NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

(202) 692-5000

43 NMB No. 5

November 10, 2015

VIA EMAIL

Christopher J. Pappaioanou
Vice President- Legal
John Jaynes
Senior VP Customer Service
Envoy Air, Inc.
4301 Regent Boulevard, MD 100
Irving, TX 75063

Jody Calemine, General Counsel
Sandy Rusher, Senior Director of Organizing
Judiann Chartier, Esq.
Communication Workers of America
501 3rd Street, NW, Suite 800
Washington, DC 20001

Mark W. Robertson, Esq.
O'Melveny & Myers, LLP
7 Times Square
New York, NY 10036

Re: NMB Case No. R-7444
Envoy Air, Inc./ CWA, AFL-CIO

This determination addresses the September 25, 2015 appeal filed by the Communication Workers of America, AFL-CIO (CWA) of the September 17, 2015 eligibility ruling by Investigator Angela Heverling. For the reasons discussed below, CWA's appeal is granted in part.

PROCEDURAL BACKGROUND

On May 12, 2015, CWA filed an application with the National Mediation Board (NMB or Board) seeking to represent "Fleet and Passenger Service Employees" at Envoy Air, Inc. (Envoy or Carrier). The Transport Workers Union (TWU) and the Carrier notified the Board that, pursuant to a voluntary recognition agreement, TWU represents Fleet Service employees at Envoy. The CWA subsequently amended its application to describe the craft or class of employees as "Passenger Service Agents (Includes Station Agents)." On May 22,

2015, the Carrier submitted the List of Potential Eligible Voters (List), including all Fleet and Passenger Service Employees.

In its June 2, 2015 position statement, the Carrier provided the Board with information about the Station Agent's job duties and functions. The job title "Station Agents" at Envoy includes employees who perform exclusively passenger services functions, employees who perform exclusively fleet service functions, and employees who are cross-utilized, performing both types of functions. CWA and TWU filed several submissions regarding the status of Envoy's Station Agents.

In order to determine the eligibility of the Station Agents, pursuant to Section 9.212 of the Board's Representation Manual (Manual), the Investigator selected a 90-day time period prior to the cut-off date and requested preponderance evidence from the Carrier to determine which employees would be eligible to vote in an election among the craft or class of Passenger Service Employees. On July 20, 2015, the Carrier provided evidence compiled from managers at the relevant stations in the form of a spreadsheet indicating what percentage of time each employee spent working "above the wing" (passenger service duties) or "below the wing" (fleet service duties). "Above the wing" work was defined by the Carrier as "directing customers, assisting with self-service, calculating and collecting excess baggage charges, meeting arrivals, checking-in customers, boarding and dispatching flights, processing customer claims for lost or damaged baggage, (and) transporting customers in wheelchairs."

The Investigator's ruling on the eligibility of the Station Agents was issued on September 17, 2015. The Investigator ruled that Station Agents at the Carrier's hub stations are not eligible to vote because all passenger service work at these stations is performed by passenger service agents. The Investigator also ruled that Station Agents at seven stations where Station Agents perform only passenger service duties would remain on the List. These stations are Bradley (BDL), Birmingham (BHM), Buffalo (BUF), Columbus (CMH), El Paso (ELP), Piedmont Triad (GSO), and Jacksonville (JAX). Additionally, the Investigator determined at stations where Envoy employs Station Agents but they perform no passenger service duties, Albuquerque (ABQ), Indianapolis (IND), and New Orleans (MSY), no Station Agents were eligible to vote. At two locations, Nashville (BNA) and Houston (IAH), certain Station Agents perform only fleet service work and were ruled ineligible to vote.

