

BEFORE THE  
NATIONAL MEDIATION BOARD

In the Matter of )  
THE FLIGHT DECK CREW MEMBERS )  
of )  
FEDERAL EXPRESS CORPORATION )  
SOUGHT TO BE REPRESENTED BY )  
THE AIR LINE PILOTS ASSOCIATION )

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NMB CASE NO. R-6044

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RESPONSE OF AIR LINE PILOTS ASSOCIATION TO REPLY SUBMISSIONS  
OF THE FEDERAL EXPRESS CORPORATION AND  
FEDERAL EXPRESS PILOTS FOR A NON-UNION OPERATION

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I. INTRODUCTION

The most recent submissions of Federal Express ("Fed Ex" or "the carrier") and The Federal Express Pilots for a Non-Union Operation ("FEPNO") seek to turn the law governing permissible campaign conduct on its head by transforming the role of the organization in the campaign from that of active, interested participant to that of passive onlooker. The absurd notion that organizations must remain mute and out of view during campaigns is the subtext underlying all of the shrill allegations of coercion found in the Fed Ex and FEPNO objections. Fed Ex and FEPNO would have the NMB fashion an entirely new and restrictive standard that would bar an organization from engaging in any conduct which "influences" the election. Campaigns would be transformed into empty charades in which organizations would be barred from saying or doing anything that might persuade eligible voters to support representation.

Both objecting parties continue to ignore the basic principle, established by statute, legislative history and conclusive case law that, because carriers have unique power and authority in the workplace, carrier conduct, such as polling, constitutes interference, while the same conduct by a union does not. Moreover, the objecting parties have still offered no evidence that the polling by the Wilson Center, or any other allegedly objectionable ALPA conduct, was in fact coercive or had any ascertainable impact on the outcome of the election.

Fed Ex claims that it "does not object to union polling" and it concedes that ALPA "has the right to question crewmembers regarding their views." (Fed Ex Reply at 2, 12). But Fed Ex asks the Board to adopt a new "policy" which would severely restrict such polling once the Board has mailed ballots to the crewmembers. There is no basis, in law or logic, for this distinction. In an NMB-conducted mail ballot election, the campaign continues until the last ballot is returned. Fed Ex and FEPNO both campaigned vigorously against ALPA (and USPA) before and after the ballots were issued. Fed Ex proposed debates with ALPA and USPA to take place during the ballot period -- and even urged that the organizations agree to waive objections to Fed Ex misconduct during such debates. During the ballot period, FEPNO urged the pilots to "hold their ballots" while the NMB reviewed FEPNO's (rejected) petition to modify the ballot. Fed Ex and FEPNO continued to distribute anti-union literature in the final week of balloting. Polling by ALPA was a continuing necessity to enable the Organizing Committee to respond to these efforts. The "policy" which Fed Ex urges the Board to adopt would violate ALPA's legal right to campaign throughout the ballot period. Given Fed Ex and FEPNO's intense, continued, coordinated campaign against ALPA and USPA, their request to set aside the election because ALPA polled pilots during the ballot phase of the campaign constitutes brazen temerity, or, in the vernacular, extreme chutzpah.



ALPA has shown that its polling, both before and after the ballots were mailed on December 3, was a legitimate effort to measure its support and identify issues of concern to the pilot group. ALPA has explained in detail the purpose, the necessity and the methodology of the polling. ALPA has also proven that it made no misrepresentations during the election; that the presence of pilot organizers in the crew rooms was typical and reasonable campaign conduct; and that USPA's presence in the campaign did not taint laboratory conditions. In response, Fed Ex and FEPNO argue that ALPA's polling was "inherently coercive," because they have no evidence that it was in fact, coercive. They claim that union conduct that "has a tendency to influence" the electorate constitutes interference, because they have no evidence of any material impact on the election. They offer much conclusory rhetoric (such as calling the polling "interrogation"), and many form "affidavits" complaining about the results of the election. But they do not make a showing of election interference; indeed, they provide absolutely no basis for any further investigation. The objecting parties simply desire to delay the inevitable. Only a prompt certification will put an end to this charade. There is no reason to further delay certification of ALPA as the representative of the Fed Ex pilots.<sup>1</sup>

