

## REPRESENTATION AND PRESIDENTIAL EMERGENCY BOARDS

37 Representation  
42 Presidential Emergency Boards



## REPRESENTATION AND PEBS

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The Office of Legal Affairs investigates representation issues; conducts elections for the purpose of determining collective bargaining representatives in the airline and railroad industries; and oversees post-mediation activities that lead or may lead to the establishment of Emergency Boards by the President of the United States (PEBs). The General Counsel also serves as legal counsel for the NMB.

## Representation

### OVERVIEW

Under the Railway Labor Act (RLA), employees in the airline and railroad industries have the right to select a labor organization or individual to represent them for collective bargaining. Employees may also decline representation. An RLA representational unit is “craft or class,” which consists of the overall grouping of employees performing particular types of related duties and functions. The selection of a collective bargaining representative is accomplished on a system-wide basis, which includes all employees in the craft or class anywhere the carrier operates in the United States. Due to this requirement and the employment patterns in the airline and railroad industries, the Agency’s representation cases frequently involve numerous operating stations across the nation. [An application for a representation investigation may be obtained from the Agency’s web site at [www.nmb.gov](http://www.nmb.gov).]

If a showing-of-interest requirement is met, the NMB continues the investigation, usually with a secret Telephone/Internet election. Only employees found to be eligible to vote by the NMB are permitted to participate in elections. The NMB is responsible for determining RLA jurisdiction, carrier status in mergers, and for ensuring that the requirements for a fair election process have been maintained without “interference, influence or coercion” by the carrier. If the employees vote to be represented, the NMB issues a certification of that result which commences the carrier’s statutory duty to bargain with the certified representative.

In many instances, labor and management raise substantial issues relating to the composition of the electorate, jurisdictional challenges, allegations of election interference, and other complex matters which require careful investigations and ruling by the NMB.

## REPRESENTATION CASES

### START PENDING



### CASES DOCKETED



### CASES CLOSED



### END-PENDING



## REPRESENTATION HIGHLIGHTS

The NMB Office of Legal Affairs (OLA) continues to operate at a high level of quality and efficiency. As a review of customer service and performance standards will attest, the Agency's Representation program consistently achieves its performance goals, delivering outstanding services to the parties and the public.

Due to a lapse in appropriations, the NMB's operations were curtailed from October 1 through October 16, 2013. The OLA staff closed 37 cases and also docketed 39 cases during the year. With the Agency resources requested for 2014 and 2015, it is estimated that 53 representation cases will be investigated and resolved in each year.

## Case Summaries

Representation disputes involving large numbers of employees generally are more publicly visible than cases involving a small number of employees. However, all cases require and receive neutral and professional investigations by the Agency. The NMB ensures that the employees' choices regarding representation are made without interference, influence or coercion. The case summaries that follow are examples of the varied representation matters which were investigated and resolved by the NMB during FY 2014.

## American Airlines / US Airways

On January 10, 2014, pursuant to the NMB's Merger Procedures and NMB Representation Manual Section 19.3, American Airlines notified the NMB that "on December 9, 2013, American Airlines Group, Inc., (formerly known as AMR Corporation) and US Airways Group, Inc., implemented a merger agreement dated February 13, 2013, resulting in the former's acquisition of the latter, including its wholly owned subsidiary US Airways, Inc." Subsequently, the NMB received applications for investigation and determination of whether American Airlines and US Airways (collectively the New American) were operating as a single transportation system. With regard to each application, the Board conducted an investigation to determine whether a single transportation system existed for representation purposes under the RLA.

**Flight Deck Crewmembers** On January 15, 2014, the Allied Pilots Association (APA) filed its application covering almost 15,000 employees in the Flight Deck Crewmember craft or class. APA represents this employee group at the pre-merger American and the US Airline Pilots Association (USAPA) is the representative at US Airways. Based on the applications of its single carrier criteria to the facts disclosed by the investigation, the Board determined that there was substantial integration of operations, financial control, and labor and personnel functions. The Board also found that the absence of seniority integration cannot by itself preclude a single carrier determination. American Airlines/US Airways, 41 NMB 174 (August 8, 2014).

