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(202) 692-5000 39 NMB No. 36

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VIA EMAIL

Sheldon M. Kline, Esq.
Counsel for American Airlines
Sheppard Mullin Richter & Hampton
1300 I Street, N.W., 11th Floor
Washington, DC 20005

Gregg Formella, Attorney
Denise Lynn
Vice President Employee Relations
American Airlines
4333 Amon Carter Boulevard
Fort Worth, TX 76155

Ed Gilmartin
General Counsel
Deirdre Hamilton
Staff Attorney
AFA-CWA
501 Third St. NW,
Washington, DC 20001

Sandy Rusher
Organizing Coordinator
Communication Workers of America
1349 Empire Central, Suite 610
Dallas, TX 75247

Re: NMB Case No. R-7310
American Airlines/CWA

Participants:

This determination addresses the March 9, 2012 appeals filed by the Communication Workers of America (CWA) and American Airlines, Inc. (American or Carrier) of Investigator Susanna F. Parker's eligibility rulings. For the reasons discussed below, CWA's and American's appeals are granted in part and denied in part.

I.

PROCEDURAL BACKGROUND

On December 7, 2011, CWA filed an application pursuant to the Railway Labor Act (RLA),[1] 45 U.S.C. § 152, Ninth (Section 2, Ninth), seeking to represent the craft or class of Passenger Service Employees on American. American's Passenger Service Employees are currently unrepresented. The Carrier filed the List of Potential Eligible Voters (List) on December 7, 2011. The Carrier filed its initial position statement on December 21, 2011 and CWA filed an initial position statement on December 30, 2011. The Investigator sent a letter to the parties on January 3, 2012, setting a schedule for filing challenges and objections.

The Carrier submitted a Supplemental Eligibility List on January 13, 2012. The CWA submitted challenges and objections to the List on January 17, 2012 and noted "in accordance with the schedule set by the Investigator on January 3, the Union will file a response regarding these individuals by January 31, 2012." On January 18, 2012, American filed a letter with the Investigator proposing a schedule for the Organization to file any challenges or objections to the Supplemental Eligibility List. On January 19, 2012, CWA responded to American's January 18, 2012 letter stating that "January 31, 2012 is the appropriate deadline according to applicable NMB precedent and the schedule entered by Ms. Parker on January 3, 2012." The Investigator issued a letter on January 19, 2012, stating that "any responses to challenges or objections, including the Carrier's submission of January 13, 2012, must be filed by 4 p.m., ET, on January 31, 2012." American responded to the CWA's challenges and objections on January 31, 2012. The CWA responded to the Carrier's Supplemental Eligibility List on January 31, 2012 and submitted Supplemental Authorization Cards. The CWA filed an additional, unsolicited, submission on February 7, 2012.

II.

Challenges and Objections

A. CWA

CWA's challenges and objections alleged that: (1) 749 Reservations Representatives stationed at closed call centers lack a reasonable expectation of returning to work and should be removed from the List; (2) 25 individuals stationed at Closed City Ticket Offices (CTO) lack a reasonable expectation of returning to work and should be removed from the List; (3) individuals with the title "Cargo Operations" are not eligible because they do not have any customer

[1] 45 U.S.C. § 151, *et seq.*

contact and they regularly supervise and discipline other employees in the craft or class; (4) Tower Planners do not have sufficient customer contact to include them in the Passenger Service Employees craft or class; (5) Compliance Coordinators should be removed from the List as they do not have any customer contact; (6) eleven employees have retired and should be removed from the List; (7) one employee has resigned and should be removed from the List; (8) one employee was terminated from employment with American and should be removed from the List; (9) four employees are deceased and should be removed from the List; (10) ten individuals should be removed from the List as they have no recall rights and no expectation of returning to work; (11) one individual turned down a recall opportunity and should be removed from the List; (12) thirteen individuals are ineligible because they no longer work in the position indicated on the List, and now work in a position outside the Passenger Service craft or class; (13) six individuals on the List have been hired by other airlines and are ineligible; (14) two employees on the List do not work for American; (15) one employee was listed twice; (16) six individuals are appealing their dismissal through the Carrier's grievance procedure and should be added to the List; and (17) one employee is on authorized medical leave of absence and should be added to the List. Additionally, CWA asserted that the individuals listed on the Supplemental Eligibility List submitted by the Carrier were not working regularly in the craft or class on and after the cut-off date. Finally, CWA argued that the Board should accept the additional authorization cards submitted by CWA on February 7, 2012 because they were all dated prior to the Carrier's submission of the Supplemental Eligibility List.