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<sup>1</sup>References to Fed Ex's March 4, 1993 Reply In Support of its Objections will be cited as ("Fed Reply at \_\_\_\_"). Exhibits attached to Fed Ex's Reply will be referred to as ("Fed Reply Exh. \_\_\_\_"). References to FEPNO's March 4, 1993 Rebuttal to Responses of ALPA and USPA will be cited as ("FEPNO Reply at \_\_\_\_"). References to ALPA's February 22, 1993 Response will be referred to as ("ALPA Response at \_\_\_\_"). References to Philip Comstock's

II. FED EX AND FEPNO'S CONTENTION THAT ALPA'S CONDUCT WAS "INHERENTLY COERCIVE" IS NOT A BASIS FOR FINDING UNION ELECTION INTERFERENCE IN THIS CASE.

A. The Standards Applicable to Carrier and Union Campaign Conduct.

Under Section 2 Ninth of the Railway Labor Act ("the RLA" or "the Act"), the NMB is authorized to use a secret ballot or any other appropriate method which will "insure the choice of representatives by the employees without interference, influence, or coercion, exercised by the carrier." Section 2 Fourth provides that "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..." [emphasis added]. In considering amendments to the Act in 1934, Congress rejected a proposed provision prohibiting union election interference, relying on the fundamental difference between carriers and unions when it comes to the power to coerce employees in an election. (See ALPA Response at 4-5). And, in Air Wisconsin, 16 NMB 235 (1989), the NMB specifically held that:

[W]hile the tests for union interference and carrier interference are the same - whether the laboratory conditions have been contaminated - because of the unique power and authority which carriers possess in the workplace, application of

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February 19, 1993 declaration will be referred to as ("Comstock Decl. ¶\_\_"). References to Eric Vartanian's February 16, 1993 declaration will be referred to as ("Vartanian Decl. ¶\_\_"). References to Eric Vartanian's March 9, 1993 declaration that accompanies the present submission will be referred to as ("Vartanian Supp. Decl. ¶\_\_").

this standard to effectively identical factual situations involving alleged union vis-a-vis carrier interference may lead to different conclusions.

Id. at 239-40 (emphasis added).

We submit that polling during an election campaign is precisely the kind of conduct referred to in Air Wisconsin which leads to different results depending upon the author of the conduct. Such polling constitutes interference because it is inherently coercive when engaged in by the carrier but it does not constitute interference when engaged in by the union.

Only where there is a clear factual showing that union polling is actually coercive and that such coercion impacted the election can union polling even arguably be found to constitute interference. This is the rule adopted by the NLRB in Springfield Discount, 195 NLRB 91, enf'd 82 LRMM 2173 (7th Cir. 1972), and its progeny. In Kusan Mfg. Co., 749 F.2d 362, 364 (6th Cir. 1984), the Sixth Circuit endorsed the Springfield Discount rule and held that union polling on the day before and on the morning of an on-site election was not "inherently coercive." The Court held that polling is legitimate, absent a clear demonstration that it "in fact was coercive and in fact influenced the result of the election." Id. at 365. (emphasis in original). See also Kux Mfg. Co. v. NLRB, 890 F.2d 804 (6th Cir. 1989); Melrose-Wakefield Hospital Ass'n v. NLRB, 615 F.2d

563 (1st Cir. 1980). This rule is totally consistent with the language, legislative history and case law under the RLA.<sup>2</sup>

B. The Contentions of Fed Ex and FEPNO Are Contrary to Established Legal Authority.

The responses of Fed Ex and FEPNO to this entire line of authority are, to put it charitably, totally unpersuasive. In an apparent effort to equate union and carrier campaign conduct, Fed Ex miscites and misquotes the Section 2 Third requirement that representatives "shall be designated by the respective parties without interference, influence or coercion by either party over designation of representatives by the other." Fed Ex misquotes the statute by deleting the phrase "over designation of representatives by the other." (See Fed Reply at 3, n.1). This distortion is obviously intended to support the erroneous contention that ALPA, like a carrier, may not "influence" pilots in selection of their representatives. Section 2 Third by its terms prohibits carriers from interfering with selection by employees of their representatives and employees from interfering with the carrier's designation of its representatives. The provision does not address union election campaign conduct, nor does it say anything about organizations influencing employees. The Board should reject Fed Ex's attempt to twist the statutory language to fit its view that unions should not be seen or heard during organizational campaigns.

