



**NATIONAL MEDIATION BOARD**  
WASHINGTON, DC 20572

(202) 692-5000

37 NMB No. 7

November 9, 2009

Chris Vellios, CPA  
Executive Vice President  
Chief Financial Officer  
Liberty Helicopters, Inc.  
P.O. Box 1338  
Linden, NJ 07036

Laurent Drogin, Esq.  
Tarter Krinsky & Drogin LLP  
1350 Broadway, 11<sup>th</sup> Floor  
New York, NY 10018

Robert Roach, Jr.  
General Vice President  
Jay Cronk  
Transportation Coordinator  
David Neigus, Esq.  
Associate General Counsel  
International Association of  
Machinists  
And Aerospace Workers  
9000 Machinists Place  
Upper Marlboro, MD 20772

Re: NMB Case No. R-7220  
Liberty Helicopters, Inc./IAM

Participants:

This determination addresses the October 29, 2009 appeal filed by the International Association of Machinists and Aerospace Workers (IAM) of Investigator Susanna Parker's eligibility rulings. For the reasons discussed below, the appeal is denied.

I.

Procedural Background

On September 3, 2009, the IAM filed an application pursuant to the Railway Labor Act<sup>1</sup>, 45 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a representation dispute involving the Mechanics and Related Employees of Sightseeing Tours of America, Inc. and Liberty Helicopters, Inc. (Liberty or

---

<sup>1</sup> 45 U.S.C. § 151, *et seq.*

Carrier). The employees are not currently represented. The case was originally docketed as File No. CR-6961. The Carrier provided a List of Potential Eligible Voters (List) on September 16, 2009. On September 29, 2009, File No. CR-6961 was converted to Case No. R-7220 and an election was authorized by the National Mediation Board (NMB or Board). A schedule for filing challenges and objections to the List was set on September 30, 2009.

On October 13, 2009, the IAM submitted its challenges to the List. On October 21, 2009, the Carrier submitted its response. On October 22, 2009, the Investigator requested additional information from the Carrier. The Carrier complied with the request on October 26, 2009. The IAM filed additional information on October 26 and 27, 2009.

On October 27, 2009, the Investigator ruled on the various challenges submitted and held, inter alia, that **William Bergen** was not a management official and would remain on the List. On October 29, 2009, the IAM appealed the Investigator's ruling.

## II.

### Challenges and Objections

In its challenges to the List, the IAM alleged that employee Bergen was a management official and should be removed from the List. The IAM stated that Bergen is the Shop Foreman at Linden Airport to whom at least two employees report. The IAM provided: an affidavit from a Carrier employee; a copy of the Carrier's Organizational Chart; and a copy of the Carrier's Flight Operations Manual.

The Carrier responded that Bergen works at two locations: Teterboro and Linden. The Carrier stated that Bergen works as a non-supervisory mechanic at the Carrier's Teterboro location and in the same management capacity as two other employees at the Linden location.<sup>2</sup> The Carrier did not contest Bergen's removal from the List.

In the October 27 ruling, the Investigator ruled that, although the parties agreed that Bergen is a management official, agreement by the participants regarding employee eligibility is not determinative. See the Board's Representation Manual (Manual) Section 8.2. The Investigator found that while Bergen may possess the authority to make assignments at the Linden

---

<sup>2</sup> The Investigator ruled that the other two employees were not management officials and eligible to vote. Neither the Carrier nor the IAM appealed that ruling.

location, there was no evidence that he has the authority to hire or fire or to effectively recommend such personnel decisions. Additionally, the Investigator ruled that there was no evidence that Bergen participates in the creation of carrier policy or budget or spends carrier funds. Based on the evidence presented and pursuant to Manual Section 9.211, the Investigator ruled that Bergen is not a management official and, therefore, is eligible to vote.

### III.

#### Appeal

In its October 29, 2009 appeal, the IAM reiterates its contention that Bergen is a management official. The IAM states that the Carrier's Organizational Chart "shows a chain of command starting from the Chief Operating Officer to the Director of Maintenance (DOM) and to the Shop Foreman and then to the Lead Mechanics and Mechanics." Quoting Liberty's Flight Operations Manual, the IAM states, "the Shop Foreman is responsible to the DOM for the overall operation of the maintenance department." The IAM alleges that "[i]t is undisputed that Bergen has the authority to dismiss and/or discipline employees, to supervise and assign mechanics and leads, and to grant overtime." Additionally, the IAM argues that Bergen has the authority to create carrier policy and to commit carrier funds since Bergen is "authorized to reject 'non-airworthy parts,' to oversee their handling and to '[a]scertain that all inspections are properly performed.'" Finally, the IAM asserts that the Carrier has not been honest in this proceeding and argues that Liberty's "egregious conduct" requires the Board to "draw an adverse inference against Liberty from Bergen's inclusion on the List."

