



NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

In the Matter of the
Application of the

AIR LINE PILOTS ASSOCIATION

alleging a representation
dispute pursuant to Section
2, Ninth, of the Railway
Labor Act, as amended

involving employees of

FEDERAL EXPRESS CORPORATION

20 NMB No. 4

CASE No. R-6044

FINDINGS UPON
INVESTIGATION-
AUTHORIZATION
OF ELECTION

October 19, 1992

On May 30, 1991, the Air Line Pilots Association (ALPA) filed an application pursuant to the Railway Labor Act, as amended, 45 U.S.C. §152, Ninth, alleging a representation dispute among Flight Deck Crew Members, employees of Federal Express Corp. This application was docketed as NMB Case No. R-6044.

At the time the application was filed, these employees were unrepresented.

The Board assigned Mediator Laurette M. Piculin to investigate. Based upon the investigation, on June 14, 1991, the Board found a dispute to exist and authorized an election. Ballots were mailed on July 12, 1991 and the count was held on August 22, 1991. On August 21, 1991, ALPA filed a "Notice of Election Objections Based on Carrier Interference". The organization requested the Board to conduct a re-run election to remedy the carrier's interference in the event ALPA lost the election.

The results of the ballot count, conducted on August 22, 1991, were that ALPA received votes from 1112 of the 2279 eligible voters. Five other valid votes were cast. The total of valid votes, 1117, was 23 votes less than the majority needed for certification.

Between August 22, 1991, and January 15, 1992¹, ALPA and Federal Express filed position statements and other documents on the issue of carrier interference. Mediator Piculin conducted interviews with approximately 40 individuals, including carrier officials, witnesses on behalf of ALPA, and randomly selected employees, between March and June 1992.

ISSUE

The issue before the Board is whether Federal Express' actions tainted the laboratory conditions necessary for a fair election under the Railway Labor Act, i.e., whether the carrier's actions constituted "interference, influence or coercion" for the purposes of Section 2, Ninth, of the Act.

CONTENTIONS

ALPA's Position

The organization argues that Federal Express has tainted the laboratory conditions which the Board deems necessary for a fair election. According to ALPA, the carrier's alleged illegal activities included:²

1. Promising or conferring unusual benefits during the campaign;

¹ On February 24, 1992, the Board revised its Representation Manual to include certain limits on election interference objections. This case was not affected by those limitations.

² On November 8, 1991, ALPA filed a supplemental submission of objections based on certain post-election activity on the part of the carrier. On November 27, 1991, the carrier filed a response in which it asserted that ALPA's contentions were both "meritless" and "untimely".

2. Engaging in surveillance or indirect polling;
3. Providing the Board with an inaccurate address list;
4. Assisting and endorsing the efforts of the "Independent Pilots for a Non-Union Operation";
5. Pre-empting ALPA's potential negotiating role through the establishment of a "permanent scope committee" during the election period;
6. Conducting an anti-ALPA campaign through written communications;
7. Making misrepresentations about ALPA; and
8. Threatening to furlough employees if ALPA won the election.

ALPA has requested a re-run election using a "Key"³ ballot.

Federal Express' Position

The carrier "vehemently denies" ALPA's allegations. In addition, Federal Express asserts that it "exercised its right of free speech" in issuing campaign communications and made certain statements in response to ALPA's statements. The carrier also maintains that any benefits granted were done so in the regular course of business. Federal

³ In a "Key" election the majority of eligible voters must vote against representation in order to prevent certification. See, Key Airlines, 16 NMB 296 (1989).

Express urges the Board to certify the election results and to dismiss ALPA's application. The carrier also had requested either a hearing or an on-the-property investigation.

FINDINGS OF LAW

Determination of the issues in this case is governed by the Railway Labor Act, as amended, 45 U.S.C. §151, et seq. Accordingly, the Board finds as follows:

I.

Federal Express Corp. is a common carrier by air as defined in 45 U.S.C. §181 of the Act.

II.

ALPA is a labor organization and representative as provided by 45 U.S.C. §151, Sixth and §152, Ninth, of the Act.

III.

45 U.S.C. §152, Third, provides, in part:

Representatives . . . shall be designated . . . without interference, influence, or coercion . . .

IV.

45 U.S.C. §152, Fourth gives employees subject to its provisions "...the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." This section also provides as follows:

No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of

their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees...or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.... (Emphasis added).

V.

45 U.S.C. §152, Ninth, provides that the Board has the duty to investigate representation disputes and to designate who may participate as eligible voters in the event an election is required. In determining the choice of the majority of employees, the Board is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives by the employees without interference, influence or coercion exercised by the carrier." (Emphasis added).

FINDINGS OF FACT

I.

Promising or Conferring Benefits

A.

On August 2, 1991, Federal Express announced that American Airlines had agreed to grant Federal Express pilots reciprocal jumpseat privileges. The memorandum which communicated this information was issued by Jay Barnwell, System Chief Pilot, and stated as follows:

After months of exhaustive efforts we have secured a Reciprocal Jumpseat Agreement with American Airlines, Inc., AMR Eagle,

Inc. and AMR Eagle's affiliated companies. This agreement extends the ability for our crew members to occupy seats on American Airlines, AMR Eagle, Flagship, Simmons and Wings West Airlines.

* * *

This has been a long awaited benefit that will help our pilot workforce. Please conform to American's policies to insure a long and favorable relationship....

According to ALPA, while it was true that this was "a long awaited benefit", the "conferral" of this benefit during the election period "was calculated to influence and change voters." According to the carrier, it had been attempting to reach the agreement with American for several months. The agreement was reached July 24, 1991, and was announced "in the normal course of events."

B.

ALPA maintains that the carrier's announcement that "widebody pay" would apply to pilots flying the Airbus 300 (A-300) also constituted an improper conferral of benefits. According to the organization, during the campaign, the carrier sent all pilots a videotape featuring Federal Express Chairman and CEO Frederick Smith and Chief Operating Officer James Barksdale. Smith and Barksdale discussed recent aircraft acquisitions, including the A-300. In response to a question as to whether the A-300 would be considered a widebody or narrowbody for compensation purposes, Smith stated that the plane would be considered a widebody. Widebody pay is higher than narrowbody pay.

Federal Express has submitted an affidavit from David F. Sutton, Assistant General Manager/Aircraft Acquisition and Sales. According to Sutton, the "industry definition of a "widebody" is an aircraft that contains a twin-aisle seat configuration in a passenger operation", whereas a "narrowbody" contains a single-aisle seat configuration...". Sutton further

states that the A-300 "is defined by the airline industry as a "widebody." Federal Express has also submitted other documents in support of its assertion that the A-300 is "universally" considered a widebody, including Airbus literature describing the A-300 as a widebody.

C.

ATA asserts that the carrier implicitly promised improvements in pension benefits during the campaign. The specific benefit referred to derives from proposed legislation, known as the Pension Access and Simplification Bill, H.R. 2730. This bill contains a provision which would eliminate the differences between union and non-union pilot pension plans under §410(b)(3)(B) of the Internal Revenue Code.

The organization cites Allegheny Airlines, 4 NMB 7 (1962) in support of its contention that Federal Express implicitly promised pension benefits, and therefore coerced its employees. In Allegheny, the Board found that the carrier, through the totality of its conduct, had interfered with employee freedom of choice. Among the carrier actions which the Board found objectionable was a letter which contained misrepresentations about Board voting procedures and statements such as, "If you vote for the union, your whole future may be altered, the whole future of Allegheny may be altered. An outside minority will seize your rights." The letter also included discussion of a future pension plan which the carrier alleged was under "active consideration" but concerning which it was "not allowed to make promises...in view of the election."