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<sup>2</sup>Contrary to Fed Ex's assertion (Fed Reply at 3), these are clearly not "limitless" standards for union conduct.

Fed Ex erroneously dismisses the clear legislative history distinguishing between union and carrier campaign conduct. (Fed Reply at 6). FEPNO at least concedes that the concept of the carrier's unique ability to coerce was in fact part of the legislative history, but claims without support, that it was rooted in the need to defend "unsophisticated and unorganized employees" from the "monopolistic railroads." (FEPNO Reply at 14). Thus, it is argued, this concept does not apply to the present case because "ALPA is a national organization with far greater influence throughout the airline industry than Federal Express." (FEPNO Reply at 14). This argument is both historically and factually wrong. The RLA of 1926 and the Amendments in 1934 were the products of negotiations and agreements between the large rail unions and the large railroads. In fact, 20 labor organizations representing 1,750,000 organized employees participated in the negotiations over the Amendments. See Statement of Donald R. Richberg, Hearings Before Committee on Interstate and Foreign Commerce, H.R. 7650, 73rd Congress (May, 1934) at 9-10. Moreover, it is ludicrous to suggest that Fed Ex does not have unique power to control the working conditions of its employees and to coerce them in their choice of a representative or that this power is eliminated by ALPA's "influence in the industry." If such alleged "influence" were the basis for election objections, ALPA could not engage in any campaign to be certified under the Act; presumably this is the result favored by the objecting parties.

Fed Ex also misquotes Air Wisconsin in its effort to equate union and carrier campaign conduct.<sup>3</sup> Their quotation obviously omits the language which states that identical factual situations lead to different results depending on whether it was union or carrier conduct. In fact, neither Fed Ex nor FEPNO are prepared to acknowledge the rationale of Air Wisconsin or of the Board's prior holding in the present case. See Federal Express, 20 NMB 4, 51-52 (1992). They insist on a false equality of treatment in objections cases, which would ignore the carrier's unique power and authority, and would prevent organizations from actively campaigning. (Fed Reply at 3-5).

Fed Ex's and FEPNO's responses to the authority specifically upholding union polling are also without merit. They totally fail to distinguish the Springfield Discount line of cases. First, they assert, without support, that ALPA's polling during the six-week balloting period was "inherently coercive." (Fed Reply at 12). This is precisely the argument rejected in Springfield Discount and Kusan Mfg. Co., supra, which held that union polling is presumed to be legitimate in the absence of evidence of actual coercion and actual impact. It is not enough to assert that the polling was "inherently coercive." The fact that part of the polling occurred after the ballots were mailed

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<sup>3</sup>In its Reply Brief, Fed Ex instructed the Board to "See Air Wisconsin, 16 NMB 235 (1989) ('... the test for union interference and carrier interference are the same: whether the laboratory conditions have been contaminated...')." (Fed Reply at 7).

does not satisfy the requirements of evidence of actual coercion and actual impact on the election. Fed Ex and FEPNO have cited no authority to support their contention that polling after the ballots have been mailed is "inherently coercive." The law and logic are to the contrary. In Kusan Mfg., supra, for example, the polling took place on the morning of the election and was found not coercive. See also NLRB v. Mercy Memorial Hospital, 836 F.2d 1022, 1025 (6th Cir. 1988) (employer challenge to election rejected where employer failed to demonstrate that allegedly threatening letter "was in fact coercive.") (emphasis in original); Aerovias de Mexico, 18 NMB 130, 138 (1991) (allegedly objectionable statements were "lacking any ascertainable impact" on laboratory conditions); Air Wisconsin, supra, 16 NMB at 237 (objecting party was "unable to establish that any specific Air Wisconsin voter was coerced" by alleged expulsions from ALPA). Fed Ex and FEPNO have not and cannot adduce evidence of actual coercion or impact with respect to the polling or any of the other conduct objected to in this case.

NLRB v. Gulf States Cannery, Inc., 585 F.2d 757 (5th Cir. 1978), cited by Fed Ex, does not support the argument that actual coercion and actual impact need not be shown in union interference cases. In Gulf States, the court rejected the argument that under the National Labor Relations Act a negative intent on the part of the union must be shown in order to find union interference. In rejecting the "intent test", the court stated that the focus of an interference inquiry is "on the

effects of a particular act on the electorate." The court reiterated the rule that allegedly objectionable acts will constitute interference only "[i]f those acts 'interfered with the employees' exercise of free choice to such an extent that they materially affected the results of an election.'" Id. at 759. (citations omitted)(emphasis added).

