NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the Application of the ASSOCIATION OF FLIGHT ATTENDANTS-CWA alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of COMPASS AIRLINES	35 NMB No. 7 CASE NO. R-7126 FINDINGS UPON INVESTIGATION-AUTHORIZATION OF ELECTION November 29, 2007

This determination addresses the application of the Association of Flight Attendants – CWA, AFL-CIO (AFA or Organization), alleging a representation dispute pursuant to the Railway Labor Act[1] (RLA or Act), 45 U.S.C. § 152, Ninth (Section 2, Ninth), among the Flight Attendants of Compass Airlines (Compass or 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 Board finds that a representation dispute exists among Compass' Flight Attendants.

PROCEDURAL BACKGROUND

On August 22, 2007, the AFA filed an application with the National Mediation Board (NMB or Board) alleging a representation dispute among Compass' Flight Attendants. The Board assigned Kendrah Davis as the Investigator. On September 7, 2007, the Carrier submitted the list and

[1] 45 U.S.C. § 151, *et seq.*

signature samples of employees on its payroll as of August 15, 2007.[2] On that same date, the Carrier filed its position statement arguing that there is no valid representation dispute because the Carrier does not yet employ a "substantial and representative complement" of employees in the craft or class. Also on that date, the Board reassigned the case to Investigator Maria-Kate Dowling. On September 21, 2007, the AFA filed its response to the Carrier's position statement. On October 1, 2007, the Carrier filed its reply to AFA's response.

ISSUE

Whether a valid representation dispute exists among Compass' Flight Attendants.

CONTENTIONS

Compass

In its position statement, the Carrier argues that there is no valid representation dispute presented by the AFA's application because it has not yet employed a "substantial and representative complement" of the 350 Flight Attendants that it expects to employ during the course of the next year. Compass argues that the Board should adopt the rationale of case law under the National Labor Relations Act (NLRA) to defer any representation election until there is a "substantial and representative complement" of employees in the craft or class. The Carrier argues, citing *Fall River Dying & Finishing Corp. v. National Labor Relations Bd.*, 482 U.S. 27 (1987), that the substantial and representative complement rule strikes the proper balance between ensuring maximum employee participation in the selection of a bargaining representative and permitting employees to be represented as quickly as possible. Compass asserts that achieving this balance is particularly important in the instant case involving a start-up enterprise under the RLA, where there is no easy mechanism for decertification if a majority of the full complement of employees later decides that they are not satisfied with a bargaining representative selected by a few early hires. Finally, the Carrier notes that in previous cases the Board has changed its standard practices in representation disputes in light of unique circumstances to ensure that any representation election would represent the free choice of a majority of the actual employees affected by the outcome of the election. *CSX Transp. Inc.*, 20 NMB 601 (1993) (change in scope

[2] Pursuant to Section 2.3 of the Representation Manual (Manual), the cut-off date for determining eligibility to vote is the "last day of the payroll period ending before the day the NMB receives the application." In this case, the application was received August 22, 2007 and the last day of the last payroll period was August 15, 2007.

of carrier's system due to merger); *USAir*, 10 NMB 495 (1983) (change in eligibility date due to 100 percent turnover in craft or class).

AFA

AFA argues that the Board should proceed with its statutory duty under Section 2, Ninth, and investigate whether a representation dispute exists among the Compass Flight Attendants based on the number of valid authorization cards filed with AFA's August 22, 2007 representation application. By submitting valid authorization cards signed by at least 35 percent of the Flight Attendants employed by Compass on the cut-off date, AFA states that it has met the requirements of both the NMB's Representation Manual and its implementing regulations to trigger a representation election among the employees of the craft or class. AFA further characterizes Compass' assertions that it will grow substantially over the course of the next year as speculative at best and not relevant to the NMB's determination of the sufficiency of AFA's showing of interest. AFA also argues, citing *Railway Labor Executives' Ass'n. v. NMB*, 29 F.3d 655 (D.C. Cir. 1994) (en banc) (RLEA), that if the NMB were to adopt Compass' position regarding a substantial and representative complement, the NMB would in effect grant the Carrier "party" status in violation of the RLA. AFA asserts that under *RLEA*, *above*, the NMB's authority under Section 2, Ninth is limited to determining whether AFA has met the 35 percent showing of interest threshold. *Id.* at 662. Finally, AFA argues that the Carrier's reliance on *Fall River, above,* is misplaced. AFA notes that *Fall River, above,* involved the National Labor Relations Board's (NLRB) authority to interpret the provisions of the NLRA and to promulgate regulations regarding that interpretation. AFA asserts that the NMB does not possess such authority. Further, AFA notes that *Fall River, above,* involved a determination of when a successor employer's duty to bargain is triggered and not an initial representation election. Compass is not a successor to any company; and under the RLA, a carrier's duty to bargain attaches when a Section 6 notice is served on the carrier following NMB certification of the representative.

