



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the
Application of the

PAPER, ALLIED-INDUSTRIAL,
CHEMICAL & ENERGY WORKERS
INTERNATIONAL UNION

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

involving employees of

PINNACLE AIRLINES
CORPORATION

30 NMB No. 29

CASE NO. R-6885

FINDINGS UPON
INVESTIGATION -
ORDER

February 14, 2003

This determination resolves election interference allegations filed by the Paper, Allied-Industrial, Chemical, and Energy Workers International Union (PACE or Organization). For the reasons below, the National Mediation Board (Board or NMB) finds that the laboratory conditions required for a fair election attached in January 2002. The Board further finds that the laboratory conditions required for a fair election were tainted and orders a re-run election by Telephone Electronic Voting (TEV). PACE's request for a "Laker" election is denied.

PROCEDURAL BACKGROUND

On April 23, 2002, PACE filed an application with the Board pursuant to the Railway Labor Act (RLA or Act),¹ as amended, 45 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a

¹ 45 U.S.C. § 151, *et seq.*

representation dispute involving Fleet and Passenger Service Employees of Pinnacle Airlines Corporation (Pinnacle or Carrier).² At the time the application was received, these employees were unrepresented. On April 25, 2002, the Board docketed the case and informed the Carrier to post NMB Form R-1(a).

The Board assigned Eileen M. Hennessey to investigate. On May 9, 2002, PACE requested that the Board conduct an “on-site ballot box election [to] be held at the [Carrier’s] Memphis, [TN] location, with a traditional mail ballot election at other sites.” On May 15, 2002, the Carrier notified the Board that it opposed the Organization’s request. On May 22, 2002, the Board found a dispute existed and authorized an all-mail ballot election. Also on May 22, 2002, the Board denied PACE’s request for a ballot box election. Ballots were mailed on June 11, 2002.

The ballot count took place on July 9, 2002. Of 698 eligible voters, 279 cast valid votes for representation. This was less than the majority required for Board certification. On July 10, 2002, the Board dismissed PACE’s application. *Pinnacle Airlines Corp.*, 29 NMB 398 (2002). On July 17, 2002,³ PACE filed election

² The application was filed for employees of Express Airlines I, Inc. d/b/a/Northwest Airlink d/b/a Pinnacle. On May 28, 2002, the Carrier informed the Board that it had officially changed its name to Pinnacle Airlines Corporation.

³ PACE also filed a submission on July 17, 2002, appealing the July 8, 2002, Investigator rulings on status changes pursuant to the Board’s Representation Manual (Manual) Section 4.6. The Carrier responded to this submission on July 23, 2002. The Organization responded to the Carrier’s submission on this issue on July 26, 2002. The issues raised by PACE in its May 26, June 16, and June 26, 2002, correspondence to the Investigator were status changes within the meaning of Manual Section 11.3, not challenges and objections. The Investigator ruled on all of the status changes .

(continued...)

interference allegations pursuant to the Board's Representation Manual (Manual).⁴ The Carrier responded on July 29, 2002. On August 6, 2002, the Board found PACE's allegations stated a prima facie case that laboratory conditions were tainted and that the Board would conduct further investigation. PACE filed additional submissions with the Board on August 16 and 30, 2002. The Carrier filed additional submissions with the Board on August 23, September 6, and December 12, 2002.

ISSUES

1. When did the laboratory conditions the Board requires for a fair election take effect?
2. Were the laboratory conditions tainted?

CONTENTIONS

PACE

PACE contends that the totality of the Carrier's conduct during the election tainted laboratory conditions. According to the Organization, laboratory conditions attached on or before January 30, 2002. PACE states that the following Carrier conduct occurred during the election period when laboratory conditions must be maintained:

³(...continued)

Investigator's rulings on status changes are not appealable. See revised Manual Section 12.3.

⁴ Unless otherwise stated, references to the Manual refer to the version of the Manual in effect at the time the application was filed, not the current version of the Manual which became effective November 1, 2002.

