NATIONAL MEDIATION BOARD
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Re: NMB Case No. R-7310
American Airlines/CWA

Participants:

This determination addresses the Motion for Reconsideration filed by American Airlines, Inc. (American or Carrier) on April 23, 2012. American seeks reconsideration of the National Mediation Board's (Board or NMB) April 19, 2012 decision to authorize an election for American's Passenger Service Employees. *American Airlines, Inc.*, 39 NMB 341 (2012).

The Communications Workers of America (CWA) filed its response to the Motion for Reconsideration on April 25, 2012. American responded to the CWA's response on April 26, 2012. For the reasons discussed below, the Board finds that American's Motion fails to state sufficient grounds to grant the relief requested.

I.

CONTENTIONS

AMERICAN

American requests the Board to reconsider its decision authorizing an election among the Passenger Service Employees on American. American contends that: (1) the Board erred in failing to apply the 50 percent showing of interest requirement mandated by the February 14, 2012 amendments to the Railway Labor Act (RLA or Act); (2) the Board improperly created a new "furloughee eligibility" rule; and (3) the Board should suspend the election schedule pending the Board's ruling on this Motion for Reconsideration.

In a subsequent filing, American requests that the Board solicit the opinion of the Attorney General of the United States regarding the applicability of the 50 percent showing of interest requirement.

CWA

CWA argues that American's Motion for Reconsideration should be denied because: (1) the amendments to the RLA do not apply retroactively; and (2) American's arguments regarding the 749 furloughees are merely reassertions of factual and legal arguments the Carrier previously raised with the Board.

II.

DISCUSSION

A. Motion for Reconsideration

The Board's Representation Manual (Manual) Section 11.0 states:

> Any motions for reconsideration for Board determinations must be received by the General Counsel within two (2) business days of the decision's date of issuance. . . . The motion must state the points of law or fact which the participant believes the NMB has overlooked or misapplied and the grounds for the relief sought. Absent a demonstration of material error of law or fact or circumstances in which the NMB's exercise of discretion to modify the decision is important to the public interest, the NMB will not grant the relief sought. The mere reassertion of factual

> and legal arguments previously presented to the NMB is insufficient to obtain relief.

B. Decision on Reconsideration

The Board only grants relief on Motions for Reconsideration in limited circumstances:

> The Board recognizes the vital importance of the consistency and stability of the law as embodied in . . . NMB determinations . . . . Accordingly, the Board does not intend to reverse prior decisions on reconsideration except in the extraordinary circumstances where, in its view, the prior decision is fundamentally inconsistent with the proper execution of the NMB's responsibilities under the Railway Labor Act.

Virgin Atlantic Airways, 21 NMB 183, 186 (1994); *see also Portland & Western R.R.*, 31 NMB 193 (2004); *Mesa Airlines, Inc./CCAir, Inc./Air Midwest, Inc.*, 30 NMB 65 (2002).

1. Showing of Interest Requirement

CWA submitted an Application for Investigation of a Representation Dispute (Application), accompanied by the requisite authorization cards, on December 7, 2011. At that time, 29 C.F.R. §1206.2(b) (1947) was in effect and stated:

> Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

The 35 percent showing of interest requirement "is not imposed upon the Board by statute; rather the Board adopted it as a regulation presumably to avoid frivolous elections and determination proceedings." *American Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 866 (2nd Cir. 1978). *See also Air Florida*, 8 NMB 571, 575 (1981).

Furthermore, Manual Section 3.601 stated:

> If the craft or class involved in the investigation is represented and covered by a valid existing contract between any such representative and the carrier, the application must be supported by a majority (more than 50%) of valid authorizations from individuals in the craft or class. In all other circumstances, an application must be supported by at least thirty-five (35) percent of valid authorizations from individuals in the craft or class.

On February 14, 2012, the Federal Aviation Administration Modernization and Reform Act of 2012 (FAA Reauthorization Act) became effective, including amendments to the RLA. These amendments included, inter alia, language regarding the showing of interest required to authorize an election. Specifically, the amended language states:

> Twelfth. Showing of interest for representation elections. The Mediation Board, upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Mediation Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.

