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November 25, 2008

Mr. Clacy Griswold
IBT Airline Division Representative
1198 Durfee Avenue
So. El Monte, CA 91733

Dear Clacy:

This letter is in response to your request for our legal opinion concerning the right of a newly-certified representative under the Railway Labor Act (“RLA”) to bargain over the rates of pay, rules and working conditions of employees already covered by an existing collective bargaining agreement negotiated by their prior representative. The law on this issue is clear. A newly-certified representative can serve a Section 6 opener and the Carrier is obligated to negotiate over the terms of a new agreement. The starting point for such negotiations is the existing the rates of pay, rules and working conditions of employees established by their existing agreement. Further, a carrier may not refuse to negotiate with a newly-certified representative on the basis that the employees it represents are already covered by a collective bargaining agreement that was negotiated by a previous representative regardless of when the existing agreement becomes amendable.

The duty of a carrier to treat – *i.e.*, to negotiate – with the certified representative of its employees over rates of pay, rules, and working conditions arises when the National Mediation Board (“NMB”) certifies a representative for its employees pursuant to Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth. Section 2, Ninth provides, in relevant part, that “[u]pon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class.” *Id.* That duty to treat with the certified representative is not nullified simply because the employees are already covered by an existing agreement that has not otherwise become amendable.

In Ass’n of Flight Attendants (AFA) v. USAir, Inc., 24 F.3d 1432 (D.C. Cir. 1995), the United States Court of Appeals for the District of Columbia Circuit described a carrier’s duty to bargain after a change in representative. It did so in addressing AFA’s effort to apply its collective bargaining agreement with USAir to the much smaller flight attendant work group employed by Trump Shuttle and previously represented by the Transportation Workers Union (“TWU”) following USAir’s assumption of managerial

control of the Shuttle. The Court of Appeals held that the status quo applicable to the Shuttle employees (*i.e.*, their existing rates of pay, rules and working conditions) was set by their existing collective bargaining agreement negotiated by the TWU and that the status quo prevailed until modified by an agreement between AFA and the carrier. *Id.* at 1439-40.

The status quo is significant for two important reasons. It contains the starting point for the parties' negotiations and the parties are forbidden from unilaterally altering the status quo except in the manner prescribed in Section 6 of the RLA. 45 U.S.C. §§ 152, Seventh; *Id.* at 1440. Indeed, as noted by the Court of Appeals in AFA, 24 F.3d at 1438, this has been the policy of the NMB since its inception in 1934:

When there is an agreement in effect between a carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that a change in representation does not alter or cancel any existing agreements made in behalf of the employees by their previous representatives.

FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 23-24 (1935). Moreover, the NMB has explained that "the purpose of such policy is to emphasize a principle of the Railway Labor Act that agreements are between the employees and the carrier and that the change of an employee representative does not automatically change the contents of an agreement." FORTY-SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD 39 (1976).

But, this does not mean that the newly-certified representative is prevented from pursuing new terms of employment or that it is locked into the status quo for any prescribed period of time. AFA, 24 F.3d at 1440. As the Court of Appeals explained, a carrier "cannot refuse to bargain over new terms based on a claim that bargaining has been settled under the pre-existing contract." *Id.* "Instead, we hold that a newly certified union in situation such as this one has full bargaining rights with respect to covered employees without regard to whether the employees previously have been covered by a collective bargaining agreement." *Id.*; *accord*, Bensel v. Allied Pilots Ass'n 387 F.3d 298, 316-17 (3d Cir. 2004) (citing AFA, 24 F.3d 1432).

The decision of the Court of Appeals for the District of Columbia was bolstered by its rejection of the notion that USAir or AFA were bound by the collective bargaining agreement negotiated by the TWU for the flight attendants employed by the Trump Shuttle. The Court rejected that notion out of hand, reasoning, "it is also clear that neither USAir nor AFA is contractually bound by the Eastern-TWU agreement, for these parties have not assented to any of the terms of that agreement." *Id.* "The application of one union's collective bargaining agreement to another union's members would create a situation where those members would have, in effect, two representatives. But, one could

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Mr. Clacy Griswold

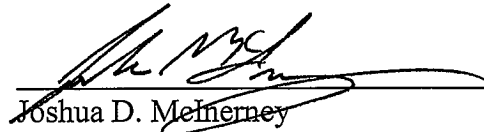
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no more have two exclusive representatives than, to use the old baseball expression, ‘two men on second base.’” AFA v. United Airlines, 71 F.3d 915, 918 (D.C. Cir. 1995).

Therefore, while a successor representative inherits the contract agreed to by its predecessor as the status quo, the carrier is obliged to agree to commence negotiations over intended changes in the agreement within thirty days of receiving notice of such changes pursuant to Section 6 of the RLA, 45 U.S.C. § 156, even though a later amendable date appears in the existing agreement.

Very truly yours,



Joshua D. McInerney

cc: David Bourne, IBT Airline Division
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