FINDINGS OF LAW

Determination of the issues in this case is governed by the RLA, as amended, 45 U.S.C. §§ 151-188. Accordingly, the Board finds as follows:

I.

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

II.

AFA is a labor organization as provided by 45 U.S.C. § 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 to designate who may participate as eligible voters in the event an election is required. In determining the choice of the majority of employees, the Board is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives . . . by the employees without interference, influence, or coercion exercised by the carrier."

STATEMENT OF FACTS

According to the declaration of John Bendoraitis, President of Compass, the Carrier is a start-up regional airline and a wholly owned subsidiary of Northwest Airlines Corporation (Northwest). In 2006, Northwest purchased certain assets of the former Independence Air for use in the start-up of Compass. Subsequently, Northwest also placed "firm" purchase orders for 36 new Embraer E-175 regional jets (EMB 175). These aircraft seat 76 passengers in a two-class configuration. By April 2007, Compass had obtained its air carrier operating certificate from the Federal Aviation Administration. Compass began scheduled passenger flights on May 2, 2007, with a fleet of one aircraft, a 50 seat CRJ 200. Bendoraitis states that Compass has made clear that its business plan contemplated a rapid "spool-up" of operations as its new aircraft became available. An August 21, 2007 press release submitted by the Carrier announces the completion of the first revenue flight with one of its new EMB 175s. Bendoraitis further states that as of the date of his declaration,

September 6, 2007, Compass had two aircraft operating in scheduled passenger service. Bendoraitis further states that the delivery schedule for the EMB 175s on "firm" order is two aircraft per month, and that Compass' launch report calls for a total of 10 new aircraft in service by the end of 2007 and all 36 in service by the end of 2008.

In his declaration, Bendoraitis further states that as of September 6, 2007, Compass had approximately 198 employees including 78 Pilots, 38 Flight Attendants, three Office and Clerical employees and 79 Management Employees. Bendoraitis states that in 2006, Compass developed plans to commence hiring additional employees "as necessary" to support the expansion of its fleet and schedule. According to Bendoraitis, Compass plans to hire new employees at the rate of approximately 50 per month beginning in September 2007. Bendoraitis estimates that by December 2008, Compass will have approximately 828 employees, including 360 Pilots, 360 Fight Attendants, eight Office and Clerical employees, and 100 Management Employees.

With regard to the Flight Attendants, Bendoraitis states that Compass began actively recruiting Flight Attendant candidates in May 2007 and publicly announced its plan to hire Flight Attendants at the rate of approximately 20 per month. As of the August 15, 2007, Compass had 20 Active Flight Attendants. As of September 6, 2007, Compass had 38 active Flight Attendants including 20 from its first training class in July 2007, 18 from its August training class, and 24 Flight Attendant trainees scheduled to graduate in September. According to the Carrier's Reply to AFA, 17 of these trainees graduated and entered active service, bringing the total active complement of Flight Attendants to 55 as of October 1, 2007. In response to the Board's inquiry, the Carrier reports that, as of November 1, 2007, the total active complement of Flight Attendants is 70. Bendoraitis states that each trainee had been promised a Flight Attendant position with Compass upon satisfactory completion of training. In addition, according to Bendoraitis, Compass has issued invitations to further training classes to more than 50 prospective trainees, many of whom have accepted the invitation and have been scheduled for future class dates.

