

United Parcel Service, Inc. and Timothy J. Gallagher and International Brotherhood of Teamsters and Teamsters/UPS National Negotiating Committee, Intervenor. Case 8-CA-24212

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS,
BROWNING, COHEN, AND TRUESDALE

The issues presented in this case are: whether the Respondent, United Parcel Service, Inc., is subject to the jurisdiction of the Railway Labor Act (RLA) rather than the National Labor Relations Act (NLRA); whether this Board should refer the jurisdictional issue to the National Mediation Board (NMB) for initial decision; and, if we have jurisdiction over the matter, whether the judge correctly found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an overbroad limitation on off-duty employee access to its premises.¹

The National Labor Relations Board has considered the judge's decision and supplemental decision and the record in light of the exceptions, briefs, and oral argument. For the reasons which follow, we find that it is appropriate in this case to decide the jurisdictional issue without referring it to the NMB. We further find that the Board has jurisdiction over the Respondent and the employees involved in this proceeding. Finally, we have decided to affirm the judge's findings and conclusions in his original decision and to adopt the recommended Order in that decision.

¹On February 10, 1993, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

On July 23, 1993, the Respondent filed a motion requesting the Board to defer to the NMB on the jurisdictional issue and to stay the Board's proceeding. On September 9, 1993, the Board remanded this case to the judge for the purpose of conducting a supplemental hearing limited to the jurisdictional issue raised by the Respondent's motion.

On September 15, 1994, the judge issued the attached supplemental decision. The General Counsel and the Intervenor each filed exceptions and a supporting brief. The Respondent filed exceptions, a supporting brief, a brief in partial support of the judge's decision, and separate answering briefs to the exceptions of the General Counsel and the Intervenor. The General Counsel and the Intervenor each filed an answering brief to the Respondent's exceptions and a reply brief to the Respondent's answering brief. The Respondent filed separate reply briefs to the answering briefs of the General Counsel and the Intervenor.

On December 7, 1994, the Board held oral argument in this case and in *Federal Express Corp.*, 317 NLRB 1155 (1995). The parties in each case, as well as Emery Air Freight Corporation d/b/a Emery Worldwide, the Labor Policy Association, the American Federation of Labor and Congress of Industrial Organizations, the National Railway Labor Conference, and the Airline Industrial Relations Conference and the Regional Airline Association, appearing as amici curiae, presented oral argument before the Board. The parties and amici curiae have filed statements of position and briefs.

I. FACTS

United Parcel Service of America, Inc. (UPS) is a Delaware corporation operating an extensive small package delivery service through several wholly owned subsidiaries. Three subsidiaries are of principal interest here. They are United Parcel Service Co. (UPS Co.), United Parcel Service, Inc., a New York corporation (UPS-NY), and United Parcel Service, Inc., an Ohio corporation (UPS-OH). The latter two entities are the Respondent in this proceeding.

From its formation in the 1950s until 1988, subsidiary UPS Co. functioned primarily as a freight-forwarder by engaging in lease and other contractual relations with commercial airlines and independent companies for the air transportation of packages for UPS-NY and UPS-OH. In early 1988, the Federal Aviation Administration (FAA) issued UPS Co. an air carrier's operating certificate. The NMB subsequently found that UPS Co. was a common carrier by air subject to the Railway Labor Act (RLA). *United Parcel Service Co.*, 17 NMB 77 (1990).

UPS Co. maintains its principal air hub in Louisville, Kentucky. At the time of the hearing, there were additional hubs located in Ontario, California; Dallas-Fort Worth, Texas; and Philadelphia, Pennsylvania. UPS Co. owns and operates approximately 147 aircraft. Through lease or rental agreements, it supplements its lift capacity with approximately 300 small aircraft.

UPS Co. employs approximately 3000 employees, including pilots, mechanics, and other flight support personnel. All of these employees are directly involved with the operation and maintenance of its aircraft. The Independent Pilots Association represents the pilots of UPS Co. Teamsters Local 2727, which represents only airline employees, represents the mechanics and utility workers of UPS Co. The wages, hours, and conditions of employment of both groups of employees are controlled by the respective collective-bargaining agreements.

The operations of the Respondent involve the ground transportation of packages, including the pick-up and delivery of time-sensitive packages that are moved, in part, by air. The Respondent's operations are divided into 12 regions, which are further subdivided into 75 districts.² The Respondent's employees process between 11 and 12 million packages each day.

Approximately 92 percent of the packages picked up, processed, and delivered by the Respondent travel exclusively by ground. The remaining 8 percent are designated "air packages." These are time-sensitive packages which are expected to be delivered to the

²The events related to the alleged unfair labor practice in this proceeding took place at a facility in Cleveland, Ohio.

consignee within stated time periods.³ Approximately 85 percent of these time-sensitive packages move, at least in part, by air. The remainder move entirely by ground transportation.

The principal classifications of ground employees are package car driver, feeder driver, sorter, and loader. There are approximately 67,000 package car drivers, who pick up and deliver packages, assuring that “next day air” packages are delivered by 10:30 a.m. There are approximately 15,000 feeder drivers, who drive tractor-trailers to an assigned location for an exchange of loads with another feeder driver; if the load consists of air packages, they drive to an airport hub. Approximately 100,000 sorters and loaders process packages at the hubs and centers. Sorters, by inspecting the zip codes or color markings indicating the address to which a package is to be delivered, direct packages for loading on the proper package car or feeder trailer for further delivery or further processing. The sorter job is the same regardless of whether the packages being sorted are air or ground packages. Loaders prepare the trailers or package cars for loading, double check that packages are being placed in the proper vehicle, and load the vehicle according to company instructions. They handle air and ground packages in the same manner, although time-sensitive air packages are generally segregated at a designated place in the package cars.

Since 1919, the International Brotherhood of Teamsters (IBT) or its subordinate bodies have represented employees of UPS-NY and UPS-OH. The IBT currently represents about 175,000 of the 245,000 employees of UPS-NY and UPS-OH in the United States. During the 1970s, the parties entered into their first national agreement covering all Teamsters-represented employees of UPS-NY and UPS-OH. The terms and conditions of employment for all Teamsters-represented employees of UPS-NY and UPS-OH are established by the National Master United Parcel Service Agreement (Master Agreement), and approximately 20 regional supplement agreements.

UPS-NY and UPS-OH also employ approximately 15,000 “Article 40” employees at the air hubs utilized by UPS Co.⁴ These Article 40 employees include air drivers, who pick up and deliver air packages that reg-

ular package car drivers were unable to deliver; air walkers, who pick up and deliver air packages by hand in downtown buildings; loaders and sorters who perform the same work as those employees at facilities other than gateways or hubs; marshallers who guide the planes to parking positions; and fuelers who perform fueler functions at hubs and gateways.

II. ANALYSIS

A. *The Judge’s Supplemental Decision*

Section 2(2) of the NLRA excludes from its definition of employer “any person subject to the Railway Labor Act.” Similarly, Section 2(3) of the NLRA excludes from its definition of employee “any individual employed by an employer subject to the Railway Labor Act.” Although UPS Co., a subsidiary of UPS, became an employer subject to the RLA when it received its common carrier certificate in 1988, the Respondent admitted or did not contest the Board’s assertion of jurisdiction in several cases litigated subsequent to 1988.⁵ In fact, the Respondent’s answer to the complaint in this proceeding admitted the Board’s jurisdiction. As previously indicated, the Respondent first raised a claim of RLA jurisdiction while this case was pending before the Board on exceptions to the judge’s original decision. In response to the Respondent’s claim, the Board remanded this case to the judge for litigation of the jurisdictional issue.

The judge issued a supplemental decision limited to the jurisdictional issue. Citing the Board’s decision in *Pan American World Airways*, 115 NLRB 493 (1956), he recommended that the record in this case be forwarded to the NMB for resolution of this issue. Notwithstanding this recommendation, the judge independently reviewed the evidence, the relevant jurisdictional sections of the RLA,⁶ and the two-prong test developed by the NMB for resolution of jurisdictional issues.⁷ He concluded that the Respondent’s operations

⁵*United Parcel Service*, 312 NLRB 596 (1993); *United Parcel Service*, 311 NLRB 974 (1993); *United Parcel Service*, 304 NLRB 693 (1991); *United Parcel Service*, 303 NLRB 326 (1991); *United Parcel Service*, 301 NLRB 1142 (1991).

⁶Sec. 1 first of the RLA provides, inter alia, as follows:

The term “carrier” includes any express company . . . and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.

Sec. 201 of the RLA extends all of the foregoing provisions to “every common carrier by air engaged in interstate or foreign commerce.”

⁷Under the two-part test, the NMB first determines whether the nature of the work performed is that traditionally performed by employees of rail or air carriers. Second, the NMB determines whether a common carrier or carriers exercise direct or indirect ownership or

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³The types of time-sensitive delivery services offered are: 1-day or next-day air—delivery is guaranteed by 10:30 a.m. the next day to almost all locations in the United States; and 2-day or second-day air—delivery is guaranteed in 2 business days in the United States and Puerto Rico. In late 1993, UPS started a “3 day select” service permitting favorable competition with Roadway Package Service, a rival ground carrier. The 3-day service is intended to provide coast-to-coast delivery in 3 days through the use of air, truck, and/or rail.

⁴Art. 40 is a section added to the 1987 Master Agreement between the Teamsters and UPS-NY and UPS-OH to cover those employees involved in the processing and handling of air packages at the hubs.

met both parts of the NMB's test for the assertion of jurisdiction under the RLA. He further concluded, however, that the "trucking service" exception to the RLA's definition of subject air and rail companies removes ground transportation carriers UPS-NY and UPS-OH from the jurisdiction of the RLA.

B. *The Issue of Referral to the NMB*

Beginning with *Pan American World Airways*, the Board has followed a general practice of referring cases to the NMB when a party raises a claim of arguable RLA jurisdiction. In *Pan American World Airways*, supra, the Board stated as follows:

[I]n view of the provisions of Section 2(2) of our Act, excluding any person from our jurisdiction who is subject to the Railway Labor Act, "it should be clear that the National Mediation Board, the agency primarily vested with jurisdiction by the terms of the Railway Labor Act, has declined to assume jurisdiction over the operations here involved." In the present case, we are administratively advised by the National Mediation Board . . . that, after studying the record herein, that board is of the opinion that it has jurisdiction over the employees involved in this proceeding. We, therefore, affirm our opinion in *Northwest Airlines, Inc.*, that unless the National Mediation Board definitely declines to assume jurisdiction over such disputed airline employees, this Board will not assert jurisdiction. Accordingly, we shall dismiss the petition. [115 NLRB at 495 (quoting *Northwest Airlines*, 47 NLRB 498 (1943)).]

We recognize that "there is no statutory requirement that this question of jurisdiction be submitted for answer first to the NMB." *Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066, 1072 (6th Cir. 1971). Nevertheless, we find that the general policy of referral which the Board has followed for nearly 40 years has important policy advantages. First, the practice enables the Board to obtain the NMB's expertise on jurisdictional matters most familiar to it. Second, the practice minimizes the possibility of conflicting agency determinations.⁸

Despite this general practice of referral, there have been exceptions in which the Board has found referral unnecessary or unjustified. The Board has not referred to the NMB cases presenting jurisdictional claims in factual situations similar to those where the NMB has

control of the employer. Both parts of the test must be satisfied for the NMB to assert jurisdiction. See, e.g., *TNT Skypack, Inc.*, 20 NMB 153, 158 (1993).