So too, Fed Ex and FEPNO erroneously assert that under NMB case law, ALPA's polling was invalid. Fed Ex totally mischaracterizes and misconstrues Mercury Services, 9 NMB 312 (1982) and Southwest Airlines, 13 NMB 120, 123 (1986), when it asserts that these cases stand for the proposition that ALPA's polling was "inherently coercive." In Mercury Services, the NMB found that the carrier's conduct in polling employees and soliciting them to turn in their ballots to the carrier was inherently coercive. The decision explicitly relies on the carrier's power to pressure employees and employees' inclination to respond to such pressure out of "loyalty." 9 NMB at 321. Mercury Services did not involve any alleged union interference and does not even purport to apply to union polling during an NMB election. Unlike the carrier in Mercury Services, ALPA and the Organizing Committee had legitimate, non-coercive reasons for polling. Moreover, ALPA and the Organizing Committee did not collect or solicit ballots. While the Wilson Center callers did ask about pilots' preferences and intent to vote, neither the Wilson Center, nor ALPA nor the Organizing Committee knew or knows how or whether any pilot actually voted. Each pilot made



the decision to vote or not to vote at his or her own convenience and in complete privacy. Fed Ex's and FEPNO's reliance on Mercury Services is another example of their misguided effort to equate carrier and union campaign conduct.

The objectors' reliance on Southwest Airlines, supra, is also misplaced. In Southwest, the Board rejected the contention that a union had interfered with the election by mailing duplicate ballots to employees. The NMB found no evidence to support the carrier's objection, pointing out that only NMB employees know who actually votes in an NMB election. Id. at 123. This truism does not in any way reflect on the validity of ALPA's polling in this case.

Likewise, Fed Ex and FEPNO continue to err in relying on Sound Refining Co., 267 NLRB 1301 (1983) and Michem, Inc., 170 NLRB 362 (1968). As explained in ALPA's prior submission (ALPA Response at 18), these cases, unlike the present case, involved the actual presence at the voting site, on the day of the election, of union representatives who made lists of individuals who actually voted. Furthermore, while ALPA and the Organizing Committee had compelling reasons to poll individuals during the campaign both before and after ballots were mailed by the NMB, there was no corresponding justification for personally watching the ballot site on the day of the election and recording names, as was done in the NLRB cases cited by Fed Ex. In the present case, unlike these two NLRB cases, the campaign continued while

the balloting was conducted. ALPA had a legal right to campaign during the ballot period, no less than in the period before the ballots were mailed.

III. ALPA HAS DEMONSTRATED BY SUBSTANTIAL UNREBUTTED EVIDENCE THAT ITS INQUIRIES REGARDING PILOTS' VOTING PREFERENCES WERE LEGITIMATE, NECESSARY AND NON-COERCIVE.

In its February 22, 1993 Response, ALPA provided the NMB with a detailed explanation of why it used polls to inquire about employee preferences during the rerun campaign. ALPA explained the rationale for conducting this polling, identified the methodology and mechanics of the polling operation and fully described how the results were used by the Organizing Committee. (ALPA Response at 12-22). Fed Ex and FEPNO have "responded" to ALPA's full explanation of the polling operation by disregarding the evidence and asserting that "ALPA does not provide a justification or rationale for why it needs to know how employees are voting as they vote." (Fed Reply at 11). They claim that ALPA's sole purpose in polling was to identify anti-ALPA flight deck crewmembers (FEPNO Reply at 9) and that the polling was "inherently coercive" because it was conducted while pilots were voting. (Fed Reply at 2-3). These assertions unravel upon even casual examination.

