

BEFORE THE
NATIONAL MEDIATION BOARD

In The Matter of)
)
THE FLIGHT DECK CREW MEMBERS)
)
 of)
)
FEDERAL EXPRESS CORPORATION)
_____)

Case No. R-6044

RESPONSE OF
THE AIR LINE PILOTS ASSOCIATION
TO MOTIONS FOR RECONSIDERATION

Once again, Federal Express management ("FedEx") and the Federal Express Pilots for a Non-Union Operation ("FEPNO") have placed before this Board frivolous arguments in an attempt to deprive the FedEx pilots of representation -- the option freely selected by the majority. FedEx argues that the Board should reconsider its decision of June 14 (20 NMB 486) and invalidate its certification of ALPA; FEPNO also asks the Board to reconsider the June 14 decision and to conduct a "meaningful employee investigation process." In support of its motion, FedEx contends that the Board's decision in October, 1992, that FedEx had interfered in the original election, "chilled the First Amendment right of Federal Express to communicate its views to its employees." FedEx argues further that the Board violated its

"statutory duty to investigate representation disputes" by interviewing an "insubstantial number of pilots" in the course of its investigation of the objections to the rerun election filed by FedEx and FEPNO. Similarly, FEPNO also challenges the Board's investigation, claiming that the number of pilots interviewed was insufficient and that the investigation was "biased and skewed" because approximately one-third of the pilots interviewed were union supporters. Finally, FedEx argues that the Board's decision certifying ALPA violated FedEx's "First Amendment and Equal Protection rights" by applying different standards to the campaign conduct of carriers and unions.

Under Section 15.0 of the National Mediation Board Representation Manual, in order to obtain the relief they seek, FedEx and FEPNO would have to demonstrate that the NMB had committed "material error of law or fact." Moreover, under Section 15.0, the "mere reassertion of factual and legal arguments previously presented to the NMB generally will be insufficient to obtain relief." As we show below, the submissions of FedEx and FEPNO do not even come close to meeting these standards; their contentions are totally without merit. FedEx is using the pendency of these motions to postpone bargaining with the pilots' representatives. See Letter from D. Maliniak to S. Rosen, June 28, 1993 (attached as Exhibit 1). The motions for reconsideration should be dismissed immediately.

FedEx's argument that the Board's October, 1992 decision ordering a rerun election "chilled" management's right to

communicate, should be rejected for several reasons. First, this contention is a reassertion of the same arguments advanced by management in defense of its conduct during the 1991 campaign. These arguments were rejected by the Board. Federal Express, 20 NMB 1, 49-52 (1992). If FedEx wanted reconsideration of the Board's decision rejecting these arguments, the appropriate time to seek such reconsideration was within ten days of the October, 1992 decision. Reassertion of these arguments now is contrary to Board procedures and is an insufficient basis for relief under Section 15.0.

Secondly, FedEx's First Amendment theory is contrary to well established Board law on the subject. The Board has consistently stated that "the privilege of free speech is not absolute. It must be evaluated in the context of the rights of others." USAir, 18 NMB 290 (1991). Thus, carrier communications which interfere with employees' free choice of representative are not protected. Texas & New Orleans Railroad v. Brotherhood of Railway and Steamship Clerks, 288 U.S. 548 (1930); I.A.M. v. Continental Airlines, 754 F. Supp. 892 (D.D.C. 1990). The Board acted well within existing authority when it found that FedEx's communications during the 1991 campaign interfered with the election.

Furthermore, FedEx's assertion that as a result of the 1992 decision it remained "passive" during the rerun campaign is ludicrous. In our submissions opposing FedEx's objections, ALPA provided undisputed evidence that during the rerun election,

management sent the pilots a steady stream of anti-ALPA propaganda via multi-page booklets, postcards, flyers, and billboards at the Memphis airport. Declaration of Eric Vartanian, Feb. 16, 1993, at paragraphs 16-32.

The contention that the Board failed to fulfill its "statutory duty to investigate" because it interviewed an insufficient number of pilots is also meritless. The Board has no statutory duty to interview any pilots as part of an investigation, much less a minimum number of pilots. It is well settled that the Board has broad discretion to determine the procedures it will use in all aspects of a representation case, including investigations of election objections. Brotherhood of Ry. and Steamship Clerks v. Ass'n for Benefit of Non-Contract Employees, 380 U.S. 650, 662 (1965). Here, the interviews were only a small part of a broad investigation; the Board had before it written position statements from the objecting parties and the organizations as well as hundreds of affidavits from pilots. The Board gave the objecting parties ample opportunity to present their objections and any supporting evidence. The Board did not commit any error in the way it handled the investigation.

FEPNO's claim that the investigation was flawed because union supporters were among the interviewees is absurd. FEPNO asserts that 31.5% of those interviewed were union supporters and therefore the interview process was "skewed." However, more than 56% of the eligible voters voted for union representation and therefore, one might well have expected that the percentage of

interviewees who supported representation would substantially exceed 31.5%. Furthermore, contrary to FEPNO's tortured logic, the Board mediator was not required to confine her interviews to pilots who had never expressed any views on the question of representation. If the Board did learn during the interview process that an interviewee was for or against representation, it was fully capable of giving the appropriate weight to the testimony.

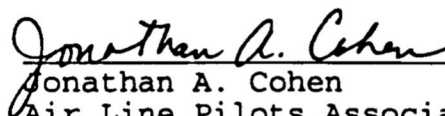
The Board's decision not to interview individuals who had submitted affidavits was a sound effort to supplement the written record and was a reasonable exercise of its administrative discretion. As mentioned, the Board is not obligated to use interviews at all in investigating objections; it is certainly not precluded from talking to union supporters as part of the process. It would indeed be anomalous if the Board, which had before it hundreds of written statements from anti-union pilots, could not interview anyone who was a union supporter.

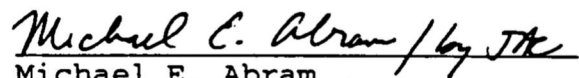
Finally, the Board should reject FedEx's assertion that its rights have been violated because the Board applied different standards to union and carrier campaign conduct. In applying a stricter standard to the carrier, the Board applied the rule of Air Wisconsin, 16 NMB 235 (1989), which recognizes the obvious fact that the carrier has unique power and authority in the workplace. FedEx's position on this issue was rejected by the Board in its June 14 decision (20 NMB at 533-35) and FedEx has

made no showing that the Board's decision in this regard constitutes an error of fact or law.

It is obvious that, as they have done repeatedly throughout this case, FedEx and FEPNO are brazenly and cynically abusing the Board's processes by advancing obviously insubstantial challenges in an effort to delay. The Board should immediately deny the motions for reconsideration.

Respectfully submitted,


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