According to a statement made by Bruce Cheever, a Federal Express pilot who was chairman of the carrier's Flight Advisory Board (FAB),⁴

...Section 410(b)(3)(B)...permits an airline employer to script a tax-qualified pension package for its air pilots that is tailored to their unique requirements [but] only where the air pilots have entered into a collective bargaining agreement in accordance with Title II of the Railway Labor Act.... The proposed amendment...is designated simply to eliminate the union-representation requirement...to allow all air pilots the opportunity to have tax-qualified plans tailored to pilots' needs....

Cheever made this statement in February of 1990 to a House Subcommittee. The amendments were not passed in 1990, however, similar provisions were introduced in a 1991 bill.

In a letter to "All Federal Express Crewmembers" dated June 16, 1991, on the subject of collective bargaining, Barksdale discussed the possible consequences of electing ALPA. Barksdale's letter contained several pages of discussion of various issues. On the issue of a retirement plan, Barksdale wrote in part,

⁴ The FAB is an entity established at Federal Express in the early 1980's, whose membership, elected by the carrier's pilots, consists of flight crewmembers. The FAB meets with management to discuss work-related issues on a quarterly basis, and meets once a month as a working committee. The purpose of the FAB as set forth in its charter is "to provide a coherent method of communication between...Flight Crewmembers and...Management." The FAB reviews and discusses such issues as working conditions, safety, and work rules.

...as final food for thought on the subject of ALPA and the right to ask for a separate retirement plan, how would you feel about paying ALPA dues if Congress grants non-union pilots the right to ask for a separate retirement plan next year?

On July 11, 1991, Barksdale sent another letter to "All Crewmembers", which contained the following:

I am certain you've heard by now, our two-year effort to get legislation passed on the pilot retirement issue recently took giant steps forward.

House Ways and Means Committee Chairman Dan Rostenkowski and a number of members of his committee agree with us that the current laws prohibiting separate retirement plans for non-union pilots are inherently unfair. As a result, he personally introduced legislation designated to remedy that inequity....

I was dumbfounded to read the attached letter from Randy Babbitt to Chairman Rostenkowski....[which] states ALPA's strong opposition to the bill which is designed to provide a level playing field for our pilots.

Throughout this campaign ALPA organizers have portrayed ALPA as the friend and protector of all airline pilots. Since the attached letter is totally inconsistent with those claims, a number of serious questions surface....

I've told you before that ALPA is a big business with its own goals, agenda and political needs. Apparently the needs of Federal Express pilots are irrelevant to ALPA when those needs are out of step with its own organizational agenda. In this case I believe ALPA's desire for several million dollars of your income in the form

of dues was more important to them than seeing that fairness prevails....

ALPA responded on July 13, 1991, and stated in part:

What guarantee do we have that management will give us a better pension plan even if the law is changed?.... Given the unwillingness of management to take advantage of existing provisions for improving pilots' retirement benefits, it is questionable as to whether they will actually make use of the provisions they are currently advocating.

It is clear that management is using this legislation to imply promises that they will not be obligated to keep.

ALPA also sent a "Bulletin" entitled "Why We Oppose the Pension Simplification Act." The "Bulletin" stated, in part:

Our management is using your FEPAC (Federal Express Political Action Committee) contribution to lobby for a change to the pension law which will allow them...to tell you that they will set up a separate pension plan for pilots, but with no front end guarantee that they will really do it....

Barksdale responded on July 16, 1991:

"I believe [ALPA's] statements are attempts to bait the company since any answer could be claimed by ALPA to be improper employer interference....

You all know that the Company has pursued this legislation for the past two years. I am confident you can judge for yourself whether the organizing committee has accurately assessed our intentions....

Finally, on July 23, 1991, ALPA issued a letter, "The Real Issue - Final Word on the Pension Simplification Plan." The letter included the following statement:

Nothing the company has ever stated ... suggests, intimates, recommends, promises or in any way obligates them to improve our pension plan and secure those improvements for years to come, even if the proposed legislation is enacted. (Emphasis in original).

To date, Congress has not passed the Pension Simplification Act.

II.

Surveillance and Polling

A.

According to ALPA, Federal Express managers engaged in surveillance in the Memphis crew lounge "during hub turns after it became clear that an election would take place." Two pilots have submitted declarations in support of the organization's assertion. Both individuals state that shortly after March 4, 1991, the date the organizing committee began its distribution of authorization cards, they noticed at least two or three managers in the crew lounge area during hub turns. Both pilots assert that this was "very uncommon." Both also observed various Flight Managers and Chief Pilots engaging in "small group discussions" with pilots between March and July, 1991.

ALPA also asserts that meetings held in five cities in six days also constituted surveillance. In June 1991, pilots received an announcement that "pilot meetings" would be held in Anchorage, Alaska, on July 14, Los Angeles, California on July 16, JFK Airport, New York and Indianapolis, Indiana on July 18, and Memphis, Tennessee on July 19. The announcement

further stated that "featured in the meetings will be Fred Smith and Jim Barksdale" and ended with the following note: "(Crewmember attendance is voluntary)."

According to one of the pilots who submitted an affidavit on behalf of ALPA, prior to ALPA's organizing campaign Smith and Barksdale "rarely if ever met with...pilots in the crew lounge areas...". ALPA asserts that "pilots could reasonably believe that their absence would be perceived as both support for the union and a personal affront to Frederick Smith...".

In response to ALPA's assertions, the carrier maintains that "Federal Express has held voluntary meetings...since the company was founded." The carrier has also submitted affidavits from various flight managers and Chief Pilots who for the most part, either deny spending more time in the crew lounges, or who maintain they were there for other purposes. In the course of her investigation, Mediator Piculin interviewed Flight Manager Fred Peters. Peters functioned as a flight duty officer in Memphis during the election period. As a flight duty officer, Peters was stationed in the Memphis crew lounge as "a direct representative of the Vice President of Flight Operations for the hub turn." The mediator asked Peters if there was an increase in the number of managers in the crew lounge during the campaign period. Peters' response was in the negative. The randomly selected employees interviewed by the mediator indicated they noticed no increase in the number of managers in the crew lounges during the months in question.

B.

ALPA also contends that the carrier indirectly polled employees "by thanking eligible voters for their calls of support to Frederick Smith." The organization cites three letters sent by the carrier between March 1991 and August 1991, in support of its contention.

On March 25, 1991, Smith wrote a "Red Letter" to "All Crewmembers" entitled "Efforts to Organize". After asking employees to compare the carrier's PSP (People Service Profit) system to "the traditional union environment", Smith closed with the following statement:

To those of you who have called to say you continue to remain committed to me and to our PSP philosophy, I thank you. Your commitment is deeply appreciated.

In Barksdale's June 16, 1991 letter he stated, "Fred and I continue to appreciate the calls of support."

On August 6, 1991, Barksdale wrote a letter to "all crewmembers" entitled "Comparing Apples to Apples", in which the postscript was:

As the representation election begins to draw to a close, I want to convey my deepest appreciation for the extreme patience and support you have shown throughout.

Although it has provided no evidence in support of its position on this issue, the carrier maintains that "Federal Express management has always attempted to be available to its employees". Federal Express states further that "many employees...have routinely communicated directly to Fred Smith,...[and] Barksdale." The carrier argues that the organization's contention that its "expressions of appreciation" constitute indirect polling indicates "just how strained ALPA's claims of carrier interference are...".

III.