The declarations of Eric Vartanian and Philip Comstock, and ALPA's Response fully justified and explained ALPA's efforts to determine how pilots planned to or did vote during the ballot

phase of the campaign. (Vartanian Decl. ¶¶ 3, 6, 14, 36; Comstock Decl. ¶¶ 16, 18, 19; ALPA Response at 13-17, 20). ALPA has shown that the Wilson Center is an established operation which has done polling of the kind it did in this campaign many times before. (Comstock Decl. ¶9). ALPA's submissions also demonstrate that there were legitimate reasons for asking pilots whether they had voted and if so for whom. The Wilson Center asked pilots about their voting preferences so that ALPA could measure the approximate level of its support at particular points in time during the campaign. (Comstock Decl. ¶¶ 17-20; Comstock Decl. Exh's 1-3). Individual responses were obtained in order to create the group portrait. The Wilson Center used the polling data to determine whether ALPA's support was growing, holding steady or eroding as the campaign progressed, and if so, why. (Comstock Decl. ¶ 12). The Organizing Committee was able to assess the impact that the negative campaign conduct of Fed Ex management and FEPNO was having on ALPA's level of support and to determine whether, and how it needed to respond to such propaganda. (Comstock Decl. ¶¶18-19; Vartanian Decl. ¶12).

The Organizing Committee also utilized the Wilson Center polling to identify pilots who were undecided or who had a somewhat favorable view of union representation. Names were provided to the Organizing Committee, so that members of the Organizing Committee could concentrate their personal contacts and telephone calls on this potential pool of ALPA voters. (Vartanian Decl. ¶¶ 3, 36, 38-39, 41). To identify such pilots,

the Wilson Center needed to ask pilots how they planned to vote and whether they had voted. Such questions are a legitimate and necessary part of campaigning. Since the rerun election was compressed into a shorter time frame than the initial election, the Organizing Committee had less time to contact the large geographically dispersed crew force; this fact made the Wilson Center polling even more critical.

Fed Ex now concedes that it "does not object to union polling" and that ALPA has the "right to poll employees regarding their views." (Fed Reply at 2, 12). Fed Ex also concedes that "ALPA has a right to poll crewmembers on a wide range of issues." (Fed Reply at 2). Although Fed Ex does not attempt to delineate what this range of issues encompasses, Fed Ex does assert that while employees are voting, a union cannot ask "are you now voting and if so, for whom?" (Fed Reply at 3). Fed Ex asserts that such polling is coercive and that "ALPA has no legitimate or lawful reason for knowing how people are actually voting as they vote." (Fed Ex at 3) (emphasis added).

These contentions disregard the fact that Fed Ex and FEPNO campaigned vigorously both before and during the balloting period. (ALPA Response at 16-17; Vartanian Decl. ¶¶ 14-34; Vartanian Supp. Decl. ¶ 6). Fed Ex even proposed debates that would have taken place during the balloting period in which the organizations would waive objections to the carrier's misconduct. (Vartanian Decl. ¶¶ 15-16; Vartanian Decl. Exh. 1). During this

period, FEPNO issued materials asking pilots to "hold their ballots" while the NMB reviewed its petition to modify the ballot. (Vartanian Decl. ¶34). In the final days before the ballot count, FEPNO was still issuing campaign statements and distributing campaign literature. (Vartanian Supp. Decl. ¶ 6; Vartanian Supp. Decl. Exhs. 1-2). The Organizing Committee relied upon Wilson Center polling to respond to these post-December 3 campaign tactics and to institute a number of changes in both its message and methods of communications.

An NMB mail ballot to a widely-dispersed, geographically separated workforce necessarily causes the campaign period to extend throughout the entire ballot period. The Board has never restricted unions from continuing their campaign activities during this period. Any such restriction would not only be extremely unrealistic; it would violate the employees' right to continue their effort at self-organization throughout the period leading to the ballot count.

Fed Ex fails to draw a meaningful distinction between the wide range of questions that it now concedes can be asked, and the allegedly forbidden questions of whether and how a pilot was planning to vote. Can an interviewer or fellow pilot ask such questions as "do you feel you can trust Fed Ex management?" or "how do you feel about ALPA?" or "would you like to help out by distributing literature in crew mailboxes?" These questions invariably elicit an individual's voting preference, and under

Fed Ex's arguments they would not be permissible. Telephone inquiries as well as campaign conversations in the crew lounge during the final six weeks of the campaign would be stilted exercises in which every question posed by a member of the Organizing Committee would potentially constitute coercive conduct. Fed Ex's argument would significantly chill necessary campaign communications.

Fed Ex and FEPNO distort ALPA's arguments and twist the facts concerning the polling operation in a vain effort to show coercion. Fed Ex misconstrues ALPA's position when it asserts that ALPA seeks to prove carrier interference in order to justify its own misconduct. In fact an important rationale for ALPA's polling was to assess and respond to the negative communications and conduct of Fed Ex and FEPNO during the ballot phase of the campaign.