DISCUSSION

Compass argues that the Board should dismiss AFA's application because it is a start-up airline and had, at the time of AFA's application, not yet employed a "substantial and representative complement" of the 350 Flight Attendants that it expects to employ during the course of the next year. Compass relies both on NLRB precedent and on Board precedent in which the NMB has changed cut-off dates in "extraordinary and unusual circumstances."

The Board is not persuaded that NLRA case law should be applied in this case. Although the NLRA may provide useful analogies for interpreting the RLA, NLRB precedent "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes." *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 439 (1989) (*quoting Trainman v. Jacksonville Terminal*, 394 U.S. 369, 383 (1969)).

Compass characterizes its status as a "start-up carrier with a rapidly expanding workforce" and relies on *Fall River Dying & Finishing Corp. v. National Labor Relations Bd.*, 482 U.S. 27 (1987) to urge the Board to dismiss the application as untimely until the Carrier hires a "representative and substantial complement of flight attendants." Even assuming that the application of NLRA precedent to the present situation was warranted, the Carrier's reliance on *Fall River* is misplaced since it is factually and legally distinguishable.

In *Fall River*, *above*, a new company, Fall River Dyeing and Finishing Company (Fall River Dyeing), purchased the plant, real property and equipment of another company that had gone out of business, Sterlingwale. The new company began operating out of its predecessor's facility and hired its predecessor's employees, who had been represented by the Union. The Union requested that Fall River Dyeing recognize and bargain with it. At the time of the Union's request, 18 of Fall River Dyeing's 21 employees were former Sterlingwale employees. In contrast, Compass is a new carrier that has purchased some assets from Independence Air, a carrier that is no longer in business. There is no contention that Compass has hired any of Independence's Flight Attendants. Moreover, *Fall River*, involved the NLRB's broad authority to interpret the unfair labor practice provisions of the NLRA. In contrast, the instant case is a representation case under the RLA and involves the Board's jurisdiction to investigate representation disputes among employees under Section 2, Ninth, of the RLA. Consequently, the Board finds no basis for relying on NLRA precedent.

The Board also finds no other basis for dismissing the petition. It is the NMB's longstanding policy consistent with Section 2, Ninth to resolve representation disputes as expeditiously as possible. *See In re Continental Airlines Corp.*, 50 B.R. 342, 358 (S.D. Tex. 1985), *aff'd, per curiam*, 790 F.2d 35 (5th Cir. 1986) ("The RLA furthers Congress' strong policy of guaranteeing employees the right to organize and collectively bargain free from any carrier interference or influence . . delays in NMB precertification proceedings seriously hamper such organizational efforts . . ."); *Brotherhood of Ry. & S.S. Clerks*, 380 U.S. 650, 668 (1968) (speed is an RLA "objective of the first order").

In this case, the Board finds that dismissing the petition based on future speculative concerns would be at odds with our statutory mandate to resolve the representation dispute expeditiously. In representation disputes, the Act deals with the present status and interests of employees involved and not with potential future status and interests of employees. *Chicago & North Western Railway Co.*, 4 NMB 240, 249 (1965).

Although the Board does not find dismissal of the application appropriate, the Board does find that the extraordinary circumstances of this case warrant modification of the cut-off date for determining eligibility. The Board has in past modified cut-off dates in representation cases in response to "extraordinary or unusual circumstances" such as a two year passage of time in processing the election and 100 percent turnover, as in *USAir*, 10 NMB 495 (1983), or a five year delay between the original cut-off date and the election as in *Piedmont Airlines*, 9 NMB 41 (1981). Compass cites both *USAir* and *Piedmont*[3] and argues that *USAir* is "most on point" to the present facts because the Board noted that use of the original cut-off date would mean that "less than a majority of the craft or class will be eligible to vote." *USAir, above*, at 496.