B. American

The Carrier responded to CWA's challenges and objections stating: (1) the 749 Reservations Representatives have recall rights, and a reasonable expectation of returning to work on American; (2) the 25 individuals stationed at CTOs should be removed as their recall rights have expired; (3) the individuals were incorrectly listed as "Cargo Operations" and all but two of these employees work directly with customers and do not have the authority to supervise or discipline employees and should be included in the Passenger Service craft or class; (4) Tower Planners perform passenger service functions and should be included in the Passenger Service Employees craft or class; (5) Compliance Coordinators perform Airport Agent work and share a community of interest with the Passenger Service Employees craft or class; (6) five individuals retired from American as of the cut-off date and should be removed from the List; (7) one individual resigned from the Carrier and should be removed from the List; (8) one employee retains recall rights with American and should remain on the List; (9) the Carrier does not have any record of the four employees' deaths, therefore, they should remain on the List; (10) ten individuals retain recall rights as of the cut-off date and should remain on the List; (11) one additional individual retained recall rights as of the cut-off date and should remain on the List; (12) four individuals are ineligible because they

no longer work in the Passenger Service craft or class; (13) the Carrier does not have any records that the six individuals are working for another Carrier, therefore, they should remain on the List; (14) one employees on the List should be removed from the List; (15) one employee was listed twice, therefore, one name should be removed from the List; (16) five individuals have grievances pending and should be added to the List while the remaining employee does not have an open grievance seeking reinstatement with American; and (17) one employee is on a medical leave of absence and should be added to the List.

The Carrier identified two additional CTO furloughees whose recall rights have expired and should be removed from the List. The Carrier argued that two of the individuals listed as "Cargo Operations" and challenged by CWA should be removed from the List as one is a Coordinator Cargo Training and one is a Level 3 Customer Service Manager (CSM). The Carrier also stated that three additional employees: one Coordinator Cargo Training employee and two Level 3 CSMs should be removed from the List. The Carrier identified 22 additional individuals with grievances pending and stated that one employee was challenged by CWA.

Additionally, the Carrier filed a Supplemental Eligibility List containing the names of 96 employees who were working at the Cincinnati Reservations Office (CRO) at the time of its closure in 1998 and who became plaintiffs in a lawsuit against American. As part of their relief, they are seeking reinstatement at American. The Carrier argued that they were not included in the List submitted to the Board on December 7, 2011, because they were not included on the furlough list at the CRO.

C. Investigator's Ruling

Investigator Parker issued her rulings on February 29, 2012. She ruled as follows:

1. The 749 furloughed Reservations Representatives have recall rights and a reasonable expectation of returning to work. The individuals remain eligible.

2. The Carrier provided documentation that the 27 individuals stationed at closed CTOs should be removed from the List because their recall rights have expired. These individuals are ineligible.

3. Due to an administrative error, individuals were incorrectly listed as "Cargo Operations." The actual titles of theses employees are: Gateway Customer Service; Coordinator Cargo Loss/Damage; Coordinator Quality Assurance; Coordinator Cargo Customer Service; and Coordinator Regulatory Compliance. Employees in each of these

positions are eligible. One employee individually challenged by CWA is a Coordinator Cargo Training, and is not eligible. One employee individually challenged by CWA is a Level 3 CSM and is ineligible. Three additional employees: one Coordinator Cargo Training employee and two Level 3 CSMs are ineligible.

4. Tower Planners do not work with passengers or have significant customer contact. There were no significant material changes in circumstances to warrant a finding that these employees share a community of interest with the Passenger Service Employees craft or class. These individuals are ineligible.

5. Compliance Coordinators have very little customer contact and are not part of the Passenger Service Employees craft or class. These individuals are ineligible.

6. Of the 11 employees alleged to have retired, five did retire as of the cut-off date. Those individuals are ineligible.

7. The employee alleged to have resigned, did resign as of the cut-off date. That individual is ineligible.

8. The employee alleged to have been terminated from employment with American retains recall rights with American. That individual is eligible.

9. CWA did not provide sufficient evidence that four individuals are deceased. Those employees remain eligible. However, the Investigator noted that since this issue is really a status change rather than an eligibility issue, the Board will consider additional evidence regarding these individuals on appeal.

10. The ten individuals identified by the CWA as having no recall rights, do, in fact, have recall rights and are eligible.

11. The individual the CWA challenged as having turned down a recall opportunity retained recall rights as of the cut-off date. This individual is eligible.

12. Of the 13 individuals alleged to be working in a position outside the Passenger Service Employees craft or class, four are no longer working in the Passenger Service Employees craft or class. These individuals are ineligible.

13. The Carrier did not have any records indicating that the six individuals alleged to have been working for another carrier are

actually working for another carrier. Additionally, these individuals retain recall rights as of the cut-off date. These individuals are eligible.