FEPNO attempts to ascribe to the Organizing Committee a non-existent motive for determining employee preferences, claiming that "the purpose of polling was precisely to identify anti-ALPA flight deck crewmembers" so that a blacklist of anti-ALPA pilots could be created. (FEPNO Reply at 9-10). The legitimate reasons for asking preference questions have been made clear and no evidence of any improper motive has been produced or exists.

Fed Ex's suggestion that ballot secrecy was somehow compromised is also a red herring. The Organizing Committee did

not and could not know how pilots actually voted. (Vartanian Decl. ¶44; ALPA's Response at 20). A pilot could respond to an inquiry by declining to answer the question. A pilot could request confidentiality. A pilot could also provide a false response to the question or respond truthfully and then change his mind at the time he actually made a final decision.

Contrary to Fed Ex's unsubstantiated allegation (Fed Reply at 13-15), the Wilson Center did not provide the Organizing Committee, or ALPA, or any other person or entity with the name of any pilot who said he would not vote or who said he opposed representation. The Wilson Center also did not provide the names of pilots who had either requested or raised concerns about confidentiality. Fed Ex's claim (for which no support was provided) that if Wilson had the list, ALPA had the list, is false (Vartanian Decl., ¶¶4, 38-40; Comstock Decl. ¶13-14). The existence of such a list is not grounds for setting aside this election.

In fact, the large majority of the pilots contacted did not request confidentiality. Fed Ex draws a sinister inference from the fact that there were any pilots who felt the need to request confidentiality, but it provides no evidence to support this view. (Fed Reply at 15). The fact is that these pilots may well have feared that the carrier and not the organization would learn of their responses and take retaliatory action. The Wilson Center reported that a number of Memphis-based pilots feared

carrier retaliation; it is quite likely that many of the pilots who indicated a desire for confidentiality did so because of fear of the carrier and not of ALPA. (Vartanian Decl. ¶10; Comstock Decl. ¶37).

Contrary to Fed Ex's assertion, ALPA does not "concede" that "survey results" were leaked. (Fed. Reply at 22). The declarations of Eric Vartanian make clear that the Organizing Committee had no interest in disseminating such information and did not in fact do so. (Vartanian Decl. ¶5; Vartanian Supp. Decl. ¶ 4). Fed Ex, however, has apparently conceded that the survey results were not false. Moreover, Fed Ex has pointed to no evidence that the alleged dissemination of polling data was capable of being coercive or was, in fact, coercive.

Thus, it is clear that Fed Ex and FEPNO have failed to offer any evidence that the Wilson Center polling was in fact coercive.

IV. FED EX AND FEPNO HAVE FAILED TO PRODUCE SPECIFIC EVIDENCE OF COERCIVE STATEMENTS AND CONDUCT THAT HAD ANY ASCERTAINABLE IMPACT ON THE VOTING BEHAVIOR OF FED EX PILOTS.

In addition to their allegations regarding polling, Fed Ex and FEPNO advance other vague and unsupported allegations of coercion. However, Fed Ex and FEPNO have failed to produce evidence of coercive statements and conduct by identifiable members of ALPA or the Organizing Committee that had any ascertainable impact on the voting behavior of any Fed Ex pilots.



They have submitted as "evidence" form affidavits, statements and letters that are all bereft of specific allegations of coercive statements and conduct. Amid the piles of paper, there is not a scrap of evidence suggesting that the Wilson Center polling or any other ALPA conduct coerced pilots into voting for ALPA or USPA.

Fed Ex and FEPNO are apparently under the impression that if they submit enough pilot statements and form affidavits that parrot entirely groundless and conclusory allegations, they will be relieved of the burden of producing substantial evidence. Fed Ex asserts that they have submitted "approximately thirty affidavits which discuss either specific instances of threats and intimidation or explai[n] the generally hostile environment created by ALPA" (Fed Reply at 23) (emphasis added). In fact, specific evidence of actual threats and intimidation have not been submitted. Moreover, Fed Ex's assertion presumes incorrectly that legitimate union campaign activity creates a hostile environment. This is simply a subterfuge to entice the NMB into delaying certification by conducting an unnecessary "on-site investigation" to find non-existent evidence which, in any event, would not support setting aside this election.