1. The Carrier terminated employees for supporting the Organization. Specifically, the Carrier terminated the chief employee organizer, Arthur Crutcher, on June 4, 2002, because of his support for the Organization. The Carrier terminated “vocal” union advocate Erik Mattox on May 14, 2002. Mattox’s termination was the result of his questioning changes in work assignment and advocating support of the Organization.
2. The Carrier granted benefits timed to affect the outcome of the election. These benefits included:
 - a.) a matching benefit for its 401(k) plan;
 - b.) a cafeteria health benefit plan which allowed employees to obtain health insurance without contributing to the premium;
 - c.) a health insurance benefit plan to part-time employees without the three-year waiting period that it had previously imposed;
 - d.) free flights for employees on Mesaba Airlines;
 - e.) an amendment to Pinnacle’s attendance policy which remained in place until on or about the deadline for returning ballots to the Board; and
 - f.) a new employee bidding schedule with more choices or lines.
3. The Carrier used the benefit changes to campaign against the Organization in videotapes and other communications to employees.
4. The Carrier engaged in surveillance of employees attending Organization meetings.

5. The Carrier established the Employee Relations Committee in February 2002, after it had knowledge of PACE's organizing campaign. The Employee Relations Committee dealt with such issues as vacation bidding, uniforms, the attendance point system, and bidding on work assignments. The Carrier allowed the Employee Relations Committee to use the Carrier's internal mail system to distribute anti-union literature.
6. The Carrier failed to post the Board's Notices of the representation dispute at two stations.

PACE also argues that a ballot from another election was intermingled with ballots from the Pinnacle election. PACE states that this is "interference with the statutory procedure for resolving disputes . . . raising the potential that ballots from this election were intermingled with ballots from other elections."

PACE requests an on-site re-run election utilizing a Laker ballot.

PINNACLE

The Carrier denies interfering with the election and asks the Board to dismiss the allegations. If the Board orders a re-run election, the Carrier argues that the facts in this case do not support a Laker election.

The Carrier asserts that laboratory conditions should attach when PACE filed its application in April 2002. Pinnacle states that PACE failed in a prior attempt to organize Fleet and Passenger Service Employees and was barred from re-applying until April 11, 2002. Additionally, PACE represents Pinnacle's flight attendants. Therefore, Pinnacle argues, the mere presence of union material on Carrier property is not sufficient to establish carrier knowledge of a union campaign.

Pinnacle contends that Crutcher was terminated because he flagrantly and repeatedly violated Carrier policy against

workplace solicitation. According to Pinnacle, Mattox was terminated because he grabbed his supervisor after a meeting to discuss Mattox's "previous disruptive and disrespectful behavior."

The Carrier claims that changes to its 401(k) plan, health plan, and travel plans were planned before the laboratory conditions attached and were presented to and conditionally approved by Pinnacle's Board of Directors in December 2001. Moreover, Pinnacle argues, these changes were applicable to all of Pinnacle's non-union employees and flight attendants, and under Board precedent, this could have been carrier interference if Pinnacle had denied the benefits to the Fleet and Passenger Service Employees because of the organizing campaign.

The Carrier denies that the re-bid of the June schedule was a benefit. Instead, it was an effort to fix staffing problems created by an increase in operations.

Pinnacle denies that it engaged in surveillance of employees. According to Pinnacle, PACE held weekly meetings on the grounds of the Memphis Airport in a room directly in front of the security station that leads to the terminal where Pinnacle conducts its operations and where Pinnacle's airport management has its offices. Therefore, Pinnacle states, to the extent that any managers were near the room at the time of a union meeting, it is a coincidence and is insufficient to support PACE's allegations of carrier surveillance.

Pinnacle asserts that the Employee Relations Committee (ER Committee), also known as the ER Team, has been in existence since 1999. The Carrier argues that the ER Committee, and the Carrier's relationship with it were not affected in any way by PACE's organizing campaign. The Carrier states that it made no changes in the scope of the ER Committee's authority, the kinds of issues that were discussed with the ER Committee, or the frequency of the ER Committee's meetings. The Carrier further asserts that it did not allow the ER Committee to use its internal mail or "V" file system to distribute anti-union literature,

and it had no knowledge that this was allegedly occurring because PACE did not bring it to the Carrier's attention.

Pinnacle states that it posted the Notice to Employees that was enclosed with the Board's April 25, 2002, letter, at all bases by April 26, 2002.