14. Of the two individuals who allegedly do not work for American, one employee is not working for American. That employee is ineligible.

15. One employee was listed twice; therefore, the duplicate name will be removed from the List.

16. Of the six individuals alleged to have pending grievances seeking reinstatement, five are appealing their dismissal and are eligible. Twenty-two additional individuals have pending grievances with American and are eligible.

17. One employee is on medical leave of absence and is eligible.

18. The individuals listed on the Supplemental Eligibility List were not working regularly in the craft or class on or after the cut-off date. These employees were not dismissed from employment; therefore, Section 9.203 of the Board's Representation Manual (Manual) does not apply. These individuals are not on the recall list at the CRO; therefore, they do not have a reasonable expectation of returning to work. These individuals are ineligible.

19. American complied with the Board's requirements and delivered the List to the Board on December 7, 2011. Pursuant to Manual Section 3.3 and Board practice, no authorization cards received after 4:00 p.m. on December 7, 2011 will be accepted.

On March 9, 2012, CWA and American filed appeals with the Board regarding various portions of the Investigator's February 29, 2012 rulings. CWA and American filed responses on March 16, 2012. On March 20, 2012, CWA requested an opportunity to file a rebuttal to American's responses. The Investigator granted that decision stating, "If the Board decides to take the Carrier's additional evidence into consideration, the Board will also consider CWA's rebuttal submission." CWA filed a rebuttal on March 23, 2012. American requested an opportunity to respond to CWA's rebuttal and filed a surrebuttal, on March 23, 2012.

III.

Appeals

A. CWA

CWA appeals the Investigator's rulings regarding: (1) the 749 furloughed Reservations Representatives; (2) the deceased individuals; and (3) the additional authorization cards submitted by CWA on January 31, 2012. CWA also appeals the Investigator's ruling regarding Erin R. Hunt. CWA asserts that the Investigator "improperly conflated the 'refused recall' situation with the 'recall rights have expired' situation." Should the Board decide not to remove the furloughees from the List, CWA requests the Board to order an evidentiary hearing. CWA argues that "an evidentiary hearing would be especially warranted here because the Board's decision regarding Furloughees' eligibility could prevent an election from being ordered."

CWA asserts that the furloughed Reservations Representatives lack a reasonable expectation of returning to work since their positions have been permanently eliminated and they do not have recall rights to home-based positions. CWA argues that if the Board finds that the Reservations Representatives have recall rights to Home Based Reservations (HBR) positions, the furloughees are still ineligible, because they would have refused multiple recall opportunities. Additionally, CWA contends that even if the Board agreed with the Investigator's interpretation of American's recall policy, the individuals at issue "reasonably believed their relationship ended in 2003 when their offices were closed and the Carrier told them that they would not be reopened. Eight years later, when American filed for bankruptcy and announced that over the duration of their recall window (which will close in 2013) the Carrier will reduce its workforce by approximately twenty percent, any remaining 'reasonable expectation' of reemployments was certainly eliminated."

CWA provided death notices for the four individuals CWA alleges are deceased.[2]

CWA asserts that the Board should order the Investigator to accept the additional authorization cards submitted on January 31, 2012. CWA argues that the Board has broad discretion regarding the showing of interest requirement and the Investigator's ruling in the instant case will encourage carriers to submit unreliable lists in haste; thereby preventing unions from submitting additional cards.

[2] The status of these individuals will be addressed by the Investigator in a future ruling.

B. American

American appeals the Investigator's rulings that the following employees are ineligible to vote: (1) Tower Planners; (2) Compliance Coordinators; and (3) former employees of the Cincinnati Reservations Office (CRO) who are seeking reinstatement with the Carrier.

American asserts generally that employees in these groups were properly included on the List and the Investigator's decisions should be overruled. Specifically, the Carrier argues that the Investigator's reliance on a 1998 decision regarding Senior Planner/Operations employees at American was inappropriate as that decision was based on a preponderance check for a small subset of the group. Citing *US Airways*, 25 NMB 399 (1998), the Carrier contends that "there has been a sea change in the way that the Board views Tower Planners" and warrants a finding that Tower Planners share a community of interest with the Passenger Service Employees at American. American also states that "even assuming that American's Tower Planners do perform services that are not directly related to passenger service, in similar circumstances, the NMB has viewed cross-utilized employees not from the perspective of the amount of work time dedicated to each activity, but to what is the most 'important' characteristic of their work position." Additionally, the Carrier argues that changes in its policies since 1998 warrant a finding that Tower Planners are properly part of the Passenger Service Employees craft or class.

