NATIONAL MEDIATION BOARD
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Re: NMB Case No. R-7313
United Airlines/IAM

Participants:

This determination addresses the February 13, 2012 appeal filed by the International Association of Machinists and Aerospace workers (IAM) of the February 10, 2012 eligibility rulings by Investigators Maria-Kate Dowling and Angela Heverling. For the reasons discussed below, IAM's appeal is granted.

PROCEDURAL BACKGROUND

On September 20, 2011, the IAM filed an application with the Board alleging a representation dispute involving the Passenger Service Employees of United Air Lines, MileagePlus, Inc, Continental Micronesia, and Continental Airlines (Carrier). On December 12, 2011, the Board issued a determination

finding a single transportation system at the Carrier for the craft or class of Passenger Service Employees. *United Air Lines/Continental Airlines, Inc.*, 39 NMB 229 (2011). Passenger Service Employees at United and at MileagePlus, Inc. (MPI) are represented by IAM and at Continental Micronesia (CMI) by the International Brotherhood of Teamsters (IBT). The Passenger Service Employees at Continental are currently unrepresented.

By letter dated January 9, 2012, the IAM requested the addition of 1,068 employees whom it contended were eligible to vote but omitted from the Potential List of Eligible Voters (List). In response, the Carrier provided evidence that 706 of these employees are cross-utilized Customer Service Representatives (CSRs) who preponderantly performed Fleet Service work at line stations during the 90-day period prior to the September 10, 2011 cut-off date. The Carrier also provided evidence that 152 are furloughed Air Freight Representatives and Air Freight Representatives-Service (AFRs) and 118 are Station Operations Representatives (SORs) who are not appropriately in the Passenger Services craft or class. IAM filed its response on February 8, 2012, asserting all 1068 employees have been historically included in the Passenger Service Employees craft or class at United Air Lines and that they share a strong work-related community of interest with the Passenger Service Employees craft or class. In addition, the IAM argued that future changes resulting from the United/Continental merger have no bearing on the current community of interest or correct craft or class determination of the pre-merger United employees at issue here.

The Investigators' eligibility rulings issued on February 10, 2012. Relying on the Carrier's preponderance evidence, the Investigators ruled that the 706 cross-utilized CSRs preponderantly performed Fleet Service duties in the 90 days prior to the cut-off date and are, therefore, ineligible to vote with the Passenger Service craft or class. The Investigators also ruled that 152 furloughed AFRs and 117 SORs lack sufficient customer contact for inclusion in the Passenger Service craft or class. These are the only rulings on appeal.[1]

The IAM filed an appeal on February 13, 2012, and the Carrier responded on February 14, 2012.[2] On February 15, 2012, the IAM filed a

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[1] To the extent that submissions raise allegations of election interference, the Board notes that, barring extraordinary circumstances, it will not take action on allegations of election interference until the end of the voting period. *See* Board Representation Manual Section 17.0. Because the Board does not find extraordinary circumstances that would require Board action at this time, any allegations regarding conduct during the election period will be addressed, if appropriate, at the end of the voting period consistent with the Board's usual practice.

[2] The Carrier filed an appeal regarding 165 CMI employees who perform Fleet Service work that it had inadvertently included on the List of Potential Eligible Voters.

rebuttal to the Carrier's response. On February 16, 2012, the Board reversed the Investigators' rulings and extended the voting period by two weeks. *United Airlines*, 39 NMB 273 (2012).[3]

CONTENTIONS

IAM

The IAM contends that the employees at issue should be eligible to vote because "decades of Board precedent includes these employees in the Passenger Service craft or class" at United and "there is a strong work-related community of interest" between these employees and other Passenger Service employees at United. According to the IAM, the Investigators erred in ignoring the consistent, historic Passenger Service Employee craft or class determinations at United. With regard to the cross-utilized CSRs, the IAM also contends that the Investigators erred in relying on preponderance evidence where there has been no material change in these employees' work due to the merger and these employees perform the same work they performed in 1998 when the Board included them as eligible voters in the Passenger Service Employees craft or class.

The IAM also argues that the pre-merger SORS are responsible for performing Passenger Service duties in the event of irregular operations, continue to bid from a single seniority list and continue to share a community of interest with other employees in the Passenger Service craft or class. Further, the Organization asserts that the SORS' duties, like the duties of the CSRs, have not changed since the merger, thus providing an additional basis for the Board to rely on its historical decisions.

Finally, the Organization asserts that the AFRs of the pre-merger United have a 35 year history of inclusion in the Passenger Service craft or class supported by Board decisions. IAM cites *United Airlines, Inc.,* 6 NMB 180, 185 (1997), in which the NMB held that "Air Freight Agents" " and their equivalent successor designations" are in the Passenger Service craft or class at United Airlines. The IAM also cites the current IAM-United Public Contact Agreement,

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The Carrier had informed the Board of these employees by letter dated January 17, 2012 and the IAM did not file a response or otherwise dispute the Carrier's position. These 165 employees will be treated as status changes to be addressed by the Investigators.

