



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. 86  
  
CASE No. R-6044  
  
FINDINGS UPON  
INVESTIGATION-  
CERTIFICATION  
  
June 14, 1993

On October 19, 1992, in Federal Express Corporation, 20 NMB 7, the National Mediation Board found that Federal Express had tainted the laboratory conditions in an election among the carrier's Flight Deck Crew Members. The Air Line Pilots Association (ALPA) had filed allegations of election interference which the Board investigated subsequent to the election.<sup>1</sup>

The Board ordered a re-run election using its standard ballot with ALPA on the ballot. Mediator Gale L. Oppenberg was assigned to continue the investigation.

Ballots were scheduled to be mailed on December 3, 1992. On December 2, 1992, the Board received a Motion for Clarification or Reconsideration of the Board's decision in 20 NMB 7, filed by the Federal Express Pilots for a Non-Union Operation (FEPNO).

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<sup>1</sup> The results of the ballot count, conducted on August 22, 1992, were that ALPA received votes from 1112 of the 2279 eligible voters. Five other valid votes were cast. The total valid votes, 1117, was 23 votes less than the majority needed for certification.

FEPNO asserted that another organization, the United States Pilots Association (USPA) was conducting a campaign to collect write-in votes. FEPNO argued that since USPA was not a party in the original election "a re-run election which interjects third parties is not a re-run election...but...an altogether new election". FEPNO requested that the Board either use a ballot without a space for write in votes, or, if the Board used its standard ballot, the Board require that a majority of eligible employees cast votes for either ALPA or USPA in order for either organization to be certified. The Board denied the Motion on December 3, 1992, in 20 NMB 91.

The results of the ballot count conducted on January 14, 1993, were that ALPA received a total of 1015 valid votes out of a potential 2279 eligible voters. USPA received 271 valid votes. Under the Board's election procedures, this would result in a certification of ALPA as the representative of the craft or class.

However, on January 14, 1993, Federal Express filed "Objections to Certification of Election", alleging election interference by ALPA and USPA. On January 19, 1992, FEPNO filed "Objections to Certification of Election Due to Election Interference By Airline Pilots Association and United States Pilots Association". Federal Express and FEPNO filed supplements to their original objections on February 4 and February 5, respectively. USPA and ALPA filed responses on February 20 and February 22, respectively. Federal Express and FEPNO filed rebuttal briefs on March 4. USPA and ALPA responded with final submissions on March 9 and March 11, respectively.

On April 27 and 28, Mediator Oppenberg conducted interviews on the Federal Express property in Memphis, Tennessee, with a number of randomly selected Federal Express crewmembers.

ISSUE

The issue before the Board is whether the laboratory conditions necessary for a fair election under the Railway Labor Act were tainted.<sup>2</sup>

CONTENTIONS

Federal Express' Position

Federal Express argues that both ALPA and USPA misrepresented the Railway Labor Act and the Board's voting and election processes, as well as carrier practices, policies and procedures. Federal Express asserts that union supporters engaged in illegal polling, coercion, interrogation and intimidation of employees in order to obtain their votes for union representation. Specifically, Federal Express contends:

1. ALPA misrepresented Board policy and procedure by failing to inform crewmembers of voting options, by asserting a Board finding of "coercive communications" against Federal Express, and by accusing Federal Express of attempting to interfere in the election;
2. USPA misled crewmembers by the use of the campaign slogan "A vote NO is a vote for ALPA", and by the distribution of a sample

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FEPNO incorporates by reference the arguments raised in its previously filed Petition for Clarification or Reconsideration, as supplemented, in this proceeding. The Board has rendered its final decision with regard to the issue of the form of the ballot and voting procedures as established in 20 NMB 7. Only those issues which involve election interference or taint to the laboratory conditions are considered here.

ballot with instructions on executing a write-in vote for USPA;

3. ALPA misrepresented Federal Express' offer of an E-mail bulletin board and its efforts in advancing certain pension legislation, and intentionally undervalued the average career earnings and compensation of Federal Express crewmembers in election materials;
4. ALPA conducted telephone polling to coerce and intimidate crewmembers, giving the impression that retaliation for voting against ALPA was possible, and ALPA leaked false survey information to solicit votes for USPA, resulting in a majority vote for representation;
5. ALPA supporters systematically subjected employees to harassment and verbal abuse, threats, and coercion, and created a hostile and intimidating work environment by occupying the crew lounge and improperly bringing in non-employee ALPA supporters to solicit Federal Express employees to vote for ALPA.

Federal Express argues that the evidence provided in supporting affidavits "provides a basis for setting aside the election." The carrier asserts that, should the Board find that more evidence is required for such a finding, it must conduct personal interviews with affiants and randomly selected crewmembers.

#### FEPNO's Position

FEPNO takes the same position as Federal Express. In addition, FEPNO contends that USPA was organized to

help ALPA by obtaining a majority vote in favor of some form of representation.

#### ALPA's Position

ALPA argues that none of its communications were misrepresentations and that, in any case, there is no evidence that the communications influenced the election. ALPA also asserts the polling of voters was neither inherently illegal nor coercive, nor was it conducted in an intimidating or threatening manner. Finally, ALPA challenges individual accounts of threats or intimidation as vague and non-specific, and argues its conduct amounted to nothing more than "standard grass roots campaigning."

ALPA also argues that the standards applicable to carrier and union campaign conduct differ due to the carrier's greater power to coerce employees in an election. ALPA contends Federal Express has failed to show that any allegedly objectionable conduct had an actual impact on the outcome of the election.

#### USPA's Position

USPA responded only to those allegations which involve its conduct during the election period. USPA denies misleading employees with either its campaign slogan or its distribution of sample ballots. USPA also denies any complicity between it and ALPA.

#### 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.

45 U.S.C. § 151, First includes within the definition of a carrier "any company which is directly or indirectly owned or controlled by or under common control with any carrier." Federal Express Corporation has been found to be a common carrier as defined in 45 U.S.C. §151, First and §181 of the Act. Federal Express, 20 NMB 7 (1992), Federal Express, 17

NMB 24 (1989), Federal Express/Flying Tiger, 16 NMB 433 (1989), Chicago Truck Drivers v. NLRB, 599 F.2d 826, 101 LRRM 2624 (7th Cir. 1979); Federal Express, 6 NMB 442 (1978).<sup>3</sup>

II.

ALPA and USPA are labor organizations and representatives as provided by 45 U.S.C. §151, Sixth and §152, Ninth, of the Act.

III.

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...."

FINDINGS OF FACT

I.

Misrepresentations of the Railway Labor Act and  
NMB Rules and Procedures

A.

Federal Express asserts that ALPA misrepresented Board procedures when its "agent", the Federal Express

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<sup>3</sup> The National Labor Relations Board (NLRB) has referred a jurisdictional question to the Board as to whether certain other Federal Express employees are subject to the Railway Labor Act. The finding in this case is made only with respect to the craft or class of Flight Deck Crew Members and does not include employees involved in the matter pending before the NLRB.

Pilots Organizing Committee (FEPOC), "failed to inform crewmembers on at least three occasions, of all the options available to ballot holders who wished no representation."

In support of this contention, the carrier has provided transcripts of several FEPOC telephone "Hotline" recorded messages. The "Hotline" message of December 30, 1992 contains the following passage concerning voting and ballot handling:

Finally, please remember that your opinion won't be heard of (sic) your ballot doesn't reach Washington in a timely manner. You matter in this election. Be part of the process. Don't let your ballot just sit on your desk. Vote for ALPA or USPA or tear up your ballot if that is your decision. But make a decision, don't just sit this one out. Your opinion counts.

The transcript of the January 4, 1993 telephone "Hotline" message reads, in part:

Vote now. We hope you will vote for ALPA, but whatever your choice make a commitment to participate in this process. Vote for ALPA or vote for USPA or tear up your ballot but don't just sit this election out by doing nothing. Your opinion counts too much in this process. We encourage you to step up to the plate and take responsibility for your career.

The transcript of the January 5, 1993 telephone "Hotline" includes the following:

This election is drawing to a close. If you haven't made a decision you'll be leaving this important career decision for others to make for you. Don't let that happen. We certainly hope that you will vote for ALPA but whatever your choice we encourage you to make a definite decision and act on it now. Vote for ALPA or for USPA or tear up your ballot if you must.