American asserts that in light of the Board's recent decision in *United Airlines*, 39 NMB 274 (2012), the Board should overrule the Investigator's determination that Compliance Coordinators are not part of the Passenger Service Employees craft or class. According to the Carrier, "like United's Station Operations Representatives, (SOR), the Compliance Coordinators at American perform passenger service functions during irregular operations."

Finally, the Carrier appeals the Investigator's decision regarding 96 former CRO employees included on a Supplemental Eligibility List. The Carrier argues that the Investigator "failed to apply applicable NMB precedent with respect to dismissed employees."

C. Responses

CWA contends that the Board should uphold the Investigator's rulings regarding the Tower Planners and the Compliance Coordinators. According to CWA, "by not even alleging in its appeal that these jobs require significant 'customer contact,' the Carrier has confirmed that these jobs are not properly included in the Passenger Service craft or class." CWA also states that the Board does not need to rely on the 1998 decision as the Tower Planners do not interact with customers presently. According to CWA, the "unusual

circumstances" present in *United Airlines*, 39 NMB 274 (2012), are not present in this case.

CWA also contends that the Board should uphold the Investigator's rulings regarding the individuals included on the Supplemental Eligibility List. CWA argues that these individuals were not working for American on the cut-off date and "by asserting in the underlying litigation that these individuals were *not* dismissed, the Carrier has foreclosed their potential eligibility based on the exception for 'dismissed employees'."

American asserts that CWA failed to meet its burden of proof with respect to the furloughed individuals. According to American, CWA's assertion that the furloughees "lack meaningful recall rights," or "that their recall rights have been forfeited, is legally incorrect and inconsistent with the factual record." American contends that the furloughed Reservations Representatives have recall rights into HBR positions. On appeal, the Carrier submitted evidence that three employees who were furloughed from closed reservations offices have accepted recall and returned to work as HBRs.[3] Additionally, the Carrier asserted that the furloughees from Norfolk will soon be receiving notices of recall for HBR positions.[4] The Carrier also contends that American's recall policy does not require a furloughee to relocate in order to maintain recall rights. The Carrier asserts that the NMB has consistently refused to predict the future, and should not do so here; with respect to the effect American's bankruptcy may have on the furloughees' reasonable expectation of returning to work.

American contends that the Board should uphold the Investigator's ruling regarding Erin R. Hunt since Hunt retains recall rights according to American's policy which allows furloughed employees to turn down recall two times before forfeiting recall rights.

American asserts that the Investigator's refusal to accept authorization cards received after December 7, 2011, should be upheld. The Carrier states that CWA did not provide "any Board precedent or substantive evidence to support its Appeal."

The Carrier also argues that there are no disputes of material fact, therefore, CWA's request for an evidentiary hearing should be denied.

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[3] On March 23, 2012, the Carrier submitted a Surrebuttal Statement stating, "American can now confirm to the NMB that, as of today, 62 of those furloughees (from the Norfolk call center) have accepted American's offer of recall and (pending standard administrative processing) will be returning soon to active service with the carrier as HBRs."

[4] The Carrier states "American is providing this information now because the CWA raised for the first time in this appeal the lack of examples of furloughees who have become reemployed as HBRs."

IV.

Discussion

The burden of persuasion in an appeal from an Investigator's ruling rests with the participant appealing the determination. *United Airlines, Inc.*, 35 NMB 100, 117 (2008); *American Airlines,* 31 NMB 539, 553 (2004); *Northwest Airlines, Inc.* 26 NMB 77, 80 (1988).

A. Furloughed Reservations Representatives

CWA has appealed the Investigator's ruling that 749 furloughed Reservations Representatives are eligible to vote as of the cut-off date.

Manual Section 9.204 states, "Furloughed employees are eligible to vote in the craft or class in which they last worked if they retain an employee-employer relationship and have a reasonable expectation of returning to work. Furloughed employees regularly working in another craft or class are ineligible to vote in the craft or class from which the employees are furloughed." The Manual does not address recall rights.

The eligibility of employees who leave the craft or class because of furlough depends on whether the employees have a reasonable expectation of returning to work. The majority of employees at issue were furloughed in 2003. None of those employees have been recalled into office-based reservations positions. The record in this case indicates that the furloughees lack unconditional recall rights to positions other than their former office-based reservations positions. According to American's recall policy, employees who are laid off or relocate as a result of a reduction in force retain recall rights for 10 years. Additionally, the Board takes administrative notice that American Airlines is currently in bankruptcy proceedings. Although the Board does not attempt to predict the future, given the bankruptcy proceedings, it seems unlikely that American will be in a position to recall a significant number of furloughed Reservations Representatives prior to the expiration of their recall rights. Therefore, there is insufficient evidence that these employees face a reasonable expectation of returning to work in their former positions to which they have recall rights.

