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July 26, 2021

Via email

Maria-Kate Dowling
General Counsel
National Mediation Board
1301 K St, NW, Suite 250-E
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Re: NMB Case No. R-7557 (American Airlines/TWU/IAM Association and AMFA)

Dear General Counsel Dowling:

The following is the Response of the TWU/IAM Association to the appeal filed by AMFA on July 12, 2021 from Investigator Bautista's Ruling on challenges and objections, pursuant to Section 10.201 of the *Representation Manual*.

The record of this matter demonstrates that the Investigator conducted a thorough factual investigation which included consideration of multiple evidentiary submissions by the participants and the Investigator's detailed requests for additional information to clarify and confirm the evidence submitted. The resulting Ruling issued on June 25, 2021 ("Ruling") provides a detailed description of the factual and legal bases for the decisions made and will permit the Board to fulfill its statutory mandate of determining whether AMFA's Application was in fact supported by the requisite showing of interest. Neither American Airlines nor the TWU/IAM Association have challenged any aspect of that Ruling. It is clear that AMFA's scattershot attack on the Ruling fails to present relevant substantive evidence or sound legal argument which could satisfy its burden of proof on appeal. *See Spirit Airlines, Inc.*, 33 NMB 363, 370 (2006) ("In representation cases, the burden of proof required to overrule an investigator's preliminary determination rests with the participant appealing that ruling"); *Continental Airlines, Inc./Continental Express, Inc.*, 26 NMB 343, 349-50 (1999) (same). Accordingly, the TWU/IAM Association respectfully submits that the appeal should be denied in all respects.

As an initial matter, it bears emphasis that AMFA's appeal disregards two fundamental requirements in representation proceedings. *First*, that it, along with all of the parties, must submit "substantive evidence" to support all challenges and objections, and "substantial evidence" to support its appeal. *Representation Manual*, §§ 8.2, 10.2. *Second*, with respect to the statutory showing of interest requirement, that the Board must identify the potential eligible voters working in the craft or class as of the cutoff date. Status changes after the cutoff date may later affect eligibility to cast a ballot, but they do not retroactively impact the showing of interest. *See, e.g., American Airlines,* 31 NMB 539 (2004). Evidence and argument pertaining to the current status of employees is irrelevant to the issues now before the Board. These failings by AMFA are apparent throughout its submission, as we show below.

I. The Investigator Properly Applied Binding NMB Precedent To Include Flight Simulator Engineers on the List of Potential Eligible Voters.

AMFA challenges the Investigator's ruling that employees working as flight simulator engineers are in the Mechanic and Related craft or class. The Board, however, has previously decided that issue and AMFA provides no evidence of changed circumstances which would call for a reconsideration of that decision.

Following the merger of US Airways and American Airlines, the Board addressed the exact question of whether or not Flight Simulator Engineers are "part of the Mechanic and Related craft or class at the New American" and it ruled that they are. *American Airlines,* 42 NMB 25, 62 (2015) ("the Simulator Technicians and Simulator Engineers remain part of the Mechanics and Related craft or class at the New American"). The facts and circumstances of these employees, including the nature of the work and prior patterns of representation, were extensively considered at the time and ruled on by the Board, yet AMFA maintains that the Board should repudiate that recent decision. AMFA's argument should be rejected.

"[I]n making its craft and class determinations, the Board has always considered the historical relationships established by employees and carriers. The Board has also long recognized that it should refrain from disturbing an established, customary, or historical craft or class in the absence of a material change in circumstances. At American, the Board has consistently found that the Simulator Technicians are included in Mechanics and Related Employees craft or class." 42 NMB at 62 (citation omitted). The Board so found in 2015, and there is no evidence whatsoever that the underlying facts supporting that determination have in any way changed in the past six years. Indeed, American Airlines confirmed that "those employees are part of the mechanic and related craft or class at American" and should therefore be included on the List. Letter, L. Guia to M. Dowling and J. Bautista, April 2, 2021, at 1. We submit that AMFA's argument is nothing more than a gratuitous assertion that the Board was wrong in 2015 (and in its prior decisions at

American). *See* Appeal at 10-17 (arguing "how in fact different the flight simulator engineers *continue to be* from the Mechanic and Related craft"). These arguments were made and rejected in 2015 and should be rejected again here. No new substantive evidence has been presented to warrant reconsideration of the Board's 2015 ruling, and thus AMFA's arguments must fail.