Pub. L. No. 112-95, § 1003, 126 Stat. 11, 147 (2012).

However, there is no statutory language or legislative history indicating that Congress intended for the amendments to the RLA to be applied *retroactively*. Applying *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), American contends that “since the Board calculated the CWA’s showing of interest on April 19, 2012 – two months after the effective date of the FAA Reauthorization – the 50 percent showing of interest must be applied.” In *Landgraf, above,* the Court set out a two-part test for a retroactivity analysis. If Congress has expressly stated that a statute applies retroactively or prospectively, that language controls. *Id.* at 280. If Congress has not provided direction, however, then the court must determine whether applying the statute to the case at hand would have a retroactive effect. *Id.* Accordingly, the statute cannot have a retroactive effect on a party’s rights or liability without clear congressional intent. The Dissent confuses the applicable standard in concluding that “If

Congress had intended to require that the new standard would apply only to applications filed after the effective date of the legislation, it could have -- and I believe would have -- done so in a more explicit fashion." Under *Landgraf, above,* if Congress intended for the 50 percent showing of interest to apply retroactively, it was required to explicitly state it.

A more recent case, discussing the second part of the two-part test introduced in *Landgraf,* articulated this step further. A court:

> Must determine whether application of [the rule] would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective. The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed and guided by 'familiar considerations of *fair notice, reasonable reliance, and settled expectations'.*

Martin v. Hadix, 527 U.S. 343, 357-58 (1999) (Emphasis added).

Both CWA and American relied on the 35 percent showing of interest requirement in place at the time of application. Additionally, the Board's decision to apply the 35 percent showing of interest requirement was based on the authorization cards submitted by the cut-off date. To apply the new requirement to an Application filed two months before the 50 percent showing of interest requirement took effect would most certainly, "upset the reasonable expectation of the parties." *See Martin, above*. The court in *Pine Tree Med. Assocs.*, 127 F.3d 118 (1997) (cited by the Dissent) noted, "There is an obvious difference between rejecting an application because it fails to meet a new regulation governing the proper format or preparation of applications that was promulgated after that application was filed, and rejecting an application because the substantive standards for granting the application on the merits have changed . . ." The change in rule addressed in *Pine Tree Med. Assocs., above,* applied to the merits rather than the actual application requirements and the court found that "fair notice and retroactivity concerns are not raised." Here the issue is not the outcome of an election, but instead the threshold to conduct an election under the Board's procedures.

American also argues that since CWA was on notice of the 50 percent showing of interest requirement as of February 14, 2012, "if it wished to avoid the application of that requirement to this representation application, it should have withdrawn its application and asked the Board to permit it to continue collecting cards. It did not do so and the 50 percent showing of interest

requirement now applies." As noted above, American's interpretation is inconsistent with the Court's retroactivity analysis. Furthermore, the Board need not decide whether CWA can withdraw its application or seek leave to submit additional cards as suggested by both American and the Dissent. Additionally, the Board need not discuss the one-year dismissal bar as suggested by the Dissent. As noted above, both CWA and American relied on the 35 percent showing of interest requirement as dictated by the Board's Rules, Manual, and over 60 years of case law at the time the application was filed with the Board with the expectation that the Board would authorize an election if the cards submitted met that threshold.

The Carrier speculates that the CWA could not satisfy a 50 percent showing of interest requirement. The Board keeps all authorizations confidential, including the number of authorizations submitted. *See* Manual Section 3.5. Furthermore, the Board's Rules at 29 C.F.R. § 1208.3(a) provide, in part, that individuals in representation matters "must have assurance" that "confidential information disclosed to . . . the NMB will not be divulged . . . ." 29 C.F.R. § 1208.4(b) provides, in part, "the Board will treat as confidential the evidence submitted in connection with a representation dispute and the investigatory file pertaining to the representation function." *See also* Manual Section 3.5.