[3] On February 20, 2012, the Carrier filed a letter response to the Board's February 16, 2012 Notice reversing the Investigators' rulings with regard to the disputed employees and extending the voting period in this case. The instant determination by the Board is based on the record before the Investigators and the submissions by the Participants on appeal.

which states that the "responsibilities of an Air Freight Representative (AFR) consist of a variety of duties involving customer service contact and service work." According to the IAM, the AFRs "are all furloughed and have been so prior to the Fleet Service election." The IAM further argues that "United knew all the facts it relies upon now in the summer of 2011 when it decided not to include AFRs on the Fleet Service List" and that nothing has changed since then.

United

In its response, the Carrier states that in light of the Board's single transportation system decision, the Investigators correctly declined to rely on precedent involving the pre-merger United and the historical inclusion of the CSRs, SORs and AFRs in the Passenger Service Employee craft or class. The Carrier also states that the preponderance test is the appropriate standard for determining the eligibility of the cross-utilized CSRs and that the Investigators correctly ruled that the CSRs at issue preponderantly performed Fleet Service work and were therefore ineligible.

With respect to the SORS, United asserts that some of these employees' job duties changed in 2005, and that those job duties are Fleet Service in nature. The Carrier argues further that the Board should determine the appropriate craft or class of the SORS based upon their current assignments. In support of its position, United cites to the fact that a merger has occurred and also cites Board decisions involving other carriers.

In addition, United contends that AFRs are part of the Fleet Service craft or class because they lack the requisite amount of customer service contact required for inclusion in the Passenger Service craft or class. The Carrier further argues that the AFRs perform functions analogous to those performed by pre-merger Continental employees covered by the Continental-IBT collective bargaining agreement who were eligible to vote in the recent United Fleet Service election. Finally, United disputes the IAM's contention that nothing has changed to warrant deviating from previous Board determinations that AFRs are part of the Passenger Service craft or class. According to United, the Board's finding that United, Continental and CMI now comprise a single transportation system "and the resulting need to harmonize the craft or class definitions across the system, makes such a deviation both appropriate and necessary."

DISCUSSION

The NMB has a statutory duty to investigate representation disputes so as to allow for the full and free expression of employee choice with regard to representation. As part of this duty, Section 2, Ninth of the Railway Labor Act grants the NMB the power to determine who may participate in elections. Thus

it is within the sole discretion of the Board to determine who is eligible to vote in each election.

At issue is the Investigators' rulings on appeal with regard to employees who have been historically included in the Passenger Service Employees craft or class at United. For 35 years, the Board has included employees who perform Fleet Service duties in the Passenger Service craft or class. This is particularly true with regard to the cross-utilized CSRs at the Carrier's line stations. In *United Air Lines, Inc.*, 6 NMB 180, 184 (1977), the Board recognized that "[t]hough it is uncontested that certain Passenger Service employees at smaller stations perform Fleet Service or other duties beyond their principal responsibilities, such diversification of function becomes significant for craft or class purposes only upon a showing that the primary responsibilities of the position in question have been substantially obscured." In 1977, the Board listed CSRs and AFRs among the Passenger Service employees at United. *Id.* at 185 n.1. The Board continued to include these employees in the Passenger Service craft or class. *See United Air Lines, Inc.*, 8 NMB 642 (1981); *United Air Lines, Inc.*, 10 NMB 364 (1983). AFRs participated in an election among Passenger Service employees in 1998. According to IAM, Station Operations Representatives have been included in the craft or class since at least 1998, when the IAM first became the certified representative. *United Air Lines, Inc.*, 25 NMB 411 (1998). The Investigators erred by not taking these prior Board determinations into consideration when determining the eligibility of these employees.

The Investigators' conclusion and the Carrier's contention that the Board's determination of a single transportation system somehow compels disregarding the historic craft or class definitions is unpersuasive, especially so without evidence that job duties have changed due to the merger process. Continental and United work groups have not yet been integrated and the Carrier did not identify any changes in job duties resulting from the merger process. It is possible that changes will occur following the completion of the merger of United and Continental, but the Board does not make determinations based on future changes. Furthermore, without evidence that the work groups have been integrated, the job classifications of employees at pre-merger Continental Airlines have no bearing of a determination of the appropriate craft or class for these employees.

The Board finds that the Investigators correctly ruled that SORS perform both Fleet Service and Passenger Service functions. However, the Investigators erred by relying on cases involving other carriers, thereby ignoring the fact that on United, the carrier at issue here, these employees have historically been considered part of the Passenger Service craft or class. All SORS, regardless of their current job assignment, continue to perform passenger service functions during irregular operations, continue to share the same community of interest

with Passenger Service Employees as they did in 1998, and they continue to bid their current assignments from the same seniority list. Further there is no evidence that SORs job functions have changed as the result of the merger.

