



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the

ASSOCIATION OF FLIGHT
ATTENDANTS-CWA
alleging representation disputes
pursuant to Section 2, Ninth, of
the Railway Labor Act, as
amended
involving employees of
AVELO AIRLINES

49 NMB No. 7

CASE NO. R-7568

FINDINGS UPON
INVESTIGATION-
AUTHORIZATION OF
ELECTION

February 15, 2022

This determination addresses the application filed by the Association of Flight Attendants-CWA (AFA-CWA) alleging a representation dispute pursuant to the Railway Labor Act (RLA), 45 U.S.C. §152, Ninth (Section 2, Ninth),¹ among Flight Attendants at Avelo Airlines (Carrier). At the time this application was received, these employees were not represented by any organization or individual.

For the reasons set forth below, the National Mediation Board (Board or NMB) finds that a representation dispute exists among Avelo's Flight Attendants, and authorizes an election using September 30, 2021 as the voter eligibility cut-off date.

PROCEDURAL BACKGROUND

On October 12, 2021, AFA-CWA filed an application with the Board alleging a representation dispute involving Avelo's Flight Attendants. The Board assigned John S.F. Gross as the Investigator.

¹ 45 U.S.C. § 151, *et seq.*

On October 27, 2021, the Carrier submitted a List of Potential Eligible Voters (List) identifying a total of 32 Flight Attendants, based on a September 30, 2021 eligibility cut-off date. It also provided signature samples for each individual on the List.

On January 10, 2022, the Carrier submitted a request that the Board modify the eligibility cut-off date from September 30, 2021 to the last day of the last payroll period prior to the date on which the Board rules on its request, should the Board authorize an election in this matter.

On January 18, 2022, AFA-CWA filed a response to the Carrier's request, and on January 25, 2022, the Carrier filed a reply to AFA-CWA's response. On January 31, 2022, AFA-CWA filed a response to the Carrier's January 25, 2022 submission.

ISSUE

Whether unusual or extraordinary circumstances exist in this matter to warrant changing the eligibility cut-off date?

CONTENTIONS

Avelo Airlines

The Carrier contends there are extraordinary circumstances in this matter warranting a modification of the September 30, 2021 eligibility cut-off date. It asks the Board to modify the September 30, 2021 cut-off date to the date of the last Flight Attendant payroll period prior to the date the Board rules on its request.

Specifically, the Carrier contends that since AFA-CWA filed its application there has been a "dramatic change in the size and composition of the Flight Attendant craft or class" as a result of the "long-planned" opening of a second Flight Attendant base in New Haven, Connecticut and expanded flying out of Burbank, California; and that absent a modification of the cut-off date just 30 percent of the Flight Attendants currently in the craft or class – a clear minority - would be eligible to participate in an election.

Citing the RLA's requirement that a majority of any craft or class of employees shall have the right to determine who shall be their representative, the Carrier asserts that an election conducted using the September 30, 2021 cut-off date would not comply with that statutory requirement "and would deny an overwhelming majority of [its Flight Attendants] an opportunity to be heard on that important question."

In support of its request to modify the cut-off date, the Carrier submitted documentation showing that 12 of the 32 Flight Attendants on the List are no longer employed by the Carrier, and a list showing 65 active Flight Attendants in its employ as of January 19, 2021. The Carrier also cites previous Board decisions, including *Compass Airlines*, 35 NMB 14 (2007), in which the Board modified the original eligibility cut-off date when there has been a substantial change in the composition of the craft or class and using the original cut-off date would have resulted in significantly less than a majority of the craft or class being eligible to vote.

AFA-CWA

AFA-CWA contends there are no extraordinary or unusual circumstances warranting a change in the September 30, 2021 cut-off date, and asks the Board to deny the Carrier's request, expeditiously determine whether the required showing of interest has been made, and, if so, proceed promptly with the election process as provided in the Board's Representation Manual (Manual).

AFA-CWA asserts that the Carrier's request that the Board modify the cut-off date to the last day of the last pay period prior to the date on which the Board rules on its request is "unduly indeterminate and utterly without precedent or factual basis." To its knowledge, the Board has never granted the open-ended relief the Carrier seeks here. AFA-CWA submits that should the Board elect to modify the cut-off date in any respect, it should be moved to the last payroll period prior to October 27, 2021, the date the Carrier submitted its List and could have, but chose not to, inform the Board of its imminent base opening and anticipated plans for new hires.