ALPA argues, in response, that crewmembers were fully aware of their options. ALPA points out that campaign literature, videotapes and billboards, as well as sample NMB ballots and the NMB's "detailed instructions" distributed with ballots have ensured that crewmembers understood voting options and procedures.

B.

Federal Express argues that ALPA deliberately misrepresented the Board's decision in 20 NMB 7 (1992) (in which the Board found Federal Express tainted the laboratory conditions in the election held August 22, 1991) by claiming the Board had cited Federal Express for "coercive communications." Federal Express asserts that no finding of "coercive communications" was made by the Board.

In support of this contention, the carrier has submitted a transcript of the FEPOC "Hotline" message for October 20, 1992, which contains the following passage:

Yesterday the National Mediation Board announced their decision regarding our protest of the 1991 representation election results. In a clear victory for Federal Express Pilots, the Board agreed with our basic contention that Federal Express Management had interfered with our rights to an unencumbered decision regarding legal representation. In doing so, FedEx Management tainted the laboratory conditions that must prevail during such elections. While the Board did not agree with all of the points that were presented in our Organizing Committee's protest, they did specify those aspects of Management's behavior that tainted last year's election.

1. Statements by managers in the early part of last year's campaign led to furlough rumors.

2. The Company misrepresented dues obligations by former ALPA Members stating



that back dues would be owed for interim periods.

3. The formation of the SCOPE Committee during a crucial point in the campaign was designed to entice pilots away from seeking legal representation to protect that aspect of their careers.

Beyond these specific points, the NMB found that the Company's pervasive and sustained anti-union posture coupled with overwhelming press and video campaign 'overwhelms an employee's right to select or not to select a Collective Bargaining Representative without carrier interference or influence.'

Federal Express argues that the October 20 "Hotline" message demonstrates that ALPA understood the Board's ruling. The carrier maintains that ALPA subsequently misrepresented the ruling by including the "coercive communications" language in its November 12 press release.

ALPA News' Press Release # 92.47, dated November 12, 1992, contains the following passage:

In ordering the re-run election, the NMB stated that Federal Express management activities, including the spreading of furlough threats, misrepresentations, and other coercive communications, tainted the laboratory conditions which are required by federal law to ensure fair elections.

ALPA responds that its "paraphrasing" was a "fair and accurate" representation of the Board's finding.

C.

Federal Express contends ALPA misrepresented the Railway Labor Act in its response to the carrier's invitation to debate election issues. The carrier asserts that ALPA president J. Randolph Babbitt accused the carrier's CEO, Frederick Smith, of "attempting to violate the NMB rules and processes"

and "'contaminating the election process' by even suggesting the debate."

To support this assertion, the carrier has provided copies of correspondence between Federal Express and ALPA. All correspondence was distributed to crewmembers at the time.

In a letter dated November 9, 1992, and addressed to Babbitt and Mark Estabrook (identified as the Interim Chairman of the USPA Organizing Committee), Smith wrote, in part:

...I am sure you will both agree with me that the decision now facing our crewmembers again is one of the most important of their aviation careers. That being the case, I feel obligated to make every effort to ensure that each crewmember makes his or her decision with eyes wide open and with all facts at his or her disposal. For that purpose only, I invite you to join me in a series of three debates.

These debates will provide each of us with the opportunity to explain the advantages of the system we each hope our pilots will ultimately embrace. The debate format will provide pilots with the opportunity to ask us pertinent questions in order to finally lay to rest any misconceptions or lingering doubts as to which system they prefer to work under.

As you well know, there are constraints on what company officials can say during a representation election. At the same time I would like to ensure that the debates are more meaningful to our pilots than they are to the lawyers. In that regard, I ask that you each join me in an agreement that none of us will use what

is said in these debates as a basis for interference charges at any time before or after the election. Such an agreement will allow us to give direct answers to the questions the pilots want answered.

In his response declining this invitation, Babbitt addressed a letter to Smith, dated November 12, 1992, which contained the following comments:

I'll admit that the opportunity to debate you on the issues you've defined appears attractive at first glance, but the fact is that the issues you've defined are simply not the issues of this election. In fact, your inserting yourself in the campaign in an attempt to define the issues makes a mockery of the election process.

Contrary to your letter, the purpose of the election is for Federal Express pilots (and not Federal Express management) to decide the best means for representing their career interests within the company, and in pursuit of company goals. Pilots have waited for 14 months to reach the point where they might make that decision free of company interference. I am disappointed to discover that you evidently are unwilling to offer them that opportunity. I am concerned that your "invitation to debate" is no more than another attempt to insert yourself into the campaign -- not only as an active participant, but as an overseer of the process. The NMB has previously criticized your personal involvement in the election process, expressing concern that it was "a reminder of the 'power and authority'" which you exercise.

I'm disturbed as well by the fact that you propose to suspend the legal process by calling for a waiver of objections to carrier interference during the proposed debates.

The rules against carrier interference are designed to protect the pilot's right of free choices. It seems to me that one would only find it necessary to suspend the rules if he intended to violate them by attempting, once again, to interfere with the pilots' decision-making process -- and that is exactly the message your proposal sends. This proposal suggests an extraordinary disdain for the rights of the pilots, for a valid process overseen by the NMB, and for the Board's decision ordering a re-run election.

\* \* \*

With these thoughts in mind, I regard your debate proposal as inappropriate to the point of contaminating the election process. (Emphasis in original)

In its January 14, 1993 submission, Federal Express argues that "in order to justify his refusal to debate" and "[b]y distorting and twisting the Board's rerun decision, its policies, and the law for benefit of the ALPA campaign, Babbitt's actions constituted interference with the Board's process and procedures."

ALPA defends its conduct on grounds that its FEPOC supporters reasonably believed that Federal Express' "tactics and proposed debate rules constituted unlawful interference." FEPOC Chairman Eric Vartanian provided an affidavit in which he states that ALPA supporters believed Smith's invitation was a "ploy designed to pressure ALPA" into allowing an expansion of the carrier's role in the election, in violation of the Railway Labor Act and NMB election policies.

II.

Voter Confusion as a Result of  
USPA's Campaign

A.

Federal Express asserts that USPA misrepresented the effect of voting options by claiming that "A vote NO is a vote for ALPA". The carrier argues that, by the continued use of this slogan, USPA misled voters regarding their voting rights and the option of voting against representation. The carrier contends that:

By posturing itself as the only alternative to ALPA representation, the USPA subverted the no representation option available to Federal Express crewmembers. In its wave of misrepresentations aimed at convincing, confusing and ultimately deceiving crewmembers about their representation choices, USPA collected votes from crewmembers who did not want representation at all. (Emphasis in original)

In support of its contention, the carrier has provided documents in which USPA used this slogan in various forms. A letter dated November 3, 1992, addressed to "Fellow Pilots" (at Federal Express), reads, in part:

2. Is a vote for USPA a vote for ALPA? No. According to NMB rules, if the majority of pilots votes for union representation, then the union that receives the majority of votes cast becomes the representative for the pilots.

3. What if I vote "NO" again? Given the closeness in the last election, we feel the option of two unions makes representation inevitable. To vote NO at this point is in fact a vote for ALPA! The choice is yours. (Emphasis in original)

A letter from USPA dated December 10, 1992, also addressed to "Fellow Pilots", contains "Twelve Undeniable Truths of Life for Fed Ex Pilots." Number 12, the only item making reference to the "No" vote issue, states:

12. To vote "NO" at this time, will ensure that the Air Line Pilots Association is certified as our bargaining agent.

In its submission of January 14, 1992, Federal Express stated:

The carrier will be seeking affidavits from confused crewmembers who voted for USPA because of these misrepresentations and will present them to the Board in its supplemental filing.

The carrier provided affidavits regarding voter confusion about election procedures and options. Several affiants asserted they were aware of other crewmembers who had been confused by the USPA slogan and campaign rhetoric. One affiant stated:

I feel that the union election for pilots at Federal Express was extremely confusing, and the information put out by both ALPA and USPA directly caused this confusion. Many crewmembers that I flew with during the vote expressed this to me, and were under totally mistaken assumptions as to how their vote would be counted.

Another affiant stated that USPA's campaign "created an atmosphere of heightened tension and confusion." The affiant adds, though, that "I did not vote for ALPA or USPA. I do not want any organized group representing me."