Address List

ALPA argues that Federal Express undermined the election by deliberately providing the Board with an inaccurate address list. According to the

organization, there are two types of address lists used at Federal Express. One, known as the PRISM list (Personnel Information System) was the basis for the labels used in the election. ALPA asserts that the PRISM list is not as accurate as the "Powership" list, which is used by the carrier's Flight Operations Department to send "time-sensitive materials." The carrier does not dispute that it used the "Powership" list to mail campaign material. In fact, all the carrier campaign materials were sent using labels generated by the "Powership" data base.

Several pilots have submitted affidavits in support of ALPA's position on this issue. Two individuals stated that all of the campaign communications sent by the carrier and "Federal Express Pilots for a Non-Union Operation (NO)" to them were received at their out of state residences. Their ballots were sent to a rental apartment in one case, and a post office box in the other instance. Another individual, who has moved several times since 1985, received his ballot at an address where he has not resided since 1985. All Federal Express communications and NO communications were sent to this individual's current address.

ALPA takes the position that by providing the Board with "valid second addresses" the carrier accomplished two purposes. According to the organization, the carrier's actions influenced "the actual vote tally" and led pilots to believe that Federal Express could manipulate the election.

According to the carrier, the list of potential eligible voters was generated from the PRISM list. When Mediator Piculin inquired about a different list for ballot mailing, the carrier informed her of the "Powership" list. The carrier further informed the mediator that the "Powership" list was not in alphabetical order, and included Federal Express employees who were not eligible voters, such as "members of flight management, employees in Crew Scheduling, Personnel Services, and others...who regularly receive copies of various materials sent to flight crewmembers." The carrier assigned two employees to review the "Powership" list to ensure it

accurately reflected the list of eligible voters. According to an affidavit submitted by Federal Express Senior Attorney Rush O'Keefe,

After working for four hours, [the two employees] had been able to complete only approximately four pages of the forty-four page Powership list. I then called Ms. Piculin, and advised her of the estimated time it would take to complete the verification process. I again told Ms. Piculin that the PRISM list was available. Ms. Piculin advised me that she would check with ALPA and let me know which list was acceptable. Ms. Piculin called me a short time thereafter, and advised me that the PRISM list would be acceptable to ALPA and the Board.

The carrier also asserts that its campaign materials were sent using the "Powership" list because the "Powership" list could generate overnight delivery labels.

The carrier has also submitted a portion of its Personnel Policy & Procedure Manual as evidence in support of its contention that the PRISM list contains personal data including "home address, home telephone number, emergency data." According to Section 10-10 of the Manual, this information is reviewed on a semi-annual basis. The carrier maintains that in contrast, "pilots are free to list whatever address they choose on the Powership list...".

In ALPA's December 20, 1991, reply to Federal Express' response, the organization asserts that no ALPA representative acceded to the use of the PRISM list for ballot-mailing purposes.

During the election period, the Board received approximately 30 requests for duplicate ballots, out of 2279 eligible voters, all of which were processed

in a timely manner. As of the date of the count, the Board had received only one "undeliverable" ballot.

IV.

Assisting the "NO" Group

The organization contends that the carrier provided assistance and endorsed the efforts of the NO group. According to ALPA, Federal Express provided the NO group "with pilot addresses and assisted the group in distributing its materials to pilots throughout the Federal system." As evidence of this allegation, ALPA has submitted affidavits from individuals stating that they received mailings from NO at the same address as Federal Express mailings. Two other pilots have submitted affidavits in support of ALPA's contention that "management employees actively participated in the distribution of NO materials." One of those individuals states that in mid-June 1991, he found NO materials next to carrier documents on a table in the Indianapolis crew lounge. The NO materials had apparently arrived with a facsimile from the "Pilots for a Non Union Operation" instructing the recipient to distribute the materials. The second individual states that in late July 1991 he was in the Los Angeles crew room when Flight Manager Doug Hap's secretary placed NO materials on a table "next to Company bulletins and information that pilots are expected to read".

ALPA also argues that "there is a suspicious similarity in the green ink used to print several Federal and NO documents." The organization requested the Board to investigate where the documents were printed as well as "the identity of the individuals who obtained and paid for the postage permit used to mail NO materials.

ALPA's final argument on the issue of the NO group is that the NO literature contains false information and exhorted employees to "'tear up the ballots'". According to ALPA, the carrier's "apparent approval of these misstatements and exhortations also tainted the laboratory conditions."

The carrier denies providing NO with an employee address list or aiding in distribution of NO's literature. Federal Express has submitted affidavits from Richard Mistretta, Senior Manager, Flight Operations Administration, and Timothy Sorrells, Flight Crewmember Handbook Specialist-Flight Administration. Mistretta's department is responsible for maintaining the pilot address list. Mistretta asserts that no one from NO or ALPA ever requested or received an address list. Sorrells, who is actually responsible for "handling all requests" for the address list also states that neither ALPA nor NO ever requested or received a copy of the list. Sorrells further states that "there are approximately 40 copies of the list circulated within Federal Express' Air Operations Division." In addition, Sorrells states that the "Pilots' Wives Association" has been provided with mailing labels.

William Cima, one of the founders of NO, provided an affidavit and was interviewed by Mediator Piculin. Cima maintains that NO did not receive any assistance from the carrier. The mediator asked Cima where the NO literature was printed and who paid for the postage. Cima responded that the materials were printed by two different printers, one in Memphis, and one in Oceanside, California. (Federal Express' printing facility is located at the Memphis International Airport Complex). NO used the second printer's postage permit. According to Cima, NO's effort were funded solely by contributions from pilots. As for the green ink, Cima states,

...we used green ink because we wanted to draw attention. We wanted to set ourselves apart. When something showed up for [the pilots] in the mail, we wanted them to see immediately its green ink so it must be from the NO group.

Cima told the mediator he received the pilots' addresses from Mark Lombardo. Lombardo whom the mediator also interviewed, was the founder of UFO, Pilots for Union Free Organization, which was active in the 1989 election among Federal Express' Flight

Deck Crew Members.⁵ Lombardo informed the mediator that he had received the list from another [unidentified] member of UFO.

In ALPA's December 20, 1991 reply, the organization asserts that the carrier actively participated in the distribution of NO literature through the carrier's COMAT (mail) system; but prevented ALPA material from being distributed. ALPA has submitted affidavits from several employees who admit receiving and distributing NO literature. The carrier does not deny that employees used the COMAT (mail) system for distribution of NO literature, but maintains that the employees also distributed ALPA literature. The carrier, in addition, has submitted statements from Federal Express managers who, for the most part, deny removing ALPA literature from crew lounges.

V.

Pre-empting ALPA's Negotiating Role

A.

ALPA maintains that the carrier pre-empted the organization's potential bargaining role through the establishment of a permanent scope committee several weeks before the count. On August 6, 1991, the FAB (Flight Advisory Board) issued a memorandum asking for volunteers

...to staff a permanent committee dealing with Scope Clause issues, Fifth Freedom Rights, and Domestic/International Feeder Operations. Mr. Barksdale has called for the formation of a Scope Committee with representatives from the FAB, Flight

⁵ In Federal Express/Flying Tiger, 16 NMB 433, (1989), the Board authorized an election with ALPA, the representative of Flying Tiger's Pilots and Co-Pilots, on the ballot. ALPA did not receive enough votes for certification.

Management, the Legal Department and Feeder Operations. The purpose is to establish a group of 'experts' to deal with future Scope issues and examine Fifth Freedom Rights. FAB representation will be a free standing committee consisting of three pilots from the Master Seniority List and one elected FAB member. Any interested pilots please contact the FAB office. Individuals serving on this committee will receive comp time or Special Projects pay.