AFA-CWA further contends that although the Board has "on a very rare occasion" modified a cut-off date when less than a majority of the craft or class would have been eligible to vote, the circumstances under which it did so were quite different from those here. It claims that when the Carrier submitted the List to the Board on October 27, 2021 it failed to even mention the opening of a new base, and instead "waited over two months, during which time it hired additional flight attendants, and – crucially - engaged in an anti-union campaign through a series of mandatory meetings and communications with new hires and the flight attendant group at large." To support the latter claim, AFA-CWA submitted copies of two email communications to Flight Attendants from Carrier representatives regarding AFA-CWA's election application.

FINDINGS OF LAW

Determination of the issues in this case is governed by the RLA, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

I.

Avelo Airlines is a common carrier as defined in 45 U.S.C. § 181.

II.

AFA-CWA is a labor organization and/or representative as provided by 45 U.S.C. § 151, Sixth, and § 152, Ninth.

III.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions “the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.”

IV.

45 U.S.C. § 152, Ninth, provides that the Board has the duty to investigate representation disputes and shall designate who may participate as eligible voters in the event an election is required.

STATEMENT OF FACTS

On September 3, 2021, the Board issued a press release announcing that, effective immediately, representation elections would be conducted by mail-in ballot for a period of time as the agency transitioned to a new electronic voting system. Related circumstances required the agency to initiate a process to build a comparable electronic voting system internally, a process that remains ongoing.

On October, 12, 2021, AFA-CWA filed its application and supporting authorizations in this matter, and on October 27, 2021, the Board received the required List and signature samples from the Carrier. Neither Participant raised with the Investigator any issue in the case, and the only matter requiring Board investigation was the sufficiency of the showing of interest.

On October 27, 2021, the Investigator checked the validity of the authorizations submitted by AFA-CWA against the List and determined there were sufficient authorizations to satisfy the 50 percent showing of interest required under the RLA, Section 1206.2 of the Board’s Rules, and Section 3.601 of its Manual. With the required showing of interest met, authorization of an election by the Board was pending. At that time, election authorizations were also pending in a number of other, older representation matters.

Expansion of the Carrier's Flight Attendant Craft or Class

According to the Carrier's List, as of the September 30, 2021 payroll cut-off date, there were 32 Flight Attendants in the craft or class. Subsequently, on November 3, 2021, the Carrier opened a new Flight Attendant base in New Haven, Connecticut, which the Carrier had publicly announced on May 5, 2021. The Carrier also increased its flying out of Burbank, California in its fall and winter 2021 flight schedule, following through on its July 2021 announcement.

In a December 8, 2021, email communication to its Flight Attendants, the Carrier described how the Board's eligibility cut-off rule would be applied in the context of the expanding Flight Attendant craft or class were an election to be conducted. Specifically, her email to Flight Attendants, VP Customer Service Victoria Stennes summarized the highlights of an earlier meeting with employees during which the AFA's application for an election was discussed, and stated:

Because there may be questions about where things stand with the AFA petition for a union vote, we provided the following update: . . .

- If there is an election, per NMB rules, only those Flight Attendants who were working as of September 30th would be eligible to vote. There were 32 Flight Attendants who met that eligibility deadline, though 9 have since left Avelo and would no longer be eligible. Thus, as things currently stand, of our 71 active Flight Attendants, only 23 would be eligible to vote.
- The outcome would be determined by a majority [of] **votes cast**. As a hypothetical example, say there were 23 Flight Attendants eligible to vote but only 10 of them did, and 6 voted for the union and 4 voted against. In that situation, the union would become the representative of all Avelo Inflight Crewmembers despite only receiving 6 votes. . . .

(Emphasis in original.)

It is undisputed that since September 30, 2021, and as of January 19, 2022, 12 of the 32 Flight Attendants on the List (37.5 percent) have separated from the Carrier²; and that as of January 19, 2022, there are 65 active Flight Attendants in the craft or class (20 from the List and 45 additional hires).

² The Carrier states in its January 25, 2022, submission to the Board that it recently received notice from two additional Flight Attendants on the List that they intend to resign "within the next two weeks," which would make a total of 14 Flight Attendants on the List ineligible to vote if an election was ordered.