The Board does not disclose the showing of interest because it is confidential commercial information supplied by applicants, and disclosure impairs both the ability of organizations to conduct campaigns and employee free choice. *Eastern Air Lines, Inc., Continental Airlines, Inc. & Continental Airlines Holdings, Inc.*, 17 NMB 432, 436 (1990). *See also Delta Air Lines, Inc.*, 27 NMB 484 (2000); *US Airways, Inc.*, 27 NMB 86, 88 (1999); *Wisconsin Central Transportation Corp. Railroads*, 24 NMB 307, 317 (1997). This policy has been upheld by Federal Courts. *See American Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863 (2d Cir. 1978).

Therefore, the Board will not comment on CWA's specific showing of interest in this case.

2. <u>Furloughed Reservations Representatives</u>

In its determination, the Board considered the cumulative evidence and arguments submitted by the participants in finding that the furloughed Reservations Representatives did not have a reasonable expectation of returning to work in their former positions. The Board found that the majority of the employees at issue were furloughed in 2003; the reservations offices were closed; and none of those employees have been recalled into their same office-based positions. Furthermore, the record established and the Board stated, "the furloughees lack <u>unconditional</u> recall rights to positions other than their former office-based positions." (Emphasis added).

In the Motion for Reconsideration, American challenges the Board's finding that the Carrier's furloughed Reservations Representatives do not have a reasonable expectation of returning to work. American argues that the Board disregarded evidence that American intended to offer recall to many of the furloughed Reservations Representatives; did offer recall to 300 furloughees from Norfolk; and that some of those individuals are returning to work for American as Home-Based Representatives. The Carrier also challenges the Board's consideration of American's bankruptcy proceedings. The Carrier did not dispute the Board's finding that the furloughees' only had unconditional recall rights to their former positions. Additionally, the Carrier did not dispute the fact that none of the furloughed Reservations Representatives have returned to their former positions. Finally, the Carrier failed to produce any evidence that American intended to return the furloughees to their former positions. American merely reasserts factual and legal arguments already considered by the Board.

Contrary to the Carrier's assertions, the Board relied on the evidence in the record regarding the present interests of the furloughees. There is nothing in the record to indicate that the Carrier is going to offer unconditional recall rights to these individuals to their former office-based positions at reservation centers now or in the future. In fact, the record establishes that the closed reservations centers will not re-open; none of the furloughees were offered recall to their former office-based positions; and none of the furloughees have returned to their former positions.

Additionally, the Board merely took "administrative notice" that American Airlines is currently in bankruptcy proceedings. The Board very clearly stated that it "does not attempt to predict the future" but noted that given the bankruptcy proceedings, it seems unlikely that the Carrier will be recalling the furloughed Reservations Representatives into office-based reservations positions before their recall rights expire in the next year. The Board did not rely on the bankruptcy proceedings as the pivotal factor in determining that the furloughed Reservations Representatives did not have a reasonable expectation of returning to work in their former positions to which they have recall rights.[1]

3. Election Schedule

The Carrier requests that the Board suspend the election pending this Motion for Reconsideration and seek the opinion of the Attorney General of the United States regarding the applicable showing of interest requirement.

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[1] The furloughees who are working as Home-Based Representatives will be addressed in a future status ruling.

It is the NMB's longstanding policy consistent with Section 2, Ninth, to resolve representation disputes as expeditiously as possible. *See Brotherhood of Ry. & S.S. Clerks*, 380 U.S. 650, 668 (1965) (speed is an RLA "objective of the first order"); *In re Continental Airlines Corp.,* 50 B.R. 342, 358 (S.D. Tex. 1985), *aff'd, per curiam*, 790 F.2d 35 (5th Cir. 1986) ("The RLA furthers Congress's strong policy of guaranteeing employees' the right to organize and collectively bargain free from any carrier interference or influence…delays in NMB pre-certification proceedings seriously hamper such organizational efforts….").

Furthermore, it is the Board's consistent practice to proceed with representation elections unless the Board itself finds it necessary to delay due to unusual or complex issues or is barred by court order. *Tower Air*, 16 NMB 326, 328 (1989); *Air Florida*, 10 NMB 294, 294 (1983). *See also Chautauqua Airlines, Inc.*, 21 NMB 226, 227-28 (1994); *Sapado I*, 19 NMB 279, 282 (1992); *USAir,* 17 NMB 69 (1989). Additionally, the Board has a general practice of not changing the election dates to avoid voter confusion and to protect the stability of the voting process. *Delta Air Lines, Inc.*, 37 NMB 337, 338 (2010); *Continental Airlines, Inc.*, 35 NMB 42, 48 (2008); *United Air Lines, Inc.*, 27 NMB 221, 227 (2000).

