COMMENTS OF THE ASSOCIATION OF FLIGHT ATTENDANTS-CWA

BEFORE THE NATIONAL MEDIATION BOARD
ON PROPOSED RULES FOR REPRESENTATION DISPUTES
DOCKET NO. C-7034
August 6, 2012

The Association of Flight Attendants-CWA ("AFA"), which represents over 60,000 Flight Attendants at 21 airlines worldwide, submits its comments regarding the Notice of Proposed Rulemaking ("NPRM") issued by the National Mediation Board ("NMB" or "the Board") on May 15, 2012, as corrected on June 7, 2012. The NPRM was issued as a result of recent amendments to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, ("RLA") contained in the Federal Aviation Administration Modernization and Reform Act of 2012, P.L. No. 112-95.

As an affiliated Union in the Transportation Trades Department ("TTD"), AFA wholeheartedly endorses the comprehensive and exhaustive comments on this NPRM that have been submitted by the TTD on behalf of its 32 affiliated unions. In light of its vast experience with representation elections and mergers under the RLA, AFA believes it is uniquely positioned to provide additional comments on the policies the Board should establish to implement these amendments.

Specifically, AFA's comments focus on the newly enacted Section 2, Twelfth of the RLA, 45 U.S.C. §152, Twelfth. That new provision, passed over the vehement objection of AFA and almost all other transportation Unions, now requires labor organizations to produce authorizations from at least 50% of the craft or class before the Board will authorize an election, or determine the representation desires of those employees. Unfortunately, this provision makes

it more difficult for unrepresented employees to obtain desired Union representation, and, as discussed below, the NMB should not apply this onerous new standard in representation disputes arising from mergers.

I. The NMB's Merger Procedures Should Remain Unchanged.

It is clear to AFA that Congress did not intend to apply this new 50% showing of interest standard in mergers involving previously certified Unions. Significantly, the language of Section 2, Twelfth does not reference mergers, and the legislative history directly on point supports the same conclusion. As Senate Majority Leader Harry Reid stated in a colloquy on the floor of the Senate on February 6, 2012: "It is our intent that the National Mediation Board's *existing* merger procedures, shall determine the percent of the craft or class to establish a showing of interest. Otherwise, employees could lose their representation simply by merging with a slightly larger unit without even having the opportunity to vote, which is unacceptable." 158 Cong. Rec. S341 (Feb. 6, 2012). (emphasis added).

Moreover, neither the makers of Section 2, Twelfth, nor its supporters contradicted Senator Reid's explicit conclusion, nor did they propose an alternative one. Senator Reid's unchallenged statement reflects Congressional intent that the 50% showing of interest shall NOT apply to representation disputes arising from mergers. AFA strongly urges the Board to adopt this interpretation of Section 2, Twelfth.

Furthermore, Senator Reid's clear expression of Congressional intent is consistent with the Board's longstanding policy of treating representation disputes arising from mergers differently than disputes initiated by unrepresented employees in a non-merger setting. In fact,

it is well-established that the Board has the legal authority to determine representation restructuring disputes arising from mergers. *Air Line Employees Ass'n Int'l v. Republic Airlines, Inc.,* 798 F.2d 967 (7th Cir. 1986). Pursuant to that authority, the Board has adopted policies "regarding the survival of certificates of representation on the acquired carrier following the creation of a single transportation system." *Trans World Airlines/Ozark Airlines,* 14 NMB 218, 233 (1987). As a result, NMB merger policies with respect to elections are distinct from the Board rules applied in a non-merger election, particularly with respect to the showing of interest needed to earn a place on the election ballot, and the bar rules for participating in a representation election. NMB *Representation Manual,* Section 19.6. Unlike an application filed by unrepresented employees, in a merger the Board determines whether existing representation structures are affected by the corporate transaction. That is, the employees have previously expressed their desire for Union representation . The only unresolved issue is the identity, if any, of the representative at the post-merger single carrier. Indeed, the primary goal of the Board's post-merger representation inquiry is to "foster stable labor relations." *Id.* at 233.

