



NATIONAL MEDIATION BOARD
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35 NMB No. 35

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Re: NMB Case No. R-7148
Delta Air Lines, Inc.

Participants:

This determination addresses the April 1, 2008 request by the Association of Flight Attendants-CWA, AFL-CIO (AFA or the Union) that the election in the Flight Attendant craft or class of employees of Delta Air Lines, Inc. (Delta or the Carrier) be conducted pursuant to a yes/no ballot, with the outcome of the election to be decided by the plurality of voters participating in the election. For the reasons discussed below, AFA's request is denied.

I. PROCEDURAL BACKGROUND

On February 14, 2008, AFA 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 Flight Attendants of Delta. On February 28, 2008, the Carrier provided the National Mediation Board (NMB or Board) with a List of Potential Eligible Voters. The Board found that a dispute existed and, on March 18, 2008, authorized an election. The tally in this election is set for May 28, 2008.

On April 1, 2008, AFA filed a position statement which, inter alia, requests a yes/no ballot to determine the representation issue in this matter. On April 9, 2008, Delta filed a response to AFA's position statement, in which it opposed the AFA request.

II. POSITIONS OF THE PARTICIPANTS

AFA

AFA contends that the Board has broad discretion in establishing the rules and procedures in a representation election. AFA cites an NMB decision where the Board found that it is not bound by its Representation Manual when ensuring employee free choice regarding representation. *Compass Airlines*, 35 NMB 14 (2008). AFA particularly notes that the Board found it had the discretion to deviate from its eligibility rules “in the face of unusual or extraordinary circumstances.” *Id.* at 20-21.

AFA argues that the current NMB voting procedures, which require a majority of the eligible voters to cast ballots for union representation in order to certify a union as the collective bargaining representative, “provide a disincentive to voting that is exploited by employers.” The Union contends that no other democratic institution uses “a voting system that infers a final result through the *non-action* of those affected by the vote.” (Emphasis in original.) AFA contends that silence is not expression, and that a yes/no ballot would remedy that problem. AFA argues, moreover, that a yes/no ballot will act as a prophylactic measure to deter Delta from repeating behavior that AFA alleges tainted previous elections.

Delta

Delta opposes any change in the Board’s balloting procedures, contending that there is no reason for any change to the longstanding, existing procedures. Delta argues that AFA offers no new policy arguments for a change in procedures, which have been consistently considered and rejected following comments from carriers and labor organizations. Delta also notes that the Board recently solicited comments from interested parties on a change in the NMB voting procedures, albeit of a different nature than the one proposed here.

III. DISCUSSION

AFA, citing *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (*ABNE*), asserts that the Board has broad discretion in establishing rules and procedures in representation matters. The Board agrees that its discretion is broad in this area. However, other than a reference to *Compass, above* (where the Board exercised its discretion to deviate from its normal eligibility cut-off date rule in the face of unusual and extraordinary circumstances), AFA points to no caselaw that supports an unannounced and extreme departure from decades of

NMB balloting rules and procedures. Moreover, AFA alleges no unusual circumstances to justify such a sharp break from precedent in this case.

AFA cites two previous Delta cases where either the Board was troubled by the carrier's conduct during the election period or an election was rerun due to carrier interference. See *Delta Airlines, Inc.*, 30 NMB 102 (2002); *Delta Airlines, Inc.*, 27 NMB 484 (2000). Based on these cases, in only one of which the Board actually found interference, AFA contends that the balloting procedures should be changed as a prophylactic measure to prevent such interference in this case. This argument fails on two grounds. First, the Board will not assume in advance of an initial election period that a carrier will engage in activities that interfere with employee free choice or taint the laboratory conditions; and there is no evidence in this case of any Carrier interference. Second, the appropriate response to allegations and findings of carrier interference is to set aside an initial election and to rerun the election, as the Board did in *Delta Airlines*, 27 NMB 484 (2000). Moreover, it is only in cases of egregious carrier interference that the Board orders the second election be conducted under the procedures essentially being requested by AFA in this matter. See *Laker Airways Ltd.*, 8 NMB 236, 253-259 (1981).

For over 70 years, the Board has required that a majority of the eligible voters cast valid votes for representation in order to certify a bargaining representative. As the Board stated in *Chamber of Commerce of the U.S. and the Int'l Bhd. of Teamsters (Chamber of Commerce)* (where the Board considered a similar proposed change to the balloting procedures):

In the Sixteenth Annual Report of the Board (1950), the Board stated its firm conviction that its duty under Section 2, Ninth, "can be more readily fulfilled and stable relations maintained by a requirement that that a majority of eligible employees cast valid ballots...." p. 20.

...

The form of the NMB ballot has remained essentially unchanged for over fifty years as well. The only changes have been to the language contained in the Instructions. The language regarding the majority being necessary for a valid election was added as a result of the *ABNE* case.

...

The level of proof required to convince the Board the changes proposed are essential, then, is quite high, and has not been met.

14 NMB 347, 362-363 (1987).

The only significant changes to the Board's balloting procedures since *Chamber of Commerce, above*, have been of a technological nature. The Board began using Telephone Electronic Voting (TEV) in 2002, and added Internet Voting as an additional component to the TEV process in 2007. When the Board proposed adding Internet Voting, it notified carriers and labor organizations, ran a mock election in which any interested party could participate, and requested comments on the change. *RE: Introduction of Internet Voting/Mock Election*, 34 NMB 71 (2007). The Board addressed the comments it received from interested parties and explained its decision to proceed with Internet Voting. *RE: Internet Voting Comment Period*, 34 NMB 200 (2007).

AFA proposes a substantive change in the NMB's balloting procedures, rather than the administrative changes entailed by TEV and Internet Voting, without allowing for any notice and comment period. AFA has failed to provide sufficient justification for changing the decision in *Chamber of Commerce above*, and, in any event, the Board would not make such a fundamental change without utilizing a process similar to the one employed in *Chamber of Commerce, above*.

AFA's reliance on *Compass Airlines*, 35 NMB 14 (2008), to support the NMB use of its discretion in deviating from its normal procedures is inapposite. That case involved unusual and extraordinary circumstances, and the change was limited to the facts of that case. In this case, AFA's arguments are applicable to every representation application filed with the Board. A change in the balloting procedures in this matter would necessitate a permanent deviation from over 70 years of Board practice. The Board is not inclined to make the requested changes, and, in any event, would not make such a sweeping change without first engaging in a complete and open administrative process to consider the matter.

AFA offers no substantive evidence or other compelling circumstances that the changes it seeks are essential. Rather, the Union relies largely on policy considerations previously submitted to and rejected by the Board. For this reason, as well as the reasons stated above, AFA's request for changing the balloting procedures is denied.

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel