NATIONAL MEDIATION BOARD
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43 NMB No. 32

July 1, 2016

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Re: NMB Case No. R-7461
Norwegian Air Shuttle ASA/Norwegian Cabin Crew Association

Participants:

This determination addresses the June 23, 2016 Motion for Reconsideration (Motion) filed by OSM Aviation, Inc. (OSM) and joined by Norwegian Air Holding Resources Ltd. (NAR), a wholly-owned subsidiary of Norwegian Air Shuttle ASA (NAS) (NAS and NAR are referred to collectively as Norwegian). OSM and Norwegian (collectively referred to as the Carrier) seek reconsideration of the National Mediation Board's (NMB or Board) June 21, 2016 decision finding that there are no unusual circumstances warranting a modification of the cut-off date and that a representation dispute exists among the Flight Attendants jointly employed by OSM and Norwegian. *Norwegian Air Shuttle ASA*, 43 NMB 140 (2016). The Norwegian Cabin Crew Association

(NCCA) seeks to represent these employees. NCCA filed a response in opposition to OSM's Motion on June 27, 2016.

For the reasons discussed below, the Motion is denied.

PROCEDURAL HISTORY

NCCA filed its application on May 28, 2015. In its May 28, 2015 docket letter, the Board requested a notice of appearance from the carrier and the following information: the date of the last day of the payroll period prior to May 28, 2015 (cut-off date), the list of potential eligible voters (List), signature samples, and a position statement. NAR and OSM filed notices of appearance. NAS, NAR, and OSM each filed position statements in response to the Board's docket letter. In their respective position statements, NAS and NAR stated that neither entity was the employer of the Flight Attendants or subject to the Board's jurisdiction. In its position statement, OSM stated it was the employer of the Flight Attendants but not subject to the Board's jurisdiction. No List or signature samples were provided to the Board.

On April 19, 2016, the NMB found that NAS, NAR, and OSM were subject to Railway Labor Act (RLA) jurisdiction and that Norwegian and OSM are joint employers of the Flight Attendants. *Norwegian Air Shuttle ASA*, 43 NMB 97 (2016) (Norwegian Decision). In that decision, the Board reiterated its request for the List, signature samples, and cut-off date.

On May 12, 2016, OSM provided a list of eligible employees as of May 15, 2015, the date of the last payroll period prior to the filing of the application. OSM also provided a list of eligible employees as of April 15, 2016, the date of the last payroll period prior to the Norwegian Decision. OSM also provided signature samples for eligible employees as of April 15, 2016. Upon the Board's request, OSM also submitted signature samples for the eligible employees as of May 15, 2015. OSM contended that there were extraordinary circumstances warranting a modification of the cut-off date from May 15, 2015 to April 15, 2016 for determining the showing of interest and eligibility to vote in the election. Applying well-settled case law and longstanding policy concerns, the Board found that there was neither turnover of more than a majority of the eligible electorate nor an extraordinary delay in the Board's investigation. *Norwegian Air Shuttle ASA*, 43 NMB 140 (2016).

OSM, joined by NAR, filed this Motion reiterating its contention that "[p]lainly, there exists unusual and special circumstances in this case which warrant a modification of the cut-off date." Specifically, OSM notes that the

Board decision relies "not on statute, but on stale authority" and no previous cases decided by the Board involve a "new, developing and expanding" employer such as the Carrier. NCCA, in its reply, states that OSM has provided no new facts or law to establish the material error required to grant a Motion for Reconsideration under Section 11.0 of the Board's Representation Manual (Manual).

DISCUSSION

Section 11.0 of the Manual provides:

> Absent a demonstration of material error of law or fact 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 the factual and legal arguments previously presented to the NMB is insufficient to obtain relief.

The Board grants relief on Motions for Reconsideration in limited circumstances where, in its view, the prior decision is fundamentally inconsistent with the proper execution of the NMB's responsibilities under the RLA. *PATH/IBEW*, 34 NMB 114, 117 (2007) (citing *Virgin Atlantic Airways*, 21 NMB 183, 186 (1994)).

