



**NATIONAL MEDIATION BOARD**

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35 NMB No. 49

May 28, 2008

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

Participants:

This determination addresses the May 16, 2008 appeal filed by the Association of Flight Attendants-CWA, AFL-CIO (AFA) of the eligibility rulings of Investigators Maria-Kate Dowling and Sarah Halpin. For the reasons discussed below, the appeal is denied.

I.

Procedural Background

On February 14, 2008, AFA filed an application pursuant to the Railway Labor Act (RLA or Act), 42 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a representation dispute involving the Flight Attendants of Delta Air Lines, Inc. (Delta or Carrier). The Delta Flight Attendants are currently unrepresented. The Carrier provided a Potential List of Eligible Voters (List) on February 29, 2008. On March 18, 2008 an election was authorized by the National Mediation Board (NMB or Board), and a schedule for filing challenges and objection to the List was set on March 24, 2008. On March 31, the Board granted AFA's request for a three-day extension to file challenges. AFA

submitted an initial position statement on April 1, 2008, and its challenges to the List on April 11, 2008. The Carrier submitted its response on April 25, 2008, and supplemented its response on May 5, 2008, and on May 12, 2008.

The Investigators issued their rulings on May 9, 2008, and May 15, 2008. AFA submitted its appeal on May 16, 2008. The Carrier responded on May 20, 2008.

## II.

### Challenges and Objections

#### A.

##### Trainees

In its challenges and objections to the List, AFA alleged that 327 flight-attendant trainees did not perform work in the craft or class prior to the cut-off date and therefore are ineligible to vote.

Delta identified 82 trainees who had completed their initial operating experience (IOE) prior to the January 31, 2008 cut-off date and contended that these employees should remain on the List. As to the remaining trainees who did not complete their IOE before the cut-off date, Delta requested that the Board “consider an adjustment” which would render these trainees eligible since they had completed their IOE by the date the election was authorized.

The Investigators, citing *Executive Jet Aviation, Inc.*, 28 NMB 467, 468 (2001), ruled that the 82 trainees who completed their IOE before the cut-off date are eligible to vote. As to the remaining trainees, the Investigators ruled that trainees who have not completed their IOE prior to the cut-off date are not eligible to vote. See, e.g., *Executive Jet Aviation, Inc.*, 28 NMB 467, 469 (2001); *Simmons Airlines*, 15 NMB 228, 230 (1988); *Horizon Air*, 14 NMB 406, 409 (1987). Therefore, the Investigators found that the remaining trainees should be removed from the List.

#### B.

##### Employees on Voluntary Furlough and Disability

AFA also alleged in its challenges and objections to the List that several hundred individuals who were on voluntary furlough were ineligible. AFA contended that there were “troubling questions about the legitimacy of Delta’s voluntary furlough program” because the program allowed the Carrier to “pad the Eligibility List” by hiring new flight attendants while current flight attendants remained on furlough. AFA also alleged that 27 flight attendants

who were on long-term disability should be removed from the list, because, AFA asserts, they had no likelihood of returning to work.

The Investigators ruled that 31 furloughed individuals would be removed from the list due to status changes, but the remaining 901 individuals identified by Delta as on voluntary furlough would remain on the List. Based on the evidence provided by the participants, the Investigators found that the 901 furloughed flight attendants' five-year recall rights had not expired, they had not refused recall, and their positions had not been eliminated. The Investigators further found that there was no evidence that Delta's furlough policy which allowed Flight Attendants to self-limit the bases to which they could be recalled was intended to allow the Carrier to pad the List or was adopted for that purpose.

The Investigators ruled that the 27 individuals on long-term disability remained Delta employees and would remain on the List. Citing *U.S. Air, Inc.*, 24 NMB 38, 52 (1996), the Investigators noted that the Board takes an expansive view of the eligibility of individuals on disability, and finds those individuals eligible so long as they maintain an employer-employee relationship with the Carrier. The Investigators found that, under the terms of Delta's disability policy, all 27 individuals remained on Delta's seniority list and remained employees of Delta, eligible to return to active status once they were medically cleared to do so.