Pinnacle states that PACE's contention that the intermingling of a ballot from another election with the ballots for this case raises "the potential that ballots from this election were intermingled with ballots from other elections" is speculative. Pinnacle argues that there is no evidence that PACE ballots were misplaced and characterizes the one intermingled ballot as a minor clerical error which had no effect on the outcome of the vote and does not rise to the level of interference with the statutory procedure for resolving disputes.

FINDINGS OF LAW

Determination of the issues in this case is governed by the RLA, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

I.

Pinnacle is a common carrier by air as defined in 45 U.S.C. § 181.

II.

PACE is a labor organization and/or representative as provided by 45 U.S.C. § 152, Ninth.

III.

45 U.S.C. § 152, Third, provides in part: “Representatives . . . shall be designated . . . without interference, influence, or coercion”

IV.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions, “the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.” This section also provides as follows:

No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization

LABORATORY CONDITIONS

On January 30, 2002, the Carrier distributed an interoffice memorandum to all customer service employees which stated “[i]t has been brought to my attention that flyers and stickers promoting various union affiliations have been posted on bulletin boards, doors, walls, tugs, and carts throughout the hub area regularly.” The memo reminds employees of the Carrier’s policy against solicitation during work time and the Carrier’s policy against posting solicitations on company bulletin boards.

Generally, the Board holds that laboratory conditions must be maintained from the date the carrier becomes aware of the organizing drive. *Mercy Air Serv., Inc.*, 29 NMB 55 (2001); *Express Airlines I, Inc.*, 28 NMB 431 (2001); *American Airlines, Inc.*, 26

NMB 412 (1999); *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998); *Key Airlines*, 16 NMB 296 (1989).

The Carrier argues that laboratory conditions in this case should attach when the application was filed with the Board. In support of this claim, the Carrier cites *Mercy Air Serv., above*, for the proposition that laboratory conditions did not attach in that case until an application was filed with the National Labor Relations Board (NLRB). This misinterprets the NMB's determination in that case. In *Mercy*, the Organization first filed an application with the NLRB and subsequently filed an application with the NMB when it learned that it fell under the NMB's jurisdiction. The NMB found that laboratory conditions in *Mercy* attached when the carrier became aware of the organizing drive, which in that case, was at least when the application was filed with the NLRB.

In addition, the Carrier argues that PACE was barred by the NMB's Rules, specifically 29 C.F.R. §1206.4 (b)(1), from applying to represent Pinnacle Fleet and Passenger Service Employees. Therefore, Pinnacle argues, laboratory conditions do not attach until at least April 11, 2002, the expiration of the bar. Pinnacle's assertion is incorrect. Section 1206.4 (b)(1) of the NMB's Rules is a bar to applications, but does not prohibit organizing prior to the expiration of the bar. Nor, does it remove the RLA's protection from activities conducted during the bar period.

The Organization submitted flyers showing that organizing meetings were held at the Memphis, TN, airport. The earliest date on the flyers was for a meeting held on January 8, 2002. Organization solicitation flyers are mentioned in the Carrier's January 30, 2002, correspondence to customer service employees. One of the locations of the meetings was a location which the Carrier describes as "located directly before the security station that leads to . . . the terminal from which Pinnacle conducts its flight operations and where Pinnacle's on-airport management staff have their offices." The Board

concludes that the Carrier became aware of the organizing drive in January 2002 and laboratory conditions attached at that time.

FINDINGS OF FACT

I.

Discharge of Employees for Union Activity

A.

Arthur Crutcher

Crutcher was hired by the Carrier as a Ramp Agent in August 2000 and was promoted to Lead Ramp Agent and continued in that position until June 4, 2002.

Crutcher was a lead employee organizer for PACE in both of PACE's campaigns to organize Fleet and Passenger Service Employees. Crutcher states that starting in late 2001, he started the second organizing campaign and asked his co-workers to sign authorization cards. In addition, Crutcher appeared in a PACE campaign video.

