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Congress of Industrial
Organizations**

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AMERICA'S UNIONS

Via First Class Mail and Electronic Mail

April 23, 2018

Robert Martinez, Jr., International President
International Association of Machinists and Aerospace Workers
9000 Machinists Place
Upper Marlboro, MD 20772-2687

Christopher Shelton, International President
Communications Workers of America
501 Third Street, N.W.
Washington, DC 20001

RE: Article XXI Case 17-3 Delta Flight Attendants

Dear Presidents Martinez and Shelton:

Enclosed is a copy of the determination of the Impartial Umpire for Article XXI case 17-3 Delta Flight Attendants

Sincerely,

Richard L. Trumka
President

Enclosure

cc: Wilma Liebman, Impartial Umpire
Sara Nelson, International President, AFA-CWA
Ed Gilmartin, AFA-CWA
Carla Markim Siegel, IAMA W
Pat Shea, CWA

Between

International Association of Machinists
and Aerospace Workers,

and

Determination re:
Delta Flight Attendants

Association of Flight Attendants,
Communications Workers of America.

The International Association of Machinists and Aerospace Workers (“IAM”) initiated this proceeding and named the Association of Flight Attendants, Communications Workers of America (“AFA/CWA”) as the other interested union. This case concerns the more than 20,000 flight attendants employed by Delta Air Lines, Inc. (“Delta”) in the United States and around the globe. Mediation was held on December 19, 2017, but was unsuccessful. President Trumka then appointed me as an *ad hoc* Umpire in this case and scheduled this matter for a hearing, which I conducted on March 23, 2018. Both unions appeared and had a full opportunity to present evidence and arguments in support of their respective positions. On April 13, the IAM filed a supplemental statement concerning events that occurred after the hearing. On April 18, the AFA/CWA filed a response.

The IAM seeks a five-year award of exclusivity to organize the Delta flight attendants on a system-wide basis. The AFA/CWA opposes the IAM’s request for exclusivity.

As a threshold matter, the AFA/CWA contends that jurisdiction is lacking over this case because the AFA/CWA is not engaged in “ongoing competition” with the IAM to represent the Delta flight attendants within the meaning of Article XXI. For the reasons that follow, I find that this dispute falls within Article XXI’s jurisdiction.

The purpose of Article XXI is “to resolve organizing competition in those situations in which the competition may be detrimental to the best interest of the workers involved and the trade union movement[.]” Art. XXI, § 1. To that end, “[a]ny AFL-CIO affiliate that is actively engaged in organizing a group of employees and seeking to become their exclusive representative may invoke [Article XXI’s Organizing Responsibility] Procedure to seek a determination affirming its ability to do so without being subject to ongoing competition by any other AFL-CIO affiliate.” Art. XXI, § 2. *See also* AFL-CIO Executive Council Policy Statement, *Revising the Decisional Criteria for Determining Organizing Responsibilities Under Article XXI of the AFL-CIO Constitution* ¶ 1 (July 22, 2005) (hereafter, “Decisional Criteria”) (stating that “the Impartial Umpire shall decide whether an award should be issued providing an affiliate the exclusive right to seek to become the exclusive representative of the employee group in question without being subject to ongoing competition or interference by other AFL-CIO affiliates”).

As Impartial Umpire Douglas Fraser explained in a case with many similarities to this one, organizing competition may exist for purposes of Article XXI even in “the absence of overt organizing activity on [an AFL-CIO affiliate]’s part” where “the unions are *in fact* facing off against each other . . . by virtue of the activities” of employees seeking to draft a competing AFL-CIO union into an ongoing organizing campaign. *Kitty Hawk Air Cargo / CommutAir*, ORP Nos. 00-11, 00-12, at 3 (May 22, 2000) (emphasis added). In that case, after a campaign by the Teamsters to organize Kitty Hawk’s pilots was already underway,¹ “a group of Kitty Hawk pilots formed the Kitty Hawk Pilots Association as an alternative to the Teamsters,” collected authorization cards, and filed a petition for an election with the National Mediation Board (“NMB”). *Id.* at 1. The Teamsters then intervened in the election. *Ibid.* At that point, the independent Association changed tack and urged pilots to write-in the Air Line Pilots Association (“ALPA”), another AFL-CIO affiliate, on their NMB ballots rather than vote for the independent. *Ibid.* ALPA denied any involvement in this effort, but “did not explicitly tell the pilots not to write in ALPA.” *Id.* at 2.

