



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the

PILOTS

alleging a representation dispute
pursuant to Section 2, Ninth, of
the Railway Labor Act, as
amended

involving employees of

AITHERAS AVIATION GROUP, LLC

41 NMB No. 52

CASE NO. R-7382

FINDINGS UPON
INVESTIGATION

September 9, 2014

This determination addresses election interference allegations filed by Aitheras Aviation Group, LLC (Aitheras or the Carrier) on July 25, 2014, involving the Carrier's employees in the Pilots craft or class who elected the Office of Professional Employees International Union (OPEIU or the Organization) on July 16, 2014. For the reasons below, the National Mediation Board (NMB or Board) finds no basis for conducting another election or for further investigation.

Procedural Background

On May 5, 2014, OPEIU filed an application with the Board pursuant to the Railway Labor Act (RLA)¹ alleging a representation dispute involving the craft or class of Pilots at Aitheras. At the time the application was received, these employees were unrepresented. The Board assigned Angela I. Heverling to investigate.

¹ 45 U.S.C. § 151, *et seq.*

Because the initial List of Potential Eligible Voters (List) provided by the Carrier included the Carrier's Chief Executive Officer (CEO) and other individuals whose job titles indicated that they had managerial authority, the Investigator requested further information about those employees. On June 11, 2014, the Investigator determined that CEO/President George Katsikas, Director of Operations Rich Newenhisen, and Chief Pilot Jamie Hocutt were management officials under the NMB Representation Manual (Manual) Section 9.211 and, therefore, ineligible to vote. On that date, the Board found that a dispute existed and authorized an election. On June 12, 2014, the Investigator sent a letter to the participants advising them when additional challenges and objections to the List could be submitted.

On June 17, 2014, the OPEIU challenged the inclusion on the List of Adrianos Stavole, alleging that Mr. Stavole was actually a scheduler who did not fly on a regular basis. The Carrier did not respond to the Organization's submission regarding Mr. Stavole. On June 18, 2014, the Carrier submitted an objection to the Investigator's rulings regarding Mr. Hocutt and Mr. Newenhisen. A July 3, 2014 eligibility ruling again determined that Mr. Newenhisen and Mr. Hocutt were management officials. The letter provided appeal dates. The Carrier, however, did not appeal the determinations regarding Mr. Newenhisen and Mr. Hocutt.

Despite Aitheras' failure to follow the procedures set out in the Board's June 12, 2014 letter, the Investigator provided the Carrier with an additional opportunity to provide evidence regarding Mr. Stavole. The Organization objected to this. The Carrier submitted evidence, but the Investigator determined that the evidence did not establish that Mr. Stavole was eligible to vote. Aitheras appealed this determination, and the Board denied the appeal as untimely on July 16, 2014. *See Aitheras Aviation Group, LLC*, 41 NMB 135 (2014).

An election was held on July 16, 2014, and the OPEIU was certified as the representative of the craft or class of Pilots on the following day. *Aitheras Aviation Group, LLC*, 41 NMB 139 (2014). The Carrier filed interference allegations against the Board on July 25, 2014, requesting that the election be rerun, and the Organization provided a response on July 29, 2014.

Interference Allegations

The Carrier makes the following allegations against the Board and Investigator:

1. An employee on the List, Anthony Korzhov, was disenfranchised because he never received Voting Instructions or an Access Code.
2. The Board has steadily eroded the number of eligible voters in this case. As evidence of this, the Carrier notes that the number of eligible voters listed in the Board's final eligibility ruling differed from the published number of eligible voters on the certification issued on July 17, 2014.
3. The Board violated Mr. Hocutt and Mr. Newenhisen's statutory right to choose a representative by finding them ineligible to vote when they do not possess the requisite managerial authority.
4. The Board interfered with and deprived Mr. Stavole's statutory right to select a representative by finding him ineligible to vote without conducting a preponderance check.

