



NATIONAL MEDIATION BOARD

Washington, D.C. 20572

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In the Matter of the
Application of the

ASSOCIATION OF FLIGHT
ATTENDANTS

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

involving employees of

SHUTTLE AMERICA
CORPORATION

30 NMB No. 1

CASE NO. R-6904

ORDER

October 4, 2002

The services of the National Mediation Board (NMB or Board) were invoked by the Association of Flight Attendants (AFA) on August 16, 2002, to investigate and determine who may represent for purposes of the Railway Labor Act, 45 U.S.C. §151, *et seq.* (RLA) personnel described as “Flight Attendants”, employees of Shuttle America Corporation (Shuttle America or Carrier). The application was docketed as NMB Case No. R-6904. The Board assigned Eileen M. Hennessey to investigate.

BACKGROUND

On August 26, 2002, the Board notified organizations and carriers of its planned implementation of Telephone Electronic Voting (TEV). On September 12, 2002, the Board authorized an election in this case. On September 18, 2002, the Board introduced and demonstrated the TEV process to carrier and organization representatives.

On September 24, 2002, the Investigator notified the participants that the election would be conducted by TEV. The Carrier was notified that it

must deliver to the Board's Office of Legal Affairs by **10 a.m., ET, October 7, 2002**, three copies of an alphabetized list of potential eligible voters (list) and a copy of the list on a diskette or CD in **MSWord Excel spreadsheet** format for the Board's use only. The spreadsheet list must include: a sequential number, the employee's last name, the employee's first name, the last four digits of the employee's Social Security Number, the job title and the duty station, for each employee.

TEV was implemented as a method for secret balloting in representation elections on September 30, 2002. The TEV process is described in the Board's Representation Manual (Manual) Section 20 issued on September 30, 2002.

On October 1, 2002, the Carrier filed objections with the Board. The Carrier states:

In the Board's correspondence of September 24, 2002, the Board requested voter data in a format to facilitate telephonic balloting. Shuttle America did not and does not consent to the Board's prior, informal request for voluntary telephonic voting on an 'experimental' basis. Shuttle America also previously furnished address labels to the Board for the purpose of conducting voting by mail ballot. Shuttle America has therefore complied with all of the Board's lawful orders in connection with the above-referenced matter.

The Carrier objects to the use of TEV in this election because of lack of “notice and comment” prior to implementation of the Board’s “new rule requiring telephone electronic voting.” Furthermore, the Carrier objects to use of TEV because the system is “demonstrably unsecure.” Finally, Shuttle America argues that use of TEV in this matter is “manifestly unfair, arbitrary and capricious” because AFA’s application was filed one month before the implementation of the Board’s “new rule.”

The TEV Instructions are scheduled to be mailed to employees on October 16, 2002. The election tally is scheduled for November 13, 2002.

DISCUSSION

A. The Board’s Authority

Shuttle America objects to the use of TEV in general, states that it does not consent to its use in this election and maintains that the Board’s request for voter information is not a lawful order.

The RLA, Section 2, Ninth, empowers the Board to establish procedures governing elections, as follows:

the Mediation Board shall be 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 in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and **establish**

the rules to govern the election . . . (Emphasis added).

In interpreting this section, the Supreme Court has held that the RLA “leaves the details to the broad discretion of the Board with only the caveat that it ‘insure’ freedom from carrier interference.” *BRAC v. Ass’n for the Benefit of Non-Contract Employees*, 380 U.S. 650, 658-659 (1965). The Board’s September 24, 2002, request for information from the Carrier is within the authority granted to the Board under the RLA.

B. Notice and Comment

The Board’s determination to implement TEV as a method of ascertaining the designated and authorized representatives of employees’ in a craft or class and the TEV policies and procedures are not subject to the notice and comment rule making procedures of the Administrative Procedures Act (APA) 5 U.S.C. § 551, *et seq.* It is well established that the APA is not applicable to the Board’s investigation of representation disputes. *Trans World Airlines, Inc.*, 7 NMB 214 (1980); *Air Florida*, 7 NMB 138 (1979). The Board in *Air Florida*, cited *Airline Dispatchers Ass’n v. NMB*, 189 F.2d 685 (D.C. Cir. 1951) and determined that the APA “does not apply to ‘agency action [that] is committed to agency discretion by law.’ 5 U.S.C. §701(a)(2).” *Air Florida* at 140. The Supreme Court’s finding in *BRAC v. Ass’n for the Benefit of Non-Contract Employees*, *above*, places the implementation of TEV within the discretion of the Board. *See also, U.S. v. Feaster*, 410 F. 2d 1354, 1363-1364 (5th Cir. 1969), *cert. denied*, 396 U.S. 962 (1969).