The Investigator considered the requested preponderance evidence from the 90-day period prior to the cut-off date regarding the remaining Station Agents at BNA and IAH and the Station Agents at 90 additional locations where

the Carrier reported that Station Agents were cross-utilized. The Investigator determined the following:

> Those employees who worked a preponderance of their time performing Passenger Service duties during that time period are eligible to vote in an election among the Passenger Service Employees craft or class.
>
> All employees listed on the Carrier's July 20, 2015 submission who worked at least 50 percent of their time performing passenger service duties, described by the Carrier as "above the wing" work, perform a sufficient amount of work in the craft or class to demonstrate a substantial interest in the working conditions of the craft or class and will remain on the List.

This included 1,646 cross-utilized Station Agents. The Investigator requested an updated List from the Carrier, removing all Fleet Service Agents and including only those Station Agents deemed eligible in the ruling. The Board authorized an election on October 5, 2015.

CWA submitted its appeal of this ruling on September 25, 2015. TWU filed a submission on October 1, 2015 and the Carrier did not respond to the CWA's appeal.

APPEAL

CWA asks the Board to find all Station Agents employed by Envoy eligible to vote in an election among the Passenger Service Employees craft or class. CWA contends that, because all Station Agents voted in a 2001 election, the Investigator erred by requesting and considering preponderance evidence regarding the cross-utilized Station Agents. According to CWA, it filed an application in 1998 in NMB Case No. CR-6644, seeking to represent Passenger Service Agents at Envoy's (then American Eagle) hub stations. CWA reports that "[t]he Carrier insisted that all Station Agents employed at non-hub stations were properly included in the craft or class. CWA withdrew the 1998 Application and filed a new one in 2001, including all the Station Agents in the description of the craft or class." This new application was docketed as NMB Case No. R-6825. CWA and the Carrier agreed that Station Agents, even those who spent more than half of their time performing fleet service functions at small non-hub stations, shared a community of interest with other Station Agents and should be included in the same craft or class.

CWA also contends that the Investigator erred by not including a discussion of the community of interest shared by Station Agents. In response to the Carrier's preponderance evidence, CWA submitted unsolicited evidence regarding the pay, benefits, insurance, leave benefits, and bidding process for Station Agents. CWA contends that the Investigator erred by not considering the unsolicited evidence it submitted regarding working conditions of the Station Agents. CWA further contends that the Investigator's Ruling disenfranchises the Station Agents who were not deemed eligible to vote in this election. According to CWA, all these employees voted in 2001 and their work has not substantially changed since then. CWA states that some employees who worked "below the wing" during the preponderance period have subsequently been reassigned to or bid for "above the wing" assignments and their eligibility should be reconsidered.[1]

TWU responded that the appeal should be denied. TWU contends that the Investigator's ruling is consistent with Board precedent and the Board's Manual's provisions regarding cross-utilized employees and traditional craft or class lines under the Railway Labor Act (RLA). Regarding CWA's contention that the exclusion of certain Station Agents from the List disenfranchises these employees, TWU argues that as the representative of Fleet Service Employees, under RLA system-wide representation requirements, it would be the representative of any Station Agents deemed to perform fleet service work.

The Carrier has not responded to the CWA's appeal.

DISCUSSION

CWA argues that a preponderance check was not appropriate in this case and cites *United Airlines*, 39 NMB 274 (2012), in support of its argument that the Investigator should have allowed all Station Agents to vote with the Passenger Service Employees craft or class because all Station Agents voted in an election at the Carrier in 2001. The Board is not persuaded by CWA's argument regarding the 2001 eligibility list. A review of the case files from R-6825 (and the prior 1998 case NMB Case No. CR-6644) produced no ruling by the Investigator or determination by the Board regarding the eligibility of the Station Agents. The question of the eligibility of these employees was not

[1] CWA's appeal also noted that Station Agents at DAL and MSP were on the initial List but were not included in the preponderance evidence provided by the Carrier. The Investigator has addressed this with the Carrier and requested evidence to support its contention that these employees were mistakenly included on the initial List.

presented to the Board, nor did the Board investigate or rule on the eligibility of Station Agents in either of those cases. Unlike *United Airlines*, there is no Board precedent establishing historical inclusion to consider. The Board is not bound by agreements between carriers and unions or by a 14-year old unchallenged eligibility list.

