



NATIONAL MEDIATION BOARD
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Re: NMB Case No. R-7130
Continental Airlines, Inc.

Participants:

This determination addresses the November 27, 2007 appeal filed by the Transport Workers Union of America (TWU) of Investigator Eileen M. Hennessey's November 20, 2007 ruling. For the reasons discussed below, the appeal is denied.

I. Procedural Background

On October 15, 2007, the TWU filed an application pursuant to the Railway Labor Act (RLA or Act) 45 U.S.C. §152, Ninth (Section 2, Ninth), alleging a representation dispute involving the Fleet Service Employees of Continental Airlines, Inc., (Continental or Carrier). On October 15, 2007, the Carrier provided a Potential List of Eligible Voters (List). The Board found that a dispute existed and authorized an election with a tally set for January 9, 2008.

On November 9, 2007, the TWU filed its challenges and objections. The Organization argued the following: the Board should authorize a five week voting period; require Continental to identify the employees who became trainees in the thirty days prior to the cut-off date and then which of them ultimately became employees of the Fleet Service craft or class; and the Board should provide the notice and instructions to Continental employees utilizing the Carrier's electronic mail system. On November 14, 2007, the Carrier responded, opposing these requests. The Organization supplemented its challenges and objections on November 19, 2007, providing a sworn declaration from a Continental fleet service employee and additional evidence of Continental's use of electronic communication tools.

On November 20, 2007, the Investigator ruled on the TWU's challenges and objections, and *inter alia*, denied the TWU's request for electronic notification of employees and electronic transmission of instructions. On November 27, 2007, the Organization appealed this ruling. The Carrier filed its response on November 27, 2007. On November 29, 2007, the TWU filed a reply to the Carrier's response.

II. Investigator's Ruling

The Investigator's denial of the TWU's request for electronic notification of individual voters and electronic transmission of instructions relied, in part, on Section 13.1 of the Board's Representation Manual (Manual) which sets forth the Board's well-established notification procedures. Specifically, the Board provides Notice of Telephone and Internet Voting Instructions (Notice) to the participants at least five calendar days prior to the date the Instructions are mailed to voters. The Notice must be posted on Carrier bulletin boards and at all locations where other notices to employees are posted. The Investigator noted that the Board does not customarily provide an individual Notice of the election to eligible employees. The Investigator concluded that there is insufficient evidence that sending the Notice electronically to each individual employee is feasible or even possible or that requiring the Carrier to post the Notice on its website would provide better notice to employees of the upcoming election than the Board's current, long-standing practice.

III. TWU's Appeal and Continental's Response

In its appeal, TWU argues that it has shown that Continental has a substantial system for e-mail communications with its employees. According to the declaration submitted by the TWU, large numbers of Continental employees receive communications from the Carrier by e-mail, and all Continental employees can access employment-related information electronically through an employee-dedicated website. TWU argues that posting of the Notice on the Continental employee-dedicated website is entirely consistent with the paper posting requirement, and that such websites are the "contemporary equivalent of bulletin boards," and they are used that way by carriers, including Continental.

The Carrier states that it does not require employees to provide e-mail addresses, does not maintain a separate craft or class listing of those e-mail addresses it may have, and cannot provide "e-notice" to, or e-mail lists for, all eligible voters within the craft or class. Continental produces a "Daily News Update" which it disseminates electronically but notes that the primary means of distribution of this document is posting paper copies on bulletin boards throughout the company. Finally, the Carrier states that "the TWU completely fails to address the procedures that would be essential for 'e-distribution' of confidential voting instructions, potential security and voting fraud issues, FOIA [Freedom of Information Act] entanglements and the rights of organizations or individuals challenging incumbent representatives, or the legitimate privacy concerns of Continental co-workers."

IV. Discussion

The Supreme Court noted in *Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, that the NMB is given broad discretion under Section 2, Ninth, to establish the rules to govern elections. 380 U.S. 650 at 654 and 661 (1965). The Board's Manual sets forth general procedural guidelines for the investigation of eligibility issues including the posting of the Notice of Telephone and Internet Voting Instructions (Notice) and Sample Telephone and Internet Voting Instructions (Sample Instructions). Consistent with its longstanding election practice and pursuant to Manual Section 13.1, the NMB provides copies of the Notice and Sample Instructions to the participants at least five (5) calendar days before the Telephone and Internet Voting Instructions (Instructions) are mailed to the eligible voters. The Carrier must post the Notice on Carrier bulletin boards and at all locations where other notices to employees usually are posted. At least one Notice per station must be posted. Every eligible voter is notified of the election by the Instructions which are mailed to their home addresses. The purpose of posting the Notice and Sample Instructions prior to sending the actual Instructions to

each employee is to alert employees about the election, to make them aware that they should be receiving the actual instructions at their home address and to provided them with guidance for obtaining duplicate Instructions if they do not receive the Instructions within five days of the mailing.