C. Security

The Carrier claims that TEV is “demonstrably unsecure” because “for example, the voter identification numbers can too easily be stolen from employees uninterested in the election by unscrupulous individuals who can then cast a vote for representation against the wishes of the real intended voter.” The potential for this kind of voter fraud exists in either a mail ballot election or a TEV election. In both the mail ballot and TEV election, a week before the mail ballot packages or the TEV Instructions (Instructions) are mailed to the eligible voters, a Sample Ballot or Notice of TEV Election (Notice) must be posted throughout the work place. In the case of the TEV election, the Notice informs the eligible voters that on a particular date they will be mailed TEV voting Instructions and a secret Voter Identification Number (VIN). The Notice also tells the eligible voter what to do if the Instructions and VIN are not received by a certain date. This TEV process is identical to the mail ballot process in which the eligible voter is notified by the posted Sample Ballot of the date the ballot package will be mailed and what to do if the ballot package is not received by the voter by a certain date.

In both election processes, the eligible voter has an expectation of receiving the ballot package or TEV Instructions from the Board by a date certain. In both processes, the eligible voter is notified to request another ballot package or TEV Instructions by a later date certain. The Board has determined that the voters’ expectation of ballot packages or TEV Instructions is an effective deterrent to potential voter fraud. Furthermore, the unauthorized use of a ballot package or TEV Instructions constitutes a crime under federal law. Based on comments from carrier and organization representatives at the Board’s September 18, 2002, meeting, and as an additional deterrent, the TEV Notices and Instructions now include warnings concerning the criminal liability of such behavior. The warnings read as follows:

“Federal law prohibits knowingly and willfully making materially false, fictitious, or fraudulent statements or representations in any matter within the jurisdiction of the United States Government. 18 U.S.C. § 1001. This includes use of another voter’s identification number.”

The Carrier also objects to TEV because “there can be no assurances that someone will not ‘hack’ into the network of the NMB’s vendor for telephone electronic voting services, enabling the hacker to alter the number of votes cast.” The Board’s TEV system is characterized by numerous overlapping computer security systems, backup systems and procedures built to be tamper proof while assuring the highest possible level of voter anonymity, confidentiality and accuracy. The system the Board uses is the result of years of development and it has been operating commercially for three years, processing hundreds of elections, without a single security breach, system failure or integrity issue.

Specifically, to prevent “hacking,” the TEV system employs several technologies. For example, Secure Sockets Layer (SSL) technology is used to pass encrypted information between a browser and the web server. SSL prevents a third party from intercepting and altering online communications. There is a network firewall and an intrusion detection system which restrict public access to the web server and network infrastructure. The web pages NMB uses to process TEV’s do not communicate with the TEV database directly. Technology known as Common Gateway Interface (CGI) modules access the database indirectly and the web and database servers reside on separate systems.

Voter authentication is achieved because the TEV system requires a Voter Identification Number (VIN) and a Personal Identification Number (PIN) to be entered in the correct sequence. The use of this VIN/PIN combination enhances the integrity and security of the TEV process. Because the VIN is a randomly-generated six digit number, the possibility of unauthorized

duplication of an eligible voter's VIN/PIN combination is statistically remote. In addition, the TEV system will lock a user out after repeated incorrect VIN/PIN entries. This lockout prevents hackers from "programmatically" discovering user VIN/PIN combinations. When a vote is successfully cast, the system gives each voter a unique confirmation number. This number can be used to trace the ballot by Board Investigators, if necessary.

The TEV system automatically electronically stores the entire history of the election to a CD which can be used by the Board's Investigator, if necessary. The electronic history is also backed up on a separate system on a daily basis and full backups are performed weekly. Throughout the election, the TEV data base is backed up by multiple systems. The power supply for the servers is on an overlapping grid which switches over within 15 seconds. Each server has a separate APC back up power supply and the building where the servers are located has an independent diesel powered generator.

The election is routinely monitored for patterns of suspicious activity. For example, this routine monitoring would identify ballots being cast from one telephone or locale over a short period of time. Monitoring occurs throughout the election period. The Board receives regular reports on any unusual or suspicious activity. To ensure confidentiality, TEV election results cannot be viewed until the election is closed and the tally conducted, thus eliminating the possibility of manipulation.

Finally, Shuttle America argues that there are "no checks and balances provided for with respect to the tabulation of votes cast." The TEV system results have been thoroughly tested and validated. In its three years of development, operation and commercial use, the TEV system results have been subjected to independent scrutiny and found to be completely accurate.

ORDER

The RLA, Section 2, Ninth states “[t]he Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.”

Accordingly, the Carrier must deliver to the Board’s Office of Legal Affairs by **10 a.m., ET, October 7, 2002**, three copies of an alphabetized list of potential eligible voters (list) and a copy of the list on a diskette or CD in **MSWord Excel spreadsheet** format for the Board’s use only. The spreadsheet list must include: a sequential number, the employee’s last name, the employee’s first name, the last four digits of the employee’s Social Security Number, the job title and the duty station, for each employee. If the Carrier refuses to comply with this ORDER, the Board will take any action it deems necessary pursuant to its authority under Section 2, Ninth.

By direction of the NATIONAL MEDIATION BOARD.

Benetta M. Mansfield

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Chief of Staff

Copies to:

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