The Board declines to seek the advice of the Attorney General of the United States on this issue. Such action would unnecessarily delay the representation election. As stated above, the NMB strives to resolve representation disputes as expeditiously as possible.

The Carrier requested, and the Board granted, both of the Carrier's requests for extensions of time in which to file the address labels. The address labels were due on Wednesday, May 2, 2012.[2] In this case, the Board finds that suspending the election schedule would be at odds with its statutory mandate. Therefore, American's request that the Board suspend the election schedule is denied.

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[2] On May 2, 2012, American filed a Complaint in the Northern District of Texas seeking a declaration that would obviate the need for it to comply with the Board's order to submit mailing labels pending resolution of the Complaint.

CONCLUSION

American failed to demonstrate a material error of law or fact or circumstances on which the Board's exercise of discretion to modify the decision is important to the public interest. Furthermore, the Board finds that American has failed to show that the prior decision is fundamentally inconsistent with the proper execution of the Board's responsibilities under the RLA.

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson
General Counsel

Member Dougherty, dissenting.

I dissent from the Majority decision because a significant body of case law from multiple federal courts of appeals makes clear that the NMB is required to apply the new showing of interest standard mandated by Congress, and its failure to do so violates the law.

In the FAA Reauthorization Act, Congress unambiguously instructed that the NMB "shall not direct an election . . . unless [it] determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class." When this legislation became effective on February 14, 2012, the NMB had not yet made a determination on the CWA's representation application. The analysis of whether or not the NMB should apply the new 50 percent standard to the CWA's application must begin with the well-settled principle that an agency "must apply the law in effect at the time it renders its decision." *Bellsouth Telecomms., Inc. v. Southeast Telephone, Inc.*, 462 F. 3d 650, 657 (6th Cir. 2006) (citing *Landgraf* at 264)(emphasis added). An exception to this mandate exists where the law would have an impermissibly retroactive effect.[3] *Bellsouth* at 657. Thus, the

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[3] Contrary to the Majority decision, I am not confused about the applicable standard, and I agree that if Congress intended for the 50 percent showing of interest to apply retroactively it was required to state it explicitly. I also agree that Congress did not explicitly authorize the Board to apply the statute retroactively in the traditional sense. However, I strongly disagree that applying the new law when determining whether to direct an election based on CWA's application is a retroactive application. The edict to "not direct an election . . . unless the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class" gives instruction to the Board for future rulings. The Board's ruling on the CWA application post-dates the effective date of the legislation and thus is a future ruling. Application of the legislation to CWA's application is prospective and must be

NMB is required to apply the new 50 percent standard to the CWA's application unless doing so would have an impermissibly retroactive effect. Cases from several different courts of appeals instruct that there is no impermissible retroactivity implicated by applying the new law to the CWA's application in this case.[4]

The CWA contends that the NMB may not apply the new law because it filed its representation application prior to the effective date of the legislation and thus will suffer "new legal consequences" or a "new disability" if the 50 percent standard is applied instead of the 35 percent standard.[5] This position is not supported by the relevant case law. Federal Courts of Appeals have consistently held that filing an application with an agency is a preliminary step and does not trigger a Landgraf retroactivity finding because it does not confer a right or constitute a sufficiently final event to create a basis for determining that liabilities have been increased, new duties have been imposed or new legal consequences have attached. *Bellsouth*, 462 F. 36 at 660-61 ("[F]iling an application with an agency does not generally confer upon the applicant an inviolable right to have the agency rule on the application pursuant to the regulations in effect at the time of the filing."); *Pine Tree Med. Assocs. v. Sec. of Health and Human Servs.*, 127 F. 3d 118, 121 (1st Cir. 1997)("[T]he mere filing of an application is not the kind of completed transaction in which a party could fairly expect stability of the relevant laws as of the transaction date."); *Durable Mfg. Co. v. United States Dep't of Labor*, 578 F. 3d 497, 503 (7th Cir. 2009)("Because [an application] is not a final determination or event, no new legal consequences would affect the application as a result of the [application of