**Passenger Service** On April 3, 2014, the CWA/IBT Association filed an application covering over 14,000 employees in the Passenger Service craft or class at the New American. Based on its investigation, the Board determined that American Airlines and US Airways have clearly combined their operations from a managerial and labor relations perspective and have taken substantial steps toward operational integration. American Airlines./US Airways, 41 NMB 90 (June 19, 2014). Having determined that a single transportation system exists, the Board proceeded to examine the potential representation consequences. The Board's investigation disclosed that there are approximately 8,287 Passenger Service Employees on the pre-merger American and approximately 6,544 on the pre-merger US Airways. Since the numbers of employees in the craft or class on each part of the system are comparable, the Board authorized an election among the craft or class of Passenger Service Employees on the New American. American Airlines, Inc./US Airways, Inc., 41 NMB 143 (July 24, 2014).

## American Airlines / US Airways (Continued)

**Flight Attendants** On June 9, 2014, the Association of Professional Flight Attendants (APFA) and the Association of Flight Attendants-CWA (AFA) jointly filed an application covering over 24,000 employees in the Flight Attendant craft or class at the New American. APFA represents the Flight Attendant craft or class at pre-merger American and AFA represents the Flight Attendant craft or class at pre-merger US Airways. The Board determined that American Airlines and US Airways are operating as a single transportation system for representation purposes. In addition to noting the previous single carrier determination, the Board noted the substantial integration of operations, financial control, and labor and personnel functions. American Airlines, Inc./US Airways, Inc., 41 NMB 145 (July 29, 2014).

In FY2014, the Board also received single carrier applications filed jointly by the Transport Workers Union of America (TWU) and the International Association of Machinists and Aerospace Workers (IAM) for the crafts or classes of Mechanics and Related, Fleet Service, and Stock Clerk Employees at the New American. In their application, TWU and IAM state that they have formed joint Associations for purposes of representing these craft or classes at the merged airline. The applications cover approximately 14,000 Mechanics and Related employees, 15,000 Fleet Service Employees, and 1,500 Stock Clerks. NMB Case File CR-7131.

## Frontier Airlines

**Pilots** An application filed by the Frontier Airline Pilots Association (FAPA) required the Board to determine whether a prior single transportation system was extinguished.

In Republic Airlines, et al./Frontier, 38 NMB 138 (2011), the Board found that Frontier Airlines was part of a single transportation system along with the other Republic Air Holdings' (RAH) subsidiaries Republic Airlines, Shuttle America and Chautauqua Airlines (Republic system) for the craft or class of Pilots. On June 28, 2011, the International Brotherhood of Teamsters (IBT) was certified as the representative of the Pilots craft or class on the Republic system. Subsequently, on December 3, 2013, RAH completed the sale of all of the outstanding shares of its wholly-owned subsidiary, Frontier Airlines Holdings, Inc. (which owns Frontier) to the Falcon acquisition Group, Inc., an affiliate of Indigo Partners, LLC. On December 18, 2013, FAPA filed its application seeking to represent the Pilots craft or class at Frontier separate from the Republic system.

Following its investigation, the Board determined that Frontier is operating as a single transportation system for the craft or class of Pilots. Frontier Airlines, Inc., 41 NMB 31 (March 31, 2014). The Board noted that Frontier is now owned by Indigo Partners and does not share Boards of Directors or other senior managers with RAH. Frontier also controls all aspects of its flight operations, holding its own FAA operating certificate, flying its aircraft under the Frontier livery and code, with Pilots wearing Frontier uniforms. Additionally, Frontier controls all aspects of its labor relations and personnel policies and is held out to the public as separate from the RAH carriers. While the Board acknowledged the existence of an Integrated Master Seniority List covering all the pilots on the former Republic system, it found that this indicia alone was insufficient to keep Frontier in the that system.