The Investigators correctly found that AFRs provide customer service to cargo customers in connection with cargo service. However, the Investigators erred by relying on cases involving other carriers, thereby ignoring the fact that on United, the carrier at issue here, these employees have historically been considered part of the Passenger Service craft or class and "customer contact" included contact with passengers or cargo customers. The furloughed AFRs continue to share the same community of interest with Passenger Service Employees as they have for the past 35 years and remain on the seniority list in the IAM/UAL PCE Contract. Further, there is no evidence that AFR job functions have changed as a result of the merger.

Finally, the Board also notes that the Investigators erred in relying on preponderance evidence to determine the eligibility of the cross-utilized CSRs. In view of the Board precedent regarding the composition of Passenger Service Employees craft or class at United and the unique circumstances with "line stations"[4] where many of these employees are based, the preponderance test is simply not the appropriate standard for determining the eligibility of these employees. As the Board has previously stated regarding these employees, it is common "for positions at smaller stations to be responsible for a broader range of duties and functions than that with which might be exercised at larger duty stations." *United,* 6 NMB at 143. The unique circumstances that prompted the Board to include these cross-utilized employees in the Passenger Service Employees craft or class 35 years ago remains unchanged.

In fact, the evidence presented by both the IAM and the Carrier demonstrates the fluidity of the job duties of these CSRs. CSRs are expected to perform a wide range of duties according to the operational needs at these line stations. These employees bid on preferred job assignments and their contract allows them to switch between Fleet Service duties and Passenger Service duties. Managers have the ultimate control over the assignments and these employees are not able to control their job duties on any given day. These employees are required to bring two uniforms to work (as well as steel-toed shoes) so they are able to switch between Fleet Service and Passenger Service

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[4] As noted in the eligibility ruling, the declarations submitted by the Carrier are from United General Mangers of Airport Operations at the following bases: Albuquerque; Albany; Austin; Windsor Locks; Boise; Charlotte; Port Columbus; Cincinnati/Northern Kentucky; Dallas/Ft. Worth; Des Moines; Sioux Falls; Spokane; Grand Rapids; Houston; Wichita; Jacksonville; Kona; Las Vegas; Lihue; Kansas City, MO; Harrisburg; Miami; New Orleans; Oakland; Kahului; Oklahoma City; Ontario, CA; Phoenix; Warwick, RI; Raleigh-Durham; Richmond; Reno-Tahoe; San Antonio; San Jose; John Wayne/Orange County; St. Louis; Tulsa; and Tucson.

duties at a moment's notice. Job duties can change seasonally and the IAM presented evidence that some employees who performed a preponderance of Fleet Service duties prior to the cut-off date are currently performing Passenger Service duties. The "snapshot" required by the preponderance test does not provide an accurate representation of the duties of these employees. It is, therefore, not the appropriate test for making this craft or class determination under the unique circumstances presented in this case**.**

The Board has long held the Act "deals with the present status and the present interests of the employees involved and not with potential future status and potential future interests of the employee." *Chicago & North Western Railway Co.*, 4 NMB 240, 249 (1965). *See also*, *Northwest Airlines, Inc.*, 18 NMB 357, 370 (1991). At line stations, the present status and interest of these cross-utilized employees is illustrated by their work-related community of interest with the rest of the Passenger Service Employees craft or class at United. As the evidence provided by the IAM demonstrates, these employees do not have regular contact with Fleet Service employees. They do not share break rooms or supervisors with the Fleet Service employees. They do not share work hours or training classes with the Fleet Service employees. They do, however, share all of these with other employees in the Passenger Service craft or class. They are on the same seniority list as the Passenger Service employees and bid for vacation from that list.

The issue before the Board in this case is the enfranchisement or disenfranchisement of approximately one thousand employees who have historically been included in the Passenger Service Employees craft or class at United. To be sure, this case involves the resolution of a representation dispute following the merger of United, MPI, Continental, and CMI. The mere fact, however, that a merger has occurred cannot be the basis for finding these employees ineligible and denying them their right to vote. As previously discussed, the Board looks to the present status and interest of the employees at issue and there is no evidence that material changes have occurred to the historical patterns of representation due to the merger. Just as the employees who were historically included in the Continental Fleet Service Employees craft or class voted in the recently conducted Fleet Service Employees election at the new merged carrier, the employees who have been historically included with Board approval in the United Passenger Service Employees craft or class are eligible to vote in this election.[5]

[5] The Carrier states that the List of Potential Eligible Voters in the Fleet Service Employees election represented the fleet service employees at United. The Carrier, however, waited until the Passenger Service Employees election before raising the eligibility of the employees at issue in this case. Thus, the Carrier's fragmentation argument fails.

In view of the unusual circumstances of this case, the Board's decision is narrowly focused on finding eligible those employees who have historically voted in the Passenger Service Employees craft or class at United.

CONCLUSION

The Board overrules the Investigators' February 10, 2012 ruling and determines that the 706 CSRs, 152 furloughed AFRs and 117 SORs are eligible to vote in the Passenger Service election.

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson
General Counsel

Member Dougherty, dissenting.