Crutcher received his annual performance evaluation in mid-February 2002. The evaluation stated that Crutcher "always gave [his supervisor] 110%." The evaluation also stated that "sometimes you give the impression that you don't have the company's best interests at heart." The evaluation went on to state that as a solution Crutcher should "give the impression that whatever changes the company wishes, you should support them wholeheartedly." When Crutcher questioned his supervisor as to what was meant by "not having the company's best interests at heart" he was told to speak to Carlos Hawkins, Senior Hub Manager. According to Crutcher's affidavit, Hawkins told Crutcher "you want a union here and we don't."

During the time Crutcher was asking employees to sign authorization cards, he was disciplined for violating Carrier

policy. On March 28, 2002, Crutcher was called into a meeting in Hub Director Elwood Nolen's office. According to Crutcher, Nolen told Crutcher that three employees felt Crutcher had intimidated them when Crutcher talked about the Organization. During this meeting, Crutcher denied he intimidated anyone. Crutcher states that Nolen told him that no solicitation was allowed. Crutcher states that he reminded Nolen that Nolen must be aware that other employees were violating the no solicitation policy by selling jewelry and cookies.

During the March 28, 2002 meeting, Nolen gave Crutcher a "FINAL WARNING" letter citing the Carrier's policy "against solicitation of any kind during working hours." The letter further stated that "it has come to my [Nolen's] attention that you have been observed conducting forceful conversations up to the point of it being considered harassment." The letter concluded by saying that this was Crutcher's "FINAL WARNING" and "any further example of behavior that is considered unacceptable in the work place will result in discipline up to and including discharge."

In support of its decision to discipline Crutcher, the Carrier submitted an affidavit from a Ground Service Agent (GSA) stating that Crutcher repeatedly bothered and harassed the GSA to sign an authorization card. According to the GSA, the solicitation took place at approximately 7 a.m., "in the smoking area under Gate A-11" on March 28, 2002. The GSA also stated that Crutcher's manner was intimidating. The GSA states that Crutcher "got into my face with a card and asked me again to fill it out." The GSA made a written report of this to Nolen and expressed fear that union supporters might threaten or retaliate against the GSA because of the GSA's reaction to Crutcher.

On May 29, 2002, Crutcher was called into a meeting in Hub Director Elwood Nolen's office. According to Crutcher, Nolen stated that Crutcher had been seen handing out union literature. Crutcher states that he found a Union leaflet in an aircraft cargo area in late May 2002, and put it on his clipboard. Subsequently, according to Crutcher, Memphis Hub Coordinator/Manager

Marquette Vann, snatched the leaflet off of his clipboard. At the end of this meeting, Crutcher was placed on suspension pending termination.

On June 4, 2002, Crutcher was terminated from Pinnacle. According to Crutcher's termination notice, he was observed on May 22, 2002, distributing a union flyer in the workplace. Pinnacle terminated Crutcher for violating the Carrier's no solicitation policy. The Carrier also listed insubordination as a reason for Crutcher's termination.

In support of its decision to terminate Crutcher, Pinnacle submitted an affidavit from Vann, stating that Crutcher handed him a union flyer on May 22, 2002, during work time on work premises. Pinnacle also submitted an affidavit from a Lead Ramp Agent, eligible to vote in the election stating that:

At approximately 11:00 a.m. on May 22, 2002, I was in the Ramp Supervisor's office in Terminal A at the Memphis airport with several other employees including Tower Supervisor Mark [Marquette] Vann. I saw Pinnacle employee Arthur Crutcher hand a union flyer to Mr. Vann. This was during work time and on work premises.

The Carrier has a policy concerning solicitation in the workplace and provided a copy of this policy in the Employee Handbook, Section 708, which states:

In an effort to ensure a productive and harmonious work environment, persons not employed by our company may not solicit or distribute literature in work areas at any time for any purposes.

Our company recognizes that employees may have interests in events and organizations outside the workplace. However, employees may not solicit or distribute literature concerning these activities during working time. Working time does not include

lunch periods, work breaks, or any other periods in which employees are not on duty.

In addition, the posting of written solicitations on company bulletin boards is prohibited. These bulletin boards display important information, and employees should consult them frequently.

The Carrier distributed an interoffice memorandum to customer service employees reminding them of the no-solicitation policy on January 30, 2002.