The first Scope committee meeting was held August 16, 1991. According to ALPA, Scope issues would be "of paramount importance" in collective bargaining. Therefore, by establishing and publicizing the committee Federal Express "sought to preempt the issue and convey the ...message to the pilots that they don't need a union...."

According to the carrier, Federal Express has a history of forming committees to deal with specific issues. The carrier also maintains that such committees do not negotiate with the carrier.

B.

Section 4-77 of the carrier's Flight Crewmembers Handbook (FCH) addresses the use of feeder or contract air operations as follows:

A. Revenue Trips

All revenue Flights conducted with aircraft owned, leased, or operated by Federal Express having an MTOGW (Maximum Take Off Gross Weight) of 50,000 pounds or greater will be scheduled and operated according to the provisions of the FCH. No one other than a Crewmember listed on the Master Seniority List will be Assigned to occupy a Crew Position during such Flights or during positioning to or from such operations. The provisions of this paragraph apply to all Company operations worldwide.

This section means that the carrier may use non-employees (feeder or contract air employees), if the aircraft is under 50,000 lbs MTOGW. The limits specified in bilateral agreements often mean that the carrier is "not free to carry freight to, through, out of, or beyond specified countries." (For example, Federal Express is prohibited from operating any aircraft in Canada using Federal Express crews).

According to the carrier, "crewmembers became irritated because of the growth in the number of exceptions to FCH Section 4-77" as the result of the merger with Flying Tiger in 1989. Barksdale told the mediator that the merger with Flying Tiger created route authority problems because the pre-merger Federal Express was primarily a domestic carrier whereas Flying Tiger had complex international routes. Since the merger, several pilots and members of flight management had expressed concerns and confusion over international route authority. Barksdale suggested the formation of a committee:

...like we had done in many other issues of communication, we set up a committee and it would be composed of those who had a vested interest in flying these new routes....I'll get people with a vested interest in it and I'll get the regulatory attorneys on the other side any time you think that the company is not adhering to its scope, I want you to raise your hand and get the lawyers to give you a definitive answer....

The mediator also interviewed James McKinney, Vice President of Flight Operations. McKinney also told the mediator that the merger created complex issues because of the

...first through fifth freedoms for the airlines....there are international laws....bi-lateral treaties negotiated between the U.S. and all these different countries. They are very complex... We have an agreement with our pilots, in our work rules, that if we can fly the freight on a purple airplane, we in fact will do

something like that. If we are not going to do that, we'll get together and explain to them what's going on.... I, quite frankly, never truly did figure it all out. So we came up with the idea, let's go for a permanent scope committee..... Barksdale and I were talking back and forth....I explained to him, look I honestly don't have time to do it, we need to get the lawyers involved, somebody who understands what our rights actually are. We need to get pilots involved, just a basic line pilot so they can figure out that we're not trying to pull the wool over anybody's eyes. And...a member of flight management....In an effort to try to get a standing committee of people that were familiar with and used to working with our bi-lateral agreements with these countries.

In its December 20, 1991 response, ALPA contends that the scope committee formed in August 1991 differed from other carrier committees in more than one respect. According to the organization, most Federal Express committees do not consist of members of management and are not "permanent." In addition ALPA asserts that most committee members are not compensated. ALPA maintains that the timing of the announcement and the formation of the scope committee were intended to influence voters.

In the carrier's January 15, 1992 submission, Federal Express contends that the scope committee became necessary in 1991 because the carrier's transition from being an international air freight carrier, as it was pre-merger, to an "international time definite integrated 'express' carrier", took place in 1991. The carrier also points out that it has been using scope committees since 1988. Additionally, the carrier asserts that "employees who serve on committees are often protected against loss of pay."

VI.

Carrier Campaign Communications

The carrier issued over 50 written communications to pilots between March and August 1991. ALPA asserts that the carrier's campaign literature influenced and coerced employees, and contained misrepresentations about ALPA.

A.

The organization cites as an "egregious example" of the carrier's attempt to misinform and intimidate pilots, the July 12, 1991 "Red Letter" sent by Frederick Smith. ("Red Letters" are used for "critical communications"). The subject of the letter was "A Time of Decision."

I told you on March 25 that I didn't plan to get involved in any political campaign. But after reading much of the ALPA campaign material and listening to all the other things that the Company has been accused of, I want you to know that there is only one person who is ultimately responsible for everything that happens at Federal Express.

That person is Frederick Wallace Smith.

I am responsible for making the tough, unpopular decisions necessary to safeguard our long-term competitive position and your long-term job security. I am also responsible for our apparent failure to clearly explain the linkage between these decisions and the security they were designed to provide. While our commitment to job security may not seem remarkable during our good years, I can assure you it is something we work hard to protect during the tough ones.

The unparalleled job security Federal Express pilots have enjoyed over the years is a result of our P-S-P (People-Service-Profit) philosophy.Our record of job security is the best evidence you have of just how successfully P-S-P works for you and your families.

.... As a student of business history I believe that life after ALPA could include life with the IAM and the Teamsters as well.

If mediocrity and acrimony follow, I believe it will be incredibly difficult to compete....

And if you don't believe corporate strife and mediocre service can lead to the corporate graveyard, ask some former Eastern employees to tell you about it.

....You should vote for ALPA if you truly believe that Captain Babbitt (or whomever future leadership would be), has earned more of a right to lead you than I have.

....When a ballot is placed in your hands I hope you'll think of it.

The organization asserts that this letter was coercive and contained "distortions of the purposes and effects of the Board's processes...".

The carrier maintains that its campaign communications, including Smith's July 12, 1991, letter were designed to "educate the crew force about ALPA" and were in response to the organization's "misrepresentations." According to Federal Express, the July 12 memorandum "was a personal response...to the barrage of claims...by ALPA that...'management' had somehow compromised, revoked or usurped virtually every positive aspect of being a Federal Express crewmember." The carrier has cited examples of ALPA campaign literature in support of its position.

The carrier also disputes ALPA's allegation that Smith's letter was coercive because he stated that unionization would adversely affect the carrier's ability to compete.

According to ALPA, the "Red Letters" sent by Smith "implied that Federal's financial future rested on the employees rejection of union representation". The organization has provided copies of these letters in support of its contentions. For example, in Smith's letter of March 25, 1991, ALPA points to such phrases as "[ALPA] couldn't have picked a worse time from the Company's perspective." In Smith's July 12 letter, ALPA cites such phrases as "corporate graveyard", "mediocrity and acrimony" and "ask some former Eastern employees" as evidence of "predictions of the dire economic consequences that would result from unionization."

B.

ALPA argues that the carrier engaged in a pattern of misrepresentation about the organization in its campaign literature. One such alleged misrepresentation involved dues. A carrier pamphlet issued June 14, 1991, entitled "Critical Reading for Former and Prospective ALPA Members" included a letter from a Flying Tiger MEC Chairman to former Flying Tiger pilots regarding payment of dues. Federal Express provided the following commentary:

One way or another, you are going to pay.

It was with irony that we read the ALPA's organizer's comments...that you may expect threats from the Company now that the Company is beginning to state its position on the organizing effort.

The irony is there because ALPA, in one single communication about dues, threatened some Federal Express crewmember with legal action, cancellation of insurance, jumpseat blacklisting, court costs and additional personal expense.

....You should also read ALPA's constitution and by-laws carefully. If you have been a former ALPA member and plan to be a member again in the near future, ALPA says it will require you to pay all assessments and dues that you would have paid if you had been an ALPA member all along. So, if you've been away from ALPA for two years, for example, ALPA says it will require you to catch up on two years of dues and assessments....

