



NATIONAL MEDIATION BOARD
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Re: NMB Case No. R-7228
Continental Airlines, Inc.

Participants:

This determination addresses the January 26, 2010 appeal filed by Continental Airlines, Inc. (Continental or Carrier) of Investigator Eileen Hennessey's January 21, 2010 eligibility ruling. For the reasons discussed below, the appeal is denied.

I.

Procedural Background

The application in this case was filed on October 16, 2009 and the Carrier filed the List of Potential Eligible Voters (List) on the same day. The Board authorized an election on December 9, 2009, and on December 10, 2009, the Investigator set the deadline for filing challenges and objections to the List, which was December 17, 2009. The Participants filed timely challenges/objections and responses in this matter and the Investigator issued a decision on those challenges on January 14, 2010. The Investigator's January 14, 2010 ruling is not at issue in this decision.

On January 15, 2010, the Carrier contacted the Board seeking to add 43 employees to the List stating that it had inadvertently omitted the employees from the List. On January 20, 2010, the International Brotherhood of Teamsters (IBT) objected to the inclusion of these employees to the craft or class stating that the Carrier's failure to raise the issue during the challenge and objection period renders its submission untimely.

II.

Challenges and Objections

The Carrier states that the job titles "Hub Operations Team Leader" and "Hub Operations Ramp Control Agent" did not exist in previous elections involving Continental's Fleet Service Employees and were excluded because Continental "failed to account for the change in job titles and associated job codes within our human resources information system." The 43 individuals were sent challenged ballots on January 19, 2010.

The IBT argues that Section 8 of the Board's Representation Manual (Manual) sets forth an orderly process for challenging the List. Specifically, the IBT maintains that Manual Section 8.1 establishes a cutoff for challenges and objections and states that challenges filed after the deadline will not be considered "absent extraordinary circumstances." These procedures for "correcting the List," the IBT states, call for challenges to be made in a timely fashion so that all disputes regarding eligibility on the basis of job classification are aired well in advance of the tally date. The IBT further states that this allows the participants a "fair chance to contact likely voters regarding their choice."

On January 21, 2010 the Investigator ruled the 43 employees in question ineligible. The Investigator stated that "[t]he Carrier's provision of 43 additional names to the List, coming 3 months after it provided the List and one month after the deadline to file challenges and objections to the list, is untimely. Therefore, the . . . [classifications of] 'Hub Ops Team Leader' and 'Hub Ops Ramp Control Agent' are ineligible."

III.

Appeal

Continental argues that extraordinary circumstances exist in this case because the Hub Operations Team Leaders and Ramp Control Agents, under the Hub Operations Coordinator job classification, were eligible to participate in the earlier elections among Continental's Fleet Service Employees. Continental states that it was a clerical error that it did not include the two

new classifications in the Fleet Service craft or class. Continental states that it “discovered this error when an unusual number of individuals within these positions reported [to the Carrier that] they had not received voting instructions.” The Carrier provided evidence that “with very few exceptions, these individuals were eligible to vote in the prior election in Case No. R-7130 in 2007-2008.” The Carrier argues that “there is no dispute regarding their current eligibility – in terms of their existing employer-employee relationships, non-management status and community of interest – within this craft or class. Their exclusion is based solely on a ‘technicality’ as to the timing of their inclusion on the list of voters.” The Carrier asserts that “[t]hrough no fault of their own, and based on a simple clerical error, these employees were not included in the initial eligibility list.”

In its appeal, the Carrier states that the “Board, however, now has the opportunity to promote the substantive rights of these employees over rote application of its representation procedures and demonstrate its respect for employee choice.” The Carrier maintains that its notice to the Board of the “inadvertent exclusion” of the Hub Operations Team Leader and Hub Operations Ramp Control Agent positions from the List is neither a challenge nor objection as those terms are used in the Manual. Moreover, Continental cites *Comair v. National Mediation Bd.*, 159 L.R.R.M. 2872 (D.D.C. 1998)¹ to support its contention that “the Board has corrected - and should correct where practical – clerical or process errors to ensure that employees are not disenfranchised.”

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).

On appeal the Carrier presented evidence that “with very few exceptions, these individuals were eligible to vote in the prior election in Case No. R-7130 in 2007-2008.” This evidence was not submitted to the Investigator. Manual Section 10.2 states that “[a]bsent extraordinary circumstances, evidence submitted on appeal will not be considered by the NMB unless it was submitted to the Investigator.” Therefore, this evidence will not be considered.

¹ In *Comair*, the court upheld the Board’s decision to re-tally the ballots to include 11 ballots which were misplaced and delivered late by the United States Postal Service.

The Carrier argues that the deadline for challenges and objections does not apply to this situation because its request to add two classifications of employees to the List “is neither a challenge nor objection as those terms are used in the Manual.” We disagree. Manual Section 8.0 defines challenges as follows: “Challenges involve issues concerning employee eligibility but do not include employment status changes. Status changes are governed by Manual Section 12.3. Objections involve all other issues or questions.” Status changes are defined in Manual Section 12.3 as including but “not limited to: death, retirement, promotion to management official, transfer out of craft or class, resignation, and working for another carrier. Employees who leave the craft or class prior to the ballot count are not eligible.” The issue to be addressed in this determination does not involve a change in employee status as defined by Manual Section 12.3. At issue is whether two job classifications created since the last representation election involving Continental’s Fleet Service Employees -- Hub Operations Team Leaders and Hub Operations Ramp Control Agents -- are properly within this craft or class. The Carrier says these classifications are “indisputably” within the craft or class. However, because the issue was raised after the challenge period, the IBT did not have a meaningful opportunity to dispute the claim. The Carrier also argues that since the employees in question were sent challenged ballots and most of them have been eligible to participate in past representation elections, “there is no existing barrier to their participation in this election.” Again, the Carrier neglects to address the issue at hand, eligibility. Normally an employee is considered eligible because they are included on the original list and withstand the challenge process. The Carrier has circumvented this process as it pertains to the eligibility of Hub Operations Team Leaders and Hub Operations Ramp Control Agents.

The Carrier’s argument contains contradictory elements – that these employees were left off of the List due to a “simple clerical error” and that the “simple clerical error” constitutes “extraordinary circumstances” according to the Manual.² Continental analogizes the facts in this case to those in *Comair v. National Mediation Bd.*, above. However, *Comair* is distinguishable from this case because *Comair* involved an error on the part of a disinterested party, the United States Postal Service and that case did not involve any eligibility issues – the employees in the *Comair* voted on time.

The Board’s procedures regarding challenges and objections exist to provide an orderly and fair structure for establishing voter eligibility. Departures from this procedure can only be justified by extraordinary circumstances. A “simple clerical error” by a participant, however inadvertent, does not constitute “extraordinary circumstances” under Manual Section 8.1.

² Manual Section 8.1 states “[a]bsent extraordinary circumstances, challenges and objections not filed by the deadline will not be considered.”

For the Board to rule otherwise could diminish the challenge and objection process and open it to manipulation by the participants.

Accordingly, for the reasons stated above the Board denies the Carrier's appeal and the 43 Hub Operations Team Leaders and Hub Operations Ramp Control Agents are ineligible and will not be added to the List.

By direction of the NATIONAL MEDIATION BOARD.

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

Mary L. Johnson
General Counsel