The Board, however, finds that the community of interest evidence provided by CWA indicates that the Station Agents who are cross-utilized and regularly perform passenger service duties, even those who do not spend a preponderance of their time performing such duties, have a sufficient interest in the craft or class, thereby making them eligible to vote. In the unique circumstances at Envoy's non-hub stations, the nature of the work makes the traditional "snapshot" view of the preponderance test inadequate in determining the eligibility of these employees. The Board has on occasion found the preponderance test to be lacking in providing an accurate representation of the working conditions of cross-utilized employees. In *United Airlines*, 39 NMB 274, 279-80 (2012), the Board stated the following:

> [T]he evidence . . . demonstrates the fluidity of the job duties . . . . These employees bid on preferred job assignments and their contract allows them to switch between Fleet Service duties and Passenger Service duties. Managers have the ultimate control over assignments and these employees are not able to control their job duties on any given day. . . . Job duties can change seasonally and . . . some employees who performed a preponderance of Fleet Service duties prior to the cut-off date are currently performing Passenger Service duties. The "snapshot" required by the preponderance test does not provide an accurate representation of the duties of these employees.

The preponderance evidence in this case similarity does not represent the true nature of the cross-utilized Station Agents' duties. There is one job description for all the Station Agents and customer service experience is considered in hiring. The cross-utilized employees regularly bid for assignments and their work varies from day to day. In some stations, there is no bidding process and managers assign employees to work above or below the wing. The evidence indicates that some employees can switch between these jobs during the same shift. There is no doubt that these employees are functionally integrated.

Job duties traditionally associated with the Passenger Service craft or class are an integral part of every cross-utilized Station Agent's job at Envoy's

non-hub station, even if they are not performing those duties on a given day. A manager could assign these duties, they could bid for them, or they could fill in for a co-worker performing above the wing duties. The percentage of time spent above or below the wing could vary seasonally or day-to-day depending on the station. All of these employees have an interest in the terms and conditions of employment for the Passenger Service craft or class and, therefore, should vote in the upcoming election.

Section 2, Ninth of the RLA grants the Board the sole discretion to determine who shall vote in each election. The determination herein is specifically limited to the facts and circumstances existing at the Carrier at the present time. The job description and submissions from employees indicate that cross-utilized employees regularly perform, through bidding or assignment, passenger services functions. Even if that fact was not captured by the snapshot provided by the preponderance evidence, these employees perform these functions for a sufficient amount of time to demonstrate that they have a substantial interest in the working conditions in the craft or class and are eligible to vote.

CWA and TWU have provided different views of which employees are covered by TWU's voluntary recognition agreement with Envoy. The Board has long stated that it does not rely on voluntary recognition agreements when determining the requirements of the RLA. *See Galveston Wharves*, 4 NMB 200, 203 (1962) ("[P]rivate representation agreements which do not conform to the recognized craft or class lines cannot be relied upon to modify the requirements of the statute."). The Board will not address the issue of which employees are covered by TWU's voluntary recognition because it is not relevant to this determination.

CONCLUSION

The Board overrules the Investigator's September 17, 2015 ruling in part and determines that 2,012 additional cross-utilized employees are eligible to vote. This determination only applies to those Station Agents who are cross-utilized. It does not impact employees at Envoy's hub stations, BOS, DFW, JFK, LGA, LAX, ORD, MIA, and RDU. This decision does not impact Station Agents at ABQ, IND, and MSY, where Station Agents perform no passenger service duties. This decision also does not apply to Station Agents at BNA and IAH who perform no passenger service duties. Therefore, the current number of eligible employees is 4879.