We encourage you to get a copy and study the ALPA constitution and by-laws.... below you'll see the verbatim quote on this subject.... (Emphasis in original)

The carrier provided an excerpt from ALPA's Constitution and By-Laws Article II, Section 4 (e) (5).

Article II, Section 4 (e)(5) states:

Any former member who has been approved for membership in accordance with the provisions of this Paragraph E of this Section shall become a member in good standing upon payment of all of his outstanding indebtedness to ALPA as of the time his former membership ceased; in addition, he shall be required to pay an amount equal to the sum total of all dues and assessments he would have paid as an active member in good standing, from the time of termination of his former membership until the time of his membership reinstatement....

ALPA maintains that the carrier's June 14 letter is a "blatant falsehood". Citing Article II Section 3, A of its Constitution and By-Laws, ALPA asserts that pilots who work for a non-ALPA carrier are not subject to dues during that time.

The carrier states that its letter was in response to letters sent to certain former Flying Tiger employees by ALPA and denies that its statements

about dues obligations were erroneous. According to the carrier, the "pamphlet was based ... upon a reasonable reading of ALPA's Constitution and By-Laws." After the merger with Flying Tiger, some former members of ALPA received bills from ALPA for dues and assessments. The carrier learned that former Flying Tiger pilots had been classified as "Inactive", and found a provision in ALPA's Constitution dealing with the dues obligations of "inactive" members. Federal Express maintains that its reading of Section 4(e)(5) led it to conclude that if ALPA were elected, certain pilots would be affected. The carrier adds that ALPA promptly disputed the carrier's June 14 pamphlet in a letter issued on June 18 and on a taped message.

In its December 20, 1991 reply brief, ALPA argues that a "good faith" belief does not mitigate the taint of laboratory conditions caused by inaccurate statements.

C.

ALPA also maintains that the carrier misrepresented the amount of money pilots would "lose" by paying ALPA dues instead of investing the funds in a 'tax-deferred account at eight percent annual interest compounded semi-monthly'." The organization argues that the carrier communication containing this statement "fails to mention that the pilots would be extremely hard-pressed to find such a favorable investment opportunity."

The communication distributed by the carrier on the issue of dues obligation was entitled "The Cost of ALPA" and consisted of a chart comparing ALPA dues at 2.35% of total airline income with money invested in a tax-deferred account paying 8% annual interest compounded semi-monthly for purposes of determining money available at retirement.

In response, the carrier asserts that an 8% rate of return is reasonable, and has submitted a "list of 50 such investment opportunities."

D.

As another example of carrier campaign misrepresentations, ALPA cites a postcard issued by Federal Express entitled "Wake-Up Call." According to ALPA, the postcard raised the question, "Is ALPA really democratic and locally controlled?" The carrier's response:

Under [ALPA's Constitution and By-Laws] the Master Executive Council (MEC) can decide against pilot membership ratification of any collective bargaining 'contract, letter of agreement or letter of understanding that, in the opinion of the MEC, substantially affects the pay, working conditions, retirement or career security of member pilots...'

ALPA contends that the postcard is "deceptive" because it "fails to mention that an MEC is ...a democratically elected body." The organization further points out that the carrier's postcard failed to mention several limitations on MEC power.

In response, the carrier asserts that the statements contained in the postcard were true.

ALPA's final submission on this issue is that the carrier left out "crucial language from a quoted portion of ALPA's Constitution."

E.

ALPA alleges that the carrier misrepresented ALPA's oversight of the Eastern Airlines B-Plan. According to the organization on July 30, 1992 the carrier issued a "Memorandum ... which falsely attribute[d] to ALPA problems with the pilots' B-Fund (the defined contribution plan) at Eastern Airlines."

The pertinent language, contained in a letter from Federal Express Senior Vice President of Personnel, James Perkins, is as follows:

...ALPA/pilot oversight does not guarantee protection of your retirement funds. A case in point would be the Eastern 'B' fund, where ALPA appointed and monitored the Trust Administration Committee that managed the fund's investments. IF ALPA oversight provides as much protection as you imply, then why is there a moratorium preventing former Eastern pilots from receiving their lump sum benefits.

The "you" referred to in Perkins' letter is Federal Express pilot Richard Kingston, who, according to the carrier, had initiated correspondence with Perkins on June 15, 1991 on the subject of pensions. Perkins had responded on July 2, and Kingston replied on July 16, 1991.

ALPA objects to Perkins' July 30 statement on the grounds that ALPA's oversight of the Eastern B-Plan bore no relation to the moratorium on lump sum benefits. The organization asserts that ALPA "does not and never did appoint the Trust Administrative Committee that manage[d] the B-Plan assets at Eastern." ALPA further states that while it nominated a minority of the Committee members, the majority were independent.

According to an affidavit submitted by August C. Lauer, Senior Manager of Employee Benefits, before Perkins' July 30 letter was issued, Lauer contacted "a high-ranking management executive at Eastern ... [with] extensive knowledge of..." Eastern's B-plan.

According to Lauer, the Eastern employee informed him that:

The Trust Administration Committee at Eastern was made up of seven (7) individuals two (2) of the seven (7) members of that committee were selected by ALPA. The remaining five (5) members were outsiders who had to be confirmed by ALPA's Eastern Airlines MEC.

VII.

Furlough Threats

A.

ALPA asserts that the carrier threatened to furlough hundreds of pilots if they voted for union representation. In support of its contentions on this issue, ALPA has submitted declarations from several individuals concerning various remarks attributed to Flight Manager Sam Davis. Mediator Piculin interviewed several individuals including Davis concerning this issue.

According to four individuals, in mid-March, during ALPA's organization drive, Davis began discussing furloughs in the Memphis crew lounge. James Camp has submitted a declaration and was interviewed by the Mediator regarding this incident. Camp stated in his declaration as follows:

I was talking to several other ... pilots when I heard Sam Davis speaking in a loud voice. He was standing approximately ten to twelve feet away from me talking to several other ... pilots. There were approximately six to eight additional...pilots standing between me and Sam Davis. I heard Davis say that ALPA was really going to cause problems in the crew force because it was going to create a lot of furloughs. He also said "if ALPA gets elected there will be furloughs." He stated the number of pilots that would be furloughed, which was in the hundreds, but I don't recall the precise number. Shortly thereafter, Captain Jack Burke, a member of the Organizing Committee, approached Davis and advised him that he couldn't threaten pilots with furloughs for supporting ALPA. Davis responded, "I'll say anything I want." and added, "I answer to a higher authority." I would estimate that at least twenty pilots were within earshot of Davis

when he made all of these remarks.

Burke has submitted a declaration confirming Camp's statements.

Eric Vartanian, Chairman of the Federal Express Pilots Organizing Committee also has submitted a declaration concerning Davis' statements. According to Vartanian, he participated in a discussion with Davis although he does

...not recall who initiated the conversation. Don Grant, another member of the organizing committee, was standing next to us. During the discussion, Sam Davis said that Federal had an excess of pilots and that if ALPA were elected then pilots would be furloughed. He stated the number of pilots that would be furloughed which was in the hundreds but I don't recall the precise number.

Another individual has submitted a declaration about a conversation he had with Davis, also sometime in mid-March 1991. This individual was also interviewed by the mediator. According to this individual, known as Declarant "A", he went to Davis' office to discuss the possibility of jobs as Pilots for friends of his. "A" states in his declaration:

... I asked [Davis] about projected hiring, ...Davis...said that all of this will be affected by unions. I said I don't know much about unions. Davis then asked me 'What's your seniority number?' I responded. He then told me that if we end up with a union on this property 'that will get very personal to you' and that we'll furlough you and people like you.