I disagree with the Majority's blanket reversal of the Investigators' rulings with regard to the cross-utilized Customer Service Representatives and Customer Service Representative-Service Directors (CSRs) who preponderantly perform Fleet Service work; the Air Freight Representatives and Air Freight Representative-Service Directors (AFRs); and the Station Operations Representative (SORs).[6] The Investigators' rulings were based on the facts in the record, and they followed important Board policies dedicated to ensuring that similarly situated employees are not divided among different crafts or classes, that crafts or classes are consistent system-wide, and that elections are decided only by individuals who, judging by the work they perform at the time of the election, have a present, shared interest in the system-wide craft or class. The Majority's reversal ignores long standing National Mediation Board (NMB) law and procedures, renders eligible employees who perform little or no Passenger Service work, and divides employees performing exactly the same type of work at the single United/Continental system.

As an initial matter, I reject the IAM's "estoppel" argument. The IAM contends that because the Carrier did not raise the eligibility of the contested employees in the earlier Fleet Service election, these employees did not have an opportunity to vote in that election and are unacceptably disenfranchised by the Investigators' ineligibility ruling in this Passenger Service election. According to the IAM, the Carrier is "estopped" from asserting – and apparently

[6] I would reverse the Investigator's ruling on Wissam Jameel, as discussed in footnote 14 below.

the Board is "estopped" from finding – that these employees are not eligible to vote in this election, regardless of Board precedent and the work actually performed. Neither the facts nor Board precedent support this approach. There is ample evidence that *all* participants in the Fleet Service election (including the IAM) were aware there were issues pertaining to the proper craft or class placement of the contested employees. The Investigator in that case took the extra step of sending a letter, dated May 20, 2011, requesting further "information regarding the composition of the Fleet Service Employees craft or class." Neither the Carrier nor the IAM took any positions on the placement of the employees at issue, and thus the question was neither raised to nor decided by the Board. The fact that certain eligibility issues were not raised or decided in an earlier case has never dictated and should not now dictate the outcome of eligibility issues in a later case, particularly when, as here, the result would be directly at odds with the relevant facts and precedent.

Significantly, the Board previously rejected an almost identical argument in *USAir, Inc*, 21 NMB 402 (1994). In *USAir*, the Organization argued that certain employees should be allowed to vote in a Passenger Service election even without sufficient customer contact because they were not eligible in a recent Fleet Service election. Rejecting this argument, the Board stated "The Board's eligibility determinations are based upon all of the facts and circumstances of each case. The Board bases its determination *on the actual duties and responsibilities of . . . employees rather than whether they were eligible to vote in a [prior] election among Fleet Service Employees.*" *Id.* at 406. The Board also noted that neither the unions nor the carrier raised the eligibility of the contested employees in the earlier election. *Id. See also US Airways Inc.*, 27 NMB 138 (1999)(In rejecting argument that a participant should be estopped from eligibility claims because of prior conduct, the Board stated that it alone determines representation, and prior conduct of the Organization or Carrier is not relevant). In the instant case, I agree it is unfortunate the contested employees would not have an opportunity to vote in either election, but that fact alone does not compel the Board to allow otherwise ineligible employees to vote in an election.[7] As in the cases cited above, claims about what did or did not happen in the earlier Fleet Service

[7] I strongly disagree with the Majority's statement that "the issue before the Board in this case is the enfranchisement or disenfranchisement of approximately one thousand employees." The issue before the Board is eligibility. I am surprised the Majority is deciding this case based on disenfranchisement when it has been perfectly happy to disenfranchise employees in the past through accretion or extension of certification in a merger context. In fact, just eight months ago, this Board extended the certification of the Stock Clerk craft or class at pre-merger United and disenfranchised 249 pre-merger Continental Stock Clerks. *United Air Lines*, 38 NMB 249 (2011). Disenfranchisement concerns did not compel the Board to deviate from precedent in that case and should not here.

election are not relevant here and provide no basis for finding the contested employees eligible.[8]

I turn next to the substantive questions of eligibility of the CSRs, AFRs, and SORs. The burden of persuasion in an appeal from an investigator's eligibility ruling rests with the participants appealing that determination. *American Airlines*, 31 NMB 539, 553 (2004); *Northwest Airlines, Inc.*, 26 NMB 77, 80 (1998). Regardless of where the burden lies, I strongly disagree with the Majority's wholesale reversal of the Investigators' rulings on all three groups.