⁸In light of these important policy advantages and the reasons further set forth in the majority opinion in *Federal Express Corp.*, supra, we disagree with Chairman Gould's view that the Board should eliminate its longstanding and effective general practice of referring RLA jurisdictional claims to the NMB.

previously declined jurisdiction.⁹ The Board has also not referred to the NMB cases which involve employees of an air carrier who are in no way engaged in activity involving airline transportation functions and whose work normally would be covered by the NLRA.¹⁰

Finally, and most significantly in the present case, the Board has also declined to refer RLA claims to the NMB for an initial opinion in cases where the Board has previously exercised uncontested jurisdiction over the employer. In *Hot Shoppes, Inc.*, 143 NLRB 578 (1963), the Board rejected on its own the claim of an airline-catering employer that the petitioned-for unit of employees was subject to the jurisdiction of the RLA. In declining to refer the matter to the NMB, the Board emphasized its previous assertion of jurisdiction over the employer's catering operations and the employer's failure to contend at any time in the past that the Board was without jurisdiction. In *Dobbs Houses, Inc.*, 183 NLRB 535 (1970), enfd. 443 F.2d 1066 (6th Cir. 1971), the Board similarly declined to refer the case to the NMB prior to finding that the employer was not a common carrier subject to the RLA. In the underlying representation proceeding, the Board's hearing officer noted a prior assertion of jurisdiction over the employer's catering operations and the employer's concession that it had not previously contended before the Board that these operations were subject to the RLA. Finally, in *Teamsters Local 287 (Emery Air Freight)*, 304 NLRB 119 (1991), the Board did not seek the NMB's opinion prior to affirming a judge's conclusion that the Board had jurisdiction over the employer. The judge found that the Board's assertion of jurisdiction over Emery in three prior cases satisfied the General Counsel's burden of proof with respect to jurisdiction and that the burden then shifted to the respondent to establish that Emery's operations had undergone a jurisdictionally significant change or that it had become an air carrier. The judge concluded that the respondent had failed to make this evidentiary showing.

We find that the rationale of *Emery Air Freight*, *Dobbs House*, and *Hot Shoppes* is applicable to the Respondent's claim of RLA jurisdiction. Prior to the instant case, the Board's jurisdiction over the Respondent's ground transportation operations had been undis-

⁹E.g., *E. W. Wiggins Airways*, 210 NLRB 996 (1974), and *Air California*, 170 NLRB 18 (1968).

¹⁰E.g., *Golden Nugget Motel*, 235 NLRB 1348 (1978), and *Trans World Airlines*, 211 NLRB 733 (1974), which states:

Where a group of employees are involved in work which would normally be covered by the National Labor Relations Act, the mere fact that the employer is one within the definitional sweep of the Railway Labor Act will not serve to bar this Board's jurisdiction. There must be a more direct connection between the employees and the transportation function so as to warrant the special considerations for which Congress enacted the Railway Labor Act.

puted for at least 47 years,¹¹ even after UPS Co. became an air carrier.¹² Furthermore, the Respondent initially admitted jurisdiction under the NLRA in this case. Under these circumstances, it is reasonable for the Board to decide the jurisdictional issue on its own and to place the burden of overcoming a presumption of continued jurisdiction on the party alleging RLA coverage.

The longstanding history of collective bargaining between the Respondent and the IBT under the NLRA is an important corollary factor justifying an exception to the general practice of referral to the NMB. None of the more than 100 cases referred by the Board to the NMB in the past has involved an entity which, after decades of collective bargaining in accord with the rights and procedures set forth in the NLRA, essentially sought to transfer to a different system of rights and procedures under the RLA. In considering an RLA jurisdictional claim in the context of a lengthy history of collective bargaining under the NLRA, we must be mindful of our statutory obligation to assure industrial peace and to prevent interruptions to commerce by promoting stability in bargaining relationships. In this particular situation, this Board's concern for the potential disruptive impact on parties whose rights and procedures have been defined for many years by the NLRA outweighs the benefits of referring the jurisdictional issue to the NMB for initial determination under the RLA.¹³

Although we decline to refer this case to the NMB, we can still avail ourselves of that agency's expertise and minimize the possibility of a future decisional conflict on the jurisdictional issue by abjuring any de novo construction of the RLA. Accordingly, in the following section, we shall apply NMB precedent to resolve the jurisdictional issue.

C. The Two-Part Jurisdictional Test and the "Trucking Service" Exception

We assume, without deciding, that the judge was correct in finding that the Respondent has demonstrated that its operations meet both parts of the NMB's test for a company which is directly or indirectly owned or controlled by an air carrier. As discussed below, however, we find that the Respondent has failed to demonstrate that the "trucking service" exception to the RLA does not apply to the operations of UPS-NY and UPS-OH.

The NMB has emphasized the degree of operational integration as a critical factor in assessing whether a trucking company is excluded from the coverage of the Railway Labor Act.¹⁴ By this analysis, the Respondent must prove that it performs services principally for air carrier UPS Co., is an integral part of that company's air transportation system, and provides services which are essential to the air carrier's operations.¹⁵ As previously summarized, the record shows that virtually all of the employees of UPS-NY and UPS-OH handle some packages which travel, at least in part, by air. On the other hand, the record also shows that over 92 percent of the packages handled by UPS-NY and UPS-OH move exclusively by ground. Under these circumstances, we agree with the judge that these companies are not so integrated with the operations of air carrier UPS Co. as to preclude exemption of the trucking operations from RLA jurisdiction.

We further agree with the judge that this case is significantly distinguishable from *Florida Express Carrier*, supra, and *O/O Truck Sales*, supra, where the NMB found the "trucking service" exception to be inapplicable. In *Florida Express*, 84 percent of the operations of trucking company Florida Express involved transporting trailers in support of the transportation activities of the parent corporation Florida East Coast Railroad, and the railroad company performed all of Florida Express' administrative functions. In *O/O Truck Sales*, the trucking subsidiary of a parent company was almost exclusively involved in providing fuel and related services to the rail carrier subsidiary.

In the instant case, unlike in *Florida Express* and *O/O Truck Sales*, trucking companies UPS-NY and UPS-OH clearly do not exist for the principal purpose of servicing the operations of air carrier UPS Co. UPS-NY and UPS-OH were the first of the UPS operations. Notwithstanding the intermodal evolution of UPS, over 92 percent of its total package volume still consists of ground packages processed by the employees of UPS-NY and UPS-OH. These employees pick up, process, and deliver ground packages in an independent nationwide ground transportation system.

With regard to the handling of packages that move by air, we note that from 1953 through 1987, while UPS Co. acted as a freight forwarder, ground company employees picked up air packages, loaded them into containers, transported them to the appropriate airport for loading onto airplanes, unloaded other containers

¹¹ *United Parcel Service of New York*, 74 NLRB 888 (1947).

¹² See cases cited above in fn. 5.

¹³ The above circumstances distinguish the present case from *Federal Express*, which the Board referred to the NMB for an advisory opinion on the jurisdictional issue. In *Federal Express*, there was no lengthy history of collective bargaining premised on uncontested NLRA jurisdiction. In fact, the NLRB has never asserted jurisdiction over Federal Express. On the contrary, Federal Express has been under the jurisdiction of the RLA for many years.

¹⁴ In *Florida Express Carrier*, 16 NMB 407 (1989), the NMB recognized the emergence of intermodal freight transportation systems and held that if the trucking activity in such a system is "integrally related to the rail or air transportation activity," then the trucking employees are not excluded from coverage of the RLA. 16 NMB 407 at 411 (citing *Chicago Truck Drivers v. NLRB*, 599 F.2d 816 (7th Cir. 1979)).

¹⁵ *Florida Express*, 16 NMB 407 at 410. Accord: *O/O Truck Sales*, 21 NMB 258, 269 (1994).

from airplanes, processed packages by sorting and unloading them into the appropriate vehicles, and delivered them. Since 1987, the job functions of the ground company employees have remained unchanged. The only change has been the certification of UPS Co. as an interstate air carrier. Further, the nature of the relationship between the ground operation and the air operation has remained essentially unchanged. Accordingly, we find that the ground companies do not perform services principally for the air company.

The Respondent argues that the air transportation operation would be impossible without the trucking services provided by the ground companies. We find that this fact is not determinative of whether the “trucking service” exception applies. If it were, there would be no point to the NMB’s discussion of the degree of integration between related trucking and air or rail carrier operations. In *O/O Truck Sales*, for instance, it would have sufficed to prove that the related rail carrier needed the fuel that the trucking company provided. It would not have mattered whether this fueling service function was a predominant or incidental part of the trucking company’s overall operations.

Although UPS-NY and UPS-OH provide an essential service to UPS Co. by transporting some time-sensitive packages, they exist primarily to carry out the core business of UPS, which continues to be the ground transportation of small packages. UPS Co. exists to provide air transportation for a relatively small number of time-sensitive packages. In sum, the Respondent’s trucking operations are not an integral part of an air carrier operation. Instead, the air carrier operations of UPS Co. exist as an adjunct to the Respondent’s truck carrier operations. Accordingly, we find that UPS-NY and UPS-OH are not “an integral part” of the air transportation system. The Respondent has therefore failed to demonstrate that the “trucking service” exception should not apply.

D. The Respondent’s “Express Company” Argument

In its postoral argument brief, the Respondent contends, for the first time, that it is an “express company” and therefore a “carrier” within the meaning of section 1 first of the RLA.¹⁶ Citing *Railway Express Agency*, 4 NMB 253 (1965), the Respondent argues that the description of services provided by the express company in that case, the “pick-up and consolidation of traffic, turning it over to common carriers by rail or air for transport, and delivery by the express company to consignee at destination,” closely resembles the Respondent’s operations. Accordingly, the Respondent argues that it should be left to the NMB, not the Board, to decide whether the Respondent satisfies the statu-

tory definition of “express company.” We disagree. As discussed below, we find that, on the present record, the Respondent has failed to support its claim, either legally or factually, that it is an “express company.”

Railway Express Agency does not address the issue of RLA jurisdiction over an employer. In that case, the NMB stated that “REA Express, Inc., is a common carrier, specifically defined as such in the first sentence of Section 1, First, of the Railway Labor Act, as amended.” 4 NMB at 267. Further, the NMB only briefly discussed the nature of express companies as part of its analysis of the representation dispute between the IBT and the Brotherhood of Railway and Steamship Clerks (BRAC) concerning the clerical class or craft status of certain employees designated in the application of the BRAC. In discussing the history of representation of express employees of REA Express, the NMB noted that its criteria for making craft or class determinations have never been taken into consideration by the express industry, and that certain differences exist between the operations of REA and those of rail carriers in the method of handling the “express traffic.” 4 NMB at 266. The NMB stated that rail carriers “historically, with possible exceptions, have never entered the cartage, pick up and delivery of parcels and LCL freight. Freight traffic has always been received from the consignor at the freight house door, and delivered to the consignee the same way.” *Id.* The NMB then stated that

express companies from REA on back to the days of Wells Fargo, American and Southeastern Express, have always provided cartage, pick-up and delivery service to their customers. The express business has always been one of pick-up and consolidation of traffic, turning it over to common carriers by rail or air for transport, and delivery by the express company to consignee at destination. In more recent times, this has been supplemented by over-the-road handling of their own business without an intermediate form of transportation. . . . In short, cartage, pick-up and delivery have never historically or generally been a part of the work performed by railroad clerical, office, station and storehouse employees. [4 NMB at 266–267.]

We do not believe that the NMB’s discussion of the differences between an express company and a rail carrier establish that the Respondent is an “express company” for purposes of RLA jurisdiction. We also note that the Respondent has failed to cite any additional NMB precedent to support its contention that it is an “express company” within the meaning of the RLA.

Furthermore, the Respondent’s argument that it is an express company for purposes of RLA jurisdiction is contrary to the position that it asserted in *White v.*

¹⁶ See fn. 6, *supra*.

United Parcel Service, 495 So. 2d 675 (Ala. Civ. App. 1985), writ quashed, 495 So. 2d 677 (Ala.S.Ct. 1986). The Respondent argued there that it was not an “express company” within the purview of an Alabama tax statute. The court agreed, finding that, unlike an express company, the Respondent (1) did not possess regular routes or schedules, (2) did not transport freight of an unusual value or freight that is perishable requiring expeditious transit, (3) did not provide unusual security for the protection of its freight, and (4) did not provide its services at a premium price.