### III.

#### Appeal

##### A.

#### Trainees

On appeal, AFA objects to the Investigators' ruling that the 82 trainees who completed their IOE before the cut-off date were eligible to vote.<sup>1</sup> AFA contends that even if these employees completed their IOE before the cut-off date, there is no evidence that they actually performed any work as an employee of the Carrier before the cut-off date. AFA contends that in determining whether a trainee is an "employee" under the RLA, the key analysis is whether they have performed work for the Carrier, not whether they have completed their IOE. Citing, e.g., *Executive Jet Aviation, Inc.*, 20 NMB 467,

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<sup>1</sup> In a May 22, 2008 letter, AFA requested that the Board hold its appeal on the issue of trainees in abeyance until after the May 28, 2008 ballot count has been completed. In light of the fact that, in discussing trainees, both participants cited to non-precedential Investigator's rulings in other cases, the Board decided to address this issue definitively here. Investigator's rulings are not precedential. Only Board determinations are precedential.

468 (2001); *ALPA v. United Airlines, Inc.*, 802 F.2d 886 (7<sup>th</sup> Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); *Air Micronesia*, 10 NMB 11 (1982); *Independent Federation of Flight Attendants v. Trans World Airlines*, 819 F.2d 839, 845-46 (8<sup>th</sup> Cir. 1987), *cert. granted on other grounds*, 56 USLW 3636 (1988). AFA asserts that, although the 82 trainees had performed their IOE before the cut-off date, they did not work as a “required crewmember” under 14 C.F.R. 121.391 until after the cut-off date because they were not assigned as such until after January 31, 2008.

Delta responds that the Investigators properly interpreted Board precedent in finding that the 82 trainees who completed their IOE before the cut-off date were eligible to vote. Delta contends that under Federal Aviation Regulation (FAR) 121.434(e), during IOE each “flight attendant must, for at least 5 hours, perform the assigned duties of a flight attendant under the supervision of a flight attendant supervisor qualified under this part who personally observes the performance of these duties.” Therefore, every Delta flight attendant who completes his or her IOE has performed work for the Carrier as a flight attendant for at least five hours. Delta argues that AFA’s interpretation would require flight attendants to perform work for the Carrier twice: once during IOE, and once after passing IOE. Delta also contends that the cases AFA cites in support of its position are inapposite, and instead support the Investigators ruling that individuals who have completed IOE before the cut-off date are eligible to vote.

## B.

### Employees on Voluntary Furlough and Disability

On appeal, AFA objects to the inclusion of individuals who are on furlough or on long-term disability on the List. AFA asserts that Delta did not provide sufficient evidence for the Board to rule on the issue of furloughed employees, or employees on long-term disability. AFA further asserts that the Board erred in permitting Delta to attest to the legitimacy of its eligibility assertions without being required to produce the underlying documentary evidence supporting them.

In its response, Delta cites the Board’s Representation Manual (Manual) Section 8.2, that AFA has the burden to support its appeal with “substantial evidence.” Delta contends that AFA has provided no evidence for its assertion that individuals on furlough or on long-term disability are ineligible.

## IV.

Discussion

## A.

Trainees

The Board's Representation Manual (Manual) Section 9.2 provides that "[a]ll individuals working regularly in the craft or class on and after the cut-off date are eligible to vote in an NMB representation election."

In this case, 82 flight attendant trainees had completed their IOE on January 26, 2008 and were "released to fly" on February 20, 2008. As the Investigators noted in their ruling, Delta Flight Attendants are required to complete an IOE in order to comply with Section 121.434 of the Federal Aviation Regulations (FAR 121.434), which requires that flight attendants complete an operating experience of at least 5 actual flight hours before assignment as a required crewmember. Delta applied for and received approval for a reduction to 2.5 actual flight hours. During the IOE, the Flight Attendant trainees perform safety and service related functions under the supervision of Operating Experience Supervisors.