Federal Express has provided only one affidavit from a crewmember who stated that he or she was confused or misled by campaign slogans or rhetoric, and as a result voted for USPA "because I felt that was the only alternative to ALPA."

B.

Mediator Oppenberg conducted an investigation of the allegation that voters were confused about voting options. Randomly selected crewmembers were asked, among other things, the following questions:<sup>4</sup>

1. Were you confused about voting options?
2. Did you understand how to vote against representation?
3. Did you understand that if you did not return the ballot it would be counted as a "No" vote?

If an individual stated he or she was confused, the Mediator asked additional questions to determine the nature and source of their confusion. Several crewmembers stated that they were uncertain as to whether voting for USPA or not voting was the most effective means of defeating ALPA. One individual stated:

...I was confused about whether the most effective way to keep ALPA out was to vote "No" as I preferred, or vote for USPA as the lesser of two evils. I understood mechanically how to vote "No". I was confused whether it would be effective

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<sup>4</sup> Federal Express has communicated to the Board its concern that the number of crewmembers interviewed (19) is "statistically insignificant." An examination of the Board's past investigations, including the investigation previously conducted in this case (Federal Express, 20 NMB 7), reveals that the number of randomly selected employees interviewed in this instance is comparable and conforms to the Board's standard practices. The Board notes that it has reviewed hundreds of affidavits from Federal Express crewmembers in addition to conducting the on-site interviews and bases its findings on all the evidence in the record, not solely the interviews.

given the combination of potential votes for ALPA & USPA. I understood votes for USPA & ALPA would be combined as being votes for representation & I didn't think that was fair.

Only one individual responded that he or she did not understand how to vote against representation. However, further inquiry revealed that the individual understood how to vote against representation, but was uncertain about the ultimate effect of such a vote. The individual stated, "I would have preferred an independent, but I felt a vote for the independent would be a vote for ALPA."

The vast majority of crewmembers interviewed were not confused about voting options or how to vote for or against representation or how the NMB would count their vote. All crewmembers interviewed indicated their understanding that failure to return a ballot would be counted as a vote against representation.

C.

FEPNO also asserts that USPA's campaign slogan confused voters:

USPA's misrepresentation that it was the only alternative to ALPA and that a "no" vote was effectively a vote for ALPA, so confused and frustrated the Crew Members' understanding as to the NMB's policies and procedures for a free and fair election, that the Crew Members' freedom of choice was effectively taken away, as is evidenced by affidavits and statements attached...

FEPNO provided 32 affidavits from crewmembers who, FEPNO asserts, were confused about voting options and therefore did not vote. Affiants stated that confusion resulted from the entry of USPA into the campaign and USPA tactics. An examination of these affidavits reveals that some affiants stated they were confused for some period of time. However, these individuals admitted that by the time they made their voting decision they were no longer confused. 11 of



the 32 affiants made no reference to any confusion at all. Only one affiant stated that his or her confusion persisted throughout the voting period, resulting in the affiant not voting.

Ten affidavits were submitted from crewmembers who, according to FEPNO, voted for USPA due to confusion and misunderstanding. Seven of these individuals submitted identical form affidavits in which they state disagreement with NMB election procedures and policies. None of these seven affiants state that either ALPA or USPA misled or confused them. Only one individual stated that the USPA slogan "had a great deal of influence on" the decision to vote for USPA.<sup>5</sup>

FEPNO provided statements from four individuals who signed identical form affidavits stating:

I voted for USPA in the...election. I feel that the election structure was fundamentally flawed....I am opposed to union representation for the pilots at Federal Express. I voted for USPA as the lesser of two evils in an effort to stop ALPA. If the election were conducted with ALPA being the only choice, I would not have returned a ballot (would not have voted for representation).

Eight other affiants also stated that they thought the election structure "fundamentally flawed." However, according to their statements, these individuals voted for USPA because they desired representation by USPA.

D.

Mark Estabrook, current interim secretary of USPA and Gary Lovan, USPA's president, provided affidavits to the Board in which they denied Federal Express' assertions. For its part, USPA argues the slogan was

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<sup>5</sup> This individual also submitted a similar affidavit on behalf of Federal Express, as discussed on page 499.

not "aimed at convincing individuals they could not vote no; rather, it was aimed at convincing pilots as to what the practical effect of that vote would be."

E.

Federal Express also asserts that USPA deceived crewmembers by distributing on two occasions a sample NMB ballot with instructions for executing a write-in vote for USPA. The carrier contends that "USPA's altered ballot appeared 'official' and its distribution was combined with misrepresentations of the Board voting process." Federal Express argues that this resulted in crewmembers voting for USPA due to confusion about their voting options.

The carrier has submitted a copy of the sample ballot which USPA distributed to Federal Express crewmembers. The ballot is marked "SAMPLE" along the right margin and the word "VOID" is printed in the space which identifies the NMB case number. The name "UNITED STATES PILOTS ASSOCIATION" is hand written in space reserved for "ANY OTHER ORGANIZATION OR INDIVIDUAL". An "X" is marked in the voting square and directions are printed in the bottom margin, with an arrow pointing to the write-in space:

WHEN YOUR BALLOT ARRIVES IN THE MAIL...  
PRINT "UNITED STATES PILOTS ASSOCIATION" ON  
THIS LINE. DO NOT MAKE ANY STRAY MARKS.  
MARK AN "X" IN THE SQUARE BELOW.

USPA defends its distribution of the sample ballot as intended to "familiarize pilots with the availability of the write-in option." The organization also states that:

Neither the Carrier nor FEPNO has submitted a single declaration or affidavit demonstrating that the sample ballot circulated by USPA was perceived as an NMB endorsement of USPA's campaign.

F.

FEPNO contends USPA was organized by ALPA representatives in order to collect enough votes from

anti-ALPA voters to reach a majority vote for some form of representation, which would allow ALPA to become the certified representative. FEPNO asserts that crewmembers "believe there is a close connection and complicity between ALPA and USPA..."

FEPNO provided 23 affidavits from crewmembers in support of this contention. Only one of these 23 actually claimed any personal knowledge of circumstances:

I know personally from many phone calls from [named] members of the USPA organizing committee, that they KNEW from the very beginning that they could not win this election. This was stated to me on multiple occasions in an effort to entice the NO group to join with USPA to defeat ALPA. If they knew they could not win, it is apparent that USPA's drive was a sham from its inception to the final count. Through inside sources we have strong reason to suspect that their leadership was covertly aligned with ALPA in an effort to split the vote so as to give ALPA the advantage and emerge the victors.

No evidence to substantiate the allegations was provided by the carrier or FEPNO.

Both ALPA and USPA deny the allegations of complicity. ALPA maintains that the "two groups competed against each other, and at times criticized one another." USPA argues that these allegations are "belied by the intense rivalry that arose between USPA and ALPA during the election period."

In support of its contentions, USPA provided the Board with copies of its constitution and by-laws, and a copy of their December 2, 1992 letter to crewmembers in which the constitution and by-laws of USPA are favorably compared to those of ALPA. In addition, USPA provided copies of documents in which ALPA and FEPOC criticized the USPA organization.

III.

Misrepresentations of Carrier  
Practices and Policies

A.

Federal Express maintains that ALPA deliberately misrepresented the carrier's policy concerning the establishment of an electronic mail (E-mail) bulletin board for campaign communications.

Federal Express asserts that it offered ALPA, USPA, FEPNO, and the individual pilots the use of the E-mail bulletin board in lieu of permitting campaign messages to appear on individual employee's E-mail screen because these screens were reserved for business communications and, "[t]he company was also motivated by maintaining certain levels of privacy for employees in their personal E-mail files."

On July 22, 1992, the carrier's Senior Vice President for Air Operations, Theodore L. Weise, forwarded a letter to FEPOC and FEPNO stating Federal Express' policy concerning the distribution of campaign literature via the E-mail system, which reads, in part:

I am writing to all the involved groups asking that everyone refrain from using distribution lists to send campaign messages that show up as an individual message to the pilot from the sender. Instead, and as an alternative accommodation to all of you, I am having our Email support group look into creating a campaign bulletin board so all interested parties and individuals desiring to express views on the union issue through Email can do so on that bulletin board.