The Interstate Commerce Act (ICA), 45 U.S.C. § 10101, which parallels the RLA, uses similar factors to define an express company. In *Arrowhead Freight Lines*, 63 M.C.C. 573, 579–581 (1955), the Interstate Commerce Commission (ICC) stated that express carriers ship perishable and valuable commodities, requiring “special care and security,” at a premium price and operate all of their shipments on firmly established schedules for regular routes. In *Arrowhead*, the ICC also emphasized that express company schedules for all deliveries are definite, firmly established, and can be changed only after notice to the affected public. Only the Respondent’s next-day and second-day air packages schedules meet the stated delivery time requirement of the express company schedule definition.

Additionally, in *Brada Miller Freight System, Inc. v. Rexco, Inc. & REA Express, Inc.*, 128 M.C.C. 285 (1976), the ICC stated that “express service, whatever else it may be, must be performed as an expedited, regular-route service.” 128 M.C.C. 285 (1976), 1976 WL 19609, *7 (ICC). Citing a previous report on REA’s attempt to restructure its operation into an irregular-route express service, the ICC noted that if REA were to completely abandon its regular-route operation, it would be “no more than an ordinary motor common carrier of small shipments, and cease to exist as an express company.” 1976 WL 19609, *6 (ICC). This description, rather than the express company description urged by the Respondent, fits its operations today. Furthermore, the Respondent has acknowledged that its ground transportation operations are subject to Subchapter II, the Motor Carrier Act of the ICA, not Subchapter I of the ICA, the section governing express company pickup and delivery services.

Based on the foregoing, we find that the Respondent has failed to demonstrate that it is no longer an employer within the meaning of Section 2(2) of the NLRA because it has become an employer subject to the jurisdiction of the RLA. Accordingly, we find and conclude that the Respondent is an employer within the meaning of the NLRA.

E. *The Unfair Labor Practice Issue*

In the judge’s original decision, he found that the Respondent violated Section 8(a)(1) of the Act by

maintaining and enforcing an overbroad restriction on off-duty employee access to its premises. We agree with the judge’s analysis of the unfair labor practice issue.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge in his initial decision and orders that the Respondent, United Parcel Service, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN GOULD, concurring.

For the reasons set forth in my dissenting opinion in *Federal Express Corp.*, 317 NLRB 1155 (1995), I would eliminate the Board’s general practice of referring cases involving RLA jurisdictional claims to the NMB for an initial ruling. Accordingly, I concur in my colleagues’ decision not to refer this case to the NMB and to assert jurisdiction over the Respondent.

Steven Wilson and Thomas Randazzo, Esqs., for the General Counsel.

Mark V. Webber and Carl E. Cormany, Esqs. (Goldfarb & Reznick), of Cleveland, Ohio, for the Respondent.

Timothy Gallagher, Esq. (Schwarzwald & Rock), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. Upon a charge filed by Timothy J. Gallagher, an individual, in this proceeding on December 27, 1991, the Acting Regional Director for Region 8 of the National Labor Relations Board issued a complaint on June 5, 1992, which alleged, in substance, that by maintaining a nonaccess rule since November 1, 1991, and by enforcing the rule on November 1, 1991, to deny employee Gallagher access to its parking lot for the purpose of engaging in protected concerted activity, United Parcel Service, Inc. (the Respondent) violated Section 8(a)(1) of the Act. Respondent filed a timely answer denying it had engaged in the unfair labor practices alleged in the complaint and it contends that the instant case should be dismissed as the dispute has already been heard by an adjunct of the U.S. District Court for the Southern District of New York.

The case was heard in Cleveland, Ohio, on October 15, 1992. All parties appeared and were afforded full opportunity to participate. On the entire record, including consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business at 4300 East 68th Street, Cleveland, Ohio, and it is engaged in the transportation and delivery of packages

throughout the United States. It annually performs services valued in excess of \$50,000 in States other than the State of Ohio. It is admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that Truck Drivers Local Union No. 407, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

From June 23, 1983, until June 5, 1992, Timothy Gallagher was employed as a part-time employee by UPS at its 68th Street facility in Cleveland, Ohio. During November 1991, he worked as a sorter on the twilight shift which started at 5:30 p.m. and ended at approximately 9 p.m.

At approximately 8 a.m. on November 1, 1991, Gallagher came to the 68th Street facility and parked his car in the employee/customer parking lot. He then positioned himself at an employee entrance to the center, which is on the north side of the building.¹ Gallagher testified that Respondent's drivers reported for work from 8 to 9 a.m. As employees approached him, he sought to distribute to them Teamsters election campaign material which urged them to vote for the Cary slate (G.C. Exh. 2). A few minutes after he commenced the described activity, a security guard came out of the building and, after ascertaining that the employee was distributing union campaign literature, told him he would have to go out in the street to do that. Gallagher explained that he was an employee of UPS and he believed that gave him the right to distribute literature on company property. The guard again instructed Gallagher to go out in the street, and when the employee refused, stating he had a right to be where he was, the guard said "we'll see about that" and went back inside the building. Shortly after the guard went back into the building, a gentleman wearing a suit, which signified to Gallagher that he was a supervisor, approached Gallagher and asked if he was a UPS employee who worked the preload shift (4 to 8 a.m.). Gallagher stated he was a UPS employee, but he worked the twilight shift. The man asked if Gallagher was aware of the Company's policy on distribution of literature and the employee responded that he was, and that he was in full compliance with that policy.² After Gallagher told the UPS supervisor he felt he was in compliance with Respondent's no-solicitation policy, the supervisor left. Shortly thereafter, Nancy Hudnutt, Respondent's north Ohio district labor relations manager, who was accompanied by one Ginger Golobish, a route supervisor, approached Gallagher.

¹ Gallagher was at what has been designated as position "A" on R. Exh. 9.

² Respondent's no-solicitation rule was placed in the record as R. Exh. 6. In sum, it prohibits employees from entering or remaining in the building and other work areas for any purpose except to report for, be present during, or conclude his or her shift, and it forbids solicitation or the circulation of materials during worktime and in work areas.

Hudnutt asked Gallagher to move to an easement where the street converges with the entrance to the parking lot to hand out his literature. When Gallagher again indicated he felt he had a right to hand out literature where he was, Hudnutt told him he had no business being there so far in advance of his shift.³ After some discussion of the election rules which had been handed down by court-appointed officers, Hudnutt again asked Gallagher to move. He refused again, and she and her companion left. Shortly thereafter, Gallagher moved to the easement located off of Respondent's property to avoid discipline by Respondent. He distributed literature at that location until about 8:45 a.m. without further interference. Gallagher testified that he ceased his distribution activity at that time because most of the drivers were already at the facility.

When he was shown a copy of Respondent's 15-minute rule at the hearing, Gallagher testified he had not seen it before and he had not been informed of its existence. He indicated that UPS has bulletin boards on the east wall of the 68th Street building and testified that while he glanced at them every night, and had looked closely at them once a week, he had never seen the 15-minute rule posted there.

During cross-examination, Gallagher indicated he drove to Respondent's facility on November 1 and he parked his car in the employee parking lot. He estimated that when he was asked to move from point A to point C as depicted on Respondent's Exhibit 9, the distance he moved was about 100 feet. He estimated the distance from point A (employee entrance) to point B (customer entrance) on Respondent's Exhibit 9 to be 200 feet.

The General Counsel sought to corroborate Gallagher's claim that the 15-minute rule was not posted near his work location on November 1, 1991, through testimony given by employees Kenneth Haas and Robert Carmosino.

Haas, who has been employed by UPS since 1979, is a small package sorter who works at the 68th Street facility on the twilight shift. He testified he lives some distance from the facility and he usually arrives at Respondent's employee parking lot about one-half hour before his scheduled 5:30 p.m. starting time. Haas indicated he normally sits in his car until about 10 minutes before his starting time. He testified no one from UPS management ever told him he could not

³ Hudnutt was seeking to enforce what has been referred to in the record as Respondent's 15-minute rule. The rule (R. Exh. 7) provides:

TO: All Employees

RE: Procedure Upon Start and Completion of Work Day

We have been experiencing serious problems with vandalism in some of our facilities. Although we know that the vast majority of our employees are mature and honest people, unfortunately we occasionally find an employee who is not.

We are confident you share our concern for controlling such situations and for providing a secure and safe work place for all of us. Therefore, we find it necessary to require that our employees, upon the completion of the request that our employees, upon the completion of the work day, promptly exit the building and property within a reasonable period of time. We also request that employees not enter UPS any earlier than fifteen (15) minutes prior to their start time.

Non-working employee frequently limit the work employee's access to our lunch rooms, rest rooms and parking facilities as well as cause interruptions to the operation. We appreciate your anticipated cooperation with this procedure.

come in earlier than 15 minutes before his shift, but he admitted he believed the rule was among the papers they gave him to read when he was hired; that he had seen the rule posted on a bulletin board in the cafeteria years ago; and that he saw the rule posted on the bulletin board at the east end of the 68th Street building about 3–4 weeks before the hearing.

Employee Carmosino, who was employed by Respondent in 1977, is a sorter who works the twilight shift. He testified that until about 2 years ago, it was pretty much standard procedure for him to enter the facility more than 15 minutes before his starting time, and that no one from management told him he could not come in to the facility 15 minutes prior to his shift. Carmosino testified that he did not see the 15-minute rule posted at the facility until he returned from vacation October 5, 1992. He claimed he did not see it earlier even though he glanced at the bulletin board every day and looked more thoroughly at least every week or two.

Respondent presented its defense through testimony given by Labor Relations Managers Gerald Fisher and Nancy Hudnutt, and through employee testimony elicited from employees Dennis Smith and James Geiger, and through the introduction of documentary evidence.

Prior to July 1991, Fisher was Respondent's district labor relations manager for north Ohio. At the time of the hearing, he was on special assignment to Respondent's corporate labor department. He testified that Respondent's no-solicitation rule and its 15-minute rule were both promulgated in the late 1970s, and that they have been posted at the 68th Street facility from that time until at least March 1991. Fisher indicated he experienced open heart surgery in March 1991 and was off for about 3 months after that. Noting that Division Manager Kevin O'Boyle's name appears on Respondent's Exhibit 8, a copy of the 15-minute rule, Fisher indicated that when division manager changes are made, the 15-minute rule is taken down and replaced with a newly typed rule which contains the current district manager's name. Fisher testified he visited the 68th Street facility a couple weeks prior to the hearing and he saw the 15-minute rule posted on a couple of bulletin boards there.

When asked what the purposes of the 15-minute rule were, Fisher replied that in the late 1970s they did not have enough parking spaces, they did not have enough restroom areas to accommodate all employees, and they had some problems with discipline or vandalism. He claimed the rule was promulgated to assist in the control of the problems and to avoid situations wherein nonworking employees would interfere with working employees or disrupt their customers.

Fisher testified that campaigning and/or the distribution of literature has never been permitted in the area that Gallagher used on November 1, 1991. He indicated that most campaigning and distribution has been accomplished off Respondent's property in the easement area between Kazimier and Grant Avenues which is marked with an "X" on Respondent's Exhibit 10. Fisher testified Respondent has permitted the circulation of union newspapers in the building at nonwork areas to nonworking employees.

Respondent sought, through Fisher's testimony to describe Respondent's Exhibits 33 through 36. Fisher testified the documents reflected the results of labor audits which were conducted at the East 68th Street facility during various years, including 1991 and 1992. Persons conducting the au-

dit's indicated in the documents, inter alia, whether Respondent's no-solicitation rule and its 15-minute rule had been posted at the time the audit was conducted. Examination of Respondent's Exhibit 33 reveals that as of August 14, 1991, all company material, including the no-solicitation and the 15-minute rules, which were supposed to be posted at the Metro South section of the 68th Street facility, were purportedly posted. The remaining exhibits reveal that postings were accomplished at other sections of the facility at stated times. Fisher testified, without contradiction, that part-time employees working in the sort operations on the belts would have reason to go to the various centers and/or other locations within the facility.