Manual Section 10.2 states "Absent extraordinary circumstances, evidence submitted on appeal will not be considered by the NMB unless it was submitted to the Investigator." Moreover, the statements submitted by the Carrier, even when considered, would not change the Board's ruling on appeal.

Based on the record in this case, the Investigator's ruling is not upheld and the names of the 749 furloughed Reservations Representatives will be removed from the List. [5]

B. Erin R. Hunt

CWA has appealed the Investigator's ruling regarding Erin R. Hunt.

As the Investigator noted, American's recall policy states that employees:

> Must respond to the recall notice within three (3) calendar days, and will have 15 calendar days from the date of the recall letter to report to your station or department. If you choose to pass up a recall offer, your name will be placed at the bottom of the recall list, and you will have only one (1) other opportunity to be recalled to work. If you do not respond to the recall notice within three (3) calendar days – either to accept recall or request your on-time bypass – you will lose recall rights to the job that you are being recalled to.

Hunt was furloughed from an Agent Personnel position at Baltimore Washington International in May of 2003; therefore, pursuant to American's recall policy, Hunt retains recall rights until May 2013. American's recall policy allows furloughed employees to "bypass recall one time without losing recall rights." The evidence supports the Investigator's ruling; therefore, the Board upholds the Investigator's ruling regarding Hunt.

C. Tower Planners

American has appealed the Investigator's ruling that the Tower Planners are not eligible. In NMB Case No. R-6635, in 1998, the CWA challenged the eligibility of 31 individuals employed as Senior Planner/Operations at American. A preponderance check established that ten of these individuals (later renamed Tower Planners) performed passenger service work between 5 and 30 percent of the time while the remaining 21 individuals did not perform passenger service work at all. Accordingly, the Investigator found that Senior Planner/Operations did not share a community of interest with Passenger Service Employees and ruled the individuals ineligible to vote in the Passenger Service Employees craft or class at American.

[5] In light of the Board's reversal of the Investigator's ruling, it is not necessary to address the additional arguments regarding the furloughed Reservations Representatives.

The Carrier argues that after the 1998 election, American made the following changes to the Tower Planners' position: (1) included Tower Planners in the Customer Service work group; (2) coded Tower Planners as Level 42s, an Airport Agent level; (3) included Tower Planners on the same compensation structure, employee benefits, and sick and vacation policies as Airport Agents; and (4) allowed Tower Planners to bump into Agent positions.

With respect to craft or class determinations at a particular carrier, the Board's policy is to adhere to previous craft or class determinations in the absence of any material change in circumstance. *United Airlines*, 39 NMB 274 (2012); *Northwest Airlines, Inc./Delta Air Lines*, 37 NMB 88 (2009); *United Air Lines, Inc.*, 32 NMB 75, 95 (2004); *United Airlines, Inc.*, 30 NMB 163, 171 (2002); *Trans World Airlines, Inc.*, 13 NMB 196, 201 (1986). Manual Section 9.1 states, in part, "Previous decisions of the NMB are also taken into account." The Carrier's claim that this standard should not apply because the 1998 determination was not based on a preponderance check of the entire group of Tower Planners is insufficient to justify a different finding in the current case.

As the Investigator noted in the current case, American's job description for Tower Planners states that a Tower Planner:

> Maintains communication with operational departments to assure timely departure of all flights. Plans and updates late changes to optimize gate utilization impact, maintains current weather displays, monitor arrival frequencies, monitor and control clearance of arriving and departing flights. Keeps track of flight progress and delay information for all flights within the assigned complex. Complete necessary documentation in SABRE star records, updates FIDS monitor, revise ETAs and ETDs, input ACARS information into SABRE. Assist in final load close-out.

Including Tower Planners in the Customer Service work group; coding Tower Planners the same as Airport Agents; including Tower Planners in the same compensation structure, employee benefits, and sick and vacation policies as Airport Agents; and allowing Tower Planners to bump into Agent positions does not establish a work-related community of interest between the Tower Planners and Passenger Service Employees. *See American Airlines, Inc.*, 26 NMB 106 (1998).

The Board makes craft or class determinations based on a work-related community of interest. *National Airlines, Inc.,* 27 NMB 550 (2000); *American Airlines, Inc., above*; *LSG Lufthansa Servs., Inc.,* 25 NMB 96 (1997). In

determining the proper craft or class for employees, the Board examines the actual duties and responsibilities of employees, not merely job titles when determining whether there is a work-related community of interest. *National Airlines, above* at 555*; American Airlines, above* at 117.