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applied unless it has impermissible retroactive effect. Moreover, the instruction to require a 50 percent showing of interest does not disturb any existing representations or collective bargaining relationships and instead affects only future representation rights. Thus, the legislation is, by its terms, prospective not retroactive. *See Landgraf* at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

[4] I disagree that the fact that the new legislation states "upon receipt of an application" even suggests that the new standard applies only to applications filed after the law's effective date. A more logical reading of this language is simply that a filing of an application is a condition precedent to the NMB directing an election under *any* standard. If Congress had intended to require that the new standard would apply only to applications filed after the effective date of the legislation, it could have -- and I believe would have -- done so in a more explicit fashion. This ambiguous reference is not sufficient to overcome the explicit effective date in the bill, the explicit directive to "not direct an election" with less than a 50 percent showing of interest, and the general rule, mentioned above, that an agency must apply the law in effect when it renders its decision.

[5] CWA also contends that its "demonstration of its showing of interest" occurred prior to the new statute's enactment. This is a misnomer because, as discussed further below, a showing of interest is not demonstrated until the NMB rules it has been demonstrated, and this had indisputably not occurred prior to the effective date of the 50 percent law.

the new standard].”); *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997)(finding no increased liability, new duties, or impairment of a right resulting from agency applying standards in place at time of ruling instead of more favorable standards in place at time application was filed); *see also, Hispanic Info & Telecomms. Network v. FCC*, 865 F. 2d 1289, 1294-95 (D.C. Cir. 1989)(“The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed.”); *Orion Communications Ltd. v. FCC*, 2000 WL 816046, *1 (D.C. Cir. 2000)(“precedent in this circuit clearly establishes that the filing of an application does not create a vested right”).[6]

In *Bellsouth*, a new telephone service provider filed an application with a state communications commission to opt in to certain terms of an existing contract held by an incumbent service provider. The applicable FCC rules in effect at the time were very favorable to the new provider; however, the FCC subsequently issued less favorable rules before the state commission ruled on the application, and, as a result of the change, the state commission denied the application. The Sixth Circuit conducted the Landgraf retroactivity analysis and determined the new rules were not applied with impermissibly retroactive effect because the filing of the application did not give the applicant a right to the relief sought and thus did not create “the kind of settled expectation protected by . . . [the] presumption against retroactivity.” *Id.* at 663. The Court stated that the applicant’s “request was not the exercise of a vested right because its . . . application did not mature until the [agency] gave its approval.” *Id.* at 662. The Court found it particularly persuasive that, even under the old standard, the applicant’s path to success was not guaranteed, and the applicant had to meet certain other criteria and withstand challenges on other grounds. *Id.* at 659. The conditional nature of the applicant’s expectation of receiving the benefit/relief sought in the application led the Court to conclude that the applicant “simply did not have a settled expectation, ‘let alone a vested right,’ that the [old rule] would govern its [application].” *Id.* at 663.[7] In its analysis, the Court specifically acknowledged that the applicant expected to benefit from the old rule when it filed its application, but determined that “the fact that parties engage in conduct on the assumption that the law will allow them to act or to benefit in a certain manner is not a sufficient reason to refuse to apply a new law that renders that assumption misplaced.” *Id.* at 662.

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[6] I am not persuaded by the Majority's attempt to distinguish *Pine Tree Med. Assocs., above,* as I dispute that the showing of interest requirement, a fundamental prerequisite to having an election, relates to mere "proper format or preparation" of representation applications as suggested by the Majority.

[7] The Court also found that use of the new rules did not subject the applicant to any new liabilities. *Id.* at 661, 665.