Before examining the facts in evidence for each set of challenged employees, I first address two aspects of the Majority decision generally applicable to all three groups: (1) the Majority's heavy, if not exclusive, reliance on past Passenger Service cases at pre-merger United and (2) the Majority's rejection of its own single carrier decision. The Majority cites four past Board decisions at pre-merger United: *United Air Lines, Inc.*, 6 NMB 180 (1977); *United Air Lines, Inc.*, 8 NMB 642 (1981); *United Air Lines, Inc.*, 10 NMB 364 (1983); *United Air Lines, Inc.*, 25 NMB 411 (1998). In the 1977 case, the Board ruled that CSRs and AFRs were part of the Passenger Service craft or class. The 1981, 1983, and 1998 cases cited do not analyze the eligibility of – or even mention – any of the three groups. In fact, the 1998 case is merely a report of election results, not an eligibility ruling at all. The three groups were apparently on the eligibility list for the 1998 election, but the Board has not specifically addressed the CSRs and AFRs[9] since 1977, and it has never addressed the SORs. Inexplicably, the Majority allows the 35-year-old case to drive its entire decision. The notion that a craft or class determination at a particular carrier is written indefinitely in stone is absurd.[10] This would

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[8] I also note that I find the IAM's suggestion that the NMB Investigators somehow aided and abetted the Carrier in a plot to disenfranchise employees baseless and insulting to the Investigators. The Investigators' role is to make rulings on the facts before them based on established Board precedent. That is what the Investigators did in this case. The fact that the IAM does not agree with the Investigators' rulings does not warrant the character attack suggested in the IAM's appeal filings. I call on my colleagues to join me in condemning this type of rhetoric and ad hominem attack on our Investigators.

[9] The IAM also cites an Investigator's ruling on the eligibility of AFRs in the 1998 representation case. Ironically, the IAM was then challenging the eligibility of the AFR's – the exact opposite position it takes here. The Investigator rejected the IAM's challenge by looking only at the AFRs written job description. The ruling provides no indication of what duties the AFRs were actually performing. Moreover, the Board is certainly not bound by this 14-year-old, unappealed Investigator ruling.

[10] Equally absurd is the Majority's suggestion that it was error for the Investigator to rely on cases involving other carriers. The Board has historically always looked to relevant precedent – whether from the same carrier or a different carrier – to guide and

prohibit the Board from taking into account changes in the industry and developments in the Board's craft or class definitions, not to mention evidence in the record before it. It is also absurd to think that the Board would be indefinitely bound by the mere fact that a certain group of employees participated in an earlier election without any discussion of their eligibility, as with the SORs.

The Majority's slavish reliance on the pre-merger United Passenger Service cases also ignores the important fact that this case involves merged carriers. A mere twelve weeks ago, this Board ruled that United and Continental comprise a single transportation system for the craft or class of Passenger Service Employees. *United Air Lines/Continental Airlines, Inc.*, 39 NMB 229 (2011). Thus, the representation case currently before the Board involves a *new* system, further diluting the relevance of the pre-merger United cases. The Majority argues the merger context here is not relevant because the Carrier has not yet changed any employee's job duties as a result of the merger. This completely misses the point. It is a bedrock Railway Labor Act principle that the Board makes system-wide craft or class determinations. *Southern Pacific Lines*, 22 NMB 70, 73 (1994). *See also*, *Republic Airlines*, 39 NMB 3 (2011); *Delta Air Lines, Inc.*, 37 NMB 88 (2009); *Burlington Northern Railroad Co.*, 18 NMB 240 (1991); *Alia Royal Jordanian Airlines*, 10 NMB 389 (1983). In making craft or class determinations in a merger situation, the Board must not only address changes to job duties, but it must also determine a new, system-wide craft or class by examining work performed by different groups of employees and synthesizing crafts or classes that may have developed differently over time at the two merging carriers. As the Majority well knows, the Board regularly revisits and redraws craft or class lines in merger cases. For example, at Continental Micronesia, there was a combined craft or class of Fleet and Passenger Service Employees. Following the merger at issue here, that craft or class no longer exists and the employees have been separated into Fleet Service and Passenger Service. *See United Air Lines/Continental Airlines, Inc.*, 39 NMB 229 (2011); *United Air Lines/Continental Airlines, Inc.*, 38 NMB 185 (2011). *See also York Railway Co.*, 29 NMB 444, 454-55 (2002)(Following the merger of two railroads, the Board determined that the appropriate craft or class was Train and Engine Service Employees, despite having previously certified a representative at one of the merged carriers for the separate crafts or classes of Engineers, Carmen, Brakeman, and Conductors); *USAir*, 15 NMB 369, 395-96 (1988) (Following the merger of USAir and Pacific Southwest Airlines (PSA), the Board determined that the combined Fleet and Passenger Service craft or class that existed at PSA was no longer appropriate and authorized an election of Fleet Service

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inform its decision-making. Particularly where the only informative on-property precedent is 35 years old, it is not at all unusual for the Board to look to more recent, on-point cases at other properties.

Employees at the merged carrier for those employees who worked a preponderance of their time in fleet service capacities).

In the type of craft or class analysis conducted by the Majority, consideration of the merger context and examination of work performed across the new system are warranted and necessary.[11] After all, the representation consequences of an election after a merger affect the entire system, not just a pre-merger group on one side or the other, and it is irresponsible to make craft or class judgments without taking account of what the post-merger, system-wide craft or class looks like. The merger context is highly relevant here, and a decades old craft or class determination at a pre-merger entity simply cannot control.

With regard to the CSRs specifically, the Majority fundamentally misunderstands the distinction between an eligibility determination and a craft or class determination. The Board already determined that the proper craft or class on the combined United/Continental system is the Passenger Service craft or class. There is no dispute that the CSRs are cross-utilized and perform both Passenger Service and Fleet Service functions. The question before the Board is whether a certain number of CSRs who perform both Passenger Service and Fleet Service functions are eligible to vote in this election. Even when the Board has previously determined a classification of employees to be part of a particular craft or class, that does not mean that every employee in that classification will always be eligible to vote in every election for that craft or class. Regardless of job classification, an employee must actually be working regularly in the craft or class on and after the cut-off date to be eligible. NMB Representation Manual 9.2, 9.212. *See Delta Air Lines, Inc.*, 38 NMB 15, 16 (2010) (Flight Attendant on special assignment who was not flying on or after the cut-off date was ineligible to vote in the Flight Attendant election); *Chicago & North Western Ry. Co.*, 4 NMB 240 (1965); *America West Airlines, Inc.*, 23 NMB 244 (1996); *USAir, Inc.* 21 NMB 402, 406 (1994)(the Board looks at the actual duties being performed by the employees at issue and not merely job titles and classifications). And where, as here, employees "perform work in more than one craft or class," our Manual and decades of NMB precedent speak directly and unequivocally to the proper method for determining eligibility of these employees: the preponderance test used by the Investigators in this case. Manual 9.212. *See also, USAir, Inc.,* , 45 (1996); *America West Airlines, Inc.*, 22 NMB 111 (1994); *America West Airlines, Inc.*, 16 NMB 135, 143 (1989). These are the cornerstones of the Board's eligibility policy, and the Board has consistently applied them to cases similar to this one

[11] The Majority basically admits it is judging craft or class and, astoundingly, states: "job classifications of pre-merger Continental Airlines have *no bearing* on a determination of the *appropriate craft or class* for these employees." It is as if the Majority thinks this election's representation choice will impact only employees on pre-merger United and not the approximately 7700 pre-merger Continental employees.

in the past. In *America West*, 16 NMB at 142-43, the Board first determined there should be a separate craft or class of Flight Attendants and then ruled that the eligibility of cross-utilized flight attendants would be determined by a 90-day preponderance check, in spite of the fact that this would render ineligible some flight attendants previously determined to be in the same craft or class with the non-cross-utilized flight attendants. *See also USAir, Inc.*, 15 NMB at 396 (Board determined post-merger that there should be a separate Fleet Service craft or class and that certain cross-utilized "Customer Service Agents" would be eligible only if they "worked a preponderance of their time in fleet service capacities during the selected period").

Thus, in my view, the preponderance test was the proper standard for the CSRs. I also believe the Investigators' application of the preponderance test to the facts in evidence was proper in this case. The Carrier provided declarations from managers based on employees' work schedules and shift history over the relevant 90-day period and determined that 706 of the 751cross-utilized CSRs spent 60 percent or more of their time performing Fleet Service duties. The employee declarations submitted by the IAM do not contradict -- and occasionally support -- this evidence. The preponderance evidence submitted by the Carrier conformed to the requirements of Manual Section 9.212 and the Investigators did not err in relying on it. See *American Airlines*, 31 NMB 539 (2004)(Board relied on preponderance evidence that was not specifically requested and consisted of a declaration based on managers' review of work records and didn't include underlying supporting documentations). Thus, the Investigators properly ruled that the 706 cross-utilized CSRs are not eligible, and the Majority's decision to overturn the ruling was a complete departure from past Board eligibility rulings.

The Majority rejects the Board's time-tested preponderance methodology in favor of the 1977 pre-merger United Passenger Service case.[12] They also

[12] The Majority also rejects the preponderance test as too limiting of a "snapshot" because of the "fluidity" of the cross-utilization of the CSRs. I also disagree with the Majority on this point. Our manual contemplates preponderance periods of different lengths – from 30 to 90 days – depending on the complexity of the case. I believe any issues arising from the extent of the cross-utilization of the CSRs were fully addressed by the Investigators' reliance on a 90-day preponderance period rather than a 30-day period. I would have been open to addressing any perceived special circumstances presented by the CSRs by simply extending the preponderance period and asking the Participants for more information about the duties performed by these individuals over a longer period of time – e.g. six months or a year. This approach would have been more in keeping with the Board's long-standing eligibility methodology of looking at actual duties. Instead, the Majority rejects any form of preponderance check and includes *all* of the CSRs without regard for whether they perform any Passenger Service functions at all. This is particularly inappropriate in light of the fact that even the IAM suggests some of the CSRs performed very little or no Passenger Service work at all. A declaration from IAM's General Secretary stated that he had discussions

argue the CSRs share a greater community of interest with Passenger Service employees than with Fleet Service employees. As these factors arise primarily in a craft or class determination but do not control eligibility, I can only assume that the Majority is, in fact, engaging in a craft or class determination placing all CSRs in the Passenger Service craft or class at the new United/Continental system. The Majority's craft or class analysis also fails. The Board is not prohibited from re-examining a 35-year-old determination, particularly where a new system has been identified. In the 1977 case relied upon so heavily by the Majority, the Board stated: "Though it is uncontested that certain Passenger Service employees at smaller stations perform Fleet Service or other duties beyond their principal responsibilities, such diversification of function becomes significant for craft or class purposes only *upon a showing that the primary responsibilities of the position in question have been substantially obscured*." *United Air Lines*, 6 NMB at 184 (emphasis supplied). In light of the evidence in the record that most of the CSR's performed mostly non-Passenger Service work in the last three months and that some number of CSRs may perform no Passenger Service work at all, it appears that the Passenger Service responsibilities of at least some of the CSRs may have been "substantially obscured."