Furthermore, the Board has repeatedly stated that "The essence of passenger service is 'customer contact.'" *See Northwest Airlines, Inc.,* 27 NMB 307 (2000); *American Airlines*, *above; USAir, Inc.,* 21 NMB 402 (1994); *China Airlines, Ltd.,* 6 NMB 434 (1978). Customer contact is integral to the Passenger Service Employees craft or class. *American Eagle*, 28 NMB 591 (2001).

The Carrier's reliance on *US Airways*, 25 NMB 399 (1998) is misplaced. In that case the Board found that certain Tower Planners' job functions were passenger related, such as re-routing passengers when a flight is delayed. Those passenger related duties are not present here. The Tower Planners at issue do not work with passengers or have customer contact. Accordingly, the Board upholds the Investigator's rulings regarding the Tower Planners.

D. Compliance Coordinators

The Carrier has appealed the Investigator's ruling that Compliance Coordinators are not eligible. The Carrier argues that American's Compliance Coordinators are analogous to the SORs in *United Airlines*, 39 NMB 274 (2012), whom the Board found were part of the Passenger Service Employees craft or class. According to the Carrier, the Compliance Coordinators perform passenger service functions during irregular operations and, as such, are part of the Passenger Service Employees craft or class.

In *United Airlines, above,* the Board found that the Investigators erred by relying on cases involving other carriers; SORs have historically been included in the Passenger Service Employees craft or class; and SORs perform passenger service functions during irregular operations.

In *United Airlines, above,* the Board noted that its decision was based on the "unusual circumstances" of that case and was "narrowly focused on finding eligible those employees who have historically voted in the Passenger Service Employees craft or class." The Compliance Coordinators have never been included in the Passenger Service Employees craft or class at American; nor are there any unusual circumstances regarding the Compliance Coordinators in the present case.

As the Investigator noted, American's job description for Compliance Coordinators states that Compliance Coordinators:

- Assist with environmental and safety vendor contract audits, training coordination, security, financial controls and operational audits/compliance.
- Conduct internal audits to ensure compliance of dangerous goods regulations.
- Review storage and handling procedures at all airport facilities.
- Remain current with changing environmental laws on local, state, and Federal levels.
- Review and monitor the progress of all Agents on Hazmat, Dangerous Goods, and security training.
- Arrange classroom schedules and coordinate with Top Trainer.
- Investigate Irregularities and fines received from the FAA, postal, customs, and INS.
- Conduct baggage delivery and Cabin Service quality checks, CSP compliance, and update the communications center.
- Conduct Skycap, catering, fuel and Baggage Service audits.
- Provide information to management for approval of invoices.
- Monitor and report maintenance parameters of Ground Service Equipment.
- Conduct load and GPM OA audits (e.g. revisions, radio logs, flight records keeping, etc.).
- Conduct periodic internal controls audits.

The Investigator found that "Although the job description states that the Compliance Coordinator 'must be able to perform all Airport Agent duties,' the evidence demonstrates that these individuals have very little customer contact. As noted above, it is well established Board precedent that "the essence of passenger service is 'customer contact.'" *See Northwest Airlines, Inc.*, *above*, *American Airlines, Inc., above*; *USAir, Inc., above*.

The Compliance Coordinators at American have minimal passenger related responsibilities and do not share a community of interest with Passenger Service Employees. Accordingly, the Board upholds the Investigator's rulings regarding the Compliance Coordinators.

E. Supplemental Eligibility List

American has appealed the Investigator's ruling that 96 former CRO employees listed on the Supplemental Eligibility List are not eligible. According to the Carrier, Board precedent regarding dismissed employees includes employees who resign their employment or take severance in lieu of recall and subsequently file an action seeking reinstatement. Citing *Iran Nat'l Airlines*

Corp., 7 NMB 238 (1980) and *EgyptAir,* 18 NMB 173 (1991), American alleges that these individuals are eligible.

In *EgyptAir, above*, several employees voluntarily resigned from employment with the carrier and subsequently filed a lawsuit against the carrier alleging they were fired for union activities. The Board found these employees had been constructively discharged and filed reinstatement actions in federal court. Based on the facts in that case, the Board found these employees eligible. In the present case, according to American, the CRO employees were not dismissed from employment.

In *Iran Nat'l Airlines Corp.*, *above,* the Board found "individuals seeking reinstatement continue to have an interest in the disposition of a representation proceeding."

These employees were working at the CRO at the time of its closure in 1998 and did not opt for recall at the time of the CRO's closure. These individuals later became plaintiffs in a lawsuit against the Carrier regarding the CRO closure. As part of their relief, they are seeking reinstatement at American. According to the Carrier, these individuals were not on the original List because they were not included on the furlough recall list at the CRO.

Even if the Board overturned the Investigator's ruling, these employees would still be ineligible based on the fact that they are seeking reinstatement to a furloughed position. As the Board held, above, the furloughees at issue in this case do not have a reasonable expectation of returning to work and are not eligible.