Declarant "B" has submitted a statement regarding a conversation he had with Davis during the spring of 1991. According to "B", he asked Davis "whether he had been telling pilots "that there would be furloughs if ALPA were elected. "B" states that Davis replied, "'yes, that's true'."

The organization contends that Davis' comments had a major impact on junior pilots because "of the position he held within the Company." According to the organization, "Davis' role in hiring the junior pilots" put him in a position to be taken seriously by those pilots.

Organizing Committee member Robert Donald Wilson has submitted a declaration stating that "at some point in time between mid-April and the end of May" of 1991, he was having a discussion with Chief Pilot Bob Sparkman, about FCH violations. According to Wilson, Davis joined the conversation. Wilson states:

During the ...discussion, I told them that I thought it was obvious that we needed a contract because the FCH was not working and I added that I expect the problem would be clarified in the future, implying that ALPA would win the election.

Sam Davis became angry and said that 'if ALPA gets in here' ...there are going to be 'people on the street.' When I pointed out that the Company doesn't put people on the street because they have a reassignment policy, Davis said that we already have too many pilots and that its only because a union isn't in here that we have a no-furlough policy. At one point in the conversation, I said that I don't think there will be a furlough. Sparkman said you may not believe it but Mr. Smith believes it.

When I then pointed out that there aren't even enough training slots to downgrade all the pilots who would be re-assigned as a result of a furlough, Sparkman replied 'I thought you were smarter than that' and added that he hoped I was 'prepared to tell that to all the people that will be furloughed.'

Wilson also asserts that Pilot Mark Lombardo told him that 'if ALPA won, he had it on word from Jim Barksdale that 600 to 700 pilots would be furloughed...".

Several other individuals have submitted declarations recounting conversations held with other employees who said they had been threatened with furlough by Davis or who were worried that they would be furloughed if ALPA won the election. Another individual, Declarant "C", states he spoke with an individual who had a conversation with Flight Manager Charles Nanney. According to "C", Nanney had told the employee that the carrier had already drawn up plans to furlough 600 pilots if a union gets on the property."

B.

The carrier disputes ALPA's description of Davis' responsibilities particularly with respect to hiring. According to Federal Express, its Flight Managers are pilots "who come off the line for a management stint and then return to line flying...". These individuals "regularly rotate back to the flight line ...and occasionally to fly the line."

As stated previously, Davis submitted an affidavit and was interviewed by the mediator. In his affidavit, Davis described his responsibilities as follows: "...screening, selection, interviewing and processing of pilot hiring."

Davis denies discussing furloughs at any time other than his March 14 or 15, 1991 conversation with Vartanian, Grant and Everett Hicks. Davis asserts that he was in the crew lounge that day because he was flying a trip. According to Davis, there were approximately 24 people in the lounge. Vartanian, who was distributing authorization cards approached Davis and Hicks and asked about the carrier's hiring plans. Davis' response:

I explained that during the winter of 1990 we were projecting hiring some 280 pilots

for 1991...Federal Express continued to hire pilots from the pilot pool because the projections indicated that we would need pilots in 1991.

In March 1991,...hiring stopped because the hiring outlook changed drastically...because of the retirement of the 747-100 airplanes and the...recession....Federal Express was now projecting an excess of 300 pilots.I shared...my concern that we now had an excess of some 200 pilots.

Davis denies linking the election of ALPA with the possibility of furloughs, but admits stating "if I was in the bottom 200 pilots, I'd be concerned". Davis also recalls a subsequent conversation with Vartanian during which the latter warned Davis about discussing furloughs. According to Davis, it was during the second conversation with Vartanian that Davis stated he answered to a higher authority. Davis told the mediator that the "higher authority" was "management."

Davis states further that a few days later at a briefing conducted by Donald Maliniak, of the carrier's Legal Department, Federal Express managers were told what they "could and could not say during an election campaign." According to Davis,

after that meeting I knew that Eric's advice had been correct and when I commented on the furlough or excess issue I told pilots who asked me that they should weigh the no furlough policy...to what they felt ALPA could negotiate and to decide for themselves what they wanted to do.

Davis denies a number of the other allegations concerning him. He denies conversing with Burke and Camp, and denies the assertions of Declarants "A", "B" and "C". As to Wilson's assertions regarding the conversation with himself and Sparkman, Davis admits "engaging in a lengthy discussion...on the ALPA campaign....and the need for a "B" type pension plan"

but asserts that he has no recollection of "any discussion about furloughs. Since we were very senior...we would be unaffected by whatever ALPA negotiated...."

Sparkman also has submitted an affidavit denying that he discussed furloughs with Wilson and Davis. Nanney has also submitted an affidavit and was interviewed by the mediator. Nanney acknowledges discussing the issue of furloughs in response to questions from pilots. According to Nanney, he told the pilots that there was no reason to expect furloughs.

As stated previously, in response to ALPA's allegations that several Federal Express managers were observed in the crew lounges more frequently than usual during the months of the campaign, various managers have submitted affidavits denying that their presence in the crew lounges was for the purpose of discussing ALPA. Davis, however, admits to more frequent visits to the Memphis crew lounge "because [of] ... reports that Jack Burke and David Webb...were telling pilots that the company was interviewing pilots...[and looking for] people who couldn't think for themselves." Davis states that he "felt an obligation to" correct these falsehoods."

C.

On April 4, 1991, Vice President of Flight Operations McKinney sent a memorandum to all crewmembers, the subject of which was "Furlough Rumor". The memorandum stated in part, as follows:

I've been told there is a rumor going around that we are planning to furlough crewmembers. There is no truth to it. On the contrary, everything we are doing as a Company to control costs and increase system efficiency is designed to avoid furloughs.

If the current volume forecasts for the next 12-18 months hold true, we will indeed be overmanned in some seats. However, ...

we intend to run a little heavy on those seats so that we are prepared to move quickly in response to an upsurge of volume.... If we intended to furlough, or were only concerned with short term cost savings, we would be excessing hundreds of crewmembers into the lower seats instead of carrying those overages....

Please bear in mind that the rumor mill tends to work overtime during periods of uncertainty.... Please be very skeptical of the rumor mill.

D.

ALPA also argues that the furlough threats made by managers were "reinforced" by the carrier's campaign literature. The organization cites several examples in support of its position on this issue. In June pilots received a postcard asking "Will Your Job Security be Enhanced by the Presence of ALPA? The postcard continued,

...Federal Express' record on pilot employment and termination under its P-S-P philosophy is an open book.

ALPA's record on this subject is an open book too.

Are you sure the grass is greener on ALPA's side of the fence? (Emphasis in original).

Another example cited by ALPA is Barksdale's letter of June 16, 1991. Part of that letter addressed job security; "There's no way for you to know with certainty what effect ALPA representation might have on your pay, benefits, workrules, job security...". The letter also stated;

ALPA representation CAN'T GUARANTEE job security for Federal Express pilots. The plainly stated truth is this: most ALPA contracts allow for furloughs. Could it be that, when push came to shove during

negotiations, the job security of junior pilots was not that high on ALPA's priority list?

The question is relevant considering the number of pilots currently on furlough from ALPA carriers. That's living proof - one of the few indisputable facts that you have to go on in the jumble of rhetoric and quasi-promises from ALPA.

Similarly, ALPA cites Smith's "Red Letter" of July 12.

