NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

40 NMB No. 25

(202) 692-5000

January 10, 2013

VIA EMAIL

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

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

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

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

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

Participants:

This determination addresses the December 24, 2012 appeal filed by American Airlines, Inc. (American or Carrier) of Investigator Susanna F. Parker's December 18, 2012 rulings. For the reasons discussed below, American's appeal is denied.

I. Procedural Background

On December 7, 2011, the Communications Workers of American (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

[1] 45 U.S.C. § 151, *et seq.*

class of Passenger Service Employees on American. On January 3, 2012, the Investigator set the schedule for all challenges and objections in this case. The Investigator ruled on all challenges on February 29, 2012. Appeals from that ruling were addressed in the National Mediation Board's (NMB or Board) April 19, 2012 decision, *American Airlines, Inc.*, 39 NMB 341 (2012). American filed a Motion for Reconsideration on April 23, 2012 and the Board issued a determination on May 3, 2012. *See American Airlines, Inc.,* 39 NMB 363 (2012). At the same time, American filed a Complaint in the Northern District of Texas. As a result of the litigation process, the Board set new election dates on November 1, 2012. On November 26, 2012, the Carrier submitted a letter addressing the eligibility of several groups of employees. American alleged:

1. 69 former South Western Reservations Office (SWRO) reservations employees who elected layoff with recall rights should be found ineligible to vote.

2. 301 Norfolk Reservations Office (NRO) furloughees have a present interest in this representation dispute and should be eligible to vote.

3. 572 employees hired since the cut-off date should be found eligible to vote.

4. 133 furloughed Cargo Agents, Passenger Service Representatives, and Premium Services Representatives (Level 86) with recall rights are not eligible since the recall rights are applicable only to their permanently abolished positions.

5. 156 employees who have made an "irrevocable election" to resign effective March 31, 2013 yet are still working in the craft or class should be removed from the List of Potential Eligible Voters (List).

On December 3, 2012, the CWA responded to a portion of American's November 26, 2012 submission. CWA argued:

1. 572 newly hired employees were not working in the craft or class on the cut-off date, therefore, they are not eligible to vote.

2. 301 NRO furloughees are ineligible, including the 57 who accepted an offer of reemployment with American.

On December 4, 2012, citing Section 13.205 of the Board's Representation Manual (Manual), the Investigator ruled that the 572 newly hired employees and the 301 NRO furloughees would be sent Instructions, VINs and PINs. Additionally, the Investigator stated that she would rule on these individuals in a future ruling. On December 10, 2012, American replied to the CWA's letter of December 3, 2012. American reiterated its position that the unusual circumstances of this case warranted changing the cut-off date to allow all passenger service employees with an ongoing interest in this dispute an opportunity to vote. On December 12, 2012, American submitted a list of new hires for the month of November 2012 and requested that these employees be sent challenged ballots. On December 13, 2012, citing Manual Section 13.205, the Investigator ruled that the 200 newly hired employees, referenced in American's December 12, 2012 submission, would be sent Instructions, VINs and PINs. Additionally, the Investigator stated that she would rule on these individuals in a future ruling.

On December 13, 2012, the CWA filed a supplemental response to American's letters of November 26, 2012 and December 10, 2012 arguing:

1. The two groups of individuals American seeks to add to the List (the 572 newly hired employees identified in American's November 26, 2012 submission and the 301 NRO furloughees) are ineligible since they were not members of the craft or class as of the cut-off date.

2. The new hires submitted by American on December 12, 2012 are ineligible because they were not members of the craft or class as of the cut-off date and they are still in training.

3. The recently furloughed Cargo Agents, Passenger Service Representatives, and Premium Services (Level 86) are eligible to vote since they "have an unqualified right to the same position in the same location from which they were laid off" for ten years from the date they were laid off.

On December 18, 2012, the Investigator addressed all the outstanding issues and status rulings in this case. The Investigator stated:

> Manual Section 8.0 defines challenges as follows: "Challenges involve issues concerning employee eligibility but do not include employment status changes. Status changes are governed by Manual Section 12.3. Objections

involve all other issues or questions." Status changes are defined in Manual Section 12.3 as including, but "not limited to: death, retirement, promotion to management official, transfer out of craft or class, resignation, and working for another carrier. Employees who leave the craft or class prior to the ballot count are not eligible."

The Board's procedures regarding challenges and objections exist to provide an orderly and fair structure for establishing voter eligibility. Departures from this procedure can only be justified by extraordinary circumstances.