The claim that there was "fear of retribution by ALPA" (Fed Reply at 20) is not grounded in reality. Fed Ex and FEPNO produced no evidence whatsoever that ALPA or the Organizing Committee ever suggested or implied that they would retaliate

against pilots who opposed ALPA representation. Vague references to statements by "ALPA supporters" do not constitute evidence of interference by ALPA or the Organizing Committee. In fact, it was Fed Ex who sought to stir up concern about ALPA retaliation by distributing a booklet to all pilots, during the balloting period, which asked "DO YOU REMEMBER, as a union member, worrying about the possibility that you would get fined, sanctioned or blacklisted for saying something that your union didn't like?" (Vartanian Decl., ¶ 29; Vartanian Dec. Exh. 12 ¶ 7). Fed Ex and FEPNO now attempt to benefit from their own hysterical union bashing by submitting similarly worded affidavits from Fed Ex pilots who say they fear an ALPA "blacklist." (Fed Ex Exhibits 1-5, 7-10; see generally, FEPNO Exhibits). Fed Ex also relies upon a letter from the President of the National Right To Work Legal Defense Foundation which seeks to discredit ALPA by inventing tales of past coercion at other carriers. The letter obviously does not constitute evidence of coercive conduct in this election.<sup>4</sup> (Fed Reply Exh. 11). Presumably, the best way for a pilot to deal with his fears of ALPA representation was to retain his or her ballot and not vote for representation. Despite Fed Ex's efforts to generate concerns about a blacklist, Fed Ex and FEPNO offer no evidence that any pilots voted for ALPA because they feared being placed on an ALPA blacklist.

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<sup>4</sup>This letter was also distributed in Fed Ex pilot mailboxes in Memphis after the ballot count. It appears that Fed Ex and/or FEPNO were continuing their efforts to manufacture fear of ALPA. (Vartanian Supp. Decl. ¶ 7).

Fed Ex offers hearsay evidence of one pilot who purportedly voted for ALPA, because of fear of ALPA, but this pilot did not even link his fear to ALPA's conduct in the rerun election, but rather referred generally to ALPA's alleged conduct during the time he worked for a different carrier. (Fed Reply Exh. 8, Caller #4). This pilot was deluded if he thought that not voting would lead to retaliation and that ALPA would retaliate against him if he voted for ALPA. Surely the NMB cannot shape its rules to accommodate someone who could be so wilfully confused.

Fed Ex has also submitted nine very similar affidavits from Fed Ex pilots who say that they fear that an ALPA reign of terror will soon be unleashed against FEPNO supporters. These groundless fears are entirely devoid of references to actual statements or conduct made during the campaign by either ALPA representatives or the Organizing Committee. For example, one pilot said he fears that the NMB would leak names of confidential affiants. This is typical of the types of entirely unfounded concerns being voiced in these statements. (Fed Reply Exh. 8, Caller #2). Similarly, FEPNO's submission of three additional pounds of exhibits does no more than allege that ALPA representatives and Organizing Committee members engaged in routine campaign activity. Vague assertions that ALPA representatives and "members of the Organizing Committee threatened crewmembers" are entirely unsubstantiated. (Fed Reply at 5). ALPA and the Organizing Committee did not make threats

against FEPNO or pilots opposed to representation. (Vartanian Supp. Decl. at ¶ 3). In any event, these pilots did not vote for union representation. Membership in ALPA will be extended to Fed Ex pilots regardless of whether or how they voted, and there is no basis for these alleged fears of retaliation -- which did not cause pilots to vote for ALPA.

FEPNO's claim that there were "constant rumors throughout the FedEx pilot group" that those not supporting ALPA would be "threatened" with "failure of check rides" (FEPNO Reply at 11) is indicative of the quality of evidence being relied upon in support of the objections. Neither the Organizing Committee nor its members ever stated or implied through their words or conduct that they would engage in, encourage or condone the harassment of Fed Ex pilots on check rides. (Vartanian Supp. Decl. ¶ 5). Fed Ex and FEPNO rely on statements alleging a general fear of harassment without being able to point to any specific incidents or actual threats. Finally, it is worth noting that none of the twelve members of the Organizing Committee serve as simulator instructors or line check airmen and therefore would not even have the opportunity to engage in such conduct. (Vartanian Supp. Decl. ¶ 5).