DISCUSSION

A representation dispute is a disagreement among the members of a craft or class as to who is their representative for purposes of collective bargaining under the Act. When the Board finds that a representation dispute exists, that dispute is found to exist only among those employees in the craft or class on the payroll of the carrier or having a bona fide employment relationship with the carrier at that point in time. Employees hired subsequent to that time obviously could not affect the Board's decision regarding a situation which existed prior to their employment and they should, therefore, not be permitted to affect the outcome of the dispute found to exist prior to their interest in the craft or class. This principle is reflected in the Board's longstanding rule on the cut-off date which states that, "For determining eligibility to vote, the cut-off date is the last day of the latest payroll period ending before the day the NMB received the [representation] application." NMB Representation Manual Section 2.3 The policy basis for this rule is that fixing the cut-off date at the commencement of its investigation insulates the representation process from manipulation by either side in order to gain an advantage with respect to the showing of interest or election results. *Continental Airlines, Inc.*, 24 NMB 196 (1997); *USAir, Inc.*, 24 NMB 38 (1996); *Norwegian Air Shuttle ASA*, 43 NMB 140, 143 (2016). Accordingly, employees not on the payroll as of the cut-off date are considered ineligible.

The Board has very rarely, and only in the face of unusual or extraordinary circumstances, deviated from its cut-off date rule; and its case history reflects a substantial record of not changing the cut-off date. See e.g., *Norwegian Air Shuttle ASA*, 43 NMB 140 (2016); *Wisconsin Central Ltd./Fox Valley & Western Ltd.*, 24 NMB 64 (1996); *America West Airlines, Inc.*, 21 NMB 293 (1994); *USAir, Inc.*, 16 NMB 63 (1988); *Continental Airlines*, 14 NMB 131 (1987); *British Airways, Inc.*, 7 NMB 457 (1980); *Air Canada*, 7 NMB 71 (1979). In addition, Board refusals to change the cut-off date have been upheld by the courts. See e.g., *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), *British Airways v. NMB*, 533 F. Supp. 150 (E.D.N.Y.) *aff'd.* 685 F.2d 52 (2d Cir1982). The Board has refused to change the cut-off date even in situations where there was substantial passage of time between the original cut-off date and the elections, or extraordinary delays in the Board's investigations. *America West Airlines, Inc.*, 21 NMB 293 (1994) (insufficient basis for changing cut-off date; rerun election using original cut-off date conducted six years after first election); *Continental Airlines*, 14 NMB 131 (1987) (no unusual circumstances where four years elapsed between cut-off date and election); *Air Canada*, 7 NMB 71 (1979) (13 months); *Norwegian Air Shuttle ASA*, 43 NMB 140 (2016) (one year).

In the very rare instances where the Board has found extraordinary circumstances warranting a change in the cut-off date, *USAir, Inc.*, 10 MMB 495

(1983), and *Piedmont Airlines*, 9 NMB 41 (1981), both involved the substantial passage of time (two years and five years, respectively) and the turnover of more than half the craft or class. *Norwegian Air Shuttle ASA*, 43 NMB 140, 143. Moreover, in each case, both the carrier and the union agreed the change in the cut-off date was appropriate; and the decision in *Piedmont Airlines* was “expressly limited to the unique facts and circumstances present in [that] case” and did not establish a precedent for handling of other representation cases.

In this case there is no substantial passage of time. The application was supported by the requisite showing of interest. Thus, a representation dispute existed. Any “delay” in authorizing an election based on the showing of interest was due to the NMB’s transition from Telephone Electronic Voting (TEV) to mail ballot elections and has been at most a few months in duration. By late November 2021, the NMB had begun authorizing mail ballot elections beginning with backlogged applications filed earlier in 2021. Under normal circumstances, if TEV was still in place, an election in this case would very likely have been authorized at the end of October 2021, with an election process likely completed by the end of December 2021. In the instant case, a mail ballot election would have been authorized in January 2022, had not a dispute over the cut-off date been initiated by the Carrier, requiring further investigation and determination by the Board.

These few months of delay were not material to this case and did not create substantial turnover among the eligible employees. Turnover is defined as the rate at which employees leave a workplace and are replaced. New employees joining the craft or class does not establish turnover. *Express I Airlines d/b/a Northwest Airlinck*, 25 NMB 328 (1998); *Western Pacific Airlines*, 23 NMB 217 (1996). Hiring new employees after the cut-off date is not turnover. Regardless of when the election began, some of the employees on the List had left the Carrier and the many new employees who joined the craft or class after the cut-off would not be eligible to vote. As evidenced by the Carrier’s own campaign statements on December 8, 2021 (a date when under the Board’s usual practices voting would have been underway), whether the election occurred shortly after the application was filed or occurs shortly after this decision issues, the result would be the same: the newly hired employees would be ineligible to vote.