The Board also rejected IBT's contention that the Board's two year certification bar in 29 C.F.R. §1206.4(a) be tolled during a period in which a carrier violates its Section 2, Ninth duty to deal with the representative certified by the NMB. The Board noted that the IBT has filed a lawsuit in federal district court alleging Frontier's failure to bargain in violation of Section 2, Ninth but that no decision had issued. In the absence of a ruling by the district court, the Board lacks the jurisdiction to "evaluate" whether Frontier treated with IBT as the certified representative as required under Section 2, Ninth. In addition, the Board found that the language of the certification bar covers applications for "the same craft or class of employees on the same carrier." In the instant case, FAPA's application is sought to represent Pilots on Frontier and not Pilots on the Republic system. Accordingly, the Board found the application was not barred.

**Mechanics and Related Employees Craft or Class** In *Frontier Airlines, Inc.*, 41 NMB 202 (August 21, 2014), the Board found that Frontier was a separate transportation system for the Mechanics and Related craft or class. As in its earlier decision regarding the Pilot craft or class at Frontier, the Board noted that Frontier does not share Boards of Directors or other senior managers with RAH and Frontier controls all aspects of its operations. The Mechanics and Related Employees report to Frontier management and are on separate seniority lists from the Mechanics and Related Employees on the Republic system. Accordingly, the Board found that Frontier is operating as a single transportation system for the craft or class of Mechanics and Related Employees. In this case, IBT also sought to accrete employees in the Maintenance Controllers position into the Mechanics and Related Employees craft or class. The Board rejected Frontier's contention that these employees were management officials. In addition the Board determined that the Maintenance Controllers shared a work-related community of interest with the Mechanics and Related Employees craft or class.

The Board majority found that under *Ross Aviation, Inc.*, 22 NMB 89 (1994), the Maintenance Controllers were covered by the IBT's certification covering the Mechanics and Related Employees craft or class since they shared a work-related community of interest, performed job functions traditionally performed by members of that craft or class and met the requisite 50 percent showing of interest requirement.

Member Geale wrote separately to express his view that the NMB's accretion policy should be reconsidered in view of not only regulatory changes to the NMB's election requirements in 2010 and statutory changes to the NMB's showing of interest requirements by legislation in 2012, but also to safeguard the freedom of association rights of working Americans by providing a secret ballot election to choose to certify or not certify an exclusive representative. He noted that such a reconsideration has the potential to improve labor relations and promote majority employee support and participation in collective bargaining. Labor unions and their representatives who have demonstrated majority support among all employees through an election, including those newly added to a unit, in turn are likely to be more successful in maintaining stable, long-term, and productive relationships with carriers. Thus, a majority vote of support by the employees being accreted into a craft or class could benefit the overall bargaining relationship.

## Presidential Emergency Boards (PEBS)

### OVERVIEW

Section 159A (Section 9A) of the Railway Labor Act (RLA) provides special, multi-step emergency procedures for unresolved collective-bargaining disputes affecting employees on publicly funded and operated commuter railroads. Section 160 (Section 10) of the RLA covers all other railroads and airlines.

When the National Mediation Board determines that a collective-bargaining dispute cannot be resolved in mediation, the agency proffers Interest Arbitration to the parties. Either labor or management may refuse the proffer and, after a 30-day cooling-off period, engage in a strike, implement new contract terms, or engage in other types of economic self help, unless a Presidential Emergency Board (PEB) is established.

If the NMB determines, pursuant to Section 160 of the RLA, that a dispute threatens substantially to interrupt interstate commerce to a degree that will deprive any section of the country of essential transportation service, the NMB notifies the President. The President may, at his discretion, establish a PEB to investigate and report respecting such dispute.

Status-quo conditions must be maintained throughout the period that the PEB is impaneled and for 30 days following the PEB report to the President. If no agreement is reached, and there is no intervention by Congress, the parties are free to engage in self-help 30 days after the PEB report to the President.