A trainee's eligibility hinges on whether the "person has performed services for the employer under that employer's supervision." *ALPA v. United Airlines, Inc.*, 802 F.2d 886, 913 (7<sup>th</sup> Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). The Board has long held that individuals that have completed their IOE have performed line functions and are eligible to vote. In *America West Airlines*, 16 NMB 135, 144 (1989) the Board found that "[u]ntil individuals training for in-flight functions have successfully completed their IOE, they have not performed line functions and therefore are not eligible." Similarly, in *Executive Jet Aviation, Inc.*, 28 NMB 467, 468 (2001), which AFA cites, the Board found trainees who had not completed their IOE ineligible because there was insufficient evidence that they had performed line functions as of the cut-off date.

The evidence in this case, in the form of Federal Aviation Regulations and Delta policies, establishes that any flight attendant who has completed his or her IOE has completed at least 2.5 hours of revenue flying under the supervision of a Delta supervisor. Thus, all flight attendants who completed their IOE before January 31, 2008 necessarily performed line functions before the cut-off date. As AFA points out, there are situations where individuals have completed their training, but nonetheless cannot be considered employees under the RLA. *ALPA v. United Airlines, above* (pilots trained as strike replacements, but who had not actually performed work under the supervision

of the carrier were not employees under the RLA); *Air Micronesia*, 10 NMB 11, 14 (1982) (individuals who had completed their training as flight attendants but had not been offered jobs or placed on the seniority list were found not to be employees because they were not subject to the carrier's "authority to supervise and direct the manner of rendition" or service). This case does not present such a situation. The 82 flight attendants here are not eligible to vote simply by virtue of the fact that they completed their IOE. Rather, they are eligible to vote because the evidence establishes that, in completion of their IOE, they performed line functions for the Carrier.

B.

Employees on Voluntary Furlough and Disability

It is the duty of the Board to investigate representation disputes among a carrier's employees. NMB Rule § 1202.3, 29 C.F.R. § 1202.3; Manual Section 1.01-1. As the Supreme Court noted in *Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661, 669 (1965) (citations omitted), the Board's duty to investigate is a duty to make such investigation as the nature of the case requires and the RLA "leaves the details [of the investigation] to the broad discretion of the Board." The Investigators may determine whether the evidence submitted by the Carrier is adequate, or whether they require further information from the Carrier in the form of underlying documents or other Carrier records. *See American Airlines*, 31 NMB 539, 583 (2004) (upholding an investigator's determination that a declaration from the Carrier's managing director of labor relations was adequate to establish that certain employees performed work in the craft or class).

In this case, the Investigators did not err in determining that the information Delta submitted regarding employees on furlough and on long-term disability was adequate. For employees on furlough, Delta provided the Board with a list of 932 flight attendants on furlough, including each individual's current employment status, date of furlough, and base preference, as well as Delta's furlough policy. For the 27 individuals AFA identified as being on long-term disability and ineligible to vote, Delta provided each individual's current employment status, the start-date of his or her disability leave, whether he or she was receiving disability benefits and the last date of payment, whether he or she was receiving travel benefits, and whether he or she was on the seniority list, as well as Delta's benefits plan and policies. The accuracy of these documents was attested to by Sandra P. Gordon, Delta's Vice President of In-Flight Service Operations and Training. In her declaration, Gordon stated that the lists were compiled from the business records of Delta in her custody or control, and/or from information provided to her by other Delta employees in the In-Flight Service department and the Human Resources Department. The Investigators did not err in determining that the information

was adequate based on Gordon's declaration, which was supported by detailed and consistent information, and made by a management official who oversaw the compilation of the information. *American Airlines, above*, at 583 (declaration was reliable because it was supported by documentation and made by a management official who ordered the work in question to be done). Additionally, there is no evidence that the records were compiled or created to pad the list, as AFA contended.

Accordingly the appeal is denied and the 82 individuals identified by Delta as having completed their IOE by the cut-off date, the 901 individuals identified by Delta as on furlough, and the 27 individuals on long-term disability will remain on the List and eligible to vote.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson".

Mary L. Johnson  
General Counsel