

Case No. 11-07
Hearing : Aug. 17, 2011
Date: Oct. 3, 2011

BEFORE THE IMPARTIAL UMPIRE
UNDER ARTICLE XX OF THE AFL-CIO CONSTITUTION

In the Matter of the Dispute Between :

COMMUNICATIONS WORKERS OF AMERICA :

and :

Re: United Air Lines/
Continental

INTERNATIONAL ASSOCIATION OF :
MACHINISTS AND AEROSPACE WORKERS :

APPEARANCES

For CWA:

Veda Shook, Vice-Pres; Int'l Pres, Ass'n of Flight
Attendants-Communications Workers of America
*Sara Nelson, Int'l V-P, AFA-CWA
Ed Sabol, Sr Dir of Organizing, AFA-CWA
Deidre Hamilton, Esq, Staff attorney, AFA-CWA
Patricia M. Shea, Esq, Attorney

For IAM:

Robrt Roach, General V-P for Transportation
Sito Panteja, Chief of Staff, Transportation
Ira Levy, Grand Lodge Rep.
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*by speakerphone

I.

This is the second determination I am filing in this dispute between IAM and CWA. It arose as a result of the merger of United Airlines, whose flight attendants have been represented by AFA-CWA, and Continental Airlines, whose flight attendant employees (and others) have been represented by IAM.¹

The first determination was governed by the expedited Voluntary Special Procedures that govern the resolution of charges under Section 5 of the AFL-CIO Constitution, and was adjudicated in a determination filed three business days after the hearing. The parties agreed, however, that the charge under Section 2 would be adjudicated after the filing of briefs. The paragraphs that follow are taken from the statement of facts in the earlier determination.

Following the employer's notification of the merger to the National Mediation Board ("the Board" or "NMB") several months earlier, in January 2011 CWA filed with the Board a petition for single-carrier representation in the "craft or class" of flight attendants at the post-merger airline. The Board granted the petition, invited both unions to make a showing of interest, and on their doing so ordered an election.

NMB practice is to hold an electronic-voting election, over a specified period of time, in this case from May 17 until June 29, 2011. At the time an election was directed, AFA-CWA represented over 15,000 flight attendants in the United unit, and IAM represented over 9,000 at Continental. Of the nearly 25,000 employees eligible to vote (the largest in NMB history), valid votes were cast by 21,780. AFA-CWA prevailed, 11,942 to 9,745.

It is also the agency's practice to issue a certification the day after voting has closed, subject to objections to the election being heard and adjudicated thereafter on timely notice and filing of objections. IAM noticed and filed such objections and a Board inquiry is pending; nonetheless NMB has issued a certification of AFA-CWA as the "duly designated and authorized" representative of the employees in question, and it has been interacting with the

¹I will use "United" and "Continental" to refer to the pre-merger companies, and "the employer" or "the post-merger company" to refer to the new entity. (Continental/Micronesia, a third company, affiliated with Continental, was also a party to the merger; I will not refer to it specifically, but will speak of both former Continental companies as "Continental").

post-merger company as representative of all of the employees in the craft or class of flight attendant. CWA has charged IAM with violating Article XX, Section 2, based on its post-certification efforts to invalidate the election and displace CWA as bargaining representative.

II.

Section 2 grants Article XX protection to an affiliate that has been "certified by the National Labor Relations Board or other federal or state agency as the collective bargaining representative" of the employees in question. A simple "plain meaning" application of the critical words, "certified" and "other," would render irrelevant here NMB's practice of issuing certifications prior to adjudication of timely challenges to the validity of an election. Despite the certification's description of the election winner as "duly designated and authorized," however, it seems undeniable that all NMB can certify to on the day after the balloting closes is the result of a ballot count. The "designation" (by the employees) and "authorization" (by the law) are in actuality only provisional, pending either the absence of objections, the dismissal of any objections ruled not to warrant an investigation and hearing, or the adjudication of the validity of the election. Whether that tentative state confers Article XX protection is for the internal processes it establishes to decide.

CWA relies on two decisions of the Executive Council's Appeals Committee and on pragmatic considerations grounded in certain factual claims. IAM in turn emphasizes the assertedly deleterious impact practice on the integrity of the election process inherently resulting from NMB's unique certification, and the long-time recognition of the right of an affiliate that is properly involved in a contested election to maintain its challenges until the agency has adjudicated their validity. It also makes pragmatic assertions of its own, and disputes as "tenuous at best" (Br., p. 15) CWA's claim to have been acting in any controlling sense as representative of the Continental employees.

I will begin with the Appeals Committee decisions, which CWA reads as determinative of the illegitimacy of IAM's post-certification efforts, and which IAM deems inapplicable to NMB's unique procedure: Case No. 90-61, State of Alaska General Gov. Unit (1991), and Case No. 97-60, Willamette Industries, Inc. (1998).²

²I need to begin by recognizing that each decision reversed the reasoning, and in one the result as well, that I had reached as

In State of Alaska, the Committee drew a sharp line between seeking to invalidate an election in a proceeding before the agency and mounting a "judicial challenge" to the agency's decision. It noted that the language "points toward" that position: Section 2 "does not, in terms, require a certification and its survival in a court challenge." "Of equal importance," the Committee went on to say:

[T]he rule we state enhances the ability of AFL-CIO unions to provide the benefits of collective bargaining to an employee group that has selected a union in a representation proceeding while at the same time providing a practical assurance - through the state agency procedures leading to the issuance of a certification - that the employees have freely and fairly selected that union as their representative.³

Since it is plain that (absent employer recognition for at least a year) Section 2 *does* require a certification, the Appeals Committee must have read Section 2 as not *also* requiring its "survival" in court. In rejecting my reliance on the possibility of a judicial reversal of the election results, the Appeals Committee invoked exactly the distinction (between "agency" and "court" review) that IAM would make here. (Br., p. 13). While that does not end the matter in IAM's favor, it does counsel against grounding a decision either way on the language of the Appeals Committee's opinion alone.

