



**NATIONAL MEDIATION BOARD**  
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35 NMB No. 13

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

Participants:

This determination addresses the December 31, 2007 Motion for Extension of the Voting Period filed by the Transport Workers Union of America (TWU or Organization). For the reasons discussed below, the Motion 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 National Mediation Board (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; the Board should require Continental to identify the employees who became trainees in the thirty days prior to the cut-off date and then identify 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.

On November 20, 2007, the Investigator ruled on the TWU's challenges and objections, and *inter alia*, denied the TWU's request for a five week voting period. On November 27, 2007, the Organization appealed a portion of the November 20 ruling. The TWU appealed the Investigator's denial of its request for electronic notification of employees and electronic transmission of instructions. The TWU did not appeal the Investigator's ruling denying its request for a five week voting period. The TWU's appeal was denied by the Board on December 3, 2007. *Continental Airlines*, 35 NMB 23 (2007). No Motion for Reconsideration of the Board's determination was filed. See Board's Representation Manual (Manual) Section 11.0. On December 31, 2007, the TWU filed a Motion for Extension of the Voting Period.

## **II. Investigator's Ruling**

The TWU initially requested that the Board establish a five week voting period stating that it:

. . . [A]nticipated that part of the voting period in this case would extend over the Thanksgiving holiday. Under the schedule actually established by the Board, the voting period does not start until after the Thanksgiving but does extend over the Christmas and New Year holidays. The Christmas/New Year's period is a longer holiday period than Thanksgiving holiday, it is a time when many people have multiple family obligations and it is a time of both extra work and extra stress for many airline industry workers.

Therefore, after the Investigator established the election schedule, which encompassed the Christmas and New Year holidays, the TWU renewed its request for a five week voting period in its challenges and objections.

The Carrier opposed the TWU's request for a five week voting period, stating that the TWU offered nothing new to support its request. The Carrier also argued that changing the voting period at this time would cause confusion.

The Investigator ruled on this objection on November 20, 2007. The Investigator denied the TWU's request for a five week voting period stating:

The Board's Representation Manual (Manual) Section 13.201 provides that the Investigator will establish a time period for voting. Several factors are considered including the number of eligible voters, the number of stations involved, and the geographical distribution of the voters. In no event will the Instructions be mailed less than 21 days before the tally. In this case, the Investigator considered all of the above factors as well as the Christmas/New Year holidays and granted an extended voting period of four weeks that begins two weeks prior to Christmas and ends over a week after the New Year holiday. The introduction of Internet Voting effective October 1, 2007, is a time-efficient addition to the Board's election procedures. Under the Board's mail ballot election procedures, extended voting periods were occasionally used because the U.S mail was used to return the ballots to the Board and that process was accomplished, at best, within days. With the TEV procedures voting is accomplished in minutes. The TWU has made no showing that a five week voting period is necessary. Moreover, in order to avoid voter confusion and protect the stability of the voting process, the Board has a general policy of not changing the dates of the election period once the dates have been announced. In this case, the election dates were announced on November 2, 2007.

As stated above, the TWU did not appeal the Investigator's denial of the five week voting period.

### **III. TWU's Motion and Continental's Response**

The TWU states that since the Investigator's ruling there have been additional developments that necessitate a seven day extension of the voting period. First, the TWU states that there were problems with the NMB's dedicated telephone line for voting because calls to that line were instead routed to phone lines answered by Board staff. Second, the Organization contends that Election Notices were not timely posted at numerous locations in Houston. Third, the Board was not notified that a number of eligible voters were on Military Leave until December 20, 2007. Finally, the TWU asserts that many employees did not receive election materials. TWU stated:

[T]he the problems with mailing and re-mailing of the packets is exacerbated by the large increase in volume of mail during the holidays. The increased error rate in the mail as a result of the increased volume adds to the problem increases. Furthermore, the

holidays when there is no mail means a loss of two days for delivery which increases delay in delivery of duplicates.

In support of this last contention, the TWU provided a sworn declaration from a TWU Organizer which stated, "I have learned that over three hundred (300) employees, and probably more that I am not aware of, have requested duplicate ballots because they did not receive packets with the initial mailing." In addition, the TWU provided approximately 67 declarations from Continental employees alleging that they did not receive their initial "ballot packet," and in spite of having requested a duplicate ballot, had not received the duplicate.

The Carrier opposes the TWU's motion. The Carrier asserts that there is no evidence for TWU's claim that "an increased error rate in the mail" and "delay in delivery of duplicates" has led to "a substantial problem in the delivery of voting packets." The Carrier also asserts that the TWU does not assert that any eligible voter was prevented from voting by the initial problem with the telephone voting line. Finally, the Carrier states that the TWU's allegation that Election Notices were not timely posted is false, untimely and has "little relevance to the bare assertion that employees have been 'hindered' or 'impeded' in voting."

#### **IV. Discussion**

**Manual Section 10.1** states:

The Investigator will issue a written ruling on the challenges and objections. The ruling will set forth the participants' appeal rights and the appeal deadline.

**Manual Section 10.2** states:

All appeals must be filed with the General Counsel and supported by substantial evidence. If the Investigator's ruling is not appealed to the NMB by the deadline, the Investigator's ruling is final. Absent extraordinary circumstances, evidence submitted on appeal will not be considered by the NMB unless it was submitted to the Investigator.