Umpire Fraser determined that, “despite the absence of overt organizing activity on ALPA’s part, the unions are in fact facing off against each other in the current election by virtue of the activities of the in-house Association.” *Id.* at 3. What was determinative was the “concrete evidence of an active, ongoing, and

¹ The Teamsters were, at the time, affiliated with the AFL-CIO and thus covered by Article XXI.

established write-in campaign,” as well as the fact that the Teamsters had “legitimate ‘reason to believe’ that ALPA [wa]s ‘about to take steps to organize’ the Kitty Hawk pilots, especially in light of ALPA’s declination to disclaim interest in representing them in the face of the write-in effort.” *Id.* at 3 and n.3 (quoting Art. XXI, § 2). *See also Glendale Memorial Hospital*, ORP Nos. 01-26, 01-28, 01-37, at 4 (Oct. 10, 2001) (explaining that, in *Kitty Hawk*, “jurisdiction to issue an Article XXI award existed because an affiliate was competing to become the representative of the employees in question, albeit through the efforts of a third party, where it refused to disclaim a representational objective”). Those factors “distinguishe[d] th[e *Kitty Hawk*] case from prior Article XXI decisions finding no jurisdiction due to an absence of organizing competition.” *Kitty Hawk*, ORP Nos. 00-11, 00-12, at 3. Those prior decisions typically involved one AFL-CIO affiliate seeking to organize a group of employees while a different AFL-CIO union sought to affiliate the independent union that already represented those employees. *See Public Employees in the Labor and Trades Unit*, ORP No. 86-01 (March 7, 1986); *Telecommunications International Union*, ORP Nos. 86-2, 86-3 (March 7, 1986). In contrast to those cases, because of “the unique availability of the write-in option” under the NMB process, “the situation at Kitty Hawk ha[d] crystallized to the point where employees [we]re in fact choosing in an NMB election between the Teamsters and ALPA.” *Kitty Hawk*, ORP Nos. 00-11, 00-12, at 3.

This case, like *Kitty Hawk*, involves an active and ongoing campaign by Delta flight attendants to enlist the AFA/CWA as their representative as well as a refusal by the AFA/CWA to disclaim interest in representing the group, such that the IAM and the AFA/CWA are in fact competing for support among Delta flight attendants.

It is undisputed that there is an active and ongoing grassroots campaign among Delta flight attendants to seek representation by the AFA/CWA and that the AFA/CWA is aware of that campaign. To illustrate, Delta flight attendants are actively soliciting signatures on AFA/CWA union authorization cards from their co-workers and sending them to the AFA/CWA. (The authorization card is available on the AFA/CWA website; there is no allegation that the AFA/CWA took affirmative steps to distribute these authorization cards to Delta flight attendants.) And, the AFA/CWA brought several Delta flight attendants who support the AFA/CWA to the hearing in this case. One of those flight attendants testified as a witness in support of the AFA/CWA, explaining, among other things,

that he is campaigning in support of representation by the AFA/CWA, although he stated that he is doing so without any assistance from the AFA/CWA.²

AFA/CWA's President testified at the hearing that, while AFA/CWA would not itself run a campaign to organize Delta flight attendants while another AFL-CIO union was doing so, the union would not disclaim interest in representing Delta flight attendants nor would it discourage them from continuing to organize in AFA/CWA's name. AFA/CWA's President also testified forthrightly that she believed that the IAM should end its attempt to organize the Delta flight attendants, in which case the AFA/CWA would move forward in an attempt to organize this group.

It is true that the pro-AFA/CWA activity here is taking place through a grassroots campaign rather than through an independent association of employees, as was the case in *Kitty Hawk*. But that distinction is of no importance for purposes of Article XXI jurisdiction. What matters is the ongoing organizing competition between the IAM and the AFA/CWA, not whether pro-AFA/CWA employees have formed a separate organization. In fact, in at least one relevant sense, there is more direct competition between affiliates here than in *Kitty Hawk*. Pro-AFA/CWA employees are circulating AFA/CWA authorization cards – rather than cards for an independent association – at the same time that the IAM is attempting to sign up the majority it needs to trigger an election. This activity places the two AFL-CIO affiliates in direct organizing competition.

Likewise, the fact that this competition is taking place at the card-signing stage rather than, as in *Kitty Hawk*, during the election makes no difference for purposes of jurisdiction. The organizing competition in *Kitty Hawk* occurred under the pre-2014 NMB rules, which required only a 35% showing of interest to trigger an election. In contrast, under the NMB's current rules, if the IAM cannot obtain a majority on authorization cards because of pro-AFA/CWA organizing, no election will take place at all. In this context, competition over achieving a card majority is plainly sufficient to create Article XXI jurisdiction.

² In light of this undisputed evidence, it is not necessary to consider the multiple exhibits presented by the IAM – and objected to by the AFA/CWA – showing websites and social media posts by Delta flight attendants supporting organizing with the AFA/CWA.

I conclude that, consistent with *Kitty Hawk*, there is sufficient organizing competition between the IAM and the AFA/CWA to create jurisdiction under Article XXI.