Another postcard was issued in July, 1991, asking the questions, "Do ALPA contracts ensure job security?" "How many ALPA members are currently on furlough?", and "What is the average length of time that those pilots have been on furlough?" Between mid-July and mid-August another document, entitled, "The Questions Posed But Never Answered By ALPA Or The Organizing Committee", was sent to crewmembers. This communication included the last two questions on the postcard discussed above.

The organization asserts that support for ALPA "eroded as a direct result of the furlough threats."

In response, the carrier maintains that the communications discussed above merely "reemphasize that Federal Express has provided its pilots with unparalleled job security in an airline industry that has a history of furloughs." Federal Express states that it has never furloughed U.S. employees, and that it has made numerous statements that it will not furlough "except as a last resort". The carrier also contends that its communications were in response to ALPA's position that pilots needed a written contract, to provide certain guarantees, such as job security.

According to Federal Express, Smith's "Red Letters" were not coercive, but were merely expressions of opinion. In addition, the carrier asserts that "Smith has a First Amendment right to express his opinion just like members of the crew force..."

In ALPA's final submission, the organization argues that the carrier has failed to rebut the organization's evidence of furlough threats. The organization refers to as evidence of this assertion a January 3, 1991, article written by Smith and distributed to all pilots, in which Smith discussed the possibility of furloughing employees in the carrier's international operations, who are covered by collective bargaining agreements which include furlough provisions.

DISCUSSION

I.

In cases involving the issue of carrier interference, including the allegations raised in the present case, the Board examines the question of whether the laboratory conditions essential to representation elections have been tainted. The Board makes its determinations in accordance with the requirements of the Railway Labor Act. Past cases include Emery Air Charter, 19 NMB 337 (1992), Egyptair, 19 NMB 166 (1992), Metroflight, 18 NMB 532 (1991), USAir, 17 NMB 377 (1990), Florida East Coast Railway, 17 NMB 177 (1990), Key Airlines, 13 NMB 153 (1986), Laker Airways, Ltd., 8 NMB 236 (1981), and Zantop International Airlines, 6 NMB 834 (1979).

The Board examines the totality of the circumstances in each case to determine whether the carrier's actions have tainted the laboratory conditions. USAir, supra, America West Airlines, Inc., 17 NMB 79 (1990). In so doing, the Board relies upon the evidence and arguments submitted by the organization and the carrier, the mediator's investigation and interviews, and past Board determinations.

ALPA has requested a re-run election using a "Key" ballot. In Florida East Coast Railway, supra, the Board cited Key Airlines, 16 NMB 296 (1989) in noting "its broad discretion in fashioning appropriate remedies for carrier interference", pursuant to Section 2, Ninth, of the Act. The Board has ordered various remedies in cases where it finds interference.

These remedies are intended to eliminate the taint of interference on the election. Remedies are fashioned in accord with the extent of the carrier interference found. One such remedy is the "Key" ballot. In a "Key" election the organization is certified unless a majority of eligible voters returns votes opposing union representation. No write-in space is provided. Another remedy is a "Laker" ballot. A "Laker" election involves the use of a "yes" or "no" ballot. No write-in space is provided, and the majority of votes actually cast determines the outcome of the election.

In Key, the Board found that the carrier had violated its employees' right to freedom of choice by engaging in such activities as: discharging and reassigning leading union organizers; denying a scheduled pay increase to employees in one craft or class immediately after a representation application was filed, but granting an increase to another craft or class immediately before a representation application was filed; holding meetings for the express purpose of discouraging organization; and threatening employees' job security should they vote for representation. The carrier also issued letters criticizing the organization (IBT). Significantly, the Board had found that the carrier had violated employee representation rights in a similar manner three years previously.

In Laker Airways, supra, the Board found that the carrier had violated the Act by: soliciting employees to turn in their ballots to carrier officials; increasing pay immediately before the election period; and polling employees as to their representation choice. As a remedy, the Board ordered a re-run election using a "Laker" ballot. A "Laker" election has been used as a remedy in other cases, such as Mid Pacific Airlines, 13 NMB 178 (1988), where the Board found the carrier had violated the Act by polling its employees and by implying that its financial future hinged on the employees rejecting union representation.

There have been a number of cases in which the Board has found the level of interference does not

warrant remedies such as "Key" or "Laker" elections. The Board has ordered a re-run election using its standard ballot procedures and a special notice in such cases as USAir, 17 NMB 377 (1990); Florida East Coast Railway; supra, and America West, supra. In Zantop International Airlines, supra, the Board also ordered a standard re-run election. There the carrier had misinformed its employees of the Board's voting procedures and held meetings with small groups of employees in which the election and unionization were discussed.

There also have been interference cases in which the Board has found no basis for taking remedial action. For example, in USAir, 18 NMB 290 (1991), the Board found that although there were isolated objectionable incidents, the carrier did not engage in a "systematic" effort to interfere in an election. More recently in Northwest Airlines, 19 NMB 94 (1991), the Board found that with the exception of isolated incidents involving supervisory employees, carrier officials did little to interfere in an election involving two organizations. See, also, Northwest Airlines, 13 NMB 399 (1986) and 14 NMB 49 (1986), where the Board found "no pattern of carrier interference" despite the fact that one organization apparently campaigned in crew lounges while another was denied access.

II.

Promise or Conferral of Benefits

ALPA argues that Federal Express engaged in a pattern of coercive conduct which interfered with its employees' freedom of choice of representative. The organization cites several previous Board determinations as well as judicial decisions in support of its position.

Board cases which deal with the issue of promise or conferral of benefits include Key, supra, and America West, supra. In Key, the Board found that the carrier used pay increases (or denial of scheduled increases) in an attempt to influence the outcome of the election. In America West, the Board found that

the carrier had not established an historical pattern of providing certain benefits, and that instead, its actions were timed to influence the outcome of the election.

In its 1990 USAir decision, the Board found that certain benefits and pay increases implemented during the election period were either previously scheduled or part of an historical pattern. In the instant case, the Board also finds that the carrier did not promise or confer benefits in order to interfere with the election. The Board's review of the record reveals that the American Airlines jumpseat agreement was the result of several months of negotiations, and the announcement of the agreement was made in the regular course of business. Similarly, the Board finds that the carrier's announcement of widebody pay for the A-300 was not an unusual benefit designed to influence the outcome of the election.

ALPA argues that the carrier used the pending Pension Simplification Bill "as a vehicle to tell pilots that they should reject ALPA because Congress, at Federal's request..." would change the law.

The Board finds that Federal Express' lobbying efforts and support for legislative changes affecting pilots' pensions preceded by several months ALPA's organizational drive. There is insufficient evidence based upon a review of the campaign communications on this issue that the carrier was promising, implicitly or otherwise, improvement in pension benefits in exchange for rejecting ALPA.

III.

Surveillance and Polling

Although ALPA asserts that Federal Express "flooded the crowded Memphis crew lounge" with managers between March and August, the Board's investigation did not adduce substantial evidence to that effect. With the exception of Sam Davis, the carrier's flight managers deny either making more frequent visits to the crew lounges or a correlation between their presence in the crew lounges and the

campaign. The randomly selected employees interviewed by the mediator and the flight duty manager told the mediator they did not notice an increased presence of managers in the crew lounges during the pertinent period. There is also insufficient evidence that the meetings held by Smith and Barksdale were used to discuss the election.

The carrier letters cited by ALPA in support of its allegation that the carrier engaged in indirect polling are not sufficient to support a finding of interference. As with the issue of surveillance, none of the randomly selected employees interviewed by the mediator perceived any attempt on the part of the carrier to ascertain their position on the election.

IV.