Employees Dennis Smith and James Geiger were called to give testimony regarding the posting of Respondent's no-solicitation and 15-minute rules. Smith, who has been employed by UPS for 4 years, testified that during his entire tenure of employment the no-solicitation rule and the 15-minute rule have been posted "by the cafeteria." Additionally, he testified that he has seen the 15-minute rule posted on bulletin boards "in the Metro's and the back," where the drivers put their package cars.

Employee Geiger, a part-time sorter who has been employed by UPS for approximately 4-1/2 years, testified that a copy of the 15-minute rule was given to him during orientation when he first started, and that he has seen it posted throughout his tenure as an employee on a board next to the lunchroom and on another board next to the feeder driver's office. The employee testified Respondent's no-solicitation policy has been posted on the same bulletin boards during his entire tenure of employment. Geiger, like Gallagher, works the twilight shift and Geiger indicated he has seen Gallagher on the sort aisle, in safety meetings, and on other occasions.

Respondent's final witness, Nancy Hudnutt, has been the north Ohio district labor relations manager since June 1991. Hudnutt indicated that she was a package car driver and drove out of the Metro North Center at East 68th Street from September 1987 until June 1988. During that period, she claims she saw both the no-solicitation and the 15-minute rule posted at the 68th Street facility.

Hudnutt described, in summary fashion, what occurred between her and Gallagher on November 1, 1991, and her description of the event tracked the description given by the employee. She verified that Pinkerton guards provide security at the 68th Street facility; with one manning a guard shack depicted at a point marked "D" on Respondent's Exhibit 10, and a second guard manning a post immediately inside the employee entrance marked "A" on Respondent's Exhibit 9.

During Hudnutt's testimony, she explained what photographs placed in the record as Respondent's Exhibits 11 through 27 depicted, indicating the areas of Respondent's Exhibits 9 and 10 which were photographed. She indicated that the employee/customer parking lot is used by only employees and persons having business with UPS and that peak customer hours at the facility are 7:30–9 a.m. and 4:30–6 p.m. Hudnutt testified customers can, and do, park anywhere in the employee/customer enclosed parking lot.

Hudnutt testified that at approximately 5:30 p.m. on November 1, 1991, a female customer came to her office shaking, crying, very upset and agitated and voiced a complaint. The complaint was that as she was attempting to exit the

employee/customer parking lot some men surrounded her car, beat on it, and tried to shove some pamphlets into her car. The customer was angry with UPS, thought UPS was at fault, and wanted to make a report. Hudnutt testified that immediately prior to the incident, she had spoken with Theodus and others connected with the Teamsters who were standing where Gallagher had completed his literature distribution earlier that morning. She indicated she returned to the area to ask the individuals if they had harassed a customer after the lady customer reported an incident to her. They denied they had harassed a customer.⁴

The parties stipulated that in 1991, UPS spent \$99,430.54 for security at its East 68th Street center; \$51,064.64 at Bishop Street; and \$107,753.67 at Middleburg Heights for a total of \$238,248.85 that year in northeastern Ohio.

Prior to the time employee Gallagher engaged in the above-described union campaign activity, the U.S. Government and the Teamsters entered a consent decree which settled civil litigation which had been instituted pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964. The consent decree, inter alia, provided a mechanism whereby a judge for the U.S. District Court for Southern District of New York, assisted by three court-appointed officers, would rule on matters involving the 1991 IBT International Union delegate and officer election. By letter dated November 1, 1991, employee Gallagher recited his version of the events at UPS on November 1 and lodged a complaint with Michael Holland, the election officer appointed by the court (see R. Exh. 1) pursuant to rules for the IBT International Union delegate and officer election which had been promulgated.

By letter dated November 2, 1991, Election Officer Holland summarized the facts supplied by Gallagher; noted that article VIII, section 10(d) of the rules "prohibits restrictions from being placed upon members' pre-existing rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund raising events, or engage in similar activities on employer . . . premises"; and found that:

UPS' action in preventing Mr. Gallagher from distributing campaign literature in its parking lot at its Cleveland, Ohio facility, a non-work area of the facility exterior to the facility building, to IBT members employed there who themselves were on non-work time clearly violated the Rules.

Noting that the ballots for the IBT International Union officer election were to be mailed on November 9, 1991, Holland indicated in his letter that interested parties were to appeal his determination within 24 hours of their receipt of his letter (R. Exh. 2).

Respondent UPS appealed Holland's decision and on November 14, 1991, Stuart Alderoty, designee for Fredrick B. Lacey, independent administrator, issued the decision of the independent administrator. After stating the facts, which were obtained by way of teleconference with named individuals including Gallagher and UPS Representatives Bernard Goldfarb and Jim Tear, a manager for UPS, and analyzing the facts utilizing *Tri-County Medical Center* criteria (222 NLRB

1089 (1976)), the independent administrator affirmed the election officer's decision in all respects (R. Exh. 3).

On December 6, 1991, Respondent UPS appealed the decisions of the election officer and the independent administrator in the Gallagher case as well as adverse decisions by those court officers in five other cases (R. Exh. 4). Among other things, UPS contended: the election officer, independent administrator, and the court lacked personal and subject matter jurisdiction over UPS; that the consent decree and the rules violate UPS' rights to equal protection and due process of law for numerous stated reasons; that UPS' appeal to the independent administrator was rendered by Stuart Alderoty, a former UPS employee, who improperly refused to rescue himself from cases involving UPS; and that the election officer and the independent administrator misapplied substantive principles of labor law.

By order dated December 20, 1991, U.S. District Court Judge Edelstein dismissed Respondent UPS' appeal "as moot" observing, inter alia: the decision involved rights of IBT members to campaign in connection with the recently completed International Union officer election; the remedies imposed were limited to the campaign period, which ended on December 10, 1991; and that UPS could have appealed before the close of the campaign period, but had failed to do so (R. Exh. 5).

B. Discussion and Conclusions

A preliminary issue to be resolved is whether the Board should refuse to consider the instant case on the merits because the U.S. District Court for the Southern District of New York, in a civil action, enjoined International Brotherhood of Teamsters and subordinate entities from litigating matters pertinent to the above-described consent decree in any other forum, and because court officers appointed pursuant to the consent decree previously considered Gallagher's protest and rendered a decision wherein it found that Respondent UPS had unlawfully prohibited the employee from distributing literature in its parking lot.

I conclude the district court's injunction does not warrant inaction by the Board because Section 10(a) of the Act states that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Moreover, I note that District Court Judge Edelstein's December 20, 1991 order dismissing as moot, inter alia, Respondent UPS' appeal of the independent administrator's decision in the case filed by employee Gallagher, which was placed in the instant record as Respondent's Exhibit 5 (R. Exh. 5), reveals the remedies imposed on Respondent pursuant to the election rules for the IBT International Union delegate and officer election were "limited to the campaign period . . . which ended on December 10, 1991." In the circumstances described, I fail to see how Board action in the instant case would impact on the district court's consent decree in any way.

With respect to the contention made in Respondent's answer to complaint, which is that consideration of this case on the merits would be improper because such is barred by the application of the doctrines of laches, waiver, collateral estoppel, and res judicata, I note that in *Buck Brown Contracting Co.*, 272 NLRB 951, 953 (1984), the Board stated:

⁴The customer, Nancy Kizys, filed a police report on November 5, 1991. See R. Exh. 28.

The fact that the unfair labor practice is also a breach of contract for which the injured party might have another remedy, such as a suit for damages under Section 301 of the Act, does not displace the authority of the Board to deal with and remedy the unfair labor practice.

As noted, *supra*, the consent decree discussed here was issued in a civil action instituted by the U.S. Government and a remedy for Gallagher's complaint lodged with court officers appointed pursuant to that consent decree simply constituted "another remedy" available to Gallagher. In my view, the reasoning applicable in Section 301 cases is equally applicable to the situation represented in the instant case.

Finally, I note that the General Counsel suggests in his brief that application of the *Spielberg/Olin* test set forth in *Olin Corp.*, 268 NLRB 573, 574 (1984), would dictate that the Board not defer to the decision of the independent administrator and/or the district court in the case filed by Gallagher pursuant to the consent decree. While I agree with the General Counsel that such an analysis would lead me to conclude deferral would be inappropriate, I feel the proceeding was similar to a Section 301 action and concurrent jurisdiction principles are controlling.

Turning to the merits, the General Counsel contends that the Board's decision in *Tri-County Medical Center*, *supra*, requires a finding that by maintaining and enforcing its 15-minute rule since November 1, 1991, Respondent violated Section 8(a)(1) of the Act. Respondent contends that *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), rather than *Tri-County* is applicable, and that a *Lenkurt* analysis should result in dismissal of the case. In the alternative, Respondent contends a *Tri-County* analysis should also result in dismissal.

In agreement with the General Counsel, I conclude that the test set forth in *Tri-County* rather than the one set forth in *Lenkurt* is applicable here as the instant case involves alleged interference with an employee's attempt to communicate his interest in union activity to employees who work on different shifts. See *Bulova Watch Co.*, 208 NLRB 798 (1974), and the more recent case of *New Jersey Bell Telephone Co.*, 308 NLRB 277, 280 (1992), where the Board stated:

In *Tri-County*, the Board articulated the analytical framework for assessing the propriety of an employer's rule limiting the access of off-duty employees to its facilities. The Board's expressed intent in doing so was to prevent undue interference with the rights of employees under Section 7 of the Act to freely communicate their interest in union activity to those who work on different shifts. [Citation omitted.]

In *Tri-County*, the Board formulated the following test for determining the legality of a no-access rule:

[S]uch a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employee seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

As revealed, *supra*, Respondent's 15-minute rule provided, *inter alia*:

we find it necessary to require that our employees . . . upon the completion of the work day, promptly exit the building and property within a reasonable period of time. We also request that employees not enter UPS any earlier than fifteen (15) minutes prior to their start time.

The General Counsel contends that the testimony given by Gallagher, Haas, and Carmosino reveals that Respondent's rule, as applied, fails to satisfy elements 2 and 3 of the *Tri-County* test. I find the contention to be without merit.

With respect to element 2, a requirement that the rule be clearly disseminated to all employees, Gallagher who worked at the 68th Street center for about 9 years, claims he never saw or heard of Respondent's 15-minute rule. The record establishes to my satisfaction that the rule has been posted on various bulletin boards within the 68th Street center since the 1970s; that employees Smith and Geiger, who are sorters assigned to the twilight shift, observed the rule on bulletin boards located in the metro south section of the facility from the outset of their employment; that General Counsel witness Haas admittedly received a copy of the rule when he was hired; and that employees engaged in sorting work on different lines within the distribution center. The observations listed cause me to conclude that Respondent adequately disseminated its 15-minute rule to all employees. If employees Gallagher and Carmosino were not aware of the rule on November 1, 1991, I conclude their unawareness resulted from their failure to look at the bulletin boards in the facility.

Turning to element 3 of the test, the General Counsel's contention is that the failure of Respondent's supervisors to enforce the 15-minute rule when employees Haas and Carmosino either arrived in the employee/customer parking lot well in advance of their starting time, or entered the center more than 15 minutes before their starting time, reveals the rule does not apply to off-duty employees seeking access to the plant for any purpose. The difficulty with the contention is that the General Counsel failed to establish that respondent supervision became aware of the untimely appearance of employees Haas or Carmosino in the parking lot or the facility.

Remaining for resolution is whether Respondent has proved that it has adequate business justification for the maintenance and enforcement of its 15-minute rule.

Reasons advanced by Respondent for the rule include: problems with vandalism; nonworking employees limiting working employees' access to the parking lot, lunchrooms and restrooms; avoidance of interruptions to the operation; security concerns; and avoidance of possibility of interference with UPS customers on UPS' property.

During the course of the instant hearing, Respondent offered no evidence which would reveal that it is presently, or has in the immediate past, experienced a vandalism problem. In fact, the record reveals that while the original 15-minute rule, which was placed in the record as Respondent's Exhibit 7, made reference to vandalism as a reason for promulgation of the rule, copies of the rule which are currently posted omit the first paragraph of the original rule and make no mention of vandalism (see R. Exh. 8).