Anthony Korzhov

The Carrier alleges that the NMB disenfranchised Mr. Korzhov because he did not receive an Access Code. The Carrier provided a declaration from Mr. Korzhov stating that he never received voting instructions. The Board sent voting instructions according to its usual procedures. The Carrier provided address labels as requested in the June 11, 2014 Wire and described in Manual Section 12.1. The Board used the address labels provided by the Carrier to mail voting instructions.

The NMB did not receive a request from Mr. Korzhov for a new Access Code. In his declaration, Mr. Korzhov does not allege that he requested an Access Code after failing to receive one in the mail. Instructions for receiving duplicate voting instructions and an Access Code were on the Notice of Telephone and Internet Voting posted in the flight operations room at the

Carrier's facility.² The Notice posted by the Carrier in this case stated the following:

If you do not receive your Access Code by June 30, 2014, you may contact the NMB to request a duplicate Access Code. Your request must be in writing and signed by you. The request must be in an individual envelope. No group requests are accepted. Requests by telephone or facsimile are not accepted. Mail the request to: NMB, Office of Legal Affairs, 1301 K Street, NW, Suite 250 East, Washington, DC 20005. **No requests will be accepted after July 9, 2014. . .**

(emphasis in original). These instructions are also described in Manual Section 13.205. In addition, the Organization provided eligible voters with a form to submit to the Board if they did not receive voting instructions.

Despite the fact that the method for requesting an Access Code is plainly described on notices posted in work areas and the Organization provided additional information to employees about how to request duplicate voting materials, Mr. Korzhov did not request an Access Code. Mr. Korzhov was not disenfranchised by the Board. He was accorded the same opportunity to choose a representative as every other eligible employee and he chose to not take steps to receive a duplicate Access Code.

Number of Eligible Voters

The Carrier alleges that there was an unexplained drop in the number of eligible voters, stating that “[t]he NMB’s handling of this case has been marked by a steady erosion of the number of eligible voters. . . . The drop in the number of eligible voters to 15 as of the tally, coupled with Mr. Korzhov’s failure to receive voting instructions and an access code, means at least two eligible persons were not permitted to exercise their statutory right to vote.” The Carrier alleges that there was no explanation for the drop in the number of eligible voters after the July 11, 2014 eligibility ruling, which stated that there were 16 eligible voters, and the certification, which listed the number of eligible voters as 15.

² On May 27, 2014, the Carrier provided a declaration from Chief Operating Officer Kevin Weir stating the following about the Notice of Telephone and Internet Voting: “The Notice was posted on May 15, 2014 on the bulletin board in the Flight Operations Room in the Company’s facility located at 2301 N. Marginal Road, Cleveland, OH 44114. That is where employee notices and information are typically posted.”

The number of eligible voters in the July 11, 2014 letter reflected all status changes and eligibility rulings up to and including that date. The letter included a rationale for every voter who was removed from the List. As stated in that letter, “the number of undeliverables will be communicated to the participants at the tally.” As per the Board’s usual practice and procedure, because one ballot was returned as undeliverable, one voter was removed from the List. This was communicated to the participants at the tally. The Investigator determined the final number of eligible voters according to the usual procedures described in Manual Section 13.208. The number communicated to attendees at the tally was the final number of eligible voters reflected on the certification.

Eligibility Rulings Regarding Mr. Hocutt and Mr. Newenhisen

The Carrier alleges that the Investigator’s June 11, 2014 and July 3, 2014 determinations that Mr. Hocutt and Mr. Newenhison are management officials deprived them of their right to choose a representative. In its July 25, 2014 submission, the Carrier repeats its prior arguments regarding these two employees. The Carrier argues that the Investigator ignored evidence that these employees are active pilots and disputes the determination that their supervisory authority and placement in the organizational hierarchy are sufficient to consider them management officials under the requirements of Manual Section 9.211.