In Willamette, I sought to distinguish the Alaska reversal on two grounds: First, the employer had refused to accept NLRB rejection of challenges to the election and had sought judicial review (in which the respondent affiliate intervened in support of the employer's appeal)⁴; second, although resort to court was

Umpire. My responsibility here is of course to avoid reading those decisions too narrowly, but also too broadly, as a result.

³The choice of language - "employee group" and "union" (rather than "affiliate") - doubtless reflected the fact that the losing union was an independent at the time of the election and certification. It affiliated with an AFL-CIO affiliate after seeking judicial review, as a result of which the prevailing union claimed Article XX protection against further prosecution of the appeal.

⁴Its stated objective was not to seek representative status in the unit in question, but to oppose a precedent that in its view

technically a collateral proceeding, it was the only method that Congress had made available to employers in a factual situation like that involved. Recognizing the closeness of the question, I found no violation.

Again, the Appeals Committee reversed. It rejected reliance on the fact of employer refusal to recognize the election winner: "Whenever possible, Article XX is applied so as not to enhance an employer's ability by unilateral conduct to manipulate Section 2 outcomes." I confess that, on reflection 24 years later, my reliance on the employer's response seems plainly wrong.

Here, however, it is the assertion that the employer is "actively engaged in collective bargaining" that grounds the claim (Br. for CWA, p. 10) of a Section 2 violation. Of course, it is only the post-merger company's decision to recognize AFA-CWA that makes such a claim possible. Not surprisingly, IAM argues that reliance on the employer's response to the election to foreclose a challenge to its validity before the agency would encourage employer interference with the election process (by barring any post-certification review of election challenges). (Br., p. 14).

The Alaska Appeals Committee decided that a "judicial challenge" is impermissible where an "employer accepts the certification by recognizing and engaging in collective bargaining with the certified union." The *Willamette* decision did not comment on the tension between its stated concern with employer "manipulation" and the broader reach of this quoted *Alaska* passage. Holding it applicable to administrative as well as judicial challenges would mean that an employer would be free to recognize the election winner or not as it preferred, with consequent major harm to either the interest of the employees and the objecting affiliate in obtaining a fair hearing on their challenges, or the interest of the employees and the prevailing affiliate in a prompt stabilization of labor standards and the bargaining and grievance processes.

As with any argument based on a claim of bad consequences, each variant factual situation needs to be appraised anew. The Committee decision in the Alaska dispute recognized as much in deciding to proceed on a "case-by-case basis," rather than to "state a general rule." I do not believe, therefore, that the Appeals Committee decisions *mandate* a ruling for one affiliate or the other.

would have a "severe chilling effect" in other units in the industry.

I similarly cannot conclude that the use of the unvarnished word, "certification," and the breadth of Section 2's unmodified reference to the NLRB or "other" State or federal agency alone warrant a "plain language" ruling for the charging affiliate, for other considerations exist in the present context, and should be taken into account. The NMB's practice of pre-hearing certification is, I believe, unique in labor law, and the airline industry was a far different world, and only recently brought within the coverage of the Railway Labor Act, when Article XX was first adopted over 50 years ago. I cannot believe that, had the question come up then, the language of Article XX would have simply been left as it was without comment.

It seems equally clear that the matter should not turn on my judgment of the plausibility and seriousness of IAM's objections. Even if Article XX were to authorize me to decide according to my view on that criterion, which it plainly does not, I am in no position to judge it. Predictably, one side sees them as of substantial import, while to the other they are frivolous or trivial, and the question where the truth lies was (appropriately) not litigated. I believe that the decision here should turn on a judgment weighing the overall likely beneficial and harmful effects of a decision allowing, or one disallowing, continuation of representational efforts pending an NMB decision. In that regard, I will emphasize that a ruling either way will be of major immediate significance. The representation of some 25,000 workers is at stake; a Board decision is apparently a year or more away, with great prejudice to the employees and both affiliates regardless of the outcome, while at the same time the delay can be avoided here only by depriving IAM and the very substantial number of workers who supported it of an opportunity that the law has long provided under the vast majority of labor-relations regulatory regimes, and which Article XX has not been deemed to abridge.

Obviously, the Appeals Committee is in a far better position to judge the matter than a minimally informed Umpire. Nevertheless, I am not authorized simply to pass the question on to the Subcommittee. Putting aside my own judgment on the pragmatic considerations, I believe that a ruling conforming access to administrative review under the Railway Labor Act with the norms that have been so widely established makes more sense than woodenly allowing the ordinary meaning of a single word or two to introduce an anomaly that I cannot imagine was intended by the addition of Article XX to the AFL-CIO Constitution. Whether there is a basis for reasons that are *not* "wooden" is for the appellate process to decide.

I therefore conclude that CWA has not yet achieved Article XX protection for the post-merger unit.

DETERMINATION

IAM is not in violation of Article XX, Section 2, of the AFL-CIO Constitution.



Howard Lesnick
Impartial Umpire