Apart from the emergency board procedures provided by Section 160 of the RLA, Section 9a provides special, multi-step emergency procedures for unresolved disputes affecting employees on publicly funded and operated commuter railroads. If the Mediation procedures are exhausted, the parties to the dispute or the Governor of any state where the railroad operates may request that the President establish a PEB. The President is required to establish such a board if requested. If no settlement is reached within 60 days following the creation of the PEB, the NMB is required to conduct a public hearing on the dispute. If there is no settlement within 120 days after the creation of the PEB, any party or the Governor of any affected state, may request a second, final-offer PEB. No Self-Help is permitted pending the exhaustion of these emergency procedures.

### PEB HIGHLIGHTS

Three PEBs were established during fiscal year 2014. All three PEBs involved the special, multi-step emergency procedures for unresolved collective-bargaining disputes affecting employees on publicly funded and operated commuter railroads. PEBs 244 and 245 were established under Section 9(a) to resolve a dispute between the Long Island Railroad (LIRR) and certain of its employees. PEB 246 was also established under Section 9(a) to resolve a dispute involving the Southeastern Pennsylvania Transportation Authority (SEPTA) and certain of its employees.

**Presidential Emergency Board 244.** In May 2010, pursuant to Section 6 of the RLA, the LIRR served on the Organizations' formal notices for changes in current rates of pay, rules, and working conditions. The parties were unable to resolve the issues in dispute in direct negotiations. Applications were filed with the NMB by the BRS, IRSA, IAM, NCFQ, and IBEW in September and October 2010, by TCU and UTU in August and September 2011, and by SMART in March 2013.

Following the applications for mediation, representatives of all parties worked with the NMB mediators and with Board Members of the NMB in an effort to reach agreements. Various proposals for settlement were discussed, considered, and rejected. On October 18, 2013, the NMB, in accordance with Section 5, First, of the RLA, urged the LIRR and the Organizations to enter into agreements to submit their collective bargaining disputes to arbitration as provided in Section 8 of the RLA ("proffer of arbitration"). On October 18, 21, and 22, 2013, the Organizations individually declined the NMB's proffer of arbitration, and on October 22, 2013, the LIRR also declined the NMB's proffer of arbitration.



## PEB HIGHLIGHTS (CONTINUED)

On October 22, 2013, the NMB served notices that its services had been terminated under the provisions of Section 5, First, of the RLA. Accordingly, self-help became available at 12:01 a.m., Eastern Standard Time, on Friday, November 22, 2013.

Following termination of mediation services, on November 18, 2013, in accordance with Section 9a of the RLA, the LIRR requested that President Obama establish an Emergency Board to investigate and issue a report and recommendations regarding the dispute. Section 9a(c)(1) of the RLA, in setting forth special procedures for commuter service, provides that any party to a dispute that is not adjusted under the other procedures of the RLA, or Governor of the State through which the service that is subject to dispute is operated, may request the President to establish an Emergency Board. Thereafter, on November 21, 2013, the President issued an Executive Order. Effective 12:01a.m., Eastern Standard Time, November 22, 2013, the Executive Order created Presidential Emergency Board 244 to investigate and report concerning the dispute between the LIRR and certain of its employees represented by the Organizations. The President appointed Ira F. Jaffe, as Chairman of the Board, and Roberta Golick and Arnold M. Zack as Members. The Board submitted its Report to the President on December 21, 2013.

**Presidential Emergency Board 245.** When the recommendations of PEB 244 did not result in a prompt resolution of the disputes, the NMB conducted a public hearing on January 15, 2014, at which the Organizations stated their willingness to accept the recommendations of PEB 244 and LIRR discussed its reasons for not accepting the recommendations of PEB 244. The dispute remained unresolved.

On March 5, 2014, LIRR requested that President Obama create a second Emergency Board pursuant to Section 9a(e) of the RLA regarding its disputes with the Organizations. Thereafter, on March 20, 2014, the President issued an Executive Order establishing, effective 12:01 a.m., Eastern Daylight Time, March 22, 2014, Presidential Emergency Board 245 to recommend adoption of a final offer from those submitted by the LIRR and the Organizations. The President appointed Joshua M. Javits, as Chairman of the Board, and M. David Vaughn and Elizabeth C. Wesman as Members. The Board submitted its Report to the President on May 20, 2014.