The Carrier did not file an appeal but responded to the IAM's allegations and stated that it "has not attempted to hide any information from the Board and has been forthcoming in its submissions to the Board."

The IAM filed a rebuttal statement on November 2, 2009, reiterating its contention that Bergen is a management official.

### IV.

#### DISCUSSION

The burden of persuasion in an appeal from an Investigator's eligibility ruling rests with the participant appealing the determination. *Amerijet Int'l, Inc.*, 35 NMB 152, 154 (2008); *American Airlines*, 31 NMB 539, 553 (2004); *Northwest Airlines, Inc.*, 26 NMB 77, 80 (1998).

Manual Section 9.211 provides:

Management officials are ineligible to vote.  
Management officials include individuals with:

- (1) the authority to dismiss and/or discipline employees or to effectively recommend the same;
- (2) the authority to supervise;
- (3) the ability to authorize and grant overtime;
- (4) the authority to transfer and/or establish assignments;
- (5) the authority to create carrier policy; and,
- (6) the authority to commit carrier funds.

The Investigator also considers:

- (1) whether the authority exercised is circumscribed by operating and policy manuals;
- (2) the placement of the individual in the organizational hierarchy of the carrier; and,
- (3) any other relevant factors regarding the individual's duties and responsibilities.

As noted by the Investigator, when the Board applies these criteria, "the Board must consider various individual elements and factors which might not be decisive if considered separately but considered cumulatively would remove a particular position from the status of an employee or subordinate official." *Pan American World Airways, Inc.*, 5 NMB 112, 115 (1973). See also *USAir, Inc.*, 24 NMB 38 (1996); *Comair, Inc.*, 22 NMB 175 (1995); *American Int'l Airways, Inc. d/b/a Connie Kalitta Servs.*, 20 NMB 94 (1992); *Challenge Air Cargo*, 17 NMB 501 (1990); *Tower Air, Inc.*, 16 NMB 338 (1989).

The Board examines job functions, not job titles, in determining whether employees are management officials. *Wheeling & Lake Erie Ry. Co.*, 17 NMB 460 (1990); *USAir*, 17 NMB 117 (1990); *Pan Am World Airways, above*.

Liberty's Flight Operation Manual states, inter alia, that the Shop Foreman is authorized to:

Assist, supervise and direct all personnel in the maintenance department.

Determine that all technical data on all articles repaired by the Company are secured and kept current with the latest revisions . . .

See that rejected and unserviceable parts are handled in such a way as to prevent their re-use as serviceable parts.

Ascertain that all inspections are properly performed . . .

[r]eport any Suspected Unapproved Parts to the Director of Maintenance . . . .

Although Bergen directs maintenance employees' work at the Linden location, the Board's determination regarding an individual's authority to hire, fire and discipline is "dependent not only upon whether the individual possess(es) such authority, but also on whether (he/she) actually exercise(s) this authority or effectively recommend(s) actions in these areas." *Challenge Air Cargo, above at 515; So. Jersey Airways, Inc.*, 13 NMB 404 (1986); *British Airways, Inc.*, 7 NMB 369 (1980). There is no evidence that Bergen hires, disciplines or discharges employees, or effectively recommends such personnel decisions. Further, there is no evidence that Bergen has the authority to authorize or grant overtime. Additionally, there is no evidence that Bergen participates in the creation of carrier policy or budget or spends carrier funds. Ensuring that inspections are performed and monitoring unserviceable parts does not constitute creating carrier policy or committing carrier funds. According to the Carrier's Flight Operations Manual, Mechanics report to Lead Mechanics who report to the Shop Foreman who then reports to the Director of Maintenance. The cumulative evidence of management status is not compelling in this case.

Accordingly, although Bergen does possess some of the indicia of management official status as set forth in Manual Section 9.211, when the Board considers the evidence cumulatively, it finds that there is insufficient

evidence to establish that Bergen is a management official. Therefore, **William Bergen** is eligible to vote and will remain on the List.<sup>3</sup>

By direction of the NATIONAL MEDIATION BOARD.

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

Mary L. Johnson  
General Counsel

---

<sup>3</sup> The IAM's appeal rests largely on its contention that Liberty has not been forthcoming during the Investigation. Accordingly, the IAM argues that Liberty's conduct requires the Board to rule Bergen ineligible to vote. The Board notes that the Carrier responded to all of the Investigator's requests for information.