The Investigator stated that she ruled on all challenges and objections in this case on February 29, 2012 and that all appeals from that ruling were properly addressed in the Board's April 19, 2012 decision, *American Airlines, Inc.*, 39 NMB 341 (2012). Therefore, she would not rule on any additional eligibility issues in this case. As such, she stated:

1. I ruled on all challenges and objections on February 29, 2012. Appeals from that ruling were addressed in the Board's April 19, 2012 decision. I will not rule on any additional eligibility challenges in this case. The 69 former SWRO employees challenged by American will remain on the List. This is not appealable.

2. In its March 9, 2012 appeal, American submitted evidence that three employees who were furloughed from closed reservations offices accepted recall and returned to work as Home-Based Representatives (HBR). On March 23, 2012, American submitted a Surrebuttal Statement stating that 62 of the furloughees from the Norfolk call center (NRO) have accepted American's offer of recall and pending administrative processing will be returning to active service with the Carrier as HBRs. American correctly notes that in its May 3, 2012 Motion for Reconsideration the Board stated, "the furloughees who are working as Home-Based Representatives will be addressed in a future status ruling." Based on the evidence provided, and pursuant to Manual Section 12.3, the 57 individuals who are working as Home-Based Representatives are eligible to vote and the remaining 244 NRO furloughees remain ineligible as stated in *American Airlines*, *Inc.,* 39 NMB 341 (2012) and *American Airlines, Inc.,* 39 NMB 363 (2012). Neither of these issues is

appealable. Any votes by the 244 NRO furloughees, if cast, will not be counted.

3. The Board does not change the cut-off date absent unusual circumstances. The record fails to establish a sufficient basis for changing the cut-off date, therefore, the cut-off date will remain December 2, 2011 and the newly hired individuals identified in American's November 26, 2012 and December 12, 2012 submissions will not be added to the List. Their votes, if cast, will not be counted.

4. I ruled on all challenges and objections on February 29, 2012. Appeals from that ruling were addressed in the Board's April 19, 2012 decision. I will not rule on any additional eligibility challenges in this case. Therefore, the 133 furloughed Cargo Agents, Passenger Service Representatives and Premium Services (Level 86) challenged by American will remain on the List. This is not appealable.

5. Manual Section 12.3 states, "Changes in employee status include, but are not limited to: death, retirement, promotion to management official, transfer out of craft or class, resignation, and working for another carrier. Employees who leave the craft or class prior to the ballot count are not eligible." The 156 employees identified by American who made an "irrevocable election" to resign effective March 31, 2013, are still working for the Carrier. Therefore, pursuant to Manual Section 12.3, these individuals will remain on the List. Pursuant to Manual Section 12.3, the Investigator's ruling regarding status changes is not appealable.

On December 19, 2012, American requested that the Investigator reconsider her December 18, 2012 decision regarding the furloughees from the SWRO; and the furloughed Cargo Agents, Passenger Service Representatives, and the Premium Service Representatives (Level 86s). According to American, "Extraordinary circumstances necessary to consider eligibility issues after the deadline for submitting challenges and objections are present in this case, none more important than the seismic changes present in the size and composition of the Passenger Service Employees craft or class that has occurred as a result of American's November 2011 bankruptcy filing and the dramatic restructuring in the Company's business operations that took place **after** the challenges and objections deadline had passed." (Emphasis in original.) The CWA responded on December 20, 2012, stating that

American's challenge to the eligibility of the Cargo Agents, Passenger Service Representatives, and the Premium Service Representatives (Level 86s) was denied as untimely by the Investigator and that it is also without merit.

II. Appeal

On December 24, 2012, American filed an appeal seeking reversal of the Investigator's December 18, 2012 ruling denying American's request to modify the cut-off date in this matter. American argues that the Investigator erred in finding that American failed to meet its burden of demonstrating "unusual circumstances" sufficient to warrant moving the cut-off date. According to American, the Carrier's bankruptcy, the ensuing restructuring, and the 2010 changes to the Board's rules warrants a change in the Board's policy regarding established cut-off dates. The Carrier also states that "American would be remiss in its responsibility to all of its employees if it did not note that the Board *sua sponte* can reverse a previous decision, regarding 244 Norfolk Reservations Office ("NRO") furloughees, which can now be seen to have been made in error. This is not part of American's appeal . . ." (Emphasis in original.) American asks the Board to "reverse that error and permit the challenged ballots submitted by NRO furloughees, if any, to be counted."