With respect to the claim that the failure to keep nonworking employees away from the facility would create parking, lunchroom, and restroom problems, Respondent witness Fisher testified that approximately 175 part-time employees are employed at the 68th Street facility, and if they all congregated in the parking lots at the facility there would be no place for customers to park. He indicated that "in the late 70's . . . we didn't have enough parking spaces, we didn't have enough restroom areas to accommodate all the employees that . . . worked at UPS and then we had some problems with discipline or vandalism." The record contains no evidence which would reveal the current capacity of Respondent's parking lots, lunchrooms, and restrooms, nor does it contain evidence which would reveal the number of employees required to produce capacity problems in the areas described.

While the 15-minute rule limits "interruptions to the operation" as a reason for promulgation of the rule, Respondent offered no evidence which would reveal that the presence of nonworking employees in its parking lot has caused interruption to its operations.

Turning to the contention that Respondent's security concerns justify the rule, Respondent observes that the parties stipulated that in 1991 UPS spent \$79,430.54 on security at the East 68th Street center; \$51,064.64 at its Bishop Street facility; and \$107,753.67 at its Middleburg Heights facility. To demonstrate what it received for the security expenditures, it placed in evidence as Respondent's Exhibits 31 and 32 officers daily activity reports for the period September 23-29, 1992, and incident reports covering years 1983 and 1990. The activity reports show little beyond the fact that Pinkerton guards frequently inspect Respondent's parking lots during their shifts. While a number of the incident reports described situations which occurred on respondent property, all but three of the reports involved respondent facilities other than the East 68th Street facility. Significantly, no off-duty employees were involved in the problems which occurred at the 68th Street facility and are described in incidents reports dated April 6, May 9, and June 30, 1983. Moreover, although off-duty employees were involved in two 1990 incident reports involving Respondent's Middleburg Heights facility, one report (dated 4/19/90) merely indicated a nonemployee attempted to enter the facility with an off-duty employee who wanted to visit the personnel office, and the other (dated 5/18/90) merely recorded the fact that five males, including one male employee, were evicted from the parking lot for dancing and playing loud music.

In support of its contention that it created the 15-minute rule to avoid the possibility that nonworking employees would interfere with UPS' customers on UPS' property, Respondent points to the incident involving Nancy Kizys and nonemployee union officials which occurred at the East 68th Street facility on November 1, 1991, and was described by Hudnutt during her testimony (see also R. Exh. 30). Noting that the record reveals that the Kizys incident occurred outside the employee/customer parking lot, at the approximately (sic) spot where employee Gallagher engaged in distribution activities after he was evicted from Respondent's parking lot, I accord little weight to such evidence which involved non-employees.

In sum, I find that Respondent, through its vague, generalized, and, in part, outdated testimony and evidence has failed

to establish that it could reasonably expect to experience vandalism; overcrowding problems in its parking lot, lunchrooms, and restrooms; interruption to its operations; additional security problems; and problems with customer access to its East 68th Street facility if off-duty employees were permitted to distribute literature in its employee/customer parking lot during shift change periods. See *St. Luke's Hospital*, 300 NLRB 836 (1990). As it failed to satisfy its evidentiary burden, I find, as alleged, that by maintaining its 15-minute rule since November 1, 1991, and by ejecting employee Timothy Gallagher from its employee parking lot on November 1, 1991, by enforcing the described rule, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. United Parcel Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing a nonaccess rule which, absent compelling business considerations, forbids off-duty employees, such as Timothy Gallagher, from distributing union literature in the employees' parking lot, Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing a rule that, in the absence of legitimate business considerations, prohibits off-duty employees from distributing union literature on the employees' parking lot, I shall recommend that the Respondent be ordered to rescind the rule.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, United Parcel Service, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a nonaccess rule which, absent compelling business considerations, forbids off-duty employees, such as Timothy Gallagher, from distributing union literature in the employees' parking lot.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the 15-minute rule which has been maintained and enforced since November 1, 1991, to prohibit off-duty employees from distributing union literature in the employ-

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ee's parking lot at the East 68th Street facility in Cleveland, Ohio.

(b) Post at its facility at East 68th Street, Cleveland, Ohio, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 8, shall be signed by an authorized representative of Respondent and posted immediately after their receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain and enforce a nonaccess rule which, absent compelling business considerations, forbids off-duty employees, such as Timothy Gallagher, from distributing union literature in the employees' parking lot.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the 15-minute rule which has been maintained and enforced since November 1, 1991, to prohibit off-duty employees from distributing union literature in the employee's parking lot at our East 68th Street facility.

UNITED PARCEL SERVICE, INC.

Steven Wilson, Esq., for the General Counsel.
Martin Wald and Gary Tocci, Esqs. (Schnader, Harrison, Segal & Lewis), of Philadelphia, Pennsylvania, for the Respondent.
Richard N. Gilberg, Stephen B. Moldof, and Michael Winston, Esqs. (Cohen, Weiss & Simon), of New York, New York, and *Mary Connelly, Esq.*, of Washington, D.C., for the Charging Party Intervenor.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. By order dated September 9, 1993, the Board ordered that this proceeding be reopened and it remanded the case to me for the purpose of conducting a supplemental hearing limited to the

jurisdictional issue raised by the Respondent in its "Motion of United Parcel Service Requesting National Labor Relations Board to Defer to National Mediation Board on Jurisdictional Issue and to Stay Proceedings," which was filed on July 23, 1993. The remanded order provided that I, "upon completion of the hearing and the receipt of briefs from the parties, prepare and serve on the parties a Supplemental Decision setting forth the resolutions of such credibility issues, findings of fact, conclusions of law and recommendations, including a recommended Order as appropriate regarding the issue on remand."

Further hearing was conducted on 19 days in Cleveland, Ohio, during the period extending from December 14, 1993, through June 30, 1994. On the entire record, including careful consideration of posthearing briefs filed by the parties, I make the following findings and reach the conclusions indicated.

FINDINGS AND CONCLUSIONS

I. FACTS

United Parcel Service of America, Inc. (UPS) is a Delaware corporation which operates an extensive package delivery service through utilization of several wholly owned subsidiaries.¹ Those subsidiaries are: United Parcel Service Co. (UPS Co.); United Parcel Service, Inc. (a New York corporation) (UPS-NY); United Parcel Service, Inc. (an Ohio corporation) (UPS-Ohio); United Parcel Service General Services Company (UPS General Services); and United Parcel Service Air Forwarding Co. (UPS Air Forwarding).

UPS Co. was formed in the 1950s and until early 1988 it functioned primarily as a freight-forwarder by engaging in lease and other contractual relations with commercial airlines and independent companies with an object of causing others to transport packages by air for UPS-NY and UPS-Ohio. In early 1988, UPS Co. was issued an air carrier's operating certificate by the Federal Aviation Administration (FAA) and it thereby became a common carrier by air subject to the Railway Labor Act (RLA). See 17 NMB 77 (1990). At present, UPS Co. maintains its principal air hub and/or operation at Louisville, Kentucky. It maintains additional air hubs at Ontario, California; Dallas-Fort Worth, Texas; and Philadelphia, Pennsylvania. It plans to open an additional air hub in the Chicago area late this fall, and another in the southeast next year. It owns and operates some 147 aircraft, and leases 1 jet airplane. Additionally, through lease contracts or rental agreements, accomplished through UPS Air Forwarding, it supplements its lift capacity with approximately 300 small aircraft. At present, UPS Co. transports an average of in excess of 900,000 packages a day and approximately 230 million each year.

UPS-NY and UPS-Ohio are, except for accounting purposes, treated as one entity. Their operations involve the ground transportation of packages and the operations are divided into 12 regions, which are, in turn, subdivided into 75 districts. Together, these ground companies employ some 67,000 package car drivers, approximately 15,000 feeder drivers who operate tractor trailers, and approximately 100,000 employees who process packages in centers and

¹UPS is the parent corporation of more than 90 domestic and foreign corporations.

hubs. The employees of UPS-NY and UPS-Ohio process 11 to 12 million packages each day. Many of the packages are picked up at one of over 1 million regular pickup locations each day. In addition to picking up and delivering approximately 230 million air packages a year, the named ground companies pick up and deliver some 2-1/2 billion packages which involve only ground transportation movement each year.

UPS General Services is a nonoperational subsidiary of UPS which provides management and other specialized services to the operating corporations.² In return for such services, the operating companies contribute a percentage of their gross income to UPS General Services. Thomas Weidemeyer, one of Respondent's principal witnesses, indicated that he is employed by UPS General Services and his current assignment is with UPS Co. as airline operations manager.³ In addition to Weidemeyer, UPS General Services has assigned other individuals to management positions in UPS Co.

UPS General Services also provides top management for UPS-NY and UPS-Ohio, the ground companies, by assigning each region a regional manager. The record reveals that Weidemeyer and each of the 12 regional managers hold the office of vice president in UPS and in each of its subsidiaries, including the particular subsidiary to which they are assigned.

UPS Air Forwarding is carried on the UPS consolidated financial statements as a wholly owned subsidiary of UPS. While Weidemeyer and Respondent witness Edmonds both referred to UPS Air Forwarding during their testimony and Weidemeyer acknowledged he was a vice president of that subsidiary, information regarding UPS Air Forwarding in the record is limited. Combined, the named witnesses did indicate that UPS Air Forwarding maintains contractual relations with UPS-NY and UPS-Ohio; that Air Forwarding pays both the ground companies and UPS Co. for the work each performs with regard to their handling of air packages; and that Air Forwarding handles all the transactions involving the services of the approximately 300 small aircraft utilized by UPS Co.

II. SERVICES OFFERED BY UPS

UPS employs approximately 248,000 employees throughout the United States. Approximately 92 percent of the packages processed by its employees move entirely by ground and approximately 8 percent are transported, at least in part, by air.

Ground Service

The delivery of packages by ground is a service accomplished entirely by the ground companies, UPS-NY and UPS-Ohio. While no specific time of delivery is promised, normal amounts of time required to effectuate ground delivery of parcels is: 150-mile radius—1 day; 450-mile radius—2 days; 900-mile radius—3 days; 1500-mile radius—4 days; and 2100-mile radius—5 days. As indicated, *supra*, the

²The services include: legal, marketing, engineering, purchasing, auditing, human resources, and labor.

³While assigned to the airline, Weidemeyer indicated he is involved with other segments of UPS as he serves on a strategy advisory committee, a management concerns committee, and a peoples steering committee.

ground companies pick up, process, and deliver 11 to 12 million packages per day. The types of packages handled vary from letters and/or documents which are placed in a letter pack to package which weigh collectively or individually less than 150 pounds. During 1993, the ground companies transported approximately 2.55 billion packages entirely by ground (I. 71).

Air Service

Approximately 8 percent of the packages picked up, processed, and delivered are time-sensitive packages which are expected to be delivered to the consignee within stated time periods. Most of the packages are moved, at least in part, by air, but Respondent concedes that approximately 15 percent are moved entirely by ground. The types of services offered are: 1-day or next-day air—delivery is guaranteed by 10:30 a.m. the next day to and almost all locations in the United States; 2-day or next-day air—delivery is guaranteed in 2 business days in the United States and Puerto Rico. In late 1993, a 3-day select service was commenced to permit Respondent to compete favorably with Roadway Package Service (RPS) a rival ground carrier. That service contemplates coast-to-coast delivery in 3 days with utilization of air, truck, and/or rail.

III. EMPLOYEE TASKS PERFORMED

The principal tasks performed by the employees of UPS Co., the airline, consist of the operation of the airplanes by some 2000 pilots, the maintenance of the aircraft by approximately 700 air mechanics, and the accomplishment of support functions by other employees. Those functions include flight dispatch, crew scheduling, weather analysis, and engineering information. The pilots are separately represented by the Independent Pilots Association and the mechanics are represented by Teamsters Local 2727, which represents only airline employees. The wages, hours, and conditions of employment of both groups are controlled by subsisting collective-bargaining agreements. UPS Co. employs a total of approximately 3000 employees and all are directly involved with the operation and maintenance of its owned aircraft.