II. The Investigator Properly Denied AMFA's Effort to Exclude Employees Based on their Current Status at American.

Throughout its filings below, and in its appeal, AMFA attempts to exclude employees from the List of Potential Eligible Voters based on evidence of their *current* job status. This approach was properly rejected by the Investigator. *See* Ruling at 2 ("whether an employee remains eligible to vote … after the cut-off date is not relevant to the determination of the showing of interest"), 21 (rejecting AMFA's evidence regarding status as of March 2021), 24 (same).

AMFA continues to take the same approach on appeal, primarily with respect to employees who it contends currently work as Fleet Service Crew Chiefs. AMFA Appeal at 45-47. But AMFA presented *no evidence* regarding the status of these employees as of the November 6, 2020 cut-off date. Rather, its only evidence in this regard was from March 2021 – four months after the cut-off date. *See* Rodgers Decl. (4/1/21) Exhibit AR. That evidence is irrelevant and cannot overcome the evidence submitted by American that these individuals were working in the craft or class as of the cut-off date. AMFA's argument was properly rejected below and should be rejected by the Board as well.

III. The Investigator Properly Rejected AMFA's Attempt to Exclude Participants in the "Active VEOP" From the List.

In response to the COVID-19 pandemic, American in 2020 instituted a variety of "early out" programs, including an "Active Voluntary Early Out Program" (the "Active VEOP").[1] Participants in this Active VEOP agreed to a *future* separation from the Company, but until such date they remain employees who receive active medical coverage and travel benefits, participate in the employee 401(k) plan, pay union dues and remain represented by the TWU/IAM Association. American included 202 such employees on its List, but excluded nearly 400 others. After careful analysis, the Investigator determined that all of these employees, who all have a future separation date well after the November 6, 2020 cut-off, should be included. That decision was correct.

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[1] AMFA attacks the Investigator for a supposed "affirmative mischaracterization" of the record by using the term "Active VEOP", Appeal at 5, but the record shows that this is the term used by American in its contemporaneous internal records. *See* Weel Decl. Exh. B at 1 (referring to the "12-Month Active VEOP") (filed 4/2/21).

"In representation disputes, the Act deals with the present status and interests of employees involved and not with potential future status and interests of employees." *Aloha Air Cargo,* 44 NMB 190, 193 (2017); *see also, US Airways,* 40 NMB 224 (2013); *Airtran Airways,* 38 NMB 80 (2011); *Chicago & North Western Ry. Co.,* 4 NMB 240 (1965).

The undisputed evidence amply supported the Ruling that employees who elected the Active VEOP have the present status and interests of active employees. *See* Declaration of James Weel (filed 4/2/21), ¶ 4(b) and Exhs. B and C; Declaration of Tom Regan (filed 12/23/20), ¶ 4. Employees who elect this Active VEOP receive medical coverage at the active employee rate; they receive employer 401(k) and pension contributions and can make 401(k) contributions with an employer match like other active employees; they are paid for 20 hours per week; they retain their airport security badges; they remain represented by TWU/IAM Association in connection with their employment, and they continue to pay union dues. Weel Decl. Exhs. B and C. They will not be separated from the Company until a year after the program begins (and therefore after the cut-off date). Weel Decl. ¶ 4(b) ("their separation date will be at the end of the 12-month period"); Weel Decl. Exh. B at 1 ("One year after the VEOP will be your exit date - at which point you'll be separated from the company and may, if eligible, retire").[2] The Investigator correctly held that these current employees should be included on the List. *See generally Representation Manual*,§ 9.205 (employees on authorized leave of absence are eligible).[3]

Indeed, the Board addressed this issue in a prior ruling regarding US Airways' Mechanic and Related employees. *See* Investigator's Ruling, *US Airways,* NMB Case No. R-7078 (June 28, 2006), at 12. The parties there disputed whether certain employees who had elected voluntary separation in lieu of furlough should be included on the eligibility list. Several of these employees "did not voluntarily separate until" after the cutoff date, and for those employees the Investigator ruled that they would be "retained on the list." *Ibid.* The same result was correctly reached here.