Moreover, while work-related community of interest is important to craft or class determinations, it is well-settled that "[t]he Board examines the actual duties and responsibilities of employees, not merely job titles when determining whether there is a work-related community of interest." *AirTran,* 39 NMB 175, 180 (2011). *See also Regional Elite Airline Servs.,* 38 NMB 299, 314 (2011); *AirTran Airways,* 28 NMB 500, 508 (2001); *National Airlines, Inc.,* 27 NMB 550, 555 (2000). Customer contact is key to inclusion in the Passenger Service craft or class. As the Board has repeatedly stated, "[t]he essence of passenger service is 'customer contact.'" *Northwest Airlines, Inc.,* 27 NMB 307, 312 (2000). *See also American Eagle,* 28 NMB 591, 598 (2001) (Customer contact is "integral to the [Passenger Service craft or class]"); *USAir, Inc.,* 21 NMB 402 (1994). The fact that employees share break rooms and supervisors cannot overcome the absence of sufficient customer contact in the actual duties they perform. *See USAir,* 21 NMB at 406-07 (The fact that employees were under the same supervisor and had same job titles as Passenger Service employees was not sufficient for the Board to include them in the Passenger Service craft or class because they did not have sufficient customer contact); *American Airlines, Inc.*, 26 NMB 106, 118-19 (1998) (Four employees with insufficient customer contact lacked sufficient community of interest and were ineligible in Passenger Service election in spite of the fact that they had the same job titles, worked in

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prior to the Fleet Service election concerning employees at issue here who "preponderantly, or, in some cases exclusively, performed fleet service work at United line stations."

the same location, and were under same wage scales and benefits as members of the Passenger Service craft or class).

The record in this case establishes that a very large number of CSRs had little or no customer contact during the last three months, and the IAM has suggested that some portion of the CSRs never or very rarely perform any customer contact duties. In spite of these uncontested facts, the Majority makes a results-oriented, blanket ruling to make them all eligible without the differentiation required by Board policy and precedent. Before determining all of these individuals belong in the Passenger Service craft or class at the single United/Continental system, the Majority should have requested more information about the actual work performed by these individuals over a longer period of time and should also have checked to make sure that it was not bifurcating groups of pre-merger United and pre-merger Continental employees performing identical work into two different crafts or classes. Because I believe the Board was neither asked for nor had sufficient information to make a craft or class determination, I dissent from the Majority to the extent they were, in effect, ruling that all CSRs must be included in the new, system-wide Passenger Service craft or class.

The Majority's reversals regarding AFRs and SORs are even more perplexing. The AFRs and SORs do not raise issues of cross-utilization and instead present a pure question of whether those employees were performing Passenger Service functions at the time the application was filed. Regardless of whether the Majority is making an eligibility ruling or a craft or class determination, the simple fact is that the AFRs and SORs do not have sufficient – or in some instances *any* – customer contact. As discussed above, the Board has consistently determined that customer contact is the lynchpin of inclusion in the Passenger Service craft or class. The uncontroverted record evidence demonstrates that these groups simply do not have sufficient customer contact.

With regard to the AFRs specifically, the Carrier submitted evidence that these employees, prior to their furlough, had "very little customer contact." and spent most of their time on back office work processing cargo shipments. The IAM did not present any conflicting evidence to demonstrate that the AFRs actually had substantial customer contact prior to their furlough.[13] The

[13] Instead of providing evidence about actual work performed, the IAM quotes language relating to the AFRs' job description in their Collective Bargaining Agreement (CBA). Board precedent is clear that evidence of actual work performed trumps job descriptions or the parties' agreement. *AirTran Airways, Inc.*, 28 NMB 500,(2001). In *United Air Lines/Continental Airlines, Inc.*, 39 NMB 33 (2011), the Board refused to combine the Flight Instructors and Flight Deck Crew Members crafts or classes following the merger despite a combined CBA at one of the carriers and an over 20-year history of bargaining together at the other. *See also Northern Ind. Commuter*

Majority and the IAM completely ignore the record evidence about the AFRs actual duties and rely on the pre-merger United Passenger Service cases. As discussed above, the controlling fact is whether the employees at issue were performing Passenger Service work (prior to furlough). Whether in a craft or class determination or eligibility ruling, the Board is not bound by a 35-year-old case, particularly in light of (1) compelling evidence in the record that the actual duties of the AFRs included only *de minimis* customer contact and (2) this Board's twelve week-old determination that there is a new, single transportation system. To determine the proper craft or class placement of the AFRs, it is important to consider all employees performing similar functions on the entire system. The Carrier submitted evidence that other employees on the new system perform duties identical to the pre-merger United AFRs and that these employees were part of the pre-merger Continental Fleet Service craft or class. If the Majority is making a craft or class determination for the AFRs, it should have taken these facts into account. The uncontested evidence in the record suggests the AFRs are more properly in the Fleet Service craft or class on the new system.