This election procedure is the same for both airlines and railroads, regardless of size or structure and regardless of the craft or class involved. Absent a showing that the majority of eligible employees do not have access to Carrier bulletin boards, the Board finds an insufficient basis to deviate from its longstanding practice and eliminate use of Carrier bulletin boards from the Board's Notice procedures.

As stated above, the Board already provides individual notification to each voter by sending each voter individual voting instructions. The TWU is asking the Board to institute as a matter of course additional individual notification. The Board has only employed, or ordered the Carrier to use, additional notice to employees where it has been shown to be necessary to remedy egregious election interference or prevent voter confusion. In this case the TWU has not shown that employing what has been, in the past, an extraordinary remedy is warranted. *See Notice to Fleet and Passenger Service Employees of Pinnacle Airlines*, 30 NMB 251 (2003); *Aeromexico*, 28 NMB 309 (2001).

Many carriers have an internal mail system and communicate to employees individually by distributing paper documents to individual employee mail boxes or folders. It has never been Board policy to require carriers to individually distribute the Notice and Sample Instructions through the carriers' internal mail system.¹ What the TWU is seeking in its appeal is an augmentation of the Board's Notice policy under the guise of compliance with the newly implemented Internet Voting process. The Board's Internet Voting process does not replace the existing TEV voting but merely adds another means of casting a ballot for those employees who choose to vote. As such it does not represent a change in the Board's voting procedures but simply another mechanism for voting. Further, the TWU has not provided any evidence that electronic notification to some, if not all, employees would be superior to the Board's current procedures. In fact, the evidence is to the contrary. Continental does not use electronic means as its primary method of communication with its employees. First, it is not equipped to do so since not all of its employees have e-mail accounts. Second, Continental has stated that its primary means of distributing certain employee publications (even certain electronic communications) is by posting paper copies on its bulletin boards.

¹ Indeed, such a practice would raise the issue of potential or perceived carrier domination or endorsement of a particular union, which is specifically prohibited by the Railway Labor Act (RLA). *See e.g., Northern Air Cargo, Inc.*, 29 NMB 1, 24 (2001).

Continental's "Daily News Update," which is e-mailed to some unknown number of Continental Fleet Service Employees, has articles on topics such as the price of crude oil, and the Carrier's "Employee of the Week" program. The internal employee website allows employees to update personnel information and sign up for vacation packages. Based on the record before the Board, there is insufficient evidence that Continental posts other similar notices on its website or e-mails other government notices directly to employees.² Therefore, the Board cannot conclude, as the TWU argues, that use of the Carrier's website is "the contemporary equivalent of bulletin boards."

The TWU seeks to have the Board substantially modify its voting procedures to add additional individual voter notification. The burden is on the Organization to show that such a modification is necessary and in this case the TWU has not met its burden. *USAirways/America West Airlines*, 33 NMB 321, 329 (2006) (citing *Northwest Airlines Inc.*, 26 NMB 77, 80 (1998)). See also *Midway Airlines*, 18 NMB 193 (1991) (finding that in representation cases the burden of proof required to persuade the Board to overrule the investigator's preliminary determination rests with the carrier or organization appealing that determination). For the foregoing reasons the TWU's appeal is denied.

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel

² In *National Grid USA Service Co. Inc.*, 348 NLRB No. 88 (December 11, 2006), the National Labor Relations Board (NLRB) adopted the judge's findings that the employer committed unfair labor practices but modified the judge's recommended Order, deleting the language directing the employer to post the "Notice to Employees" on its internet website. The NLRB found the remedial provision inappropriate where there was no evidence demonstrating that the employer customarily communicated with its employees through electronic means. See also *Nordstrom, Inc.*, 347 NLRB No. 28, slip op. at 1(2006). We also know of no instance in which the Department of Labor requires employers to post notices electronically.