In its determination, the Board considered the cumulative evidence and arguments submitted by the participants in finding that there were no unusual circumstances warranting modification of the cut-off date. As the Board noted, fixing the cut-off date at the commencement of its investigation insulates the representation process from manipulation by either side in order to gain an advantage with respect to the showing of interest or election results and, therefore, the Board has declined to change the cut-off date where a majority of the craft or class remains eligible to vote. *Norwegian Air Shuttle ASA, above*, 43 NMB at 143 (citations omitted). OSM concedes in its Motion that the 153 employees employed on May 15, 2015 remain a majority of the 275 Flight Attendants in the craft of class.[1]

Citing long-standing consistent precedent, the Board noted that a substantial passage of time or an extraordinary delay in its investigation such as five years justifies a change in the cut-off date, but that in the instant case

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[1] OSM notes that the Board's decision erroneously stated that 46 employees left the craft or class after May 15, 2015 when in fact 76 left the craft or class. While this inadvertent error will be corrected, the Board notes that the material fact is that 153 employees remained and 153 is a majority of the craft or class.

only a year passed between the filing of the application and the receipt of the List. OSM argues that "there is no statutory, common law or otherwise, Board requirement that such magic number be met," especially "in today's times . . . of rapid expansion, innovation, and, frankly frequent movement by employees from one employer to another." The Board, however, addressed this argument. As noted in the decision, the Board has rarely found that the expansion of a Carrier's operations and hiring new employees provides a basis for changing the cut-off date. *Norwegian Air Shuttle ASA*, 43 NMB at 143 (citing *American International Airways*, 10 NMB 456 (1983)). This Carrier is not the first employer to hire new employees or expand its operations and the Board has consistently refused to change the cut-off date to include new employees in the absence of a significant passage of time and a turnover of clearly more than half of the craft or class. *Express I Airlines, d/b/a Northwest Airlink*, 25 NMB 328 (1998); *Western Pacific Airlines*, 23 NMB 217 (1996); *America West Airlines, Inc.*, 21 NMB 293 (1994); *USAir, Inc.*, 16 NMB 63 (1988); and *Piedmont Airlines*, 9 NMB 41 (1981).

OSM also seems to argue that the Board somehow erred in relying on cases decided in the 1990s and 1980s and that these decisions are inapplicable to the needs of a rapidly expanding start-up carrier. In *Compass Airlines*, 35 NMB 14 (2007), the Board applied the same precedent to a rapidly expanding start-up carrier. In *Compass Airlines*, the Board found that extraordinary circumstances warranted changing the cut-off date because the start-up carrier's Flight Attendant craft or class had tripled during the investigation and the original cut-off date would disenfranchise 71 percent of the employees. *Id.* at 21. However, as the Board determined, the circumstances in this case are not the same as those in *Compass Airlines*. *Norwegian Air Shuttle ASA*, 43 NMB at 143.[2] Having considered the facts and the relevant precedent, the Board concluded that there were no unusual circumstances and that the cut-off date remains May 15, 2015. *Id.* at 144. Further, the investigation disclosed that NCCA had established the requisite showing of interest. *Id.*

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2 OSM states in its Motion that the Board erred in citing *Compass Airlines* because the carrier in that case urged the Board to adopt a legal theory under the National Labor Relations Act to defer any representation election until there was a "substantial and representative complement" of employees in the craft or class. OSM is correct both that the Board rejected this argument in *Compass Airlines* and no similar argument was raised in this case. The Board, however, cited *Compass Airlines* for its discussion of when the rapid expansion of the craft or class might warrant changing the cut-off date. *Compass Airlines*, 35 NMB at 20-21.

As discussed above, OSM's Motion does not cite any error of material fact made by the Board in its determination. Nor does OSM cite a single point of law that the Board overlooked or misapplied in its decision. OSM has merely reasserted factual and legal arguments already considered by the Board.

CONCLUSION

The Carrier has failed to demonstrate a material error of law or fact or circumstances on which the Board's exercise of its discretion to modify the decision is important to the public interest. Therefore, relief upon reconsideration is denied.

By direction of the NATIONAL MEDIATION BOARD

Mary L. Johnson
General Counsel