Although Pinnacle has a no-solicitation policy, PACE submitted statements from Pinnacle employees who stated that solicitation in the work place was routine. According to eight employee affidavits, the following violations of the solicitation policy took place during the laboratory conditions period:

1. Sale of Girl Scout cookies. Nolen was aware of sale in work areas because employees delivered the cookies to Supervisor Nolen's office.
2. Sale of clothing delivered to Supervisor Smith's office.
3. Another employee sold lotions to co-workers. The employee states he/she brought a sample to a supervisor named "Dale" in the fleet office and showed the merchandise to another Supervisor, Frank Gilliam near Supervisor Jennings' office.
4. Many employees sold Girl Scout cookies throughout the work area even in the gate area.
5. Girl Scout cookies are sold by employees every year. In 2002, Supervisor Anderson kept Girl Scout cookies in her office. Employees were allowed to buy and sell Girl Scout cookies out of the administrative office. Supervisor Julie Holmes was present when

buying and selling was going on. Employees sold Avon products and compact discs to their co-workers without any objection from management.

6. Flyers for a Soul Fest dinner were posted on bulletin boards near the time clock from July 20, 2002 until August 20, 2002. Soul Fest dinners were provided by Pinnacle employee Shelby Bibbs. Supervisors purchased Soul Fest dinners near Gate 19 on August 20, 2002—these supervisors were clearly identifiable because they wear white shirts. An employee sold tickets to the broadcast of the June 6, 2002 Tyson-Lewis fight. Tickets were sold on the ramp during work time. Supervisor Adnip observed this sale. Dearin Woodard, an employee, sold and continues to sell Avon on a daily basis. Woodard sells Avon at several locations including the operations area during work hours. Supervisors Jones and Adnip were present when Woodard sold items in the operations area during work hours.
7. Flyers for a soul food meal were distributed in August 2002. The meal was prepared by an employee of Pinnacle as part of her catering business. The meal cost \$10.00. Flyers were posted by the time clock where other important notices are posted and in the break room.
8. Pinnacle employee Shelby Bibbs served a soul food dinner to employees. Many employees purchased the dinners between “pushes” while they were on the clock and not on an official break. Among the employees was Joe Grogan, a supervisor, who also had a plate of food. Pinnacle employee David Molten sells turkey legs and other food to employees in the break room of concourse A. The selling goes on while employees are on the clock. Supervisors are aware of this because the supervisor’s office is next to the break room.

Nolen submitted an affidavit stating that he did not engage in “disparate discipline” against Crutcher. Nolen states that he,

[w]as not aware of other solicitations going on, particularly after I sent out the January 30, 2002 reminder about the no solicitation policy. If they had occurred and had been brought to my attention, I would have taken appropriate action. . . . I have enforced the policy across-the-board by, for example, removing an employee’s card about his real estate business from a company bulletin board and recently telling another employee that she could not solicit donations for a church because of the policy.

According to Crutcher’s affidavit, in the days following Crutcher’s March 28, 2002, meeting with Nolen, employees complained to Crutcher that Nolen had told them that they could no longer sell items because Crutcher had complained that the no solicitation policy was being enforced disparately.

Crutcher filed a complaint in federal district court on September 27, 2002, alleging violations of the RLA.

B.

Erik Mattox

The Carrier hired Mattox as a GSA on February 25, 2001. According to Mattox’s affidavit, on April 26, 2002, Mattox attended a meeting at which Nolen described the new “Operational Structural Plan.” According to Mattox, during the meeting Mattox asked “when we unionize, will we have to work in this manner if we have job descriptions with a signed contract?” According to Mattox, Nolen responded “Erik, if you’re going to be disruptive, I am going to ask you to leave.” Later that day, Mattox states that he was told to report to Nolen’s office. Mattox states that he requested a witness to be present in the meeting, but none was provided. According to Mattox, Nolen told Mattox to:

[S]hut up, be quiet and listen. He said that he knew I was a union supporter, but that he would not have anyone disrespecting him with that in his meetings. He said that he had come up with a plan to get me on the right track and he handed me a verbal warning, which was in writing. He said it was about my conduct, that I needed to sign it. I wrote on the verbal warning sheet what had occurred in the meeting with Nolen and myself, about not receiving my Weingarten rights. He read what I had written and asked, "Are you going to attack me?" I had done nothing except write on the verbal warning. He told me to give him my badge and I did. I asked if he was firing me. He said that he would call me. Supervisor Lamar Trent came into the hallway and escorted me to my locker for my personal belongings and then to the checkpoint.