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[2] Exhibit M to AMFA's March 16, 2021 filing contains the terms of the Active VEOP (also referred to as the "No Lump Sum" VEOP), which specifies that the employees who elect that option will not be separated from the company until 12 months have passed. While AMFA also directs the Board to Exhibits N and O of its March 16, 2021 filing, Appeal at 7, those exhibits are not related to the Active VEOP. They relate instead to a "Special VEOP" and a "VEOP – Lump Sum." Unlike the Active VEOP at issue here, under both of those programs, employees "are separated from American at the commencement of the VEOP". AMFA Exhibits N and O (3/26/21) at 1. The Ruling here did not involve either of those programs.

[3] AMFA mischaracterizes the Board's rules regarding Leaves of Absence as holding that an employee on leave must always be shown to have a "reasonable expectation of returning to work." Appeal at 9. That is not correct. The only employees to whom that requirement applies are those who are "receiving disability payments." *Representation Manual*, § 9.205.

IV. The Investigator Properly Included Employees Preponderantly Performing Mechanic and Related Functions as of the Cut-Off Date.

All parties agreed that employees who were spending a preponderance of their work time performing job functions encompassed by the Mechanic and Related craft or class should be included on the List. *See generally Representation Manual,§* 9.212; *United Airlines,* 28 NMB 533, 550-51 (2001). Applying settled Board precedent, the Investigator correctly ruled that aircraft movement, deicing, lavatory service, and fueling are all functions that fall within that category and directed the inclusion of employees performing that work as of the cut-off date on the List.

American does not challenge that Ruling in any way, and AMFA likewise does not dispute that Ruling with respect to lavatory service or fueling. AMFA does appeal the Ruling with respect to aircraft movement and deicing. As with its other arguments on appeal, AMFA is wrong.

A. **Aircraft Movement.** "The Board has long held that employees who perform [the work of] ... moving aircraft should be included in the same craft of class as mechanics 'in that they are engaged in a common function- the maintenance function.' *United Airlines,* 6 NMB 134, 141 (1977)(citing *Eastern Airlines,* 4 NMB 54, 63 (1965); *see also Federal Express,* 20 NMB 360 (1993)." Investigator's Rulings *US Airways,* NMB Case No. R-7362, (July 16, 2013) (adding to the List employees who predominantly perform aircraft movement).

Here, as described in the Declaration of Thomas Regan (filed 12/23/20)), and confirmed by American Airlines' submissions, *see* Declaration of Lynn Vaughn (filed 4/2/21), substantial ground aircraft movement at American is conducted by those Fleet Service Employees who work on dedicated and separately-bid "Tow Teams". While AMFA argues that this work is not sufficiently related to the maintenance function, the Board has repeatedly held to the contrary. Moreover, the evidence here confirms the correctness of the Ruling. Tow Team work is based on checklists maintained on American's "maintenance and engineering" website; Tow Team employees are separately trained and qualified for this work, which includes exterior safety checks, aircraft towing, and brake riding. Regan Decl., ¶¶ 6-10 and Exh. A. This work falls squarely within the Mechanic and Related craft or class, *United Airlines,* 6 NMB at 141, and employees who preponderantly worked at these tasks as of the cutoff date were thus properly added to the List.

B. **Deicing.** The basic definition of the Mechanic and Related craft or class includes "ground service personnel who perform work ... cleaning and maintaining the exterior of aircraft." *United Airlines,* 6 NMB 134, 135 (1977). All parties recognized that deicing, which involves the cleaning of ice and related debris from aircraft exteriors to allow for safe operations falls squarely within this category. Accordingly, "[t]he NMB considers deicing activities to be included in GSE service and maintenance," *Global Aviation Services, LLC,* 35 NMB 2, 6 (2008), which is within the Mechanic and Related craft or class. *See Frontier Airlines,* 29 NMB 386 (2002); *US Airways,* 28 NMB 91 (2000).