The Investigator responded to these arguments previously in her July 3, 2014 eligibility ruling. In that ruling, the Investigator also described the following procedure for appealing her determination: “Any appeals of these rulings must be filed with the National Mediation Board (Board) by **12 noon ET on Wednesday, July 9, 2014** (emphasis in original), in accordance with the Board’s Representation Manual (Manual) Section 10.2. Responses must be filed with the Board by **12 noon ET on Monday, July 14, 2014** (emphasis in original). No extensions of time will be granted.” The Carrier did not appeal these determinations. According to Manual Section 10.2, “[i]f the Investigator’s ruling is not appealed to the NMB by the deadline, the Investigator’s ruling is final.”

The Carrier failed to appeal the determination regarding Mr. Hocutt and Mr. Newenhison, and the Investigator’s determinations are final. The Carrier cannot use the post-election interference process to relitigate its arguments regarding these employees. As described in Manual Section 17.0, election interference allegations are those that state that “laboratory conditions were

tainted.” The Carrier failed to follow the procedures for appealing these determinations and a post-election interference allegation is not the appropriate place to raise arguments regarding voter eligibility that should have been resolved prior to the tally.

Adrianos Stavole

The Carrier also alleges that Mr. Stavole was deprived of his statutory right to select a representative due to “the NMB’s errors of fact and of law.” Mr. Stavole was removed from the List after the Organization challenged his eligibility, alleging that he is actually a scheduler who does not fly regularly. Following the Organization’s challenge on June 17, 2014, the Carrier failed to respond according to the procedures set out in the Investigator’s June 12, 2014 Challenges and Objections letter. Because the Carrier is the participant with access to information regarding Mr. Stavole’s duties and qualifications, the Investigator requested additional information from the Carrier rather than remove Mr. Stavole from the List based solely on the Organization’s claims. The Carrier responded and the Investigator determined that the evidence did not establish that Mr. Stavole is appropriately part of the Pilot craft or class. The Carrier filed an untimely appeal which was denied by the Board on July 16, 2014.

As in its allegations regarding the employees discussed above, the Carrier here is attempting to use the interference process to relitigate an eligibility determination after failing to follow the Board’s procedures prior to the tally. The Carrier failed to provide evidence establishing Mr. Stavole’s eligibility and failed to file a timely appeal. As noted in the Investigator’s determination, “the Carrier did not provide a declaration, a current schedule, or any other evidence of Mr. Stavole’s current status as a line pilot.” The Carrier provided evidence that he flew on a flight in 2011.

The Carrier argues that the Investigator should have conducted a preponderance check of Mr. Stavole’s duties. A preponderance check is not appropriate where there is no evidence that an employee regularly works in the craft or class at issue. According to Manual Section 9.2, eligibility is limited to employees “working regularly in the craft or class on and after the cut-off date . . .” The Carrier had two opportunities to provide evidence that Mr. Stavole regularly flew before and after the cut-off date and did not provide it. The Carrier cannot now complain that the Investigator did not request that information in the form of a preponderance check. A preponderance check under Section 9.212 is commonly used where an investigator needs to

determine which craft or class an employee belongs in when he or she works in more than one craft or class. Here, the Carrier provided evidence that Mr. Stavole flew in August of 2011 but did not provide evidence that he regularly works in the Pilot craft or class. Therefore, a preponderance check was not necessary.

The Carrier is simply reiterating arguments it made in its untimely appeal of the Investigator's determination. The Board has already denied that appeal and according to Manual Section 10.2, the Investigator's determination regarding Mr. Stavole is final.

Conclusion

According to Manual Section 17.0, allegations of election interference "must state a prima facie case that the laboratory conditions were tainted and must be supported by substantive evidence." The Carrier does not allege that laboratory conditions have been tainted and there is no basis for further investigation. For the reasons stated above, the Board denies the Carrier's request for a new election.

By direction of the NATIONAL MEDIATION BOARD.



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