On the merits, the IAM seeks an award of exclusivity and urges me to exercise my discretion to grant it five years to organize the Delta flight attendants. AFA/CWA contends that, even if there is jurisdiction under Article XXI, the IAM is not entitled to an award of exclusivity and, if an award is issued, it should not be for more than the ordinary one-year period. Applying the Article XXI Decisional Criteria, I determine that the IAM is entitled to an eighteen-month award of exclusivity to organize the Delta flight attendants.

By way of background, the AFA/CWA represents approximately 50,000 flight attendants at twenty airlines. Prior to the merger of Northwest Airlines into Delta in approximately 2008, the AFA/CWA represented Northwest's flight attendants. After that merger, the AFA/CWA sought to represent the combined group of Northwest and Delta flight attendants. In a July 2010 election, the AFA/CWA narrowly lost this effort, winning 49.2% of the votes cast by the combined group of Delta flight attendants.

The IAM is the largest union representing airlines employees in North America, representing approximately 120,000 airline employees in every craft and class except pilots. Among these members, approximately 2,700 are flight attendants. After the AFA/CWA's narrow loss in the July 2010 Delta flight attendants election, the IAM began its own effort to organize this group. After some back-and-forth with the AFA/CWA about the IAM's organizing efforts – including an effort by the AFA/CWA to register its campaign with the AFL-CIO Strategic Campaign Registration Program which the IAM opposed – in late 2012, the AFA/CWA agreed to allow the IAM an opportunity to attempt to organize the Delta flight attendants.

That effort led to the IAM filing an election petition with the NMB in January 2015. In April 2015, however, the IAM withdrew that petition and the NMB announced that it had reason to question the reliability of some of the authorization cards submitted by the IAM.

In the wake of the withdrawal of its petition, the IAM continued to organize and collect authorization cards from Delta flight attendants. The IAM is currently

spending approximately \$1 million per year on the campaign and has assigned approximately twenty full-time paid staff to organizing Delta flight attendants.

The AFA/CWA is not currently organizing Delta flight attendants although, as previously discussed, there is an active grassroots campaign by Delta flight attendants in support of representation by the AFA/CWA. The AFA/CWA states that, if the IAM were to stop organizing Delta flight attendants, the AFA/CWA would do so.

The revised decisional criteria adopted by the AFL-CIO Executive Council in July 2005 directs the Impartial Umpire to weigh and balance the following factors in deciding whether an affiliate should be granted an exclusivity award:

- (a) The extent of each union's membership, and the extent and effectiveness of each union's organizing activity, with respect to the same facility, employer, geographic area, occupational category, or industry (listed in descending order of overall significance);
- (b) The ability of each union to win representation and achieve a strong contract on behalf of the workers in question;
- (c) The duration and extent of each union's active organizing efforts, and its corresponding investment of resources, with respect to the employee group in question; and
- (d) The level of demonstrated support for each union among the employee group in question.

Decisional Criteria, ¶ 2.

No one factor automatically trumps another; rather the decisional criteria are to be weighed and balanced "as the Umpire deems appropriate in accordance with the policies and purposes of Article XXI." *Id.* at ¶ 4.

This case is unusual both because the AFA/CWA has previously acceded to the IAM's efforts to organize the Delta flight attendants and also because the AFA/CWA does not seek exclusivity or otherwise ask me to evaluate the comparative merits of its own ability to organize the Delta flight attendants, denying any current attempt to organize the group.

As to factor (a), the IAM clearly has a strong membership presence in the airline industry and, to a lesser extent, among flight attendants, and has presented evidence of the effectiveness of its organizing activity both within the airline industry and among flight attendants. While the AFA/CWA likely could make a strong showing on this factor as well, it does not seek its own award of exclusivity or claim to be currently organizing the Delta flight attendants, nor does it question that the IAM has sufficient presence in the industry to effectively organize and represent the Delta flight attendants.

Similarly, as to factor (b), as a general matter, there is no question of the IAM's ability to win representation and achieve a strong contract on behalf of flight attendants, although, as discussed further below, the AFA/CWA does question whether the IAM is currently in a position to do so at Delta. The AFA/CWA previously endorsed the IAM's effort to win representation of the Delta flight attendants during the run-up to the IAM's January 2015 petition-filing, demonstrating at least the AFA/CWA's general agreement that the IAM could provide strong representation to the group. Again, the AFA/CWA likely could make a strong showing on this factor as well, but does not seek its own award of exclusivity or claim to be currently organizing the Delta flight attendants.

The AFA/CWA focuses its argument on factor (d) – the level of demonstrated support for the IAM among the employee group in question – emphasizing the IAM's withdrawal of its election petition in April 2015 and arguing that the circumstances surrounding that withdrawal make it unlikely that the IAM will be able to win back sufficient support among Delta flight attendants to achieve representation. The AFA/CWA also claims, as relevant to factor (c), that the IAM is not currently committing sufficient resources to organize this large group of employees, contrasting the AFA/CWA's own investment in a similar-sized successful organizing campaign among flight attendants at United Airlines in 2011.