Included in the preponderance evidence were 134 employees who performed no duties either above or below the wing during the preponderance period. The Board has requested evidence on the status of these employees and the Investigator will issue a ruling announcing which are eligible to vote.

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson
General Counsel

Chairman Geale, dissenting in part and concurring in part.

I disagree with the Majority's decision and would have upheld the Investigator's decision for both procedural and substantive reasons. The Majority has ignored NMB policies—in this case our Representation Manual—to reach its decision and has done so without due notice to the industries under our jurisdiction. Moreover, the Majority used Agency and Carrier resources in requesting a preponderance check -- as contemplated by our Manual -- and then chose to ignore those results.

Even assuming the Majority's new test for eligibility was appropriate – whatever it may be since the decision does not appear to provide a recognizable standard that makes any sense – the decision has the improper effect of fragmenting the craft or class of fleet service personnel that are already represented by the Transport Workers Union (TWU) in violation of longstanding NMB precedent and policy. Indeed, over one thousand six hundred employees who performed absolutely no passenger service work within 90-days of the cutoff date for this election will now be voting and affecting an election for the rest of the passenger service craft or class.

I concur, however, in the Majority's decision to ignore CWA's argument that prior lists and elections somehow control eligibility in this case. Any history of who voted or did not vote in prior elections or who objected or did not object is generally irrelevant. The Board makes decisions based on the facts and circumstances at issue currently, including actual job duties, and not

based on old agreements between carriers and unions or a 14-year old eligibility list.

Background

The question before the Board is whether a certain number of Station Agents who may perform either or both Passenger Service and Fleet Service functions are eligible to vote in this election. In making its decisions on eligibility for craft and class determinations, the NMB "looks to actual duties and responsibilities of employees, not merely job titles." *National Airlines*, 27 NMB 550, 555 (2000); *see also US Air, Inc.*, 21 NMB 402, 406 (1994). Regardless of job classification, an employee must actually be working regularly in the craft or class on and after the cut-off date to be eligible. NMB Representation Manual sections 9.2, 9.212; *see also Delta Air Lines, Inc.*, 38 NMB 15, 16 (2010) (Flight Attendant on special assignment who was not flying on or after the cut-off date was ineligible to vote in the Flight Attendant election); *Chicago & North Western Ry. Co.*, 4 NMB 240 (1965); *America West Airlines, Inc.*, 23 NMB 244 (1996); *USAir, Inc.,* 21 NMB 402, 406 (1994)(the Board looks at the actual duties being performed by the employees at issue and not merely job titles and classifications). Where there is cross-utilization of employees between two or more crafts or classes, there is longstanding precedent of using a preponderance test to place individual employees based on a lookback of 30-90 days. *See, e.g., America West Airlines*, 16 NMB 135 (1989); *see also* Manual section 9.212.

Fleet Service Employees and Passenger Service Employees are both longstanding separate crafts and classes on airlines, including Envoy, so there is no dispute that there is a history of recognizing these two separate crafts and classes. Accordingly, the NMB Investigator received an initial Eligibility List including cross-utilized Station Agents that perform both types of work for purposes of the showing of interest. The Board then directed that the Investigator follow the provisions in Manual Section 9.212 and request information for the prior 90 days from the cutoff on a subset of Station Agents to determine eligibility. The Investigator received that information on July 20, 2015 and then ruled that those employees who perform that work for a preponderance of the time during the 90-day period would be eligible. The Investigator determined that these employees according to precedent and policy

perform a sufficient amount of work in the craft or class to demonstrate a substantial interest in the working conditions of the craft or class to vote in the election.

Procedural Impropriety

The Investigator's ruling was based on the facts in the record, and she followed important Board policies dedicated to ensuring that similarly situated employees are not divided among different crafts or classes, that crafts or classes are consistent system-wide, and that elections are decided only by individuals who, judging by the work they perform at the time of the election, have a present, shared interest in the system-wide craft or class. The burden of persuasion in an appeal from an investigator's eligibility ruling rests with the entity appealing that determination. *American Airlines*, 31 NMB 539, 553 (2004); *Northwest Airlines, Inc.*, 26 NMB 77, 80 (1998).

