

BEFORE THE
NATIONAL MEDIATION BOARD

In The Matter Of)	
THE FLIGHT DECK CREWMEMBERS)	
of)	Case No. R-6044
FEDERAL EXPRESS CORPORATION)	

**CARRIER'S REPLY IN SUPPORT OF ITS
MOTION FOR RECONSIDERATION**

Rather than responding to the points actually raised by Federal Express in its Motion for Reconsideration, the Air Line Pilots Association ("ALPA") elected to employ the "straw man" technique of misstating Federal Express' arguments and then addressing points never raised in the Motion. When the actual grounds for Federal Express' Motion are considered on their merits, it is clear that the Motion must be granted.

I. The Board's October 19, 1992 Decision Unlawfully Chilled Federal Express' Exercise Of Its First Amendment Rights

Federal Express asks the Board to reconsider its certification of ALPA because the October 19, 1992 decision ordering a rerun election violated Federal Express' First Amendment right of free expression. ALPA points out that Federal Express did in fact communicate to the limited extent the Board's decision allowed with its pilots during the second

election campaign, and offers this in support of its argument that Federal Express' First Amendment rights were in no way impaired. This is irrelevant. The fact that Federal Express may have communicated to the degree the Board's decision allowed does not in any way defeat the claim that it was unlawfully chilled from communicating in other ways. In other words, Federal Express' rights were violated even though it was not completely muzzled by the Board's October 19 decision. The violation occurred because the October 19 decision inhibited, or "chilled" Federal Express from communicating in a lawful manner.

For evidence of the chill, the Board need look no further than page 495 of its June 14 decision, where it quotes a letter from Frederick Smith proposing a debate with ALPA. In that letter, Smith plainly expressed concern about making lawful statements ¹ that could be construed by the Board as grounds for overturning an election. The debate would have allowed Smith to make non-coercive statements without fear that such statements would, as they were in the first election, be deemed interference. Smith's letter establishes that the October 19 decision improperly inhibited Federal Express from communicating with its pilots in a lawful, non-coercive manner.

ALPA misses the point when it cites cases establishing that a carrier's First Amendment rights do not encompass the right to engage in coercive speech during a union election campaign. It was not coercive speech that the Board prohibited in its October 19 decision. Rather, in describing the effect of Federal

¹ It would be ludicrous to assume that Smith was advertising to ALPA that he wanted to make coercive statements.

Express' communications during the first campaign, the Board stated that "each of the carrier's actions, standing alone, [did]not . . . constitute interference per se." Federal Express Corp., 20 N.M.B 7, 51 (1992). The Board's restrictions on lawful communications in the second election violated Federal Express' rights, and it is on this point that Federal Express challenges the First Amendment ramifications of certifying ALPA.² For the reasons set forth in the Motion and herein, the June 14, 1993 certification of ALPA should be invalidated.

II. The Board Violated The Rights Of Federal Express By Applying Irreconcilably Inconsistent Standards For Dealing With Employee Coercion

As with the First Amendment claim, ALPA's response to Federal Express' Equal Protection claim is to mischaracterize it. Federal Express does not, as ALPA claims, seek reconsideration on the grounds that the Board should deem campaign communications to have the same effect if uttered by a carrier as if uttered by a union. The Board stated its position on that issue in Air Wisconsin, 16 NMB 235 (1989). What makes the Board's June 14 decision improper is that, having found that ALPA actually made coercive statements, the Board did not overturn the second election. Instead, the Board held that an election will not be overturned on the basis of union interference absent proof of actual retaliation against an employee. This is the point on which Federal Express seeks reconsideration.

² ALPA contends that Federal Express' Motion represents a reassertion of arguments previously raised in this proceeding. While these arguments were indeed raised in previous filings, the Board's decisions in this case do not address the points raised in Federal Express' Motion.

In a union campaign, a well-founded fear of retaliation against voters destroys laboratory conditions. Once the Board has found that such a well-founded fear exists, it should invalidate the election, regardless of the identity of the party responsible for instilling that fear, and regardless of whether any threats of retaliation have actually been carried out. The Board's refusal to do so indicates that the determining factor in whether to overturn the results of an election turns solely on whether the employee was intimidated by a carrier (election overturned) or a union (election upheld). Application of those conflicting standards based on the identity of the parties violated the Equal Protection rights of Federal Express.

ALPA's ability to carry through on its threats and coercion of employees is well documented. (Supplement to Carrier's Objections To Certification Of Election, pp. 9-10). Any suggestion that threats or coercion by ALPA should be discounted on the basis of ALPA's inability to follow through on those threats simply ignores reality. It is apparent from the evidence already submitted that ALPA's threats and coercion were sufficient to warrant overturning the election. In addition to that evidence, Federal Express now has new evidence of a "Scabs Of Eastern" list having been sent to Federal Express personnel. The fact that this list has been sent to Federal Express personnel responsible for pilot hiring and the threats and coercion implicit in the creation, maintenance and distribution of such a list, provides new evidence of a continuing pattern of conduct, and requires that the Board take into account the effect these activities have had in destroying laboratory conditions.

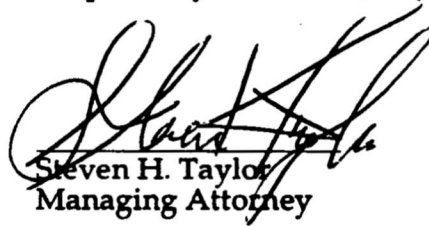
III. Pendency Of A Motion For Reconsideration Pursuant To NMB Procedures

Federal Express has also not refused to "treat with" ALPA as would be required by the Railway Labor Act and as alleged in ALPA's submission. The Board's procedures allow for a "Motion To Reconsider," and until the Board has rendered a decision it would be inappropriate and premature for the Company to address ALPA's status as the exclusive bargaining representative for crewmembers at Federal Express.

IV. Conclusion

The Board should grant Federal Express' Motion For Reconsideration and invalidate the certification of ALPA.

Respectfully submitted,



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CORPORATION

FXBSG.733

CERTIFICATE OF SERVICE

I hereby certify that I have this 12 of July, 1993, served a copy of the foregoing Carrier's Reply In Support Of Its Motion For Reconsideration upon the individuals indicated below by mailing a copy of same via FedEx Letter addressed as follows:

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