\* \* \*

I am asking each of you and your committee members not to create distribution lists in Email to send out

campaign correspondence to fellow crewmembers. There are already numerous other ways to communicate your views to the pilots and I expect everyone to use those traditional methods until an Email campaign bulletin board can be set up. Once the Email campaign bulletin board is established, you will be informed of the procedures and how they will be applied to the campaign bulletin board. Needless to say, upon conclusion of the campaign, the Email campaign bulletin board will be discontinued.

In a memorandum to crewmembers, dated November 3, 1992, Weise described the procedures for accessing this bulletin board and noted:

Granting this E-mail access to the groups and crewmembers is done to promote an open forum for pilots to discuss the representation issue. However, please be aware that Federal Express will not tolerate the use of profanity or vulgarity by any group or individual. If profanity or vulgarity appears on any screen, Federal Express reserves the right to delete and discipline the crewmember or group who engages in this type of conduct.

Additionally, the individual groups mentioned above will have their own identification access and a password for exclusive entry into their bulletin boards. This design is to ensure that no one gains access to these boards to erase or sabotage their efforts during the campaign.

Federal Express provided a transcript of the FEPOC telephone "Hotline" message of November 14, 1992, which, the carrier argues, constitutes a misrepresentation of Weise's remarks. It includes the following passage:

It was a refinement of the Email campaign bulletin board where the company offered the [forum] in order to monitor and control the discussion.

Federal Express asserts ALPA was aware this charge was false but deliberately created the opportunity to disparage Federal Express management and misrepresent Federal Express practices.

Based on the affidavit of Eric Vartanian, ALPA responds that "[i]t was reasonable to believe that Fed Ex had the capacity to determine whether individual pilots were accessing particular messages.... The Organizing Committee believed that Fed Ex's justification for creating the bulletin board was pretextual and had no basis in fact."

B.

Federal Express also alleges that ALPA "fabricated a statement about the Company's intentions" in pursuing pension legislation. Federal Express provided a transcript of the FEPOC "Hotline" telephone message of November 5, 1992:

Yesterday President Bush vetoed the HR-11 that contained the so-called Federal Express Pilot's Provision of the Pension Simplification Legislation. The issue is, therefore, dead for the time being. Regardless of your opinions on the issue, however, all the other stateside employees of Federal Express are probably rejoicing now since their retirement remains tied to ours. That is, their retirement is predicated on age 60. Had the bill and the special provisions passed, the Company would have had the opportunity to leave our Pilots' Retirement unchanged and to extend all other employees' retirement age beyond 60 thereby reaping tremendous actuarial benefits.

Ann S. Dickey, Federal Express' Managing Director of Government Affairs, has submitted an affidavit which states, in part:

Federal has pursued legislative pension relief for our pilots for one reason only - fairness. Federal does not believe that it is fair that unionized pilots should enjoy a level of benefits legally unavailable to pilots who have chosen to remain nonunion. The statement that ALPA made on November 5, 1992 had absolutely no basis in fact and was designed to derogate and completely misrepresent the Company's efforts concerning this legislation.

ALPA denies the allegation of "fabricating" a statement about Federal Express' intentions. "ALPA did not say that Fed Ex would or intended to leave benefits unchanged, just that it could do so."

C.

Federal Express also alleges that ALPA misrepresented the career earnings and compensation of Federal Express crewmembers as compared to crewmembers at other airlines. Federal Express asserts that "ALPA literature bases its assumptions on false potential career earnings...and fails to mention recent contract concessions at [other airlines]." The carrier argues that the "independent" expert who conducted the research was employed "to enhance and overstate pilot pay and benefit levels at unionized carriers while simultaneously misrepresenting, minimizing, discounting, or completely ignoring comparable Federal Express pay, benefits, and work rules."

Federal Express has submitted a reproduction of the January 6, 1993 issue of "Final Approach" (published by ALPA and FEPOC), which contained comparisons of pay and benefits of Federal Express pilots and pilots of other airlines, including graphs comparing career earnings, retirement benefits, and "A" and "B" pension plans. The publication bases much of its information on a report by Kit Darby of Air, Inc., who is identified as an "independent industry

analyst." Representative of the assertions made throughout the report are the following claims:

The disconcerting truth is that, during his or her career, the average FedEx pilot will earn up to \$4 million less than pilots at the top of the industry -- \$ 2.3 million less than the average, and over \$ 1 million less than UPS pilots.

\* \* \*

To put it in the simplest of terms, OUR FEDEX RETIREMENT PLAN IS WELL BELOW YOUR PROFESSIONAL WORTH AND AIRLINE PILOT INDUSTRY STANDARDS.

\* \* \*

Incredibly, there is a \$4.25 million difference between career earnings of a United and a FedEx pilot using the equitable assumptions of the study.... United's B-plan accounts for \$2.4 million of this difference alone, which negates any claims of assumption variations that might otherwise skew the findings. Our only excuse for a B-plan revolves around profit sharing (which continues devoid of corporate cash contributions) and the 401(k), which provides a whopping \$250 maximum yearly corporate contribution.

This is yet another example of an outside, independent source finding that FedEx pilots lag far behind industry standards in both retirement and compensation.

Federal Express provided two affidavits alleging misrepresentations in the Air, Inc. study. August C. Lauer, Senior Manager of Employee Benefits, stated the following in his affidavit:

Mr. Darby's report assumed no contributions by Federal in a B-Plan. The report failed to note that Federal Express



contributes to a Profit Sharing Plan, a version of a B-Plan. Mr. Darby's assumption therefore misrepresents the retirement benefits of Federal Express pilots in comparison to pilots of other major airlines.

Mr. Darby's report also assumed the worth of Federal Express pilots' retirement plan to be 7.5% of their total earnings. This is a misrepresentation. The records will show that our retirement plans have been worth 11.6% at Federal Express for the past 15 years.

William J. Cahill, Managing Director of Compensation, also submitted an affidavit, which states:

Mr. Darby's report assumed an 80-hour average of flying each month. This "average" totally ignores the fact that Federal Express' work rules are in many instances more generous than other major airlines. The records will show that at Federal Express, it is the rule, rather than the exception, to be credited with greater than 90 CH for a month of BLG flying. Mr. Darby's flawed assumption misrepresents the potential career earnings of Federal Express pilots. This misrepresentation slights Federal Express pilots' career earnings by 15% or more.

Mr. Darby's assumption regarding the length of time it takes to make widebody captain (i.e., 21 years) is also a misrepresentation. A review of the historical career progression at Federal will show that Federal's most junior widebody Captain (MD-11) reached that position in about 9 years. Federal's most junior DC-10 captain reached that position in 12 years.

Mr. Darby's report assumes that the average pilot will spend 10 years as a

widebody (senior) captain. Based on Federal's historical experience, some pilots may spend 25-30 years as widebody captains. This assumption misrepresents the potential career earnings of Federal Express' pilots.

Mr. Darby's report does not take into consideration the recent contract concession limitations at Delta, Northwest, United and USAir; therefore, it significantly misrepresents the job security and potential career earnings of those pilots.

ALPA maintains that Federal Express' criticisms are "completely without merit." ALPA argues that the report was an accurate comparison based on accepted methodology and conservative assumptions and that it "contains a full explanation of all underlying assumptions" which allowed pilots "the full opportunity to hear both sides and judge for themselves."

#### IV.

##### Illegal Polling

###### A.

Federal Express contends ALPA engaged in illegal telephone polling of crewmembers "for the purpose of determining if they voted in this election." The carrier asserts ALPA hired the Wilson Center for Public Research to conduct a survey "to identify who had voted in the election, and for those who had returned a ballot, how they had voted." The carrier also maintains that, after the Wilson Center "interrogated" crewmembers, an ALPA or FEPOC representative would "follow[] up with a second or third call."

According to Federal Express, "ALPA gave all crewmembers the unmistakable impression that a list of all employees and how they voted in the election was being maintained." The carrier argues that because ALPA holds itself out as having a great deal of power,

"comparable to that of a carrier", and because of ALPA's reputation for its ability to retaliate against employees, this type of interrogation should be found to be a per se violation of the RLA:

ALPA's interrogation of employees regarding their vote is inherently coercive because it raises the specter of future retaliation, allows direct pressure to be applied against crewmembers who do not wish to be represented by a union, and destroys the basic concept of a secret ballot election.

FEPNO also alleges that the polling by ALPA and the Wilson Center was illegal and constituted interference in the election. FEPNO claims that ALPA used Wilson "to interview Crew Members to determine their views on representation, so that Crew Members who did not vote or were not going to vote could be targeted for coercion, harassment and intimidation into voting for ALPA by ALPA representatives." FEPNO asserts these actions were "directly contrary to the secret ballot procedures of the NMB."