As to the SORs, the evidence in the record demonstrates that in 2005 all load planning functions at pre-merger United were transferred to a central location, and all 35 SORs at that location now perform only load planning functions. The IAM presented no contradicting evidence and, in fact, presented no evidence at all about the actual work performed by any of the SORs. The Majority didn't address this particular group of SORs at all, and the IAM relied again on language in their Passenger Service CBA.[14] Again, the evidence in the

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Transp. Dist., 27 NMB 512, 518 (2000) ("A carrier is free to voluntarily recognize a particular union as the representative of a group of employees which may or may not constitute a craft or class. But, when a dispute is brought before the Board, it must determine whether the group constitutes a proper craft or class."); *Northwest Airlines*, 14 NMB 76, 99 (1986).

[14] The IAM also claims that these SORs should be eligible because United took the position in the Fleet Service election that one of the load planning SORs, Wissam Jameel, was in the Passenger Service craft or class. None of the participants challenged this position, the Investigator ruled him ineligible, and that ruling was not appealed. The Investigators in this case relied on the Carrier's earlier position and ruled Mr. Jameel eligible in the Passenger Service election without conducting an examination of his actual duties. The case of Mr. Jameel is disappointing in many respects. It is unfortunate that an analysis of his actual duties was not performed in the Fleet Service case, although I note that the Investigator was not presented with any such evidence. In this case, I would overturn the Investigator's eligibility ruling because it was based solely on the Carrier's representations in the Fleet Service case. I believe the Investigators should have looked at Mr. Jameel's actual work and, presumably, found him ineligible as a load planning SOR with no customer contact. I also strongly chastise the Carrier for taking different positions on Mr. Jameel and his job classification in the two elections. My disappointment in the Carrier and

record about changed circumstances and duties actually performed by these SORs trumps CBA language. Moreover, the only case cited on this issue by the IAM, *National Airlines*, 27 NMB 594 (2000), actually supports the exclusion of the load planning SORs. In *National,* the Board stated that several Customer Service Agents "did not perform fleet service functions *other than* weight and balance and load planning" to warrant inclusion in the Fleet Service craft or class at that particular carrier. *Id.* at 596-97. (emphasis supplied). The language used by the Board clearly indicates that it considered weight and balance and load planning to be fleet service, *not* passenger service, functions. Other Board decisions confirm that weight, balance and load planning have long been considered not Passenger Service functions. *See e.g. Continental Airlines*, 10 NMB 433, 452 (1983) (Load Planning Specialists and CSAs performing similar duties were included in Fleet Service Employees craft or class). *American Airlines, Inc*, 10 NMB 26, 42 (1982) (Airport Operations Agents, who performed "weight and balance" work for a preponderance of their time, were properly part of the Office Clerical craft or class.). In light of the uncontested evidence that 35 SORS performed *only* weight, balance and load planning functions, these individuals clearly fall outside the Passenger Service craft or class at the new system and should not be eligible to vote in this Passenger Service election. I fail to see any basis whatsoever for overturning the Investigators' ruling as to these individuals.

The remaining SORs were also properly ruled ineligible by the Investigators. The evidence in the record demonstrates that non-load planning SORs predominantly coordinate flight information and flight planning information among dispatchers and other Carrier employees. The Carrier submitted evidence that the SORs have only *de minimis* customer contact. The IAM again did not offer any conflicting evidence except the terms of the CBA, which does not control. In addition, the Carrier presented evidence that employees at pre-merger Continental performing work identical to the non-load planning SORs are in the Fleet Service craft or class. I strongly maintain that any craft or class determination the Board makes with respect to the pre-merger United SORs must take into account similar duties performed by employees across the entire new system. As with the AFRs and load planning SORs, the uncontested evidence in the record indicates that these SORs fall outside the Passenger Service craft or class and should not be eligible to vote in this election.

With all three employee groups, the Majority has excessively relied on a decades-old craft or class decision and ignored its own single carrier decision. The Majority has also ignored record evidence and sound, long-standing Board

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disagreement with the Investigators' rulings in both elections, however, in no way compel the Board to find eligible 35 employees who, according to uncontroverted evidence, perform no Passenger Service work. It would be completely contrary to Board principles to make a baseless eligibility finding merely to "punish" a participant.

policies. The Investigators' focus on the work actually performed by the employees at issue was completely appropriate. Thus, I find no basis for overturning the Investigators' rulings, and I dissent from the Majority's reversal.