The CWA's arguments in this case fail to meet that high standard as they were raised and rejected by the Investigator and have been generally rejected by the NMB with one *sui generis* exception.[2] The Majority chose to include all Station Agents who might perform passenger service work, including 1,694 who performed zero such work in the ninety days before the cutoff, because they may share a community of interest and might perform passenger service work at some point. That is not the standard, and I cannot support its application retroactively on principle.

This is not the first time I have stated my disagreement with my colleagues for making new rules and applying them retroactively when there are existing rules that have and should guide the industries over which we have jurisdiction. In the absence of some change in circumstances, it is generally incumbent on government agencies to follow the standing precedent and guidance on agency policy (i.e., in this case the NMB Representation

[2] The Majority and CWA's reliance on a 2012 decision, *United Airlines*, 39 NMB 274 (2012), is misplaced, and the Majority in effect piles another bad decision upon what was supposed to be a unique circumstance in the *United* case. Among other differences, that case dealt in part with the results of a single-carrier determination following a merger. Furthermore, my predecessor, Member Dougherty, disagreed for many similar reasons, and I endorse that dissent. *See* 39 NMB 274, 281-291 (Member Dougherty dissenting).

Manual). This ensures fairness and an equal playing field for the community generally. There are obviously times when it is necessary to update precedent and guidance due to a change in statute or circumstances, but those should be relatively rare. Unfortunately, my colleagues seem generally willing to make retroactive changes to policy when it results in a favorable result from their perspective. This kind of Star Chamber proceeding hurts the NMB's standing in the industries when the rules change without fair notice.

With that said, and as discussed more fully below, I believe the Majority has a legitimate concern that the preponderance test may need to be changed or updated for certain circumstances where there is broad cross-utilization that is difficult to analyze or quantify. I disagree with ignoring the standing precedent and guidance in the meantime, however.

Substantive Impropriety

As noted above, the Majority, for whatever reason, chose to ignore the work of our Investigator, and is allowing all Station Agents, including 1,694 individuals who performed absolutely no passenger service work in the last 90 days before the cutoff date, to vote in the upcoming election for a passenger service representative. These individuals in fact performed some or all of their work in the Fleet Service Employees class or another craft or class during the prior ninety days before the cutoff.

As noted in their pleadings, the TWU already represents Envoy Fleet Service personnel pursuant to a longstanding voluntary recognition. The TWU-Envoy agreement also specifically states that TWU is "the sole bargaining agent for all Fleet Service employees employed by the Company." This is not surprising given that the RLA requires representation on a system-wide basis. *See, e.g., US Air*, 15 NMB 369, 392 (1988) (citing *Simmons Airlines*, 15 NMB 124 (1988) and *Summit Airlines, Inc. v. Local 295*, 628 F.2d 787 (2d Cir. 1980)).[3] These principles are true regardless of whether the specific bargaining agreement currently or historically covers specific locations and specific fleet

[3] Furthermore, contrary to CWA's arguments, a voluntary recognition versus a certification after an election does not alter the system-wide basis of representation under the RLA. Indeed, the pilot craft at Delta and a large number of railroad unions have been recognized voluntarily for decades, including some for half a century or more.

service agents or not. The CWA and the NMB cannot and should not substitute their judgment on what is the appropriate scope of the current collective bargaining agreement for the fleet service craft or class. That is an issue between the Carrier and the TWU (and the TWU leadership and its membership).