As to the level of employee support, the IAM acknowledges that it has not yet reached the majority support on authorization cards from Delta flight attendants that is now required under NMB rules to trigger a representation election, something it blames on “hav[ing] to fight [on] two fronts, one the employer and the other a sister AFL-CIO union.” The IAM provided testimony that it maintains a solid base of support among employees, however, and is building towards a majority on authorization cards, but it did not avail itself of the opportunity to allow the Impartial Umpire to review *en camera* its signed cards. *See, e.g., CVS Health Distribution Center*, ORP No. 15-05 (Feb. 9, 2016); *Department of Veteran*

Affairs, ORP No. 13-01 (Sept. 4, 2013); *American Medical Response*, ORP No. 13-02 (Aug. 1, 2013).

As to resources dedicated towards the campaign, I find that the IAM has provided persuasive evidence that it is committing significant resources to run a large and active campaign among the Delta flight attendants, even if the amount of resources is not as great as the AFA/CWA claims is necessary to win. Especially in the absence of any claim by the AFA/CWA that it exclusively should be permitted to organize the Delta flight attendants and has a plan for doing so, the IAM's evidence is sufficient on this factor.

The Executive Council has instructed that a union that can demonstrate that it "has been engaged in an active organizing campaign for the employee group in question for a period of one year . . . , that it has made a substantial investment in the campaign, and that it has a reasonable chance of successfully organizing the employee group in question, should receive an exclusivity award." Decisional Criteria, ¶ 4. I find that the IAM has been engaged in an active campaign to organize the Delta flight attendants for several years and has made a substantial investment in the campaign. Although the IAM admits it is still short of the number of cards needed to file for an election and win representation, I find, as Umpire Fraser did in *Kitty Hawk*, "that the [IAM]'s campaign has a reasonable chance of succeeding, particularly once it is clear that the [IAM is] the only AFL-CIO union that can organize the [flight attendants] for the term of this award." *Kitty Hawk*, Nos. 00-11, 0012, at 3 n.5. I therefore award the IAM exclusivity to organize the Delta flight attendants.

Where an award of exclusivity is merited, "the Umpire shall issue an award . . . running for a period of one year or such shorter or longer period as the Umpire for good reason establishes." Art. XXI, Sec. 4. Here, the IAM requests a five-year award based on the size of the employee group and the harm caused by the AFA/CWA's competition with the IAM's organizing efforts. The IAM has not directed me to any precedent that would support such a long period of exclusivity. The IAM has already had *de facto* exclusivity for several years to organize the Delta flight attendants (at least until the grassroots campaign in support of the AFA/CWA began). Although Delta is a global operation, the ability to campaign among a widely-dispersed workforce is facilitated by social media and other electronic means of communication, which the IAM is fully employing. And, the IAM itself claims that its support among Delta flight attendants has grown over the past six months.

For those reasons, my initial ruling would have been that the IAM should be able to significantly advance its campaign with a normal one-year exclusivity award. However, while this decision was pending, additional events occurred which have led me to reconsider the length of the award. The AFA/CWA acknowledges that four Delta flight attendants, who it characterizes as a “nascent group of pro-AFA activists,” attended the AFA/CWA’s annual convention in early April 2018 while this matter was under advisement. The AFA/CWA does not dispute the IAM’s assertion that these Delta Flight attendants were formally recognized from the podium at the convention and that a lengthy discussion about the need to organize Delta flight attendants occurred. Also undisputed is that a national AFL-CIO officer appeared at the AFA/CWA convention – unaware of the ongoing organizing competition between the IAM and the AFA/CWA and this pending Article XXI proceeding – and spoke in support of organizing the Delta flight attendants. That officer later apologized to the IAM for the unfortunate circumstance of having inadvertently publicly inserted himself into the middle of this ongoing dispute.

It is of course impossible to determine whether these post-hearing activities caused damage to the IAM’s organizing efforts among Delta flight attendants or to calculate with precision how much damage may have been caused. But, given the reasonable likelihood that some damage has been done, I have decided to extend the exclusivity award by six months. An eighteen-month exclusivity award – and, in particular, the clarity provided by the award that the IAM is the only AFL-CIO union permitted to organize the Delta flight attendants during this period – will provide the IAM with a reasonable opportunity to succeed without further interference in a setting “in which . . . competition may be detrimental to the best interest of the workers involved.” Art. XXI, Sec. 1. If the IAM cannot succeed within this eighteen-month time period, competition in organizing may then be in the best interest of Delta flight attendants.

Wilma Liebman
Impartial Umpire