Both Federal Express and FEPNO submitted affidavits from crewmembers in support of their contentions. The affidavits provided by Federal Express allege specific instances of polling by ALPA and Wilson Research, including questioning crewmembers as to whether they received and/or returned a ballot, how crewmembers voted or intended to vote, and questioning of crewmembers' wives. Federal Express alleges, "[a]fter Wilson contacted a crewmember, an ALPA representative -- usually a member of the organizing committee -- followed up with a second or third call." Federal Express argues that such conduct constituted intimidation and harassment:

When ALPA and Wilson called, they identified the individuals by name; thus, impressing on the crewmember that the "survey" was not confidential. The lack of privacy was reinforced when the call from Wilson was immediately followed by a call directly from the organizing committee.... Many affiants stated the totality of ALPA's

conduct resulted in crewmembers being intimidated and harassed.

In the affidavits provided by Federal Express several crewmembers stated that they felt threatened or intimidated by the polling. Many also asserted their "belief" that their privacy had been invaded and that ALPA had harassed them and their families. Several crewmembers stated their "belief" that the polling was an attempt to coerce votes for ALPA, and that their right to a secret ballot was violated. Several affiants also stated that they responded to the polling by refusing to answer questions and by informing the caller of the private nature of their voting decision.

One affidavit provided by Federal Express contains allegations of numerous instances where a crewmember and his wife were contacted by telephone and questioned regarding the crewmember's voting position. It reads, in part:

Several days later, I received a call from yet another person who identified himself as a member of the Organizing Committee. The Committee member asked me to reveal how I had voted. I informed the Committee member that this was a secret ballot and that I considered it a private matter. The conversation ended there, and I received no further calls. I felt that the Organizing Committee was interrogating me regarding my views involving the union election. I further felt that the Organizing Committee invaded my privacy and right to a secret ballot.

Another affiant alleges several instances of telephone polling, among them the following:

Sometime before January 14, 1993, I received a call from a woman who identified herself as an individual conducting a poll for ALPA. The poll consisted of the following questions (paraphrased):

- a. Did you receive your ballot?
- b. Did you send in your ballot?
- c. Would you mind if someone from ALPA called you to discuss the issues?

I resented being asked whether I had mailed in my ballot since the question was obviously intended to determine whether I favored union representation. I answered affirmatively about receiving my ballot; however, I told the caller that it was none of her business whether I had mailed in my ballot. I also told her that her questionnaire was biased. The remainder of my conversation with the above referenced caller was elusive so as not to indicate whether I favored union representation or not since I didn't know what use would be made of my responses.

The affiant describes subsequent calls from fellow crewmembers inquiring into the affiant's voting intentions, stating: "I believe that the multiple calls were intended to coerce me into voting for union representation, since I had not told any of the callers whether I would send in my ballot."

B.

FEPNO provided 65 affidavits which are identical in form, containing two assertions:

- #1. I received a telephone call from a representative from the Wilson Research Center who asked me questions concerning the election. This included specific questions on the disposition of my ballot.
- #2. I received a telephone call from a representative from the ALPA Organizing Committee who asked me questions concerning the election. This included specific questions on the disposition of my ballot.

Following these assertions is a general statement of the affiant to the effect: "I found this/these call(s) to be intimidating and an invasion of my right to cast a secret ballot." Affiants were able to signify agreement with one or both assertions. Several affiants called by Wilson noted that they hung up after being informed of the caller's identification with the FEPOC or ALPA. One affiant who was contacted by Wilson noted:

I should have hung up, but I answered the questions -- I made it known that I was anti-ALPA -- then I thought -- Have I just hung myself? If ALPA wins they know all the pilots who are anti-ALPA. [That] could make it rough on us.

Another affiant who was contacted by Wilson Research crossed out language that he or she found the call(s) intimidating, although the affiant retained the assertion that the call(s) were an invasion of the right to cast a secret ballot. One crewmember who agreed with both assertions also included comments separately:

I have been repeatedly harassed by members of the ALPA Organizing Committee through phone calls inquiring about my personal, political views. I also have reason to believe these people had privileged (sic) information regarding the status of my ballot.

FEPNO has also provided many individual affidavits submitted by crewmembers which allege polling by ALPA and Wilson. One of these affiants related a conversation he had heard concerning the polling:

While at work one morning in the week prior to the ballot (sic) count, I was reading FCIFs in the crew lounge. [A FEPOC member], was standing beside me discussing the campaign with another crewmember. I heard [this FEPOC member] tell this individual that the Wilson Center was providing the FEPOC names of the

individuals who, when polled, gave answers that were "wishy washy", i.e. indecisive or lacking resolve in their voting position. The committee (FEPOC) was then calling these individuals to convince them to vote for the ALPA. This, of course, is paraphrased -- but is an accurate description of the context of the conversation.

C.

Polling by the Wilson Center

In response to the carrier's and FEPNO's submissions on this issue ALPA has provided an affidavit from Philip Comstock, Executive Director of the Wilson Center for Public Research, Inc. Comstock's affidavit describes the organization and the actual polling done on behalf of ALPA among Federal Express flight deck crew members.

According to Comstock, the Wilson Center is a "not-for profit corporation with the support of organized labor to serve the interests of unions in the United States and Canada." Wilson's work largely consists of conducting telephone polls commissioned by labor unions. It has conducted polling during organizing and election campaigns and prior to major negotiations, for the purposes of determining union members' political views and voting behavior and their views of regulatory and legislative issues, and to aid in determining the appropriate means to further boycott activities and encourage union label purchasing. Comstock also refers to several other firms which "have also conducted polls on behalf of unions during the course of union organizing and election campaigns."

Wilson was retained by ALPA during the re-run election campaign to conduct pilot polling. The polling took place in three phases. Phase one occurred between November 14 and November 23, 1992; phase two, on December 19 and 20, 1992; and, in phase

three, Wilson conducted interviews with pilots between December 28, 1992 and January 10, 1993. The Board mailed ballots to crewmembers on December 3, 1992, and the ballots were counted on January 14, 1993.

According to Comstock, during the phase one polling in which Wilson interviewed 425 pilots, Wilson contacted 109 additional pilots who declined to be interviewed. Of the 425 pilots, 47 pilots "made at least some type of direct or indirect reference to confidentiality and were therefore provided confidentiality."

During the second phase of polling in which Wilson interviewed 53 pilots, none expressed concerns about confidentiality and nine additional pilots were contacted but refused to be interviewed. No names were provided as a result of this polling, according to Comstock.

During the third phase, Wilson interviewed 828 pilots. Of these, 33 made references to confidentiality which Comstock states were honored. Wilson contacted a total of 143 additional pilots who refused to be surveyed.

Comstock reported results to members of ALPA and FEPOC at various points during and after the polling process. On November 21 and 22, during the first phase of polling, Comstock reported that "support for union representation had grown significantly since the first election" and "support for ALPA, USPA and NO representation was about equally divided....[The] adjusted numbers produced an approximately 33% share" for each of these choices.

Comstock also advised ALPA that pilots had concerns about retirement pay. He advised ALPA that pilots from other airlines were considered "the most trustworthy source of information on the question of union representation and that this should be considered in planning future communications to the pilot group." According to Comstock, he told ALPA that they might be able to "win over" USPA supporters and should therefore not "alienate" these voters by being too critical of USPA.



According to Comstock, Wilson's polling also revealed that pilots feared employer reprisal against pro-union pilots. Comstock claimed to have "received no reports whatsoever of any pilots who exhibited any fear of reprisals by ALPA, the Organizing Committee or its supporters against pilots who opposed representation."

Comstock provided written lists containing names of pilots who favored ALPA or could be considered potential ALPA supporters, and of pilots whom Wilson "determined... could be encouraged and persuaded to vote for ALPA."

Other than these written lists containing a total of 273 names, no other information about the attitudes or preferences of specific individual pilots surveyed by the Wilson Center was communicated to ... the Organizing Committee, ALPA or any other entity. The Wilson Center did not provide the Organizing Committee, 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 Organizing Committee, ALPA, or any other person or entity with the names of pilots who had either requested or raised concerns about confidentiality.