In its comments, the TTD provides numerous examples explaining how the application of Section 2, Twelfth to post-merger representation proceedings could disrupt and interfere with the Board's goal of maintaining stable labor relations at the post-merger carrier. (*See* TTD Comments, pp. 6-8). In AFA's view, the best illustration of the potentially devastating impact Section 2, Twelfth could have on existing representation rights is AFA's experience fighting to retain its certification after the merger of Pinnacle, Mesaba and Colgan Airlines.

To review, AFA has represented the Mesaba Flight Attendants since 1999. During that time AFA has negotiated several collective bargaining agreements and successfully navigated

the Mesaba Flight Attendants through the treacherous waters of bankruptcy and the §1113 negotiation process. In July, 2010, Mesaba was purchased by Pinnacle Airlines, which also owns Colgan Airlines. Colgan and Pinnacle Flight Attendants were represented by another Union and greatly outnumbered the Mesaba Flight Attendants represented by AFA. After maintaining separate airlines for about a year, Pinnacle announced it was restructuring its operations, and ultimately decided, after many false starts, to merge all three airlines.

In response to this corporate restructuring, AFA filed an application with the NMB in June, 2011, seeking a determination that a single transportation system had been created through the merger of the three airlines. Pinnacle insisted that it was engaged in an "asset transfer" that did not trigger the Board's single transportation system procedures. While this representation dispute was pending, Mesaba Flight Attendants were subjected to drastic, Company-imposed, unilateral changes in their working conditions and reductions in their bidding seniority. While AFA's certification remained in place, the Company refused to recognize it, and adamantly refused to negotiate with AFA over any contractual changes. Due to the Board's exclusive jurisdiction over representation disputes, AFA could not initiate judicial action to enforce its collective bargaining agreement and compel Pinnacle management to "treat" with AFA. *See, e.g., International Brotherhood of Teamsters v. Frontier Airlines,* 628 F.3d 402 (7th Cir. 2010). AFA essentially was a Union "without portfolio" – unable to adequately represent its members or enforce its CBA while the NMB case dragged on.

Once the Board found a single carrier to exist, however, AFA quickly marshaled its supporters and obtained sufficient authorizations to get on the election ballot. Though AFA represented only 30% of the entire Flight Attendant group, it managed to obtain valid

authorizations from over 50% of the craft or class. But that outpouring of support for AFA was not guaranteed. Rather, it reflected the deep anger and uncertainty experienced by the Flight Attendants affected by this merger. Ultimately, AFA prevailed in the NMB election and is now the certified collective bargaining representative for all the Flight Attendants at the Pinnacle single transportation system. *Pinnacle System,* 39 NMB 475 (2012).

If Section 2, Twelfth had applied to this merger, it would have jeopardized AFA's long-standing representation rights, potentially leaving AFA banished from the election ballot and its certification extinguished - only because it could not persuade almost a majority of the craft or class to sign valid authorizations. The fact that AFA, a "minority" union at Pinnacle, won certification exposes the onerous and punitive nature of Section 2, Twelfth if it is applied in a post-merger representation dispute: "minority" unions would likely be unable to get on the ballot even though, like AFA, they could win the representation election. Such an outcome is contrary to the principle of employee "free choice" under the RLA and is inconsistent with the NMB's goal of fostering stable labor relations.

Under the current NMB merger rules, a 35% showing of interest amply demonstrates significant support for an incumbent union and results in the union's placement on the ballot. No reading of the RLA can possibly support a policy that results in loss of certification without an election; particularly where a union enjoys the support from almost one-half the craft or class.

In conclusion, AFA's experience in the Pinnacle merger confirms its view that the application of Section 2, Twelfth to representation disputes arising in mergers is contrary to Congressional intent, and is inconsistent with employee free choice guaranteed under the RLA. As the government agency empowered to ensure employee free choice, the NMB must do

everything possible to implement policies that preserve existing union certifications. The application of Section 2, Twelfth to representation disputes arising from mergers would have the opposite effect by jeopardizing existing representations and limiting employee free choice under the RLA.

Respectfully submitted,

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