The Carrier suspended Mattox with pay on April 26, 2002. On May 14, 2002, the Carrier terminated Mattox. The termination letter stated, in part,

[Y]our action on Friday, April 26, 2002 was a clear violation of company policy. Please refer to page(s) 27 & 28. Fighting or threatening violence in the workplace and rowdy or disruptive activity in the workplace are two examples of infractions of rules of conduct that may result in immediate discharge. Based on your display in the work area, your employment with Express Airlines I, Inc. is terminated effective May 14, 2002.

Nolen gives a different account of the events leading up to Mattox's termination. Nolen states that Mattox "repeatedly disrupted a meeting I was holding among approximately 25 employees concerning a change in the way in which Memphis operations were structured." Nolen further states:

Although Mattox raised his hand the first time he wished to speak during the meeting, he subsequently, interrupted me on several occasions with comments along the lines of “it’s not going to work” and “the company is treating us like slaves.” His statements made it difficult for me to even finish my sentences. After several interruptions, I told him that if he were going to be disruptive, he should leave. Mattox did leave the meeting, approximately 5 minutes later.

Later that day, I met with Mattox for the purpose of giving him a verbal warning for his conduct during the meeting, which I felt was both disruptive and disrespectful to me and the other employees.

Nolen states that he completed a Performance Development Employee Communication form and asked Mattox to complete a portion of the form. Mattox did so and asked for a second sheet in order to continue his comments. Nolen states that on the way to the photocopier, Mattox stated that Nolen had to sign the second sheet of paper with Mattox’s comments. Nolen told Mattox he had no intention of doing so. Nolen states that:

Mattox then grabbed me by the wrist and snatched the second sheet from my hand. He also attempted to take the first page of the form from me but did not succeed. At this point he finally released my hand and asked “Am I fired?” I immediately suspended him. . . . I later discharged him because of his physical assault against me, which violated company policies against fighting and rowdy behavior in the workplace. The termination was based on his actions after the meeting, not his disruptive and disrespectful conduct during it, and had nothing to do with Mattox’s views about the union.

Mattox filed a complaint in federal district court on September 27, 2002, alleging violations of the RLA.

II.

Changes in Benefits

A.

401(k)

Pinnacle submitted evidence that it made changes to the 401(k) plan effective March 1, 2002. The changes, which included elimination of the waiting period, increasing the Carrier matching benefit provided and immediate vesting of the match, were announced to employees in the January 2002 issue of the employee newsletter.

The proposal to make changes to the 401(k) plan was presented to, and conditionally approved by, Pinnacle's Board of Directors in December 2001. The Carrier provided minutes of the December 20, 2001, Board of Directors meeting reflecting the presentation of the 401(k) plan changes to Pinnacle's Board of Directors. The changes to the 401(k) plan applied to all Pinnacle employees except the pilots.

B.

Health Benefits

On May 13 and 14, 2002, employees attended meetings about new health insurance benefits. The changes to health insurance benefits included implementation of a cafeteria or “flex benefit” plan. Prior to the cafeteria plan, part-time employees had to have worked for Pinnacle for three years or a specific number of hours before they became eligible to participate in the Carrier’s health insurance plan, for which the Carrier pays 65 to 90 percent of the premium. Although this requirement did not change after the cafeteria plan was implemented, an additional plan for part-time employees was offered. This additional plan provided a minimum level of benefits with the premium to be paid entirely by the part-time employee. The insurance company agreed to underwrite this plan only if at least 51 employees signed up for it. No employees signed up for it, so the plan never went into effect.

The Carrier submitted evidence that it had been in discussions with an outside company that served as its benefits plan administrator regarding changes in the health insurance plans since before August 5, 2001. Pinnacle submitted communications from the benefits plan administrator recommending an enrollment period for the cafeteria plan during late March through April 2002. In late 2001, the Carrier was considering different companies to administer the cafeteria plan and ultimately switched to a different benefits plan administrator effective January 1, 2002.