\* \* \*

It is the policy of the Wilson Center not to provide clients with the names of respondents who either request or raise concerns about confidentiality. If any pilot who was telephoned by our interviewers either requested or raised concerns about confidentiality, the responses of that pilot were not disclosed to the Organizing Committee, ALPA or any other person or entity and that person was designated a "confidential respondent."

The Wilson Center retained the confidential responses but did not disclose the names and/or individual responses of any of these confidential respondents to the Organizing Committee, ALPA, or any other person or entity....

The names of confidential respondents were not included on the lists of names.  
(Emphasis in original)

D.

Polling by FEPOC

ALPA asserts that the Organizing Committee's telephone polling "consisted of pilots calling other pilots to talk about the representation election." ALPA denies the allegations that FEPOC members were given the names of anti-union pilots by Wilson, or that they targeted anti-union pilots for harassment or intimidation.

ALPA has provided an affidavit from Eric Vartanian, Chairman of FEPOC. Vartanian contends that the Wilson Center only provided FEPOC with names of pilots who had a somewhat favorable view of ALPA or were potential ALPA supporters. He denies that the confidentiality of responses were compromised. He argues that FEPOC's polling and that of the Wilson Center ran simultaneously, therefore "[i]t would have also been possible for a pilot who had been assured of confidentiality, to be called independently through the phone canvass operation."

At the outset of the re-run campaign, the Organizing Committee made a conscious decision to attempt to contact as many Fed Ex pilots as possible to encourage them to vote for ALPA....During these conversations, callers would inquire as to the preferences of individual pilots in order to determine whether more time and resources should be spent on encouraging that particular pilot to vote for ALPA representation....

It is important to realize that the Organizing Committee had no knowledge of whether any particular pilot contacted during the phone canvass or in the Wilson Center polling surveys had actually voted, or had even responded honestly and accurately to our inquiries.

E.

Federal Express also asserts that false survey information was leaked for the purpose of soliciting "no" voters to vote for USPA, thus resulting in a majority vote for representation. Federal Express submitted several affidavits which allege that crewmembers were told of rumors and "survey results" by ALPA supporters. The carrier argues that the distribution of this information ensured an outcome in favor of either some type of representation or representation by ALPA specifically. The carrier did not provide any evidence of written communication of survey results among crewmembers.

Eric Vartanian provided a response to this charge on behalf of ALPA. In a supplement to his affidavit, Vartanian denies that any FEPOC member leaked survey results during the campaign.

V.

Threats, Harassment, and Coercion

A.

Federal Express contends ALPA's threats, harassment, and coercion of Federal Express pilots constituted a "gross destruction of laboratory conditions." The carrier asserts three forms of conduct are violations of the RLA: (1) ALPA's telephone and face-to-face interrogations of pilots about their voting preferences; (2) ALPA's crowding and domination of the crew lounge during nightly hub turns; and, (3) ALPA's practice of bringing non-employee ALPA supporters onto Federal Express property to solicit pilots during working hours. Federal Express argues that this activity created a "hostile environment [which] was further exacerbated by the

systematic calling of all crewmembers and interrogating them regarding their voting intentions."

FEPNO charges ALPA with intimidation and coercion of pilots for the "express purpose" of pressuring them to both support and vote for ALPA. FEPNO points to the "actions of ALPA on the flight deck" in addition to the "presence of ALPA campaigners in areas normally reserved for pilots preparing their flight plans" as contributing to the hostile environment.

In support of its contentions, Federal Express provided six affidavits from crewmembers in which they discussed specific instances of "threatening" or "intimidating" treatment by fellow crewmembers who were ALPA supporters. Three affiants stated that they were involved in or witnessed "heated arguments" and confrontations with ALPA supporters in the crew lounge which produced a "disruptive and intimidating" atmosphere. Several affiants indicated they were subjected to verbal abuse and felt "intimidated", "pressured", "threatened, angry, and scared", as a result.

Crewmembers allege they were threatened with being blackballed and with being subject to "difficulties" on future check flights by ALPA supporters.

In early December, 1992, in the Federal Express Memphis crew lounge on a hub turn, a Federal crewmember who is an ALPA supporter told me "that if I did not join ALPA, then when it came time for checkrides, I would have a very difficult time!"

Crewmembers also allege in-flight misconduct in connection with discussions about their non-support of ALPA. Two crewmembers alleged damage to their automobiles which they ascribed to ALPA supporters. Junior crew members claim confrontations with more senior officers were extremely intimidating.

On December 11, 1992, at approximately 1:00 a.m., I observed that non-Federal

Express people were frequenting the crew lounge and engaging Federal Express crew members who were coming to and going from work in conversation about ALPA. I witnessed a heated and angry exchange between a Federal Express Captain and a non-Federal Express person. I was not close enough to hear the conversation, but the yelling was disruptive and intimidating for a junior guy like me. The atmosphere created by the presence of the non-employee person in the crew lounge was disturbing and pressurizing.

One individual stated that ALPA's campaign tactics were "very unethical."

Federal Express provided 13 affidavits in which crew members stated their various "beliefs" that: ALPA will harass them in the future for their anti-union activities; ALPA will retaliate for any refusal to pay dues or assessments; ALPA crewmembers will give unfavorable checkrides in retaliation for their non-union stance; ALPA will practice expulsion on non-union jumpseaters; ALPA's retaliation will surface in the cockpit and create unsafe flying conditions; pro-ALPA crewmembers will change maintenance log books and report false information to the FAA; and, pro-ALPA crewmembers will report minor technicalities and/or fabrications to the FAA concerning non-union supporters' flight performance.

ALPA denies the allegations and asserts that no evidence has been provided to support assertions concerning a design by ALPA supporters, organizers, or directors to retaliate against crewmembers.

B.

1.

Federal Express also alleges "ALPA brought non-Federal Express employees onto Federal Express property as either guests of crewmembers or under the guise of being interline jumpseaters in order to lobby Federal Express crewmembers in the Federal Express Memphis crew lounge." Federal Express asserts ALPA

was aware of the policy against non-employees soliciting on company property and intentionally avoided seeking management approval, thus "improperly trespassing on Federal Express property."

Fred Peters, Flight Manager/Duty Officer for Federal Express, submitted an affidavit alleging an instance of such conduct and stating Federal Express' policy:

In approximately late November or December, 1992, the Federal Express Pilots Organizing Committee, (FEPOC), held a formal meeting in the Memphis satellite crew lounge to discuss issues.

Following that meeting, FEPOC, USPA, and the "NO" Committees were notified by management that meetings were not to be held on Federal Express Company property.

\* \* \*

On December 9, 1992 FEPOC had, as their guest, ...[a United Airlines ALPA member] in the crew lounge.

[This individual] participated in soliciting for the Air Line Pilots Association (ALPA).

It is against Federal Express policy to allow non-employees to solicit on company property.

ALPA responds that, based on Captain Vartanian's affidavits, only one non-employee ALPA pilot was present in the crew lounge, and that this individual was present "with the full knowledge of Flight Duty Officer Fred Peters.... Peters voiced no objections whatsoever to [this individual's] presence or conduct." No evidence was submitted demonstrating approval or objection by Federal Express officials prior to or at the time of the non-employee's visit.

2.

FEPNO has provided 131 affidavits in which crewmembers signified their agreement with the statement: "The domination of the Memphis crew lounge by the ALPA Organizers was overbearing and intimidating." One particular affiant attached additional comments stating:

[T]he ALPA organization domination in the crew lounge was more intimidating than anything I have ever seen from management, even during my...years as an ALPA member.... Week after week the ALPA organizational committee controlled one side of the middle of the crew lounge as they pushed support and financial assistance for their cause. I know they feel that they were doing it in their own best interests; however, I truly felt like a lamb in the lions den. I felt extremely uncomfortable trying to conduct my preflight duties around their group. Their conduct was bullying to say the least. They could not have orchestrated a more overwhelming show of force and muscle even if that was their objective. I am convinced that this was a deliberate attempt, meant to sway votes by impressing others with their strength, determination and defiance of others. The pressure was enormous when you're made to feel like you're in the silent minority and all you have to do is sign on the dotted line, wear your ALPA pin and then you'll be accepted into their group with open arms.

ALPA argues that the statements from crewmembers only show that:

...some pilots were annoyed that members of the Organizing Committee and ALPA supporters were campaigning and discussing the election in the crew lounges. There is no evidence that pilots were actually coerced in the sense that they feared

reprisals by ALPA if they did not vote for ALPA representation.