The CWA responded on December 31, 2012, stating that American's appeal should be denied in full. According to the CWA, employees hired after the cut-off date are ineligible under well-settled Board precedent and the other issues raised in American's appeal cannot be brought before the Board at this time. Furthermore, the CWA argues that there is no basis to reconsider the Board's ruling regarding the furloughed NRO employees.

III. Discussion

In her December 18, 2012 rulings, the Investigator addressed each of the Carrier's challenges and reminded American that she ruled on all challenges and objections in this case on February 29, 2012. Additionally, all appeals from that ruling were properly addressed in the Board's April 19, 2012 decision. *American Airlines, Inc.*, 39 NMB 341 (2012) and the denial of American's Motion for Reconsideration, *American Airlines, Inc.*, 39 NMB 363 (2012). Therefore, the Investigator stated that she would not rule on any additional eligibility issues in this case. In each instance, the Investigator plainly stated, "this is not appealable." Specifically, the Board has already determined that the NRO furloughees are not eligible to vote. *American Airlines, Inc.*, 39 NMB

341, 350 (2012). American acknowledges that this is not part of its December 24, 2012 appeal. The Investigator properly addressed the NRO furlughees who are now working as HBRs, as status rulings, and found they are eligible to vote. Pursuant to Manual Section 12.3, status rulings are not appealable. The Board finds no reason to revisit any of these issues.

Manual Section 2.3 describes the eligibility cut-off date and provides, "For determining eligibility to vote, the cut-off date is the last day of the payroll period ending before the day the NMB received the application. This cut-off date is applicable regardless of whether there are multiple payroll periods for the craft or class."

The Board does not change the cut-off date absent unusual circumstances. *Re: The Indiana Rail Road Co.*, 25 NMB 68 (1997), *Wisconsin Central Ltd./Fox Valley & Western Ltd.*, 24 NMB 64 (1996), *America West Airlines*, 21 NMB 293 (1994). In *America West*, *above,* the Board declined to change the cut-off date despite a lapse of almost six years between the original date and the re-run election. Circumstances in which the Board has changed the cut-off date include *USAir, Inc.,* 10 NMB 495 (1983) (two year passage of time in processing the election and 100 percent turnover) and *Piedmont Airlines*, 9 NMB 41 (1981) (five-year delay between the original cut-off date and the election resulting in a turnover of more than one half of the electorate). Neither situation has occurred here. There has not been a turnover of more than a majority of the eligible electorate in this case nor has there been an extraordinary delay between the original cut-off date and the election. The investigation of the representation application was delayed, in large part, due to litigation instituted by American.

In *Continental Airlines*, 14 NMB 131 (1987), the Board denied the Carrier's request to change the cut-off date despite the fact that the date had been established more than four years prior to the ballot counts. The Board cited its determinations in *British Airways, Inc.*, 7 NMB 457 (1980), and *Air Canada*, 7 NMB 71 (1979). In both cases, the courts upheld the Board's refusal to change the cut-off date. *British Airways v. NMB*, 533 F. Supp. 150 (E.D.N.Y.) *aff'd* 685 F.2d 52 (2d Cir. 1982), *Air Canada v. NMB*, 478 F. Supp. 615 (S.D.N.Y. 1979), *aff'd* 659 F. 2d 1057 (1981), *cert. denied* 454 U.S. 965 (1981). American's argument that the Board's 2010 election rule warrants a change in the Board's policy regarding established cut-off dates is also insufficient.

The Carrier's argument that its bankruptcy and the ensuing restructuring justifies altering the cut-off date is unfounded. The Board consistently proceeds with representation elections, following the Board's

established procedures, despite bankruptcy and restructuring at major carriers, including *United Airlines, Inc.*, 30 NMB 277 (2003) and *Northwest Airlines, Inc.*, 33 NMB 195 (2006). Carrier bankruptcy does not constitute the "extraordinary circumstances" necessary to justify changing the cut-off date. Furthermore, as outlined above, the restructuring that occurred as a result of American's bankruptcy has not led to a turnover of more than a majority of the eligible Passenger Service Employees. *See USAir, Inc., above,* and *Piedmont Airlines, above.*

In the present case, the Board Investigator's ruling was in accordance with Board policies and procedures. There has not been a turnover of more than a majority of the eligible electorate and an examination of the record in this case reveals no unique facts or circumstances which would warrant a change in the cut-off date.

IV. Conclusion

For the reasons stated above, the Investigator's decision not to change the cut-off date is upheld. Therefore, the cut-off date will remain December 2, 2011 and the newly hired individuals identified in American's November 26, 2012 and December 12, 2012 submissions will not be added to the List.

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson
General Counsel

cc:
Jeffrey Bartos, Esq.