F. Supplemental Authorization Cards

The Board's review of the arguments submitted by CWA reveals an insufficient basis for allowing additional cards. The cases cited by CWA, most notably *Local 732, Brotherhood of Teamsters v. NMB*, 438 F. Supp. 1357 (S.D. N.Y. 1977), hold that determination of showing of interest is within the Board's discretion. However, the Board deviates from its rules and practices only under extraordinary circumstances, and CWA has failed to provide the Board with sufficient evidence of extraordinary circumstances to warrant the acceptance of additional cards.

V.

Authorization of Election

The Board finds a dispute to exist in NMB Case No. R-7310, among Passenger Service Employees on American, sought to be represented by CWA and presently unrepresented. An Internet and TEV election is hereby authorized using a cut-off date of December 2, 2011. Tally in Washington, DC.

Pursuant to Manual Section 12.1, the Carrier is hereby required to furnish, within five calendar days, 1" X 2-5/8" peel-off labels bearing the alphabetized names and current addresses of those employees on the List of Potential Eligible Voters. The Carrier must print the same sequence number from the List of Potential Eligible Voters beside each voter's name on the address label.

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson
General Counsel

Member Dougherty, dissenting in part.

I dissent from the Majority's reversal of the Investigator's ruling regarding the furloughed Reservations Representatives. The Investigator's ruling on the furloughees was legally sound and based on the facts in the record. The Majority's reversal ignores longstanding National Mediation Board (NMB or Board) case law and procedures, and it disenfranchises hundreds of individuals who, under Board precedent and policy, have a right to be considered in this representation matter.[6]

This case boils down to two simple, well-supported facts: first, the furloughed Reservations Representatives at issue have unexpired recall rights

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[6] Recently, the Majority rejected significant Board precedent and practice and decided an eligibility case based on "disenfranchisement." *United Airlines*, 39 NMB 274, 280 (2012)("The issue before the Board in this case is the enfranchisement or disenfranchisement of approximately one thousand employees. . . ."). In this case, the Majority seems untroubled by the disenfranchisement of over 700 individuals in spite of the fact that, unlike in *United, above,* their eligibility would be completely consistent with Board precedent and policy, and in spite of the fact that the disenfranchised individuals include 62 individuals who actually have been recalled and will likely be working in the craft or class when the election takes place. I see no basis for depriving these individuals of a voice in this representation process.

that have, in practice, included recalls to home based positions; and second, American not only planned new recall opportunities but also has already offered recall to a large group of the employees at issue, some of whom have already accepted and will be returning to work. These facts clearly demonstrate that the furloughees at issue "have a reasonable expectation of returning to work," as required by the standard set forth in the NMB Representation Manual, Section 9.204, and decades of Board eligibility rulings. The Majority rejects these facts and this standard and instead imposes newly conceived requirements that recall rights be "unconditional" and that furloughees have a reasonable expectation of returning to work "in their former positions." As discussed below, these new requirements have no foundation in Board precedent and are at odds with Board policy.

The Majority agrees that the furloughed Reservations Representatives "retain recall rights for ten years," and there is no dispute that the ten-year period has not expired for the group at issue here. Historically, the Board has found individuals with active recall rights to be eligible. *United Airlines, Inc.*, 28 NMB 533 (2001) (furloughed employees are eligible regardless of the length of time they are on furlough, if their recall rights have not expired); *Continental Airlines, Inc.*, 23 NMB 118 (1996) (furloughed employees with a five-year right of recall and opportunity to bid for positions at other stations have a reasonable expectation of returning to work); *America West Airlines*, 21 NMB 458 (1994). The Board has found unexpired recall rights compelling even where the positions from which the employees were furloughed have been eliminated. *US Air, Inc.*, 21 NMB 281 (1994) (furloughed employees whose work had been permanently contracted out but had a six-year right of recall had reasonable expectation of returning to work); *United Airlines, Inc.*, 10 NMB 364 (1983) (employees who retained recall rights were eligible, including those whose stations had closed and who had not bid for positions at other stations). In *El Al Israel Airlines, Ltd.*, 12 NMB 282 (1985), the carrier argued that it had closed its commissary department and had no intention of restoring the commissary function; therefore, the individuals at issue had no reasonable expectation of returning to work. The Board found these individuals retained an employee-employer relationship and had a reasonable expectation of returning to work since they were on furlough and had not accepted severance pay. *See also Trans World Airlines, Inc.*, 13 NMB 210 (1986). The evidence of American's past recall practices clearly shows that the Reservations Representatives' recall rights include the possibility of recall to Home Based Representative (HBR) positions.[7] The Majority is incorrect that the recall policy and practice must be "unconditional." The Board has never required recall rights to be unconditional; rather, the Board's emphasis has always been on the existence of recall policies or practices, not the technicalities or conditions

[7] Board precedent supports looking to practices in addition to written policies for evidence of recall rights. *Continental Airlines, Inc., above*.

of the recall rights. Thus, the unexpired recall rights of the furloughed Reservations Representatives, together with the past practice of offering recall to HBR positions, create a strong basis for upholding the Investigator's ruling in this case.