### DISCUSSION

In determining whether there has been interference in a representation election, the Board examines the record for evidence that the laboratory conditions essential to a fair election have been tainted. Federal Express Corporation, 20 NMB 7 (1993), Metroflight, 18 NMB 532 (1991), USAir, 17 NMB 377 (1990), Key Airlines, 13 NMB 153 (1986). Determinations of the Board are made in accordance with the requirements of the Railway Labor Act. Past cases include Fox River Valley Railroad, 20 NMB 251 (1993), Egyptair, 19 NMB 166 (1992), Florida East Coast Railway, 17 NMB 177 (1990), Air Wisconsin, 16 NMB 296 (1989), Long Island Rail Road Co., 12 NMB 187 (1985), Laker Airways, Ltd., 8 NMB 236 (1981), and Zantop International Airlines, 6 NMB 834 (1979).

The Board considers the facts and circumstances in their totality to determine whether the alleged actions tainted the laboratory conditions. USAir, supra. In reaching its decision in this case, the Board has relied upon the evidence and arguments submitted by the carrier and the organizations, the Mediator's investigation including interviews, and past Board determinations.

The Board has found a taint of laboratory conditions where there has been solicitation of employees to turn in their ballots to carrier officials, Mercury Services, Inc., 9 NMB 312 (1982), and when carriers have engaged in polling and keeping track of employees who have ballots, Laker, supra. Also, where there has been misrepresentations of the Board's ballot and/or voting procedures, USAir, 17 NMB 377 (1990), Allegheny Airlines, 4 NMB 7 (1962), and "veiled threats" concerning the consequences of representation, Key Airlines, supra, the Board has found such conduct taints the laboratory conditions.

The Board has also addressed allegations of misleading voters through campaign literature and factual misstatements, Metroflight, 19 NMB 254 (1992),



American Inter-Island, Inc., 8 NMB 410 (1981), and of misrepresenting Board policy and voting procedures by the distribution of sample ballots, Continental Airlines, 14 NMB 131 (1987), Long Island Rail Road Co., supra. Allegations of promising benefits or assuring protection against carrier actions, Metroflight, supra, Long Island Rail Road Co., supra, and intimidating, coercing, and threatening retaliation for failure to support efforts to unionize, Aerovias de Mexico, 18 NMB 130 (1991), Air Wisconsin, supra, Continental Airlines, supra, have also been the subject of Board decisions.

ALPA argues:

[c]onsistent with [the legislative history of the Railway Labor Act], the NMB has made clear through its decisions in Federal Express and Air Wisconsin that the more limited role of a carrier in a representation campaign and its far greater ability to coerce employees because of the power it wields over them, requires a very high threshold for a finding of union interference.

Federal Express responds that "there is a single standard for conduct which destroys laboratory conditions" and that, "at some point, a union's conduct crosses the line to improper conduct."

In Air Wisconsin, supra, the Board noted:

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

I.

Misrepresentations of the Railway Labor Act and  
NMB Rules and Procedures

A.

Federal Express contends that ALPA, through FEPOC, violated the NMB's election rules by failing to inform voters of all their options. In support of this contention, Federal Express relies on Metroflight, 13 NMB 284 (1986), and Laker, supra for its assertion that the Board has "consistently held carriers responsible for failing to inform fully the electorate of all the voting alternatives available to them." However, a review of these decisions reveals that the Board did not actually make such findings. In Metroflight, supra, the Board found that the attempt to solicit and collect ballots from employees constituted election interference in violation of the Railway Labor Act and that the combination of this violation with the carrier's misrepresentations of Board policy and rules tainted the laboratory conditions. In Laker, supra, the Board required the carrier to make certain information available "where there is gross interference with a Board election", in order to attempt to restore laboratory conditions.

In the case at hand, FEPOC urged voters to "[v]ote for ALPA or USPA or tear up your ballot if that is your decision." A review of FEPOC statements and of the evidence developed through the investigation does not support a finding that FEPOC violated the Board's election rules.

B.

Federal Express contends that the "Hotline" message of October 20, 1992 demonstrates that ALPA understood the Board's decision in 20 NMB 7, yet ALPA "deliberately broadened, misrepresented and then distributed [the] exaggeration" that the Board had cited Federal Express for "coercive communications" in its November 12 press release.

In Federal Express Corporation, the Board found that:

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....

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 decision on this issue, we find the carrier's actions here have tainted the laboratory conditions necessary for the conduct of a fair election.

ALPA's characterization of the Board's decision as a finding of "coercive communications" does not rise to the level of misrepresentation which taints the laboratory conditions.

C.

Federal Express contends ALPA misrepresented the Railway Labor Act when Babbitt rejected Smith's invitation to debate and accused him of attempting to violate NMB rules and "contaminating the election process."

In response to this contention, ALPA argues that Smith's debate invitation and his request for all parties to agree not to file objections to any remarks made during the debates placed ALPA in the position of either:

...enabling Frederick Smith to assume a far greater role in the campaign than he should by becoming an active participant and self appointed overseer -- or rejecting the debate challenge and being attacked as an enemy of free speech, afraid to answer tough questions....The Organizing Committee

should have never been forced into this predicament. The Organizing Committee reasonably believed that Fed Ex's tactics and proposed debate rules constituted unlawful interference.

After consideration of the evidence and arguments on this issue, the Board finds that Babbitt's letter did not taint the laboratory conditions.

II.

Voter Confusion as a Result of  
USPA's Campaign

A.

Federal Express and FEPNO assert that USPA's campaign slogan ("A vote NO is a vote for ALPA") confused and deceived crewmembers as to their voting rights and options. They contend that the slogan was a misrepresentation of NMB voting procedures and that its use resulted in crewmembers voting for USPA when they did not want any representation. The carrier argues that failure to "accurately and completely represent" voting procedures constitutes a taint of the laboratory conditions.

In support of its argument, the carrier cites several Board decisions: USAir, 17 NMB 377 (1990); Metroflight, 13 NMB 284 (1986); Zantop International Airlines, 6 NMB 834 (1979); and, Allegheny Airlines, 4 NMB 7 (1962).

In USAir, the Board found that the carrier's assertions as to the consequences of a union election victory contained inaccuracies and misstatements about the Board's rules regarding representation and decertification procedures and the ability to strike.

In Metroflight, the carrier misrepresented Board policy in a letter which informed employees that they could vote against representation by writing "no" on their ballot and returning it to one of several carrier officials. The Board held that the attempt to collect ballots was a per se violation of the Act, and that misleading employees regarding voting options

while attempting to collect ballots tainted the laboratory conditions.

In Zantop International Airlines, the Board determined that, where a carrier takes action to communicate with its employees regarding the rules of a representation election:

Employees should be given accurate information concerning the method of voting and the consequences of voting. While a carrier may provide accurate information which shows an employee how to act to defeat a union, failure to inform an employee that writing "no union" will void the ballot is inherently misleading.

In Allegheny Airlines, the Board found the carrier made misleading statements where the carrier only partially informed employees of voting procedures but failed to inform them that voting "no union" would void their ballots.

It is clear from a review of these and other Board decisions that a carrier has no obligation to inform employees of their voting options. However, where a carrier communicates information about election rules and voting procedures, consistent with the requirement to maintain laboratory conditions the Board requires the carrier to provide accurate information which does not mislead employees.

The Board finds that USPA's slogan did not constitute a misrepresentation of Board voting procedures or policies. USPA did not assert that voting against representation was not an available option for crewmembers, but rather that, in USPA's judgment, some form of representation was likely and the effect of not voting or voting "no" would be to ensure ALPA as the winner of the election. USPA did not assert that the Board would count a "no" vote as a vote in favor of ALPA, but rather that efforts to defeat ALPA were more likely to succeed if crewmembers supported USPA.

Both Federal Express and FEPNO have submitted affidavits in which crewmembers state that they were

confused about their voting options and the effect of their votes. The Board has carefully considered all the evidence from these affidavits and from the additional interviews it has conducted in an effort to determine the precise nature of these crewmembers' confusion.