C.

Mesaba Buddy Passes

The Carrier submitted evidence that the Mesaba buddy passes had been under discussion between Mesaba and the Carrier since at least 1999. Discussions regarding the buddy passes continued in late 2001 through January 2002. At the

time the discussions began, Mesaba had a larger route structure than Pinnacle and flew to more destinations. Therefore, according to Pinnacle, Mesaba did not consider getting buddy passes on Pinnacle to be as valuable as Pinnacle getting buddy passes to use on Mesaba. According to Pinnacle, Mesaba's perception changed as Northwest Airlines increasingly transferred regional jet flying from Mesaba to Pinnacle. In February 2002, an agreement "in concept" was reached between the President of Mesaba and the President of Pinnacle. There was a delay in finalizing the pass agreement because Mesaba had to determine how to track and control buddy pass usage and address issues of service charges and employee income tax withholding implications.

In June 2002, Pinnacle reached agreement with Mesaba to allow employees to use "buddy passes" on each airline.

D.

Attendance Policy

According to Pinnacle, in June 2002, it faced staffing shortages on the reinstatement of the fourth "bank" of flying which had been discontinued after the events of September 11, 2001. Pinnacle defines a "bank" as a time of day when a large number of Northwest flights arrive to and depart from Memphis. In May 2002, the Carrier decided to resume the fourth bank or night-time operations effective June 7, 2002. Pinnacle states that it could not adequately staff the additional flying by recalling furloughed employees. According to Pinnacle, by the week prior to the reinstatement of the fourth bank, it projected that due to difficulty in contacting furloughed employees and employees declining recall, it faced a staffing shortage of 50-60 customer service employees.

Pinnacle has a program called Attendance Improvement Method (AIM) which has been in place for several years. Under the AIM program, employees are assessed points for unexcused absences and for being tardy and are subject to discipline up to and including termination for accumulating various point levels. Normally, an employee can get a quarter point deducted from his or her total for agreeing to work an overtime push. During the first week in June 2002, in order to adequately staff the fourth bank, the Carrier decided to temporarily increase the point deduction to one point for employees volunteering to work overtime. According to the Carrier, originally, this increase was scheduled to last until June 10, 2002. However, when the results of the June bid came out, Pinnacle had large blocks of time that were not adequately staffed. Therefore, the Carrier extended the change in the AIM program until early July 2002.

E.

New Bidding System

Pinnacle experienced difficulties with the employee bidding for June 2002 schedules. The June bid was the first bid that incorporated the return of the fourth bank. The Carrier states that “because of poor line construction, the bid was a disaster for both management—because it led to wholly inadequate staffing levels at certain times—and employees—who felt that the bid did not contain as many ‘days only’ lines as had been the case in past bids.” The Carrier, therefore, re-did the June bid in order to reach adequate staffing levels.

According to an employee affidavit submitted by PACE, there was a bidding procedure that was to go into effect on June 1, 2002. When it was announced, Hub Director Elwood Nolen said that the idea came from the ER Committee. The affidavit stated that the bid procedure was terrible. It forced many employees to lose their normal shift and jobs.

This employee stated that Carrier management officials met with employees on June 1 and 2, 2002. At the first meeting many

employees spoke against the bid procedure. After the second meeting, the Carrier announced a new bid procedure which was to be implemented by June 11, 2002. According to this employee's statement, "this bid was better for part time employees. There were more lines to bid on, and some employees got back to shifts and jobs they were comfortable with."

III.

Campaign Video

On June 7, 2002, Pinnacle sent all Fleet and Passenger Service Employees a letter and videotape from Philip Trenary, President and CEO of Pinnacle Airlines. The video is a series of scenes in which an actor who portrays an undecided Pinnacle employee has conversations with other actors in an effort to decide how to vote in the election. In one scene, the undecided Pinnacle employee has a conversation with his wife, where the wife states "you've got a good thing going and I don't want to see you mess it up. I put together a list - some of the things you might have overlooked." The wife then goes on to enumerate all of the benefits he receives: "the pay increases you have gotten"; "the new cafeteria benefits plan"; "the new match on the 401k plan"; "we don't have to pay for long term disability and life insurance is free as well"; "we don't pay for passes anymore"; "I am impressed with the way they handled the furloughs after September 11th . . . they did the right thing and went by seniority"; "[Pinnacle] is going all jet - passengers love Regional Jets and that translates to job security to me." The "wife" concludes by saying "you [sic] willing to pay your hard earned money for someone else to do your talking? Sounds to me like you've already got a good deal."