As the Supreme Court noted in *Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, the NMB is given broad discretion under Section 2, Ninth, to designate who may participate in elections and to establish the rules to govern elections. 380 U.S. 650 at 654 and 661 (1965). Although the Board's Manual sets forth procedural guidelines for the investigation of eligibility issues including the cut-off date, the provisions of the Manual are neither binding on the Board nor the exclusive procedures for the NMB's investigation of representation matters. The courts have recognized that the Manual is "not a compilation of regularly promulgated rules and regulations having the force and effect of law." *Hawaiian Airlines v.* NMB, 102 LRRM 3322, 3325 (D. Hi. 1979), *aff'd without op.*, 659 F.2d 1088 (9th Cir. 1979), *op. replaced*, 109 LRRM 2936 (9th Cir. 1981), *cert den.*, 456 U.S. 929 (1982). Thus, the NMB has the discretion under the RLA to establish rules for

[3] Compass also cites *CSX Transp., Inc.*, 20 NMB 601 (1993), a case in which the carrier's system changed during the pendency of the application. Although the Board changed the cut-off date to the last day of the last payroll period prior to the date of the Board determination, the decision noted, that "[t]his is not a case where the Board changed the cut-off date due to extraordinary circumstances. This is a case where the Board followed its usual practice where the scope of the carrier's system has changed." *Id.* at 611. Clearly, no system change has occurred in the present case.

the cut-off date and for eligibility to vote in an election, and to deviate from those rules in the face of unusual or extraordinary circumstances.[4]

The Board has recognized that substantial turn-over of employees in the craft or class is an extraordinary or unusual circumstance that warrants modifying the cut-off date. In *USAir, above,* the investigation of the representation petition was delayed at the carrier's suggestion pending resolution of a similar case involving United Airlines. When the investigation resumed, the Board noted that "[s]ince the original cut-off date, the number of eligible employees has been reduced to 13 and 13 newly hired employees have entered the craft or class." 10 NMB at 495. Noting that the RLA provides that the "majority of any craft or class may select a representative," the Board concluded that using the original cut-off date would mean that less than a majority of the craft or class will be eligible to vote. *Id.* at 496. Similarly, in the instant case, use of the original cut-off date of August 15, 2007 would mean that significantly less than a majority of the craft or class will be eligible to vote. Based on the circumstances of this case, namely a rapidly expanding complement of employees of a start-up carrier and the time required to resolve the complex and novel issues presented by the parties, the Board finds that the cut-off date for eligibility should be changed to November 1, 2007. The modification of the cut-off date in these extraordinary circumstances strikes the appropriate balance between the statutory mandates to expeditiously resolve representation disputes and to ensure that a majority of the craft or class has the opportunity to select a representative. 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.

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[4] Based on its discretion under Section 2, Ninth, the Board also finds no merit in the Carrier's contention that AFA should be required to present a showing of interest from "a substantial and representative complement of employees expected to be in the flight attendant craft or class." The courts have uniformly held that the validity of the showing of interest is an administrative determination and "may not be litigated by . . . either Employer or Union." *Air Canada v. NMB*, 478 F. Supp. 615 (S.D. NY 1979), on final hearing, 107 LRRM 2028 (S.D. NY 1980), *aff'd* 107 LRRM 2049 (2nd Cir 1980), *cert. den.* 108 LRRM 2923 (1981). The courts have further held that "[t]he authority conferred on the NMB by Section 2, Ninth, surely encompasses broad discretion to decide when a showing of interest has been made." *Local 732, IBT v. NMB*, 438 F. Supp. 1357 (S.D. NY 1977); *IAM v. NMB*, 409 F.Supp. 113 (D.D.C. 1976). The expansion of the craft or class during the course of the investigation does not negate the fact that a sufficient number of valid authorization cards was presented at the appropriate time in the proceeding. Accordingly, the Board finds that a representation dispute exists and that there is sufficient interest among employees to justify an election.

CONCLUSION

The Board finds a dispute to exist in NMB Case No. R-7126, among the Flight Attendants of Compass Airlines sought to be represented by AFA and presently unrepresented. A TEV and Internet election is hereby authorized using a cut-off date of November 1, 2007.

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 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.

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