The tasks performed by the employees of UPS-NY and UPS-Ohio are considerably more diverse than those performed by the airline's employees.

What might be described as the principal tasks performed by the ground companies' employees are those tasks performed at its centers and its hubs, the facilities which receive and process packages. Those tasks include:

Package Car Driver—The ground companies employ about 67,000 drivers who wear brown uniforms and drive the brown vans seen almost everywhere. These employees report for work between 8:30 and 9 a.m., pretrip their trucks by conducting a safety check and checking fluids. They then deliver the packages in their preloaded truck, assuring that next-day air packages are delivered by 10:30 a.m. On completing their deliveries, they make any pickups which they are scheduled to make,⁴ and they return to their center to complete required paperwork and to check out. A major change in their job in recent times is that they record deliv-

⁴Pickups might be made at facilities which house customer counters, at commercial customers' premises, at letter centers (similar to mailboxes), or at one-time pickup points.

ery information on a computer clipboard called a diad, rather than record such information manually. Use of the diad permits the transmission of the information to a mainframe computer located in New Jersey.

Feeder Driver—The feeder drivers, like package car drivers, wear brown uniforms with the UPS logo. They report to work at different times and pretrip their vehicles, receive their dispatch instructions, hook up their tractors to the trailer(s) they are to pull, and drive to their assigned location. That location might be to a hub, a location where they will meet another feeder driver and exchange loads, or to an airport if the load consists of air packages. Most feeder drivers return to their home every night after servicing their tractors on return to their assigned work locations. A major change in their work routine in recent times has been the substitution of a computer device called Ivis which is used to record information the drivers previously recorded manually in logs.

Sorters—The job of a sorter consists of standing by belts that move packages from package cars or feeder trailers, inspecting the zip codes and/or color markings which indicate the address to which the package is to be delivered or the belt which it is to be placed on, and placing the package on the appropriate belt so it will be loaded on the proper package car or feeder trailer for delivery or further processing. The job content is basically the same whether air or ground packages are flowing down the belt.

Loader—The loader prepares the trailers or package cars for loading by placing rollers in position to facilitate moving packages into the vehicle or trailers. They inspect the packages to assure that they are being placed in the proper vehicle and accomplish loading in accordance with applicable loading instructions. Their handling of air and ground packages is accomplished in essentially the same way although they normally segregate time-sensitive packages such as next-day or second-day air packages if loading them in a package car. Loaders working at air dock locations in the centers and hubs load air packages into containers rather than package cars or trailers, but the process is essentially the same.

During the negotiations which led to the 1987–1990 master agreement, the parties agreed to include a new section in the agreement—“Article 40, Air Operations”—to provide Respondent with increased flexibility to help insure timely delivery of air packages. Article 40 was intended to cover those employees whose work involves the handling of air packages, principally at the four air hubs utilized by UPS Co. and at the gateways, which are serviced by smaller planes. Weidemeyer explained during his testimony that Respondent created what it calls an air group to control the airline operation as well as the group of some 15,000 employees who perform article 40 work. He testified that Dick Ochme is the air group manager and also serves as the president of the airline (UPS Co.). Reporting to Ochme are: Phil Delmares, controller; Phil Hunter, industrial engineering; Doug Kuelpman, public affairs; Jack Kraus, air operations (UPS-NY and UPS-Ohio employees at Louisville and gateways); and Tom Weidemeyer. All the named individuals as well as Kraus and Weidemeyer’s subordinates who are listed on R-80 are employed by UPS General Services. Weidemeyer testified that Ochme’s office is in Atlanta and he has responsibilities that go beyond the air group as he is part of many management

committees in which he interchanges ideas with top-lead senior managers from other parts of the business.

All of the so-called article 40 employees are employed by either UPS-NY or UPS-Ohio and they are covered by all portions of the master agreement as well as article 40. Weidemeyer estimated that the following number of article 40 employees work at the existing air hubs; Louisville—5500; Ontario (California)—600–700; Dallas-Fort Worth—200; and Philadelphia—1200.⁵ The job titles and work description of employees performing such work are as follows:

Air Drivers—Approximately 4000 employees pick up and deliver air packages that regular package car drivers are unable to delivery for various reasons, including time restraints.

Marshaller—Between 100 and 200 employees work at the air hubs and at gateway locations in this capacity. Their main responsibility is to guide planes to their parking positions, utilizing batterns.

Air Walkers—Approximately 100 employees walk through downtown buildings picking up and delivering air packages by hand.

Loaders, Unloaders, and Sorters—In excess of 50 percent of the article 40 employees perform loading, unloading, and sorting of packages at the air hubs and gateway locations. The work they perform is essentially the same work performed by employees in the same job classifications who work at locations other than the air hubs and gateways with exception of the fact that loaders and unloaders may work with containers as well as trailers and package cars.

Fuelers—A small number of employees—less than 100—perform fueler functions at the air hubs and gateway locations.

Respondent’s *Gateway Managers Manual* (I. Exh. 5, pp. 1 and 2) defines, in part, the relationship between the above-described gateway or article 40 employees and UPS Co., stating:⁶

The UPS Airline is a wholly owned subsidiary by the name of the UPSCO. It provides air lift to UPS Forwarding, Inc. which is the agent of the ground companies. The daily operating relationship between the

⁵ UPS-NY and UPS-Ohio employees have always accomplished all processing and movement of packages during times when the packages were on the ground. Thus the record reveals that during that period extending from approximately 1953 through 1987 when UPS Co. was acting as a freight forwarder and arranging transportation of air packages for UPS-NY and UPS-Ohio, the named ground companies picked up all the air packages, sorted them, loaded them into containers, transported them to Louisville or to appropriate airports, and physically loaded the containers on the planes. Moreover, when planes arrived at Louisville or elsewhere, they unloaded the containers from the planes, processed the packages by sorting and loading them in appropriate vehicles, and ultimately caused the package car drivers or feeder drivers to deliver them. The described work accomplished by UPS-NY and UPS-Ohio employees continues to be accomplished by them even though UPS Co. now operates as an airline rather than a freight forwarder. That portion of the work performed at one of the four air hubs, at the gateway locations, and/or the handling of only air packages is the work covered by art. 40 of the master agreement.

⁶ A listing of the gateways used and identification of the group (UPS-NY and Ohio or vendor) serving the locations is set forth in I. Exh. 14.

two organizations is very similar to the current relationships between UPS and the contract carriers.

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The Airline employees group consists of pilots, mechanics, technicians, clerks and their supervisors and managers. Gateway personnel are not part of the Airline, and for contractual and legal reasons have no supervisory authority or responsibility for Airline employees based at the Gateways.

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The Airline is required by the FAA to be responsible for, and to audit, all procedures which can affect the safety and airworthiness of their aircraft. These include, but are not limited to: fuel procedures, aircraft arrival procedures, unloading, loading, aircraft towing, parking, mooring, aircraft washing, hazardous material procedures, marshalling, cold weather operations including de-icing, palletized cargo and bulk cargo.

The Gateways are responsible to insure that all ground support procedures, as developed by the Airline, are followed at all times; and that they are subject to periodic audits by the Airline and the FAA. Certain critical functions, such as Weight and Balance and Hazardous Materials Procedures, require written authorization from the Airline, in order to be performed by Gateway personnel.⁷

The final group of employees who perform tasks related to the transportation of packages by air are the employees of UPS General Services who are assigned to accomplish UPS Air Forwarding's work. The precise nature of the efforts exerted by UPS Air Forwarding to facilitate the actual transportation of packages is not revealed in the record.⁸ The record does indicate, however, that UPS Air Forwarding arranges for the services of the 300 nonowned planes that are used to transport air packages to and from the various gateways.

During his appearance as a witness, Patrick Edmonds, a manager in financial planning who is intimately acquainted with Respondent's accounting systems, explained UPS Air Forwarding's financial relationship with the ground companies and the airline. He initially indicated that at the end of each week, each of the UPS ground districts send a comprehensive bill to each of their customers indicating the charge for each service provided during the week; i.e., charge for packages to be delivered by ground; charge for 1-day air; charge for 2-day air, etc. Thereafter, the customer remits by sending a check to United Parcel Service. After the customer's remittance is received at the UPS corporate office in Atlanta, those funds remitted for air package service are credited to UPS Air Forwarding. Thereafter, individuals who

⁷FAA regulations require UPS Co. to assure that UPS-NY and UPS-Ohio employees who perform tasks which affect the safety or air-worthiness of aircraft are properly trained. It fulfills that obligations by conducting an air managers' training school at Louisville, and by training certain designees employed by the ground companies to enable them to conduct necessary training at the air hubs and/or gateways.

⁸See the last page of I. Exh. 24, which contains an organizational chart depicting UPS Air Forwarding between UPS of New York (ground)—UPS of Ohio (ground) and UPS Co. (airline), Air Forwarding's function is described to be: ground companies contract with Air Forwarding for air services. Air Forwarding contracts with airline to fly packages.

are actually employed by UPS General Services, acting on behalf of Air Forwarding, compute the remuneration which is to be received by UPS Co. for flying the packages and the amount to be received by UPS-NY and/or UPS-Ohio for their services, which include the pickup and delivery of the packages, the sorting, loading, and other functions involved in handling of the packages. Edmonds indicated UPS Co. is paid a given amount for each block hour flown, while the ground companies are paid on a per package basis. Edmonds indicated the accounting procedure is not significantly different than it was when UPS used carriers rather than their own airplanes prior to 1988.

In sum, the record reveals that the 3000 employees employed by UPS Co. engage almost exclusively in the operation, movement, and maintenance of UPS Co. owned aircraft. On the other hand, the employees of UPS-NY and UPS-Ohio who work at the air hubs and gateways are engaged principally in the loading, unloading, sorting, pickup, and delivery of air packages.⁹

IV. COLLECTIVE-BARGAINING AGREEMENTS

Since 1919, the International Brotherhood of Teamsters (IBT) or its subordinate bodies have represented employees of UPS-NY and UPS-Ohio. The IBT currently represents about 175,000 of the 245,000 persons employed by UPS-NY and UPS-Ohio in the United States. During the 1970s, the parties entered their first national agreement covering all Teamsters-represented employees of UPS-NY and UPS-Ohio. The current National Master United Parcel Service Agreement (master agreement) which covers all Teamsters-represented ground employees appears in the record as Intervenor's Exhibit 44. The terms and conditions of employment for the IBT-represented employees of UPS-NY and UPS-Ohio are established by the master agreement, and approximately 20 regional supplement agreements. They apply only to employees of UPS-NY and UPS-NY and UPS-Ohio.

The current collective-bargaining agreement between UPS Co. and Teamsters Local 2717 was placed in the record as Respondent's Exhibit 73. The contract defines the wages, hours, and other terms and conditions of employment of mechanics and utility workers employed by UPS Co. The agreement does not purport to cover employees of UPS-NY or UPS-Ohio.

The current collective-bargaining agreement between UPS Co. and the Independent Pilots Association was placed in the record as Respondent's Exhibit 72. It defines the wages, hours, and other conditions of employment of UPS Co.'s crewmembers.

V. DISCIPLINE AND CONTROL OF EMPLOYEES

During the course of the hearing, Intervenor caused several of its business managers and employees occupying the position of package car driver, feeder driver, and inside employee (loader) to describe the manner in which UPS-NY and UPS-Ohio employees accomplish their jobs. A composite of their

⁹The record reveals (R. Exh. 91) that during the years 1990-1993, 44 hourly employees transferred to or from air to ground jobs, and that during the period 1989-1993, some 110 management-to-management transfers to or from air positions occurred. The record fails to reveal that employees transferred from the ground companies to UPS Co., the airline.

testimony reveals that the ground company employees are supervised and disciplined exclusively by ground company management officials and such employees do not normally come in contact with UPS Co. pilots and mechanics in the normal course of their work activities. In this vein, Joe Pilerani, the business representative for Teamsters Local 407 in Cleveland, testified that the 1600 members of his Local Union do not come in contact with UPS Co. personnel because none are based in the Cleveland, Ohio area. Similarly, the record reveals that the employees employed by UPS Co. are hired, trained, and supervised by management officials in the employ of or assigned to UPS Co.