All of the other cases cited above also involve applications filed with agencies under certain rules or standards that were then changed before the agencies ruled on the applications. In all of these cases, the courts found the filing of the application prior to the rule change insufficient to prevent the agency from applying the new standards. The same is true in this case. CWA's filing of a representation application does not lock in a right to the relief/benefit sought -- an election. To the contrary, there are a number of steps that must occur before an applicant is entitled to an election: the Board must determine the validity of the authorization cards, the number of valid cards, the eligibility of the signators, the proper scope of the eligibility list and craft or class, among other issues. And all of these matters are subject to challenges by the carrier. Upon filing a representation application, an applicant may hope that its request for an election will be granted, but it has no guarantee. Thus, the applicant has no guarantee that its application will be granted based on the rules in effect at the time of its filing.

The CWA's expectations were necessarily conditional, and the NMB's use of a new standard passed after the filing of its application would not (1) impair a right (because no right vested with the filing of the application); (2) increase liability for past conduct (because denial of an election cannot constitute "punishment" or increased liability where there was no guaranteed right to an election); or (3) impose new duties for transactions already completed (because filing the application does not complete a transaction). The fact that CWA acted in reliance on the 35 percent standard when it collected authorization cards and submitted its application does not dictate a different result. As the *Bellsouth* court concluded: "the fact that parties engage in conduct on the assumption that the law will allow them to act or to benefit in a certain manner is not a sufficient reason to refuse to apply a new law that renders that assumption misplaced." *Bellsouth* at 662; *see also Landgraf* at 270 n24 ("Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct."); *see also DIRECTV, Inc. v. FCC*, 110 F.39 816 (D.C. Cir. 1997)(finding change in an FCC rule was not impermissibly retroactive even though some businesses spent millions of dollars on a project in reliance on the old FCC rule); *cf. Eco Mfg. LLC v. Honeywell, Inc.*, 357 F. 3d 649, 652 (7th Cir 2004)(rejecting retroactivity argument because "all [the plaintiff] ever has had to go on is a statutory rule; it did not have a contract or a license or a judgment").

The relevant case law and our procedures for processing representation applications make clear that applying the 50 percent showing of interest requirement to the CWA's representation application would not have an impermissibly retroactive effect, and thus the Majority was bound to apply the new law.

Even if application of the new standard to CWA's application implicated retroactivity concerns, there are other options open to the Board that would

address these concerns. Applying the new standard to CWA's application as it currently stands and dismissing the application with a one year bar against filing a new application are not only the actions available to the Board. The Board has broad discretion to define the period during which it will accept authorization cards, and the Board could provide CWA an additional period of time to collect cards before ruling on its application under the new standard.[8] Although the Board has a policy of cutting off acceptance of authorization cards on the date the carrier submits a list of eligible voters (in this case, that date was December 7, 2011), the Board has the discretion to reopen – and has in the past reopened -- the period of card acceptance. In this case, the Board clearly has the authority and the discretion to allow CWA a period of additional time to submit more authorization cards before it rules on its application. Similarly, if the Board were to apply the new 50 percent rule and dismiss CWA's application for an insufficient showing of interest, the Board could allow CWA to re-file immediately (or at any time) with a new application and new showing of interest. The NMB rule barring an applicant from filing a new application for one year after an application has been dismissed specifically makes exceptions for "unusual or extraordinary circumstances." 29 CFR 1206.4. The NMB has altered the one-year bar in the past and surely has the discretion to do so in the unusual circumstances presented here. Either or both of these steps would address any argument that the new standard has retroactive effect. If the Majority has concerns about retroactivity, it should use one of these options rather than ignore a significant legislative mandate.

Because Congress has acted to require a showing of interest of not less than 50 percent, the Board must either follow the substantial precedent and apply the new law to CWA's current application and/or use its discretion to allow CWA more time to collect and submit cards before it applies the new law to its application and/or allow CWA to re-file at any time if the application of the new law results in the dismissal of CWA's application. The Majority's decision to reject any of these avenues and instead order an election without a showing of interest from at least 50 percent of the craft or class violates the FAA Reauthorization Act and thwarts clear will of Congress. Because I would have agreed to any of the above options and because I believe the law requires the Board to follow one or a combination of these options, I dissent from the Majority's decision to order an election without a showing of interest from at least 50 percent of the craft or class in this case.

I also dissent from the Majority decision regarding the furloughed Reservations Representatives for the reasons stated in my original dissent from the underlying decision.

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[8] The Board does not need a request from CWA to take this action.