Moreover, while work-related community of interest is important to craft or class determinations, it is well-settled that "[t]he Board examines the actual duties and responsibilities of employees, not merely job titles when determining whether there is a work-related community of interest." *AirTran*, 39 NMB 175, 180 (2011). *See also Regional Elite Airline Servs.*, 38 NMB 299, 314 (2011); *AirTran Airways*, 28 NMB 500, 508 (2001); *National Airlines, Inc.*, 27 NMB 550, 555 (2000). As the Board has repeatedly stated, "[t]he essence of passenger service is customer contact." *Northwest Airlines, Inc.*, 27 NMB 307, 312 (2000). *See also American Eagle*, 28 NMB 591, 598 (2001) (Customer contact is "integral to the [Passenger Service craft or class]"); *USAir, Inc.*, 21 NMB 402, 405-06 (1994).

The record in this case establishes that a very large number of Station Agents – 1,694 to be exact -- had little or no customer contact during the last three months. Thus, the Majority's decision, in fact, ignores this longstanding NMB law and procedure, renders eligible employees who perform little or no Passenger Service work, and divides employees performing exactly the same type of work. That is improper and unfair to the TWU, its membership and the Carrier who will have to manage both relationships going forward. It is also unfair to the actual passenger service craft or class who will have at least 1,600 arguably fleet service or other craft or class workers voting in the passenger service representation election.[4]

Policy Changes to Consider

[4] The Majority appears to have decided that all the potentially cross-utilized Station Agents share a greater community of interest with Passenger Service employees than with Fleet Service employees regardless of actual job duties. As these factors arise primarily in a craft or class determination but do not control eligibility, it appears the Majority has made that decision as part of a new craft or class determination. That analysis fails for the same reasons the eligibility decision fails.

While I strongly disagree with what the Majority did in this case, I submit that the Majority is correct to raise cross-utilization as a policy issue that the NMB may need to address more broadly. Cross-utilization has made it more difficult to effectively maintain clear boundaries among the classes and crafts generally and certainly as to eligibility determinations in this case for Station Agents. While I would prefer to follow our rules, I understand the majority's desire to err on the side of greater democratic rights for possible craft or class members. To completely deny cross-utilized employees from voting on what organization (if any) will represent them and negotiate a CBA with the Carrier affecting their terms and conditions of work is potentially unfair. However, to allow employees to vote only because they might at some point work in that craft or class is equally absurd and harms the voting rights of actual craft or class members by diluting their vote with non-craft or class members.[5]

As I have previously pointed out, large amorphous groups that do not share the same broad community of interest or expertise may not be appropriate crafts or classes on certain airlines or at all. See *American Airline*s, 42 NMB 35, 78 (2015) (Member Geale dissenting). As the industry changes, the NMB should adapt as well. For example, cross-utilized employees in smaller venues may have a very different set of interests than those employees solely performing passenger or fleet service work at a hub. Thus, it may be time to consider creating a new craft or class of cross-utilized employees for smaller airlines or smaller locations since the employees may do both passenger and fleet work (or possibly other work in a third craft or class) in the same shift or on alternating days. Such employees may share more in common with each other as cross-utilized employees than full time fleet service or full

[5] The Majority rejects the preponderance test as too limiting because of the fluidity of the cross-utilization of the Station Agents. Our Manual contemplates preponderance periods of different lengths – from 30 to 90 days – depending on the complexity of the case. Perhaps any perceived special circumstances presented by the Station Agents could be addressed by simply extending the preponderance period over a longer period of time – e.g. six months or a year. This approach would have been more in keeping with the Board's long-standing eligibility methodology of looking at actual duties. Instead, the Majority rejects any form of preponderance check and includes Station Agents without regard for whether any individuals performed any Passenger Service functions.

time passenger service -- which generally only exist at larger hubs as the record reflects in this case for Envoy.

Conclusion

I cannot agree with the procedural means of making the decision in this case or the actual policy of the Majority. I would address the issue of cross-utilization in a way that is transparent, fair and not retroactive as well as avoid fragmenting an existing craft or class that is represented by the TWU and diluting the voting rights of actual passenger service craft or class members. Accordingly, I respectfully dissent.