The TWU's Motion for Extension of the Voting Period is an untimely appeal of the Investigator's November 20, 2007 ruling and is denied. Nothing cited by the TWU in support of its motion constitutes "extraordinary circumstances" sufficient to warrant extending the voting period.

### A. The Telephone Voting Process

The Voting Instructions were sent to employees December 11, 2007. On December 13, 2007, the Board was notified that voters were experiencing difficulty using the telephone voting system; calls to the dedicated telephone voting line were not being routed correctly to the system. Within two hours of becoming aware of this issue, the Board corrected the problem. Employees have been able to use the telephone voting system successfully for approximately 27 days of the four week voting period. Moreover, the option to vote using the Internet was available to any employee who could not get through using the telephone system in the initial hours of the voting period.

### B. Posting the Election Notices

Pursuant to the schedule established by the Investigator, the Election Notice and Sample Instructions were sent to the participants on December 4, 2007. Counsel for the TWU left a telephone message for the Investigator on December 7, 2007 stating that the Election Notice was not posted in several locations in the Carrier's system. The Investigator contacted counsel for the TWU and requested that the TWU submit further evidence of the exact locations where the Election Notice was not posted. However nothing further was submitted. There is no evidence that employees received inadequate notice of the election.

### C. Mail Delivery

**Manual Section 13.206** states:

Voters may request duplicate Instructions, including a VIN and a PIN, by contacting the NMB in writing. The request must be signed by the voter requesting the Instructions and mailed in an individual envelope; group requests are not accepted. Requests by telephone, facsimile or electronic mail are not accepted. Requests received less than five (5) days before the tally will not be honored. Requests dated or received prior to the mailing of the Instructions will not be honored.

Both the Election Notice and the Voting Instructions inform voters that if they have not received a Voter Identification Number/Personal Identification Number (VIN/PIN) by December 17, 2007, they may contact the NMB to request a duplicate VIN/PIN and that the deadline for requesting a duplicate VIN/PIN was January 4, 2008. For security reasons these requests must be made in writing and duplicate VIN/PINs are mailed to voters; VIN/PIN information is not given out over the telephone or via e-mail or facsimile. All

duplicate requests received by the Board as of January 4, 2008 were processed.

This is a large election, involving almost 8,000 employees\*. In large elections, it is not unusual for the Board to receive large numbers of duplicate requests, and materials returned as undeliverable. In this case, the Board has not received a disproportionate number of duplicate requests or materials returned as undeliverable (approximately 65). The Board has effective systems in place to deal with both circumstances. Moreover, the statements provided in the TWU's declarations are not supported by the facts available to the Board.

#### D. Employees on Military Leave

**Manual Section 12.1** states in part:

The participants should notify the Investigator, within five (5) calendar days of the authorization, of any employees on military leave who are serving in foreign countries or of any potential eligible voters located outside the U.S.

The purpose for requiring early notification to the Board of voters located outside of the U.S. is to facilitate timely delivery of voting materials to those voters. The election in this case was authorized on November 2, 2007. The Carrier did not comply on a timely basis with the Manual concerning notification to the Board of employees on military leave. The TWU did not notify the Board of employees on military leave until December 20, 2007. The Carrier provided the names of 24 employees on military leave between December 26, 2007 and January 2, 2008. The Carrier provided addresses for most of these employees during this same time period.

By January 3, 2008, the Board sent by overnight delivery duplicate instructions to the addresses provided by the Carrier. Any employee on military leave who the Board cannot confirm received duplicate VIN/PIN's will be removed from the List. The Carrier and/or the TWU should have notified the Board of any employees on military leave who are serving in foreign countries by November 7, 2007. The Board was not provided addresses for these 24 employees until almost two months later. However, this does not rise to the level of "extraordinary circumstances" necessary for the Board to overrule the Investigator's ruling and extend the voting period. Moreover, the TWU has not demonstrated that a seven day extension of the voting period would be a more effective way of dealing with this situation than the remedy the Board is utilizing.

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\* The initial List contained 7879 potential eligible voters.

### E. Voter Confusion

TWU states that it recognizes that the Investigator's November 20, 2007 ruling stated that the Board has a general policy of not changing election dates to avoid voter confusion and to protect the stability of the voting process, but states that it "does not see how an extension in these circumstances would sow confusion." The Board disagrees. On November, 2, 2007, the Board announced that the tally would take place on January 9, 2008. On December 4, 2007, the Election Notice and Sample Instructions stating the date of the tally were sent to the participants and shortly thereafter this information was posted in the workplace. On December 11, 2007, almost 8,000 eligible voters were notified individually that the tally would take place on January 9, 2008 and that the deadline for receipt of duplicate VIN/PIN requests was January 4, 2008. While the TWU requests a seven day extension of the voting period, it has no proposal for how the Board is to notify the approximately 8,000 voters that the deadline has been extended. To extend the voting period without notifying employees of the extension would be fruitless.

There is no effective way to officially notify all of the almost 8,000 employees of a change in the voting period prior to the tally. The initial notification process took over five weeks (the time period between authorization and ballot mail-out); the TWU made its request for an extension less than 10 days prior to the tally. Moreover, the Board does not have the means to contact employees individually. The Board does not maintain employee address information; the labels provided by the Carrier for the Instructions have been used. Absent official notification of each employee that the Board changed the schedule it had widely disseminated, the potential for voter confusion is too great and any potential benefit is speculative at best.

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson  
General Counsel