Here, the Investigator was provided with substantive evidence in the form of bid sheets, work schedules, employer and employee declarations which together established that significant numbers of fleet service employees had bid specifically for exclusively deicing positions and were performing the work of deicing as of the cut-off date. *See* Regan Decl. (filed 12/23/20) ¶ 14 and Exh. B; IAM TWU Submission (1/14/21) Exh. B2 (declarations); *see generally* Ruling at 21-24 (describing evidence received, including "the schedules of the employees who performed deicing work"). AMFA did not submit substantive evidence to the contrary, but raised speculative and irrelevant arguments based on the potential status of employees after the cut-off date. The Investigator properly rejected those arguments. Ruling at 24 ("AMFA's argument does not refute the declarations from the employees and the Managing Director of Labor Relations regarding the specific functions performed by the employees as of the cut-off date").

On appeal, AMFA focuses exclusively on one statement in the record asserting that no employee performed deicing in the 60 days before the cut-off date. Appeal at 31. However, that early statement by American Airlines witness Vaughn was specifically reviewed and investigated below, with the Investigator "request[ing] additional information" and receiving "supplemental evidence that clarified [the Carrier's] initial response." Ruling at 21. That additional investigation, which included receipt of "the schedules of the employees who performed deicing work" during the relevant period, established as a matter of fact (and consistent with the substantive evidence of the employee declarations the TWU/IAM Association had submitted) that these employees "performed deicing work exclusively and performing work in the craft or class of Mechanics and Related Employees" during the period before and past the cutoff date. Rulings at 21-23. AMFA's appeal does not even touch on this additional evidence or identify any potentially contravening facts. Accordingly, the appeal should be rejected.

V. The Investigator Properly Rejected AMFA's Other Challenges As Not Supported by Substantive Evidence.

Finally, AMFA argues that three individuals it says were deceased as of the cut-off date, and one individual it says is working at another carrier, must be removed from the List. Appeal at 2-3. 9-10. The Investigator correctly ruled, however, that AMFA had also failed to provide substantive evidence to support these contentions. Ruling at 2-3, 5.

With respect to the allegedly deceased individuals, AMFA relied primarily on on-line source material which did not establish conclusively whether or not the individuals named on-line were in fact the same individuals who worked for American Airlines. *See* Rodgers Decl. (submitted 3/15/21), ¶ 5. American Airlines submitted evidence demonstrating these same individuals' current status even after the cut-off date, which the Investigator properly credited. Ruling at 3 (citing Weel Declaration and American Human Resources Information System data). AMFA's unsponsored and unexplained documents do not overcome the presumption of eligibility based on the carrier's records. *See US Air, Inc.*, 24 NMB 38, 38 (1996).

The same analysis applies to AMFA's claim regarding an individual who they say is currently working for another carrier. AMFA submitted an "employee profile" of an individual possibly working for Southwest Airlines who had the same name as an employee who was listed as working for American Airlines as of the cut-off date. AMFA provided no evidence that the employee at Southwest was in fact the same person as the employee at American, nor did it produce evidence that - if it was the same person – he was working at Southwest as of the cutoff date. The Investigator correctly ruled that AMFA's submission did not present substantive evidence sufficient to overcome the carrier's submission that this individual was in fact eligible to vote as of the cut-off date. *Id.*[4]

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For all of the foregoing reasons, the TWU/IAM Association respectfully submits that AMFA's Appeal should be denied in its entirety.

Respectfully submitted,

Jeffrey A. Bartos

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[4] AMFA also takes issue with the Investigator's Ruling that it has waived its claim that American was engaged in "carrier interference" by virtue of a collective bargaining agreement provision regarding the selection of a medical care provider. Appeal at 40-45. But that ruling was clearly correct. On February 26, 2021, the Investigator issued an order regarding the schedule for filings in this matter and specifically directed that, by March 15, 2021, the parties submit all challenges and objections they have. With respect to previously filed materials, such as the filing raising this carrier interference argument, the Investigator unambiguously ordered that "The AMFA … must incorporate by reference any previously-filed challenges, objections, and supporting data. Failure to incorporate such allegations by reference will result in the Investigator finding those issues are no longer part of the investigation. … The Investigator will deny all challenges and objections … not filed by deadline." AMFA did not raise this issue in any way in its March 15, 2021 submission, and therefore waived it. *See Representation Manual*, § 8.1 ("Absent extraordinary circumstances, challenges and objections not filed by the deadline will not be considered."). In any event, the Investigator correctly ruled that the Board in a representation proceeding does not have jurisdiction regarding the terms of a ratified collective bargaining agreement.