Address List

The carrier has presented evidence that the PRISM list, used in the election, contained addresses which the carrier believed to be accurate home addresses. Employees are responsible for informing the carrier of their correct addresses. Although ALPA asserts that the organization received over 150 duplicate ballot requests, the Board itself received approximately 30 such requests. ALPA has not provided sufficient evidence either that the PRISM list was inaccurate, or that the carrier deliberately provided labels from the PRISM list to undermine the election.⁶

V.

Assisting the NO Group

There is also insufficient evidence that the carrier assisted or endorsed the efforts of the NO group. Based upon the evidence submitted by ALPA and

⁶ Based upon the investigation, the Board finds no basis for granting ALPA's request that the Board compare the two address lists. See, USAir, 18 NMB 290 (1991) note 4 at 333.

the carrier, as well as the mediator's interviews, the Board finds no evidence other than that the NO group was an independent entity funded by pilots. There is no evidence that the NO materials were printed by Federal Express. There is also no evidence that the carrier provided the NO group with an address list. It is clear from the record that it is possible to obtain Federal Express employee addresses from a number of sources. Finally, there is no evidence that the carrier was responsible for any misrepresentations made by the NO group in its communications.

The investigation also revealed that NO literature, ALPA literature, and carrier literature were prevalent at carrier stations and widely distributed during the election period. There is insufficient evidence of either systematic carrier assistance in the distribution of NO literature or carrier-orchestrated removal of ALPA literature.

VI.

Pre-empting ALPA's Negotiating Role

It is apparent from a review of the record that the scope committee was established in August, 1991 to deal with the complex and confusing questions arising from the carrier's international operations. Despite ALPA's contention that the purpose of the scope committee was to negotiate with the carrier, there is insufficient evidence to support such a conclusion. It is also evident that the carrier has historically used committees to deal with or to enhance communications on various work-related problems. However, the Board is disturbed by the timing of the formation of the committee, in the middle of the election period. As the merger with Flying Tiger had occurred two years previously, the Board questions whether it was necessary to establish the committee at that particular point in time.

VII.

Carrier Campaign Communications

A.

The Board has consistently stated that "[t]he privilege of free speech is not absolute. It must be evaluated in the context of the rights of others." USAir, 18 NMB 290 (1991), USAir, 17 NMB 377 (1990), Allegheny, *supra*. See, also, Texas & New Orleans Railroad v. Brotherhood of Railway and Steamship Clerks, 288 U.S. 548 (1930).

However, the Board has also stated that carriers may communicate to employees concerning election issues. In Laker, *supra*, the Board noted that it was "not unmindful of Laker's constitutional right to communicate its views to its employees."

The Board has found carrier campaign communications to be in violation of Section 2, Ninth when the communications contain misstatements about Board voting procedures as in Zantop, *supra*, and Allegheny, *supra*. In the Board's 1990 USAir decision, the Board found that in addition to making misstatements about Board procedures, USAir made inaccurate statements about subjects of collective bargaining and misleading statements about the organization (IBT). In Mid Pacific Airlines, 13 NMB 178 (1986), the Board found that the carrier had interfered with an election by *inter alia*, issuing a letter implying that the carrier's financial future rested on the employees' rejection of union representation. The Board stated in Allegheny, *supra*:

It is clear that the employees would read the letter fully appreciative of the power and authority which [the] carrier exercised over them with respect to their day-to-day assignments and security of their jobs. It would be completely unrealistic to believe that under such circumstances employees would not be particularly susceptible to the arguments advanced by the carrier

against union representation. It was pure and simple pressure to interfere with a free choice of a representative.

The Board finds the carrier's campaign communications, particularly Smith's July 12 letter, and the carrier's letter regarding dues obligations, of concern. Smith's letter could be perceived as a reminder of the "power and authority" which Smith "exercised." Employees, especially less senior employees, could have been influenced by this and other carrier communications. In addition, whether or not the carrier's letter regarding dues obligations was a deliberate misrepresentation, at the least it was misleading. The Board notes, however, that many of the carrier's letters were issued in response to ALPA's campaign materials. The investigation reveals that employees were sent numerous pieces of campaign literature by ALPA, the carrier and the NO group for a several month period.

VIII.

Furlough Threats

The Board has repeatedly held that threatening employees with adverse actions if they voted for union representation constitutes interference. Key, supra, Laker, supra.

A review of the evidence reveals that there was no concerted effort on the part of the carrier to link furloughs with union representation. Federal Express historically has a no-furlough policy, hence its campaign communications which disputed ALPA's statements that a union was necessary for job security were not objectionable.

Evidence supports a finding that Sam Davis made remarks about furloughs which spread through Federal Express and caused concern among pilots in March and April. There is insufficient evidence that Davis or any other carrier official continued to make such remarks beyond early spring. In any event, McKinney's letter of April 4, 1991 made it clear that the carrier did not intend to furlough employees. McKinney's

placement in the hierarchy was considerably higher than Davis'. However, the laboratory conditions had already been tainted by Davis' remarks, which were disseminated by word of mouth to many pilots.

Individuals who provided testimony on behalf of ALPA stated that they had heard from other junior pilots that they were worried about job security if they voted for ALPA. However, none of the randomly selected employees expressed belief that the carrier would furlough in retaliation for electing ALPA.

CONCLUSION

When Federal Express' conduct is viewed in its totality, the Board finds the laboratory conditions were tainted. The Board finds particular activity objectionable, specifically Davis' remarks in mid-March, which led to the furlough rumors. The Board is also troubled by the carrier's dues misrepresentations and the timing of the formation of the permanent scope committee.

In USAir, 17 NMB 377 (1990), the Board found that the carrier's actions constituted interference when "coupled with a pervasive and sustained anti-union posture...".

While each of the carrier's actions here, standing alone, may not have constituted interference per se, the pervasiveness of the carrier's campaign does concern us. Although the Board allows some involvement by carriers in representation matters, the carrier has a far more limited role in election campaigns than the organizations. That role is more limited than the overall level of campaign activities taken by the carrier in the instant case.

There is a level of carrier communication, as in this case, which overwhelms an employee's right to select or not select a collective bargaining representative without carrier interference or influence. Indeed, in this case the Board's investigation revealed that many employees began to disregard election material due to its sheer volume.

When a carrier's statements and material override, or render moot, the union's campaign, we find it objectionable and not within the employer's role as anticipated by the Act. In short, in the language of prior decisions on this issue, we find the carrier's actions here have tainted the laboratory conditions necessary for the conduct of a fair election.

The Board finds insufficient evidence in support of ALPA's contentions that the carrier assisted the NO group. Similarly, there is no evidence on the record sufficient to persuade the Board that the carrier concertedly engaged in such illegal activities as surveillance or polling, or made promises of, or conferred benefits in an attempt to influence the election. As to ALPA's contentions about the FAB and the scope committee, there is evidence that the carrier had historically worked with FAB and various committees in order to deal with work-related issues. However, the Board finds the timing of the establishment of the scope committee, during the election period, to be problematic. There is insufficient evidence that the carrier provided the Board with inaccurate addresses in order to manipulate the election results.

In view of all the circumstances in this case, the Board hereby authorizes a re-run election, using its standard ballot. The list of eligible voters will contain all those in the craft or class of Flight Deck Crew Members as of the last day of the last payroll period prior to the date of this decision. The count will take place in Washington, D.C. The election will be conducted on an expedited basis. The carrier must provide the Board with address labels for ballot mailing purposes.

A mediator will be assigned to continue the investigation.

By direction of the NATIONAL MEDIATION BOARD.

William A. Gill, Jr.
William A. Gill, Jr.
Executive Director

Copies to:

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