The carrier and FEPNO have presented insufficient evidence that the USPA campaign slogan caused crewmembers to believe that Board voting procedures and policies had eliminated the option of voting against representation. The Board reviewed over 300 affidavits from Federal Express crewmembers and conducted interviews with randomly selected crewmembers as previously noted. Only six crewmembers stated that they voted for USPA to avoid any representation because they were confused. Moreover, all six of these individuals stated their confusion was not a result of misunderstanding Board voting procedures; rather, they were confused about whether the most effective way to defeat ALPA was to vote "no" or to vote for USPA. Although many crewmembers did not agree with the Board's policies, all of these USPA voters state that they understood the procedures and made a decision based on their best judgment of how to stop ALPA.

An examination of the evidence shows that several crewmembers may have been uncertain whether the best way to defeat ALPA was to vote "no" (or to not vote), or to support USPA. Individual crewmembers weighed the effect of their vote against the anticipated votes of their fellow crewmembers. Several crewmembers were convinced that some form of representation was inevitable and decided to support USPA as the alternative to ALPA. Others believed that, because in their judgment a majority vote for representation was not inevitable, it was possible to avoid representation altogether by not returning a ballot.

It is clear, based on the affidavits and interviews, that crewmembers understood how to vote against representation and the effect of not returning a ballot. Crewmembers understood the Board's policy, which was printed on the ballot (and the sample ballot distributed by USPA) as:

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.

The USPA campaign slogan and statements did not contradict or misrepresent these procedures and policies.

B.

The carrier also asserts that USPA's distribution of an "altered" ballot combined with its misrepresentations of the Board's processes destroyed the laboratory conditions. The carrier cites Allegheny Airlines, supra as precedent for overturning an election on the basis of this conduct. As the Board stated there, "[a]side from the fact that the Carrier engaged in a misrepresentation of the Board's ballot and voting procedure, the important fact is that the Carrier knew that a ballot marked 'No Union' would be a void ballot but did not so inform its employees." As discussed above, the Board finds that neither USPA nor ALPA misrepresented its voting policies or procedures. A write-in vote is counted as a valid vote and not a void ballot. The ballot was clearly marked "SAMPLE" and "VOID". In addition, insufficient evidence has been presented to show that the sample ballot created the impression that the impartiality of the Board had been breached. See, Long Island Rail Road, 12 NMB 187 (1985). Therefore, the Board finds no basis for finding that USPA tainted the laboratory conditions.

C.

Finally, neither Federal Express nor FEPNO provided sufficient evidence to demonstrate any degree of complicity between ALPA and USPA. Crewmembers' opinions regarding the intent of USPA organizers and their suspicions of the organizers' objectives do not warrant a finding of a taint of laboratory conditions.

III.

Misrepresentations of Carrier  
Practices and Policies

Federal Express contends that ALPA intentionally misrepresented the policies and practices of the carrier concerning the E-mail bulletin board, the pension legislation, and crewmembers' career earnings and benefits. The carrier argues that these alleged misrepresentations "constitute objectionable conduct."

ALPA defends its statements as: (1) an expression of a reasonable opinion about carrier motives in establishing the E-mail bulletin board; (2) a reminder that the pension legislation would not compel Federal Express to improve its benefits package; and (3) an accurate report based on conservative assumptions which are reasonable industry standards.

The Board finds that Federal Express has not demonstrated that ALPA misrepresented the carrier's policies and practices. Moreover, in the context of an election campaign, ALPA's alleged statements did not taint the laboratory conditions.

IV.

Illegal Polling

Federal Express argues that the polling of crewmembers by ALPA and the Wilson Center should be held to be a per se violation of the Railway Labor Act. Federal Express contends that ALPA and FEPOC had access to confidential poll results and targeted crewmembers for harassment, threats, and intimidation. The carrier asserts that because ALPA gave the impression that it was keeping lists of how crewmembers were voting and because ALPA's power to retaliate against crewmembers is "comparable to that of a carrier", this "direct pressure...destroys the basic concept of a secret ballot election."

Federal Express relies on Mercury Services, Inc., 9 NMB 312 (1982) as authority for its assertion that "[t]he NMB has expressly prohibited carrier and union



questioning regarding an employee's vote." The Board's review of these decisions reveals otherwise. In Mercury Services, the Board found the carrier had tainted the laboratory conditions, not by polling employees, but by soliciting employees to turn in their ballots to carrier officials. The Board described this conduct as "analogous to polling employees about their views." (Emphasis supplied) The carrier's solicitation and collection of ballots was held to be a per se violation which interfered with the employees' exercise of their right to self-organization.

The Board views polling of employees during a representation election as one instance where the application of its standard (whether the laboratory conditions have been tainted) to "effectively identical factual situations involving alleged union vis-a-vis carrier interference may lead to different conclusions." Air Wisconsin, supra. Whereas polling by a carrier is coercive precisely because of the substantial and material ability of the carrier to act against employees, the kind of polling evidenced here did not carry with it the same threat of imminent retaliation. Cf. generally, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

The Board finds that Federal Express and FEPNO have provided insufficient evidence to show the laboratory conditions have been tainted due to the polling by ALPA or the Wilson Center. No evidence was provided to support the contentions that the Wilson Center compromised the confidentiality of any crewmember's responses or that ALPA's conduct had any effect on the crewmembers' exercise of their right to free choice of representatives. The affidavits submitted contain assertions of crewmembers' "feelings" of intimidation and invasion of the privacy of their votes. Although many crewmembers provided statements that they "believed" that ALPA would retaliate against them for their lack of support or their anti-ALPA stance, neither the carrier nor FEPNO provided any evidence to support these allegations.

Similarly, the Board finds the carrier and FEPNO have provided insufficient evidence to show that the alleged release of polling information resulted from

conduct on the part of ALPA or FEPOC, or that ALPA's use of this information tainted the laboratory conditions of the election.

V.

Threats, Harassment, and Coercion

Federal Express contends that ALPA supporters created a "hostile environment" by: (1) interrogating crewmembers in the telephone polls and in face-to-face confrontations; (2) dominating the crew lounge during hub turns; and (3) bringing non-employee ALPA pilots onto Federal Express property during working hours. The carrier claims this conduct constituted a "gross destruction of laboratory conditions."

FEPNO contends that ALPA supporters intimidated and coerced crewmembers to pressure them to support ALPA. FEPNO also contends that ALPA supporters contributed to the "hostile environment" through incidents of improper conduct on the flight deck and in the crew lounge.

The affidavits provided by Federal Express and FEPNO in support of their contentions for the most part contain allegations against unidentified fellow crewmembers. Very few affidavits contain allegations of misconduct by specific individuals (fellow crewmembers). No affidavits contain allegations of threats, harassment, or coercion by ALPA officials. Nor has Federal Express presented evidence of the "intimidating" effect of non-employees "trespassing" on company property. The Board notes there is insufficient evidence of objections to, or a regularly enforced policy against, the presence of non-employees in the crew lounge. The Board considers the union campaign here to be appropriate, as opposed to the coercive nature which the same conduct would have when engaged in by a carrier. See, Air Wisconsin, supra. Therefore, the Board finds that ALPA's conduct did not taint the laboratory conditions.

CONCLUSION AND CERTIFICATION

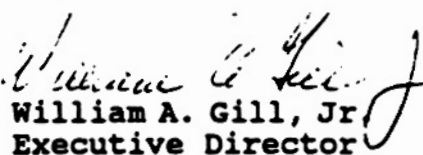
When the Board views the record in this case in its totality, it finds that the laboratory conditions

were not tainted. The Board finds that the carrier has not provided sufficient evidence to support its assertions that crewmembers were confused about the Board's election rules or that ALPA's or USPA's alleged misrepresentations tainted the laboratory conditions. In addition, the crewmember interviews conducted by Mediator Oppenberg failed to disclose any confusion over the Board's voting procedures. Based on the evidence submitted by the carrier and FEPNO and the information obtained as a result of the Mediator's investigation, the Board finds no basis for conducting any additional interviews.

The Board finds further that ALPA did not engage in improper polling nor did it threaten or harass employees, such as to result in a taint of the laboratory conditions.

In accordance with Section 2, Ninth, of the Railway Labor Act, as amended, and based upon its investigation pursuant thereto, the National Mediation Board certifies that the Air Line Pilot's Association has been duly designated and authorized to represent for the purposes of the Railway Labor Act, as amended, the craft or class of Flight Deck Crew Members, employees of Federal Express Corporation.

By direction of the NATIONAL MEDIATION BOARD.

  
William A. Gill, Jr.  
Executive Director

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