But the Reservations Representatives' eligibility need not rest on recall rights alone; other strong evidence of their reasonable expectation of return to work supports a finding of eligibility. As the Investigator noted in her ruling, American submitted evidence in its January 31, 2012 submission that it intended to expand the HBR program by hiring additional HBRs and offering recall to furloughed Reservations Representatives, including the 749 at issue here. On appeal, American confirmed that, consistent with the plan outlined in its January 31 submission, it has, in fact, offered recall to furloughees who worked at the Norfolk (Virginia) Reservations Office (NRO) to return as HBRs. In its surrebuttal, American notified the Board that as of March 23, 2012, 62 furloughees accepted American's offer of recall and will be returning to work. This is particularly compelling evidence that the furloughed Reservations Representatives do indeed have a reasonable expectation of returning to work and should be eligible. Moreover, finding these individuals eligible is consistent with the longstanding and sound Board policy of giving individuals with present interests in a craft or class a say in representation matters relating to that craft or class.

The Majority rejects the NRO recall evidence and relies instead on its conclusion that the Reservations Representatives do not have a reasonable expectation of returning to work ***"in their former positions."***[8] Never before has the Board required that the "reasonable expectation" be of reinstatement to former positions. Such a limitation does not appear in the Manual or past cases, and it represents a shift away from the time-tested requirement that eligibility depends on a "reasonable expectation of returning ***to work"*** in the craft or class – not to a particular position.

The Majority should have found the Norfolk recall evidence relevant and persuasive, particularly given the fact that the Majority's ineligibility ruling in this case will deny a voice to hundreds of employees who, the evidence shows, either have already been offered recall or may in the near future be offered

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[8] The evidence about the NRO recall was properly submitted as an update to previously disclosed evidence. Even without the NRO recall evidence, the Board should have upheld the Investigator's ruling. Our Manual and past practices require furloughees to have a "reasonable" expectation of return to work – not a guarantee. As discussed above, evidence of the furloughees' recall rights and American's plan to recall the Reservations Representatives to HBR positions was submitted by American prior to the Investigator's ruling and is sufficient to demonstrate a *reasonable* expectation of return to work. *See US Air,* 21 NMB 281 (1994) ("while there is uncertainty whether furloughed Shuttle Fleet Service Employees will be recalled to work, there is insufficient evidence that furloughed employees do not have a reasonable expectation of returning to work.").

recall. As mentioned above, this includes 62 individuals who have already accepted recall and will likely be working in the craft or class when an election is held. The disenfranchisement of individuals who, in some instances, may actively be working in the craft or class when the election is held is an extraordinary result. I know of no other Board decisions – and the Majority does not cite to any – that support such an outcome.

In lieu of relying on the record evidence about the HBR recall program and the NRO recall offers, the Majority takes administrative notice that American is currently in bankruptcy proceedings and states that "it seems unlikely that American will be in a position to recall a significant number of furloughed Reservations Representatives prior to the expiration of their recall rights." The Majority's reliance on American's bankruptcy status is inappropriate. What may or may not happen in the future as a consequence of American's bankruptcy is pure speculation and should not be considered, much less dispositive. Time and time again, the Board has confirmed "that 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." *United Airlines,* 39 NMB 274, 280 (2012)*; Chicago & North Western Ry. Co.*, 4 NMB 240, 249 (1965). *See also Northwest Airlines, Inc.*, 18 NMB 357, 370 (1991). It is remarkable and unprecedented that the Majority would accept and rely on speculative guesses as to what may happen in bankruptcy over the concrete evidence that American is indeed offering recall to the employees in question.

The record established that the furloughed Reservations Representatives have recall rights and an expectation – or, in some cases, an actual *invitation* to – return to work. The Investigator relied on multiple past Board decisions in ruling that these employees were eligible. These individuals clearly have a present shared interest with the Passenger Service craft or class at American, and giving them a voice in matters relating to the representation of this group is consistent with Board eligibility policy generally. The Majority's reversal ignores this sound policy and longstanding NMB case law. Considering all of the submissions from the participants on this issue, I find the Investigator's ruling was supported by the evidence and reached the correct result. I find no basis for overturning the Investigator's ruling, and I dissent from the Majority's reversal.