FEPNO also makes the entirely unsubstantiated assertion that "[w]hile pilots are in the crew lounge, the pilot's complete attention and focus must be on their flights so as to ensure flight safety." (FEPNO Reply at 12). FEPNO argues that ALPA's

campaign activities interfered with this need to "focus." The declaration of Eric Vartanian clearly refutes FEPNO's assertion. In fact non-flight related activities regularly take place in the crew lounge. (Vartanian Decl. ¶ 52). What really underlies FEPNO's complaint is that they object to ALPA and to any campaign activity or conduct undertaken by ALPA supporters on behalf of ALPA regardless of where it took place. FEPNO actually suggests that it was somehow improper for ALPA Executive Board (actually Executive Council) members to rent hotel space in Memphis so that they could host a cocktail party where they could meet Fed Ex pilots. (FEPNO Reply at 5-6). FEPNO apparently finds ALPA's presence within the City of Memphis to be grounds for overturning the election result.

V. FED EX AND FEPNO HAVE NOT DEMONSTRATED ANY JUSTIFICATION FOR THE NMB TO CONDUCT ANY FURTHER INVESTIGATION.

Fed Ex and FEPNO have been given ample opportunity by the NMB to present evidence of interference. Working hand-in-hand, Fed Ex and FEPNO have managed to muster rhetoric and half-baked legal theories but no real evidence of interference -- either in the Wilson Center polling or in any other aspect of the campaign.

They have produced no evidence that the polling was coercive or that it had an impact on the election outcome. In the whole pile of material they have presented, there is not one allegation by any pilot that he was coerced into voting for ALPA

because of the Wilson Center poll. In fact, they concede that this evidentiary vacuum exists so they rely on their "inherent coerciveness" theory, which we have demonstrated is totally inapplicable in this context. Incredibly, they also cite their lack of evidentiary support as a basis for the need for further investigation! This, too, is extreme temerity.

Regarding their other allegations of coercion, the objecting parties provide a few isolated, conclusory and vague allegations that fail to identify ALPA or the Organizing Committee as the authors of any improper statements or conduct. Such allegations are factually and legally insufficient.

The objections regarding misrepresentations and alleged USPA interference were totally rebutted in ALPA's (and USPA's) February 22 submissions. The objecting parties have added nothing to these allegations in their Reply submissions. In the face of the showing that these contentions are without merit, they retreat to their refrain of "let's have an on-site investigation." (Fed Reply at 24, 25). The Board should reject this invitation to delay. As the NMB has recently stated, "The Board will not investigate unsubstantiated generalized allegations." Fox River Valley Railroad, 20 DMB 251, 261 (1993). See also, United Steelworkers, IAM/US Air Shuttle, 20 NMB 162 (1993) (allegations of interference rejected based on position statements and documents and without further investigation).

There are compelling reasons for the Board to immediately dismiss the objections and certify ALPA. The majority of pilots that voted for representation are being deprived of their right to representation. The carrier is using this "limbo" period to institute changes in benefits while the pilots do not have a certified representative to act in their behalf. (Vartanian Supp. Decl. ¶ 8). There is a significant incentive for the carrier and FEPNO to lengthen the investigation and further postpone certification. It is worth noting that this is in marked contrast to the clear disincentive unions have to lengthen objection investigations. The Board should not permit a carrier or an anti-union employee minority to needlessly delay certification.

#### VI. CONCLUSION

The Board has before it all the evidence (or lack of evidence) necessary to resolve and dismiss the objections. There are no material factual issues for the Board to investigate. The time has come to end this representation case. Fed Ex and FEPNO had their chance in the court of pilot opinion, and they have lost. This case should now be over.

Based on the foregoing and on its submission of February 22, ALPA submits that the objections of Fed Ex and FEPNO should be dismissed without further investigation and ALPA should be certified immediately as the representative of the pilots of Federal Express.

Dated: March 11, 1993

Respectfully submitted,

*Jonathan Cohen*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response of ALPA To Reply Submissions of Federal Express Corporation and Federal Express Pilots For a Non-Union Operation and the Supplemental Declaration of Eric Vartanian in Support Thereof were served on the following parties by overnight delivery on March 11, 1993:

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Dated: March 11, 1993