VI. THINGS AVAILABLE TO ALL THREE OPERATING COMPANIES

Through the testimony of Weidemeyer and Dale Whitney, UPS' corporate health manager, Respondent established that certain benefits, publications, and/or programs are available to the management and employees of all three operating companies. Thus Weidemeyer testified that the following are available to all: the UPS "Atlas" telephone system; the information stored in a mainframe New Jersey computer by DIADS (Delivery Information Acquisition Device); UPS Thrift Plan; the Managers' Incentive Plan; Length of Service awards; the publication "Our Big Idea"; the publication "Inside UPS"; participation in discussions with supervisors called TLA (Talk, Listen & Act) program; and participation in another discussion plan called "KORE"—Keep Our Reputation Plan.

Whitney indicated during his testimony that the employees of the three operating companies involved in this case participate in three general types of insurance and/or pension plans. They are: those plans administered solely by UPS; those plans jointly trusted and jointly administered; and those plans where UPS is solely contributory. He testified that in the first category are three health care plans called the UPS insurance plan, the UPS health and welfare plan, and UPS health program and that some employees from each of the operating companies participate in each of the health plans. Additionally, Whitney indicated that UPS has several retirement plans and that employees of UPS Co. other than flight crewmembers and mechanics participate in the UPS retirement plan along with certain employees employed by the ground companies.

VII. OWNERSHIP OF EQUIPMENT

As indicated, supra, UPS Co. owns 147 airplanes and leases 1 jet. Additionally, it owns the equipment which is used to move or service aircraft while they are on the ground. These items of equipment are ground power units, air start units, deicing equipment, fuel trucks, and push back trigs.

Respondent witness Weidemeyer testified that commitments to purchase additional aircraft will cause the size of Respondent's fleet to exceed 200 planes by the year 2000. The record reveals that at the present time the dollar value of the equipment owned by UPS Co. equals the dollar value of the equipment owned by UPS-NY and UPS-Ohio.

Just as UPS Co. owns all the planes which actually fly packages and all the equipment which is required to accomplish movement of the aircraft on the ground, UPS-NY and

UPS-Ohio own all the package cars, tractors and trailers, sorting equipment, containers, loading and unloading equipment, and other machinery and equipment which is needed and required to process and transport packages on the ground. While the record reveals the ground companies own approximately 128,000 vehicles, it does not indicate the number or dollar value of the other items of equipment used to handle packages, but it is undisputed that they own the facilities and equipment used to handle the packages they process.

VIII. STRIKE-RELATED TESTIMONY

During one session of the hearing, Respondent called a number of customer witnesses to establish what would happen to their operations if UPS were involved in a strike. That testimony is not deemed to be particularly germane to the issues before me. In sum, however, the customer witnesses indicated that they had no satisfactory alternative means of shipping their products by ground because the United States Postal Service and/or RPS have indicated they could not handle their volume; use of Federal Express for air shipments would cause them to incur much higher and perhaps prohibitively high costs; the maxiship labeling systems provided by UPS could not be used to ship via other carriers and preparation of manifests by hand would be extremely time consuming; they would be compelled to effectuate layoffs if a strike continued beyond a few days; and, in some instances, the customers would cease to operate if UPS could not deliver their products.

IX. STATISTICAL EVIDENCE

During the course of the hearing, Respondent's monthly consolidated operating statements for December of each year from 1988 through 1993 were placed in evidence. During their appearances as witnesses, Respondent's witness Patrick Edmonds and IBT's director of research, Stephen Sleigh, made extensive reference to the consolidated operating statements. Through Sleigh, Intervenor placed a number of graphs depicting the number of ground and the number of air packages handled during stated periods in the record. Such documents were supplemented by additional graphs depicting the revenue received as a result of the pickup and delivery of both ground and air packages during stated periods.

As noted, supra, Respondent indicated during the presentation of its case that 15 percent of the so-called air packages were, in fact, processed entirely by ground. The parties spent hours during the hearing in an attempt to ascertain precisely the percentage of next-day air and second-day air packages which were processed without an air movement. Utilizing the monthly consolidated operating statements and figures supplied by Respondent witnesses, Sleigh prepared the exhibits placed in the record as Intervenor's Exhibits 51 through 74. Selective reference to those exhibits appears below.

Intervenor's Exhibit 53 depicts the volume of ground packages and air packages which were handled by Respondent's operating companies in years 1991-1993 in domestic operations. The exhibit reveals, inter alia, that in 1993, slightly over 2.5 billion (2,548,964,000) ground packages and slightly over 200 million (201,364,000) air packages were handled by the system.

Intervenor's Exhibit 54 depicts the revenue experienced by UPS for the pickup and delivery of domestic ground and air packages during the years 1991–1993. The exhibit reveals, inter alia, 1993 revenue for ground packages was slightly more than \$12.2 billion (\$12,255,316,000), and the 1993 revenue for air packages was slightly more than \$3.2 billion (\$3,246,904,000). The exhibit further reveals that processing of ground packages in 1993 accounted for 79.06 percent of total revenue for the handling of domestic packages while revenue for air packages handled accounted for 20.94 percent of total revenue during 1993.

Intervenor's Exhibit 55 reveals, inter alia, that during the first 4 months of 1994, Respondent delivered entirely by ground 9.88 percent of its 1-day air packages and 21 percent of its 2-day air packages.

Intervenor's Exhibit 64 reveals that during the first 4 months of 1994, 81.04 percent of total package revenue of slightly more than \$4.2 billion (\$4,240,090,000) was produced by ground movement of packages, while 18.96 percent of total revenue or slightly less than \$1 billion (\$992,171,000) was received for the handling of air packages.

Dianne Weinman, a senior marketing analyst with Respondent, testified that she analyzed specified publications and documents which permitted the preparation of R-97. The document reveals the volume and percentage of total of 1-day air and 2-day air packages handled during years 1992 and 1993 by UPS and its air package competitors, i.e., Airborne, DHL, Emery, Federal Express, and USPS. The document reveals, inter alia, that Airborne and Federal Express are UPS' major competitors in the 1-day air package business, with the three entities handling in 1993 the following percentages of 1-day air handled by all named competitors: Airborne—17.41 percent; Federal Express—51.26 percent; and UPS—19.44 percent. With respect to 2-day air, UPS' major competitors are the United States Postal Service (USPS) and Federal Express. The three entities handled the following percentages of all 2-day air packages handled by all six entities in 1993: Federal Express—33.60 percent; USPS—33.76 percent; and UPS—18.37 percent. Weinman indicated during her testimony that Federal Express handles approximately 1.6 million packages a day and that approximately 200,000 of those packages are transported by ground.

X. THE EXPERT WITNESS TESTIMONY

Respondent caused two individuals it claimed to be experts in their field to testify at the hearing.

William Childs is an associate professor of history at Ohio State University. He is the author of a book entitled *Trucking and the Public Interest*, and holds a Ph.D. in history. Dr. Childs testified that in 1926 when the RLA was enacted, trucking firms were "small scale, one (1) man, one (1) truck." At the time, he indicated the preponderance of hauls were pickup and delivery service within cities; that about half of the roads were macadamized. Dr. Childs stated that by 1934, when the trucking service exception was added to the RLA, about three-fourths of the roads were surfaced but most were two lane. He agreed there were no entities in 1934 which were comparable to UPS as it existed in 1993.

Justin Zubrod Sr. is a consultant employed by A. T. Kearney. He has handled some 200 consulting assignments involving the transportation industry since 1989. Twenty to

twenty-five of those assignments were performed at UPS. Zubrod testified that airline people receive a higher degree of training than do people who perform similar jobs at ground companies. He indicated that many entities involved in transportation today are intermodal. As an illustration, he pointed to his understanding that UPS and USPS each account for 20–25 percent of TOFC (trailers on flat cars) business enjoyed by the railroads in this country. He further indicated that J. B. Hunt, Schneider, and other trucking companies rely heavily on rail for trailer transportation. In response to inquiry, Zubrod stated he has not seen a situation in the United States wherein two competitors such as Federal Express and UPS are regulated by different labor statutes.

Conclusions

I. RELEVANT STATUTORY PROVISIONS

Section 2(2) of the National Labor Relations Act (NLRA) provides that the term "employer" shall not include "any person subject to the Railway Labor Act." Section 2(3) of the NLRA provides that the term "employee" shall not include any individual employed by an employer subject to the Railway Labor Act (RLA).

Section 1 first of the RLA defines "carrier," in part, as follows:

The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.

Subchapter 11 of the RLA, Section 201, extends the provisions of the RLA to every "common carrier by air engaged in interstate or foreign commerce," stating:

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. 45 U.S.C. § 181.

II. THE TEST

Where the company is not directly "a common carrier by air engaged in interstate or foreign commerce," it may still be subject to the Railway Labor Act if the company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce.

The National Mediation Board applies a two-part test in determining whether an employer and its employees are subject to the Railway Labor Act. First, it determines whether the nature of the work performed is that traditionally per-

formed by employees of rail or air carriers. Second, it determines whether a common carrier or carriers exercise direct or indirect ownership or control. Both parts of this test must be satisfied for the Board to assert jurisdiction.

III. ANALYSIS

A. Positions of the Parties

1. Part one of the test

Counsel for the General Counsel and Intervenor, IBT, claim the air package related work performed by employees of UPS-NY and UPS-Ohio (less than 8 percent of total volume of packages handled) is “too negligible” to provide a basis for RLA jurisdiction. Respondent contends that it has shown that the ground operations (those of UPS-NY and UPS-Ohio) are an “integral part of” and/or “essential to” the air operations of UPS Co. and the ground employees are covered by the RLA regardless of the precise percentage of total packages eventually moved by air transportation on a given day.

2. Part two of the test

The General Counsel and Intervenor contend that, since UPS-NY and UPS-Ohio are not air carriers and they are not owned by an air carrier, Respondent was required but failed to satisfy the following evidentiary burden set forth in, *inter alia*, *TNT Skypac, Inc.*, 20 NMB 152 (1993):

In a jurisdiction case, when the Board examines whether an entity is controlled by a carrier or carriers, it focuses on the carrier’s role in the entity’s daily operations and its effect on the manner in which employees perform their jobs. Specifically, the Board examines the extent of carrier control over the manner in which the entity does business and the carrier’s access to the entity’s operations and records. The Board also examines the carrier’s role in hiring and terminating employees; the degree to which the carrier affects other conditions of employment; whether employees are held out to the public as carrier employees; and the degree of carrier control over employee training. *Sapado I (Dobbs International Services)*, 18 NMB 525 (1991); *Bankhead Industries, Inc.*, 17 NMB 153 (1990).

Respondent claims it meets part two of the test because it has demonstrated that UPS of America owns UPS-NY, UPS-Ohio, and UPS Co. and it has shown that the ground companies are “under common control” with a carrier.

3. The “trucking service” exception

Counsel for the General Counsel and Intervenor contend the NMB has refused to find the “trucking exception” to be inapplicable only in those situations in which an ICC-certificated carrier has been created by an air or rail carrier to perform work for that carrier and/or where the great preponderance of the work performed by the trucking company is performed for the rail and/or air carrier. They contend the “trucking exception” is applicable where, as here, about 92 percent of the transportation of packages is unrelated to the air transportation activities of UPS Co., the airline.

Respondent contends that trucking service has evolved to such an extent over the years that the NMB has properly bestowed carrier status on trucking companies which provide essential services to air or rail carriers. It further contends that UPS-NY and UPS-Ohio are not trucking companies, but are, instead, a segment of an intermodal system.