The Board is mindful of the statutory mandate “to ensure that a majority of the craft or class has the opportunity to select a representative.” However, that obligation is balanced against the Board’s obligation to “insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.” The purpose for fixing the cut-off date at the commencement of the investigation is to insulate the representation process from manipulation. Identifying a percentage at which the cut-off date might be

changed would invite manipulation. Adding new employees who began working after the cut-off date would allow exactly what the Board's cut-off date rule is intended to prevent. In the instant case, a majority of the Flight Attendants on the List are still employed and working in the craft or class and their votes will determine the representation question. The Board is not persuaded that a change in the size and composition of a craft or class *absent any other factor* should serve as unusual or extraordinary circumstances to justify changing a cut-off date.

The Carrier relies heavily on the decision in *Compass Airlines*, 35 NMB 14 (2007). In that case the Board rejected the carrier's request to dismiss the application until it had hired a "substantial and representative complement" of employees in its Flight Attendant craft or class. Instead, the Board modified the cut-off date based on the unique circumstances of a rapidly expanding start-up carrier and the novel and complex issues argued to the Board. *Id.* at 21. The Board further stated that "this determination is expressly limited to the unique facts and circumstances present in this case and does not establish a precedent for handling of other representation cases."

Here, the Carrier argues that the "dramatic change in the size and composition of the Flight Attendant craft or class" since AFA-CWA filed its application warrants modification of the September 30, 2021 cut-off date. Absent a modification, it asserts, 45 of its 65 Flight Attendants (nearly 70 percent of the craft or class) would be disenfranchised; in other words, only 30 percent of the craft or class would determine the representation status of the Carrier's Flight Attendants. As noted above, this was also the case in December and the Carrier campaigned on this argument but did not raise the issue to the Board. Further, the Carrier does not point to any continued expansion of its Flight Attendant workforce.

The Board has rarely found that expanding operations and hiring new employees constitutes unusual circumstances warranting a change in the cut-off date. See *American International Airways*, 10 NMB 456 (1983) (fact that carrier was expanding its operations and hiring new employees not a reason for making exception to Board's established practice with respect to cut-off date in representation cases), citing *Air Canada v. NMB*, 478 F. Supp. 615 (S.D.N.Y. 1979); 659 F.2d 1057 (2nd Cir. 1981), cert. den. 108 LRRM 2923 (1981). In fact, *Compass Airlines* is the only case in which the Board changed a cut-off date in a matter involving expanding operations, and it did so on a non-precedential basis.

The Board is not inclined to accept *Compass Airlines* as precedent given that, by its own terms, it was not intended to become precedent. In precedential cases, the Board has declined to find that expanding carrier operations and

hiring new employees constitutes unusual circumstances warranting a change in the cut-off date. The Board finds the reasoning in those precedential cases sound.

Finally, the Board distinguishes the instant case from *Compass Airlines* with respect to the recently-added process for decertification. In *Compass Airlines*, the Carrier argued that ensuring maximum employee participation in the selection of a bargaining representative was particularly important in the case of a start-up airline subject to the RLA, under which there was no easy mechanism for decertification if a majority of the full complement of employees later decides they are not satisfied with a bargaining representative selected by a few early hires. With the Board's 2019 rulemaking, there is now a straightforward process in place for employees seeking to decertify a union.

The cut-off date freezes a moment in time. And in almost all circumstances, new employees will be hired after that date and be ineligible to vote. Changes to the cut-off date have been made so very rarely and only in the most unique and unusual of circumstances – and the Board is very wary of expanding the scope of circumstances that in its view satisfy that very high, exacting standard. Each case stands on its own facts, and the Board will make its determinations upon full consideration of those facts, consistent with its very broad discretion under the Act to determine and apply the rules of its elections, including the cut-off date and voter eligibility. In the instant case, there have been no extraordinary circumstances that warrant changing the cut-off date.

Based on the particular facts and circumstances of this case, the Board does not find unusual or extraordinary circumstances exist in this matter which would warrant changing the September 30, 2021, cut-off date for eligibility.

CONCLUSION AND AUTHORIZATION OF ELECTION

Based on the investigation, AFA-CWA has established the requisite showing of interest and the Board finds a dispute to exist in R-7568 among Flight Attendants employed by Avelo Airlines, Inc., sought to be represented by AFA-CWA, and presently unrepresented. A Mail Ballot election is hereby authorized using a cut-off date of September 30, 2021.

