



NATIONAL MEDIATION BOARD
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44 NMB No. 44

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Re: NMB Case R-7497
Lufthansa Technik Puerto Rico-IAM

Participants:

This determination addresses the October 11, 2017 Motion for Reconsideration (Motion) filed by the International Association of Machinists & Aerospace Workers (IAM or Organization). The IAM seeks reconsideration of the National Mediation Board's (NMB or Board) October 6, 2017 decision canceling the representation election that began September 6, 2017 in view of the devastation to Puerto Rico caused by Hurricane Maria. *Lufthansa Technik Puerto Rico*, 44 NMB 204 (2017). *Lufthansa Technik Puerto Rico* (*Lufthansa Technik* or *Carrier*) filed a response in opposition to the IAM's Motion on October 17, 2017.

For the reasons discussed below, the IAM's Motion is denied.

PROCEDURAL BACKGROUND

On August 21, 2017, the NMB authorized an election for the Mechanics and Related Employees at Lufthansa, sought to be represented by the IAM. The election began on September 6, 2017 and the tally was scheduled to take place at 2 pm, ET, on September 27, 2017. The deadline for duplicate ballot requests was September 20, 2017.

As a result of Hurricane Irma's disruption to Puerto Rico, the Carrier filed a letter on September 11, 2017 requesting two additional weeks of voting in R-7497. The IAM responded to the Carrier's request for an extension on September 12, 2017, opposing an extension.

On September 18, 2017, the Carrier submitted a follow-up request for an extension of the voting period, citing the potential disruption due to Hurricane Maria. On September 19, 2017, the Carrier provided an alert from the U.S. Postal Service which stated it had closed all postal facilities in Puerto Rico due to the imminent arrival of Hurricane Maria.

On September 20, 2017, Hurricane Maria, the strongest storm to make landfall in Puerto Rico in 85 years, came ashore with sustained winds of 155 m.p.h. Hurricane Maria devastated Puerto Rico, knocking out power to the entire island, destroying homes, and causing widespread flooding. Also on September 20, 2017, the Carrier provided an article from The Washington Post which reported that "Puerto Rico is entirely without power" due to the impact of Hurricane Maria. The Carrier reiterated its request for a two-week extension of the voting period as well as an extension of the deadline for submitting duplicate ballot requests.

The IAM responded on September 21, 2017, agreeing that there was a need to extend the voting period and the deadline for duplicate ballot requests. The Organization asserted that 10 days would be sufficient and that "the Board can review the matter in a week to determine if more time is necessary." On September 27, 2017, based on the destruction caused by Hurricane Maria, the Board extended the voting period and the deadline for receipt of duplicate ballot requests to, October 11, 2017, and October 4, 2017 respectively. *Lufthansa Technik Puerto Rico*, 44 NMB 200 (2017).

On September 28, 2017, the Carrier requested that the Board indefinitely stay the election, expressing concern that eligible employees would be unable to vote because nearly 100 percent of the island was without electricity and about 91 percent of cell sites were out of service. On October 2, 2017, the IAM opposed Lufthansa's request, arguing that the Carrier was trying to gain an advantage in

the election by postponing the election. The IAM contended that a second delay would confuse voters, some of whom might not be aware of the first postponement and some of whom might have discarded their voting materials without casting a ballot. The IAM requested that, in the event the Board decided not to proceed with the tally, the NMB should conduct a certification by card check. On October 2, 2017, the Carrier responded to the IAM's request by stating its opposition to certification by card check and restating its request for an indefinite stay.

On October 6, 2017, the Board issued its decision cancelling the election. *Lufthansa Technik Puerto Rico*, 44 NMB 204 (2017). The Board found that the situation in Puerto Rico had not improved significantly since its September 27, 2017 decision and that, given the timing of the hurricanes, it was likely that many eligible employees did not vote before the storms hit Puerto Rico and would have been unable to vote in the aftermath of Hurricane Maria. The Board further found that to conduct a tally at that point in time would disenfranchise a sizable portion of the eligible voters. The Board therefore cancelled the election begun on September 6, 2017, and stated that it would continue to monitor the situation in Puerto Rico and would determine when and how best to ascertain the representation wishes of the affected employees.

In its Motion, the IAM argues that the Board has exceeded its statutory authority by cancelling the election and not attempting to expeditiously proceed with an alternative method to determine the employees' choice of representative. The IAM reiterates its request that the NMB conduct a certification by card check. The IAM also states that by cancelling the election, the Board has created confusion and created a situation where laboratory conditions cannot be maintained. The IAM states that the NMB will also violate its statutory duty if it fails to count ballots already cast. The IAM again requests that the Board postpone the election for one month rather than cancel the election. Finally, the IAM states that the NMB should instruct the Carrier to provide a mailing list to the IAM so that the IAM can communicate effectively with employees about the circumstances of this election. The IAM suggests such a list of employees' home addresses will also allow the IAM to assist the Board in communicating about the election and in its investigation by providing the Board with updated addresses if employees have had to move due to flooding or other hurricane related damage.