B. Conclusions

Patently, the main issue in this case is whether the “trucking service” language in section 1 first of the RLA dictates a conclusion that the operations of UPS-NY and UPS-Ohio are subject to the jurisdiction of the National Labor Relations Board rather than the National Mediation Board. In my view, the record here should be forwarded to the NMB for consideration because, in part, the NLRB stated the following in *Pan American World Airways*, 115 NLRB 493 (1956):¹⁰

[I]n view of the provision of Section 2(2) of our Act, excluding any person from our jurisdiction who is subject to the Railway Labor Act, “it [first] should be clear that the National Mediation Board, the agency primarily vested with jurisdiction by the terms of the Railway Labor Act, has declined to assume jurisdiction over the operations here involved” [*i.e.*, before the NLRB takes it upon itself to assert jurisdiction] . . . [U]nless the National Mediation Board definitely declines to assume jurisdiction over such disputed airline employees, the Board will not assert jurisdiction.

Notwithstanding the fact that I am of the view that the NMB should resolve the jurisdictional issue posed, I indicate, for the reasons set forth below, that my research leads me to conclude that UPS-NY and UPS-Ohio’s operations satisfy both parts of the NMB’s jurisdictional test, but since their operations are heavily ground oriented, the “trucking services” exception removes them from coverage under the RLA.

1. Part one of the test

The record reveals that substantially all of the employees of UPS-NY and UPS-Ohio, particularly those classified as article 40 employees, participate in the pickup, processing, and delivery of in excess of 900,000 air packages a day and approximately 230 million packages each year. The revenue received by UPS for the transportation of air packages during 1993 amounted to slightly less than \$3.9 billion, accounting for approximately 24 percent of all UPS revenue. In addition to the fact that UPS-NY and UPS-Ohio package car drivers and their feeder drivers pick up and deliver almost 100 percent of the air packages handled, and the same companies’ inside employees process the packages at centers and hubs, almost 15,000 UPS-NY and UPS-Ohio employees perform air package related activities at Respondent’s air hubs and gateway locations. A significant number of those so-called

¹⁰ While the NLRB has determined in given cases that the employees of various employers do or do not fall under the coverage of the RLA, it has only done so in those situations wherein the NMB has ruled in like, or a very similar situation, that such employees are or are not covered by the RLA. See for example the NLRB’s treatment of Federal Express drivers discussed in *Chicago Truck Drivers v. NLRB*, 599 F.2d 816 (1979).

article 40 and/or air group employees guide airplanes to parking positions, load and unload planes, fuel planes, and perform other functions which affect the safety and air-worthiness of the aircraft such as deicing. In prior cases, the NMB has found ramp work such as that described above to be work traditionally performed by air carriers. See *Caribbean Airline Services*, 19 NMB 242 (1992); *AMR Services Corp.*, 18 NMB 348 (1991); *Energy Support Services*, 14 NMB 326 (1987).

Here, the number of air packages transported, the number of employees participating in the transportation process, and the huge amount of revenue produced would preclude a finding—urged by Intervenor (Br. 48)—that the amount of air transportation related work performed by ground employees is “too negligible” to provide a basis for RLA jurisdiction. I conclude Respondent has demonstrated that it meets the first part of the NMB’s jurisdictional test.

2. Part two of the test

The instant record reveals that UPS of America, Inc. is a holding company which wholly owns UPS-NY, UPS-Ohio, and UPS Co. Moreover, the record reveals that UPS created UPS General Services which enables it to assign top management to the three named operating companies. Significantly, those managers, by virtue of their positions with UPS General Services, serve as officers of each of the UPS-owned subsidiaries involved in the instant case. As further revealed by the record, through additional individuals employed by UPS General Services, UPS provides legal, marketing, engineering, purchasing, auditing, human resources, and labor relations to each of the above-named operating companies.

The RLA provides, in relevant part, that the term “carrier” includes “any company which is directly owned or controlled by or under common control with any carrier” (emphasis added). As observed by Respondent in its brief (Br. 26), the NMB in *AMR Services Corp.*, 18 NMB 348 (1991), found AMR Services, which, with American Airlines and American Eagle, was commonly owned by AMR Corporation, subject to the RLA. Similarly, in *O/O Truck Sales*, 21 NMB 258, 267 (1994), the NMB decided that O/O Truck Sales, which was commonly owned with CSXT, a rail carrier, was subject to its jurisdiction, stating:

[*268] There is conflicting evidence as to the scope of control over the day to day [**16] day activities of O/O employees by CSXT. However, there is no dispute that O/O is indirectly owned by CSX (through CSXI) and CSXT is directly owned by CSX. In *Chelsea Catering Corp.*, 19 NMB 301, 304 (1992), the Board stated:

When a carrier and an entity performing work traditionally performed by [] industry employees are commonly owned by a holding company, the Board has found the entity subject to the Railway Labor Act.

See also *AMR Services Corp.*, 18 NMB 348 (1991). Because it owns both entities, CSX controls both CSXT and O/O (through CSIX). Therefore, since both CSXT and O/O are controlled by the same corporate parent, O/O is under common control with a carrier. See *Delpo Company v. NMB*, 509 F.Supp. 468 (D. Del. 1981); *Delpo Company v. Railway Carmen*, 519 Supp.

842 (D. Del. 1981), affd. 676 F.2d 960 (3d Cir.), cert. denied, 103 S.Ct. 343 (1982). Thus, both parts of the Board’s jurisdictional test are satisfied.

Applying the above-described teachings to the facts in the instant case, I conclude Respondent has satisfied part two of the NMB’s jurisdictional test.

3. The “trucking service” exception

In *Southern Region Motor Transport*, 5 NMB 298 (1975), the NMB held that Southern Regional Motor Transport (SRMT) was not a carrier within the meaning of the RLA because it viewed the fact that SRMT held a certificate as a motor carrier under the Interstate Commerce Act “as decisionally significant.” More recently, in *Florida Express Carrier*, 16 NMB 407 (1989), after finding that Florida Express was a wholly owned subsidiary of the Florida East Coast Railroad, and that during 1988 it handled 12,005 trailers and 10,027 or 84 percent were handled to or from ramps on the Florida East Coast Railroad, the NMB found the “trucking exception” did not preclude it from assuming jurisdiction over Florida Express, stating (at 410 and 411):

As stated in *Seaboard System Railroad—Clinchfield Line*, 11 NMB 217 (1984), the Board is aware of the need for practical judgments based on contemporary conditions. In 1975, intermodal transportation had not reached a significant stage. Today, railroad companies now utilize trucking service as an integral part of their intermodal freight service. When there is a major change in the actual operations of a railroad system, the Board must not allow form to govern substance. See *Clinchfield*, supra.

In the present case, Florida Express is a subsidiary of the Florida East Coast Railroad. Approximately 84 percent of the operations of Florida Express involve transporting trailers in support of the transportation activities of the Florida East Coast Railroad. All of the administrative functions of Florida Express are performed by the Railroad. The fact that a trucking company, which is directly or indirectly owned or controlled by or under common control with any carrier, is certified by the Interstate Commerce Commission as a common carrier by motor vehicle, does not preclude a determination that it is a carrier within the meaning of the Railway Labor Act. If the trucking activity is integrally related to the rail or air transportation activity, then the trucking employees are not excluded from coverage of the Railway Labor Act. *Chicago Truck Drivers v. NLRB*, 599 F.2d 816, 101 LRRM 2624 (7th Cir. 1979) and *Adams v. Federal Express Corp.*, 547 F.2d 319, 94 LRRM 2008 (6th Cir 1976), cert. denied, 431 U.S. 915 (1977).

For these reasons, the Board concludes that Florida Express is a carrier within the meaning of the Act.

As observed by Respondent, the NMB applied the standard announced in *Florida Express Carrier*, supra, in *O/O Truck Sales*, 21 NMB 258 (1994). In *O/O*, the NMB reiterated that it found Florida Express to be covered by the RLA because it performed services principally for Florida East Coast Railroad, and, accordingly, it was an integral part of

a rail transportation system whose service was essential to the operation of the railroad. After claiming it interpreted the RLA in a manner consistent with prior court decisions and the interests of “broad national policies,” and making reference to statements made in cases by the Supreme Court and the U.S. Court of Appeals for the Eighth Circuit, the NMB quoted the Eighth Circuit comments in *Northwest Airlines v. Jackson*, 185 F.2d 74, 77, stating:

The Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities. It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the work included carrier activities within its company functions.

It then found *O/O* to be subject to the RLA, stating (21 NMB at 258):

Applying the standard announced in *Florida Express Carrier*, supra, the Board finds that *O/O*’s trucking activity is integrally related to CSXT’s rail transportation activities. *O/O* performs services almost exclusively with CSXT, even though its contracts are only with CSXI. Indeed, *O/O* exists principally to provide fueling and related services for CSXT’s rail operations. The Board will not permit the form of *O/O*’s transactions to conceal the substance of its relation with the rail carrier. Because of its substantial role in providing fueling services essential to CSXT’s rail operations, *O/O* is an integral part [**23] of that rail transportation system. Therefore, *O/O* is not excluded from coverage under the Act by the “trucking exception” of § 151, First.

Conclusion

For all of the reasons discussed above, the Board finds that *O/O Truck Sales, Inc.* is subject to the Railway Labor Act, as amended, 45 U.S.C. § 151 et seq. File No. CR-6492 is hereby converted to Case No. R-6281. The Mediator will continue the investigation in this case.

Briefly recapitulated, the record in the instant case reveals that UPS-NY and UPS-Ohio, ground companies which operate some 128,000 vehicles, pick up, process, and deliver, independent of any air movement, some 2.5 billion packages each year. Additionally, the same ground companies pick up, process, and deliver some 250 million time-sensitive packages each year. Approximately 15 percent of those time-sensitive packages never see an airplane as the delivery time commitment can be met by transporting them by ground. The packages that are moved at least in part by air are transported by UPS Co., the UPS airline. With specific regard to

time-sensitive packages, the record reveals that the employees of UPS-NY and UPS-Ohio accomplish all processing of such packages while they are actually on the ground. Their processing activities include the pickup of the packages, the sorting of packages, the loading of containers, the movement of containers to air hubs or gateways, the loading of containers on UPS Co. planes, the guidance of UPS Co. planes to parking places on arrival at air hubs or gateways, the removal of containers from planes, the processing of packages at air hubs or gateways, the refueling and deicing of UPS Co. planes, and the delivery of packages to consignees via package cars or feeder vehicles. While all ground company employees regularly handle air packages, some 15,000 “Air Group” and/or “Article 40” employees devote almost all of their time handling air packages at Respondent’s four air hubs and its gateway operations.

When the standard announced by the NMB in *Florida Express Carrier*, supra, which was reaffirmed in *O/O Truck Sales*, supra, is applied to the facts in the instant case, one must conclude that the functions performed by UPS-NY and UPS-Ohio employees when they handle time-sensitive packages are “integrally related” to UPS Co.’s air transportation activities. Such services clearly constitute an “integral part” of the transportation of packages by air, and the services performed by the ground companies are “essential” to the operation of the airline. In the circumstances described, Respondent contends the “trucking exception” is inapplicable and a conclusion that the operations of UPS-NY and UPS-Ohio are subject to the RLA is warranted. I disagree.

In both *Florida Express* and *O/O Truck Sales*, the NMB observed that the trucking companies performed services principally for a railroad. Patently, the instant case is factually distinguishable as 92 percent of the packages handled by UPS-NY and UPS-Ohio move exclusively by ground and only about 8 percent are transported by air. However, the situation is one in which the breadth of the language used by the NMB in the above-named cases is such that Respondent can justifiably argue that application of the standard first formulated in *Florida Express* should lead to the conclusion it urges. Clearly, the reach of the standard under discussion should be determined, and I submit the record in this case should be forwarded to the NMB to permit it to accomplish that task.

For the reasons stated, I recommend that the National Labor Relations Board grant Respondent’s motion to defer to the National Mediation Board on the jurisdiction issue it has raised.¹¹

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.