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. The Carrier must also provide to the Board the name and sequence number of those

potential eligible voters on military leave who are serving in foreign countries or who reside outside of the United States. The Carrier must use the most expeditious method possible, such as overnight mail, to ensure that the Board receives the labels within five calendar days. Tally in Washington, D.C.

By direction of the NATIONAL MEDIATION BOARD.



Maria-Kate Dowling
Acting General Counsel

Chairman Fauth, concurring in part and dissenting in part.

I write separately because I disagree with my colleagues' decision not to change the cut-off date. In my view, unusual and extraordinary circumstances exist that warrant changing the date. While I would not grant the Carrier's open-ended request to extend the cut-off date to the last Flight Attendant payroll period ending prior to the date of this determination, I would modify the cut-off date to January 19, 2022.

Absent the change, only 30 percent of the Carrier's Flight Attendant craft or class will be eligible to vote in the election. I simply cannot countenance an outcome where a significant majority of employees in the craft or class will not have their voices heard on whether or not they wish to be represented, particularly when the delay in the decision to authorize an election was of the Board's own making. Not changing the cut-off date silences those employees, and as a result a clear minority of the craft or class will decide the representation question for the entire employee group.

The Carrier heavily relies on *Compass Airlines*, 35 NMB 14 (2007) to support its request to change the cut-off date, and rightly so. Although in *Compass* the Board expressly stated its determination "does not establish a precedent for handling of other representation cases," in my opinion the determination is very much a precedent for changing a cut-off date in a matter involving a rapidly expanding start-up carrier. From my perspective, there is no meaningful distinction between the facts in *Compass* and those here particularly as they pertain to the expansion of the crafts or classes at issue and the periods of "delay".

Critically, the numbers of employees involved in both cases are virtually identical. In *Compass*, the start-up carrier's flight attendant craft or class tripled

during the Board's investigation and, absent the change in the cut-off date, 71 percent of the employees in the craft or class would have been disenfranchised. Similarly, here (using the Carrier's numbers as of January 19, 2022), the Carrier's Flight Attendant craft or class expanded from 32 (as of the September 30, 2021 cut-off date) to 65, with 12 of the 32 on the List having separated from the Carrier since AFA-CWA filed its application. Based on these numbers, and using the September 30, 2021 cut-off date, only 20 of the 65 Flight Attendants (roughly 30 percent) will be eligible to vote in the election, and roughly 70 percent will not be, virtually the same percentages in *Compass*.

In addition, in *Compass*, the Board changed the cut-off date from August 15, 2007 to November 1, 2007, a period of approximately two and a half months. Here, a change in the cut-off date to January 19, 2022 would be an extension of roughly three and a half months, not a meaningful difference in my opinion. Both periods represent very reasonable, modest extensions to address the particular circumstances in each case.

Most significantly, in refusing to change the cut-off date here, my colleagues seem unconcerned with ensuring majority participation in matters involving the substantial turnover of employees during the period prior to election authorization. Unlike my colleagues, I am simply not comfortable with proceeding with an election (in the circumstances of this case) in which only 30 percent of the craft or class would be eligible to participate.

Notably, in making its decision to change the cut-off date in *Compass*, the Board recognized its statutory mandate "to ensure that a majority of the craft or class has the opportunity to select a representative." *Id.* at 21. In addition, in *USAir*, 10 NMB 495 (1983), in agreeing to change the cut-off date there, the Board stated, "The [RLA] provides that the majority of any craft or class may select a representative. In the present case, less than a majority of the craft or class will be eligible to vote using the Board's normal procedures." *Id.* And more recently, in *Norwegian Air Shuttle ASA*, 42 NMB 152 (2016), the Board noted it "has declined to change the cut-off date where a majority of the craft or class remains eligible to vote." *Id.* at 154, citing *Norwegian Air Shuttle ASA*, 43 NMB 140, 143 (2016). Clearly, the Board has a well-established history of striving to ensure majority participation in cases involving expanding crafts or classes.

To conclude, I disagree with my colleagues' decision not to change the cut-off date. In my opinion, a reasonable extension of the cut-off date will ensure a majority of the Flight Attendant craft or class will be eligible vote in the election. Such an outcome is presumably in both participants' interests; and it should certainly be of the utmost interest to the Board.