The Carrier, in its opposition to the IAM's Motion, states that the IAM 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). Contrary to the IAM's position, the Carrier cites multiple cases in which the Board has cancelled elections underway and scheduled re-run elections where employees were unable to vote because of technical problems or confusion regarding the voting process. The Carrier also notes the Board's long

standing policy of proceeding with a certification by card check only with the written agreement of the carrier, not present here. Finally, the Carrier states that it should not be required to provide a mailing list to the IAM since the IAM has had and will continue to have access to eligible employees.

DISCUSSION

Section 11.0 of the Manual provides:

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 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 Railway Labor Act. *Norwegian Air Shuttle*, 42 NMB 152 (2016); *Port Auth. Trans-Hudson Corp.*, 34 NMB 114 (2007); *Virgin Atl. Airways*, 21 NMB 183, 186 (1994).

In its determination, the Board took administrative notice of the devastating effect of Hurricane Maria on the people and infrastructure of Puerto Rico as well as the arguments submitted by the participants in finding that the election that began on September 6, 2017 should be cancelled. As the Board noted, "to conduct a tally at this point in time would, in the Board's view, disenfranchise a sizable portion of the eligible voters." The Board is well aware of its statutory obligation not only to expeditiously resolve representation disputes¹ but also to determine the rules governing the election for choice of representative. Contrary to the IAM's assertion, the Board has not exceeded its authority by cancelling the election in this case. The Board's duty is to choose the appropriate method to reliably measure employee choice in representation disputes. Section 2, Ninth's broad language contemplates the exercise of judgment by the Board as to the circumstances under which a representation dispute is ongoing and the appropriate method required in those circumstances to determine employee choice. In the Board's view, to prolong the election period in circumstances where there is not reliable access to potable water and basic services let alone, internet,

¹ The IAM references the language of Section 2, Ninth providing that the Board shall investigate a representation dispute and "certify, to both parties, in writing within thirty days" the name of the individual or organization authorized to represent the affected employees. It is well-settled that this language is directory rather than mandatory. *See e.g., Air Florida v. NMB*, 534 F.Supp. 1, 11 (S.D. Fla. 1982) (citing *System Fed'n v. Virginian Railway*, 11 F.Supp. 621, 627 (E.D. Va. 1935), *aff'd*, 84 F.2d 641 (4th Cir. 1936), *aff'd*, 300 U.S. 515 (1937)).

telephones, and mail is inappropriate. News reports continue to demonstrate that more than 80 percent of the island's electric grid is not functioning and 40 percent of residents lack a cellphone signal. The Carrier notes that although most of the employees in the craft or class have returned to work on a "fairly regular basis," they are allowed necessary time off to attend to personal obligations related to recovery efforts. The Carrier also states its understanding that many employees may remain without electricity, as well as cell phone, internet, and postal services.

The IAM's Motion is rooted in its disagreement with the Board's judgment in this case. The IAM reiterates its request that the Board employ a certification by card check – over the Carrier's objection. In the alternative, the IAM requests that the Board postpone the election tally for a month and if circumstances warrant it postpone the tally again. Certification by card check was previously considered and rejected by the Board. With regard to successive postponement of the tally, the Board does not view this alternative as less confusing or more likely to produce a fair outcome than cancelling and subsequently re-running an election when circumstances permit. Employees who previously cast ballots will have the opportunity to vote in such an election and will in no way be disenfranchised.

Finally, the IAM also requests that the Carrier provide it with a mailing list to remedy confusion and to aid the Board in its investigation and communication with employees. In the Board's view, the IAM's request is unwarranted. The Carrier states that it has posted the Board's October 6, 2017 decision cancelling the election and the Board's subsequent notice in English and Spanish regarding the cancellation of the election. The posting of this notice was ordered by the Board to inform employees that the election was cancelled due to the effects of Hurricane Maria and to advise employees that the Board would determine the appropriate timing and means of resolving the existing representation dispute when conditions on the island permitted. Unlike *USAir*, 21 NMB 201 (1994), cited by the IAM, this case involves a single facility where the majority of employees have returned to work and the Carrier is able to communicate any change of employee addresses to the Board. At this time, no further assistance to the Board is necessary.

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

CONCLUSION

The IAM 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