<sup>1</sup>Brotherhood of Railroad Signalmen ("BRS") represents Signal and Communication Workers; Independent Railway Supervisors Association International ("IRSA") represents Gang Foremen; International Association of Machinists & Aerospace Workers ("IAMAW") represents Machinists; International Brotherhood of Electrical Workers ("IBEW") represents Electrical Workers; National Conference of Firemen & Oilers/Service Employees International Union ("NCFO") represents Laborers; Transportation Communications International Union ("TCU") represents Clerks, Dispatchers, Block Operators, and "Exception 5" Employees; and International Association of Sheet Metal, Air, Rail, and Transportation Workers ("SMART") represents Trainmen, Maintenance of Way Employees, Maintenance of Way Supervisors, Carmen, Special Service Attendants, and Sheet Metal Workers.

**Presidential Emergency Board 246.** On February 2, 2009 and July 23, 2009, pursuant to Section 6 of the RLA, the International Brotherhood of Electrical Workers (IBEW) and the Brotherhood of Locomotive Engineers and Trainmen (BLET), respectively, served on SEPTA formal notices for changes in current rates of pay, rules, and working conditions. The parties were unable to resolve the issues in dispute in direct negotiations. Applications for mediation were filed with the NMB by BLET on April 9, 2010 and by IBEW on June 21, 2010.

Following the applications for mediation, representatives of all parties worked with the NMB mediators and with Board Members of the NMB in an effort to reach agreements. Various proposals for settlement were discussed, considered, and rejected. On May 1, 2014, the NMB, in accordance with Section 5, First, of the RLA, urged SEPTA and the Organizations to enter into agreements to submit their collective bargaining disputes to arbitration as provided in Section 8 of the RLA ("proffer of arbitration"). On May 2 and 6, 2014, BLET and IBEW, respectively, accepted the NMB's proffer of arbitration, and on May 8, 2014, SEPTA declined the NMB's proffer of arbitration.

On May 14, 2014, the NMB served notices that its services had been terminated under the provisions of Section 5, First, of the RLA. Accordingly, self-help became available at 12:01 a.m., Eastern Daylight Time, on Saturday, June 14, 2014. Absent the establishment of an Emergency Board, BLET and IBEW commenced a strike on June 14, 2014.

On June 14, 2014, in accordance with Section 9a of the RLA, the Governor of Pennsylvania requested that President Obama establish an Emergency Board to investigate and issue a report and recommendations regarding the dispute. Section 9a(c)(1) of the RLA, in setting forth special procedures for commuter service, provides that any party to a dispute that is not adjusted under the other procedures of the RLA, or Governor of the State through which the service that is subject to dispute is operated, may request the President to establish an Emergency Board. On June 14, 2014, the President issued an Executive Order creating Emergency Board 246, effective 12:01 a.m. Eastern Daylight Time, June 15, 2014 to investigate the dispute between SEPTA and certain of its employees represented by the BLET and IBEW. BLET and IBEW ceased striking when the Emergency Board became effective. The President appointed Richard R. Kasher, as Chairman of the Board, and Ann S. Kenis and Bonnie Siber Weinstock as Members. The Board submitted its Report to the President on July 14, 2014.

**Forecast for FY 2015, FY 2016, and Beyond.** The NMB cannot predict precisely the number of PEBs that may be created during a given fiscal year. Estimates are based, among other factors, upon prior experience and knowledge of the contentiousness of the parties in the bargaining process and mediation, the number of cases, and the degree of impact of any dispute. For example, the release of the Massachusetts Bay Commuter Railroad (MBCR) parties created a high probability of 2 PEBs during FY 2011, for which the agency appropriately prepared. In the end, the parties reached agreements during the cooling off period, with no PEB being created. In FY 2012, there was a PEB involving NCCC and multiple unions. Activity leading up to a release and the creation of a PEB for the LIRR and multiple unions occurred in FY 2013, but the PEB was established in FY 2014. As discussed above, a second PEB was established for the LIRR in FY 2014 under the special commuter rail provisions of Section 9(a). In addition, a PEB was also established for SEPTA under Section 9(a).