IV.

Surveillance

Benjamin Brandon, International Organizer for PACE, stated that starting in January 2002, PACE had regular meetings on Tuesdays at 1:30 p.m. in the Lumberman Room at the Memphis, TN, Airport.

The Lumberman Room is a meeting room operated by the Skyport Inn. The Skyport Inn is a hotel which is physically located within the Memphis, Tennessee Airport. The Lumberman Room is the largest meeting room operated by Skyport. PACE generally reserved this room for its organizing meetings. On one occasion the Lumberman Room was not available and PACE used a meeting room in the Skyport Inn. This room was located within the Inn itself, across the concourse (approximately 15-20 feet) from the Lumberman Room. This room had windows looking out onto the concourse. The Skyport Inn meeting room and the Lumberman Room are located just outside of the Security checkpoint for Terminal A. Terminal A is the terminal where Pinnacle operates.

PACE submitted affidavits from six individuals attesting to at least five surveillance events. The affidavits disclose that these supervisors were seen standing in the concourse anywhere from 10-40 feet from the meeting room. The PACE affidavits state that these supervisors had no legitimate reason to be standing in this area and also state that employees attending the meeting noticed the supervisors standing there and were uncomfortable by their presence.

A.

Supervisor Owens

Brandon states that in February 2002, he observed a supervisor, Jerry Owens, standing across from the entrance to the Lumberman Room observing employees going into the meeting.

Several employees submitted statements stating that Owens was watching employees entering the union meeting. Brandon stated that although Owens was in a reception area in front of the receptionist's desk, Owens was clearly looking at the door and looking away from the receptionist.

Brandon states that on March 26, 2002, he again observed Owens standing outside the Skyport Inn, Memphis, TN, watching employees as they entered the meeting. Brandon states that Owens left the area where the meeting was held but returned later to watch the room from "around a post" for approximately 15 minutes. Employees at the meeting told Brandon they felt uncomfortable. Brandon then confronted Owens and told him surveillance was illegal. Brandon states that Owens stated he was just passing by. When Brandon stated that he had observed Owens there for 15 minutes, Brandon states Owens said he was there to talk to the receptionist who was his friend. Brandon states he told Owens that the receptionist was at the desk and Owens was behind the post. Owens, according to Brandon, stated that "if the employees got a union it would help him, too."

Owens submitted an affidavit stating that he never "spied on any employees." Owens further states:

As of February-March 2002 I was not even aware that union meetings were being held. I had been given supervisor training during the last PACE election during which I was told that spying on employees is not permitted. I have never violated this rule.

I am good friends with a woman who works at the Skyport ticket desk counter, which is in front of the Skyport meeting room and across from the Lumberman room. If I was in that area at all, and I have no recollection of being there on the dates that the Union claims I was, it would have been to talk to my friend, not to spy.

B.

Supervisors Smith and Anderson

Brandon states that on April 16, 2002, he observed Pinnacle supervisors, Mary Smith and Ella Anderson, standing 15 to 20 feet from the door going to the meeting room just before the meeting. Brandon states that he recorded his observation of Smith and Anderson at the time and is certain of the date it occurred. According to Brandon, when he “caught their attention, they hid their eyes with their hands.” Several employees submitted statements stating that Smith and Anderson were observing employees entering PACE meetings.

Anderson and Smith submitted affidavits denying that they spied on employees. Anderson states that she is aware that she cannot spy on employees both because of Pinnacle training she received and because, in a previous position, she managed employees in a union environment for 15 years. Anderson states that she does not recall being aware that there were union meetings being held on April 16, 2002. Anderson states that the only time she can recall spending any time near the Lumberman Room with Smith was April 9, 2002. On that date, she and Smith waited by the Delta ticket counter which is near the Lumberman Room for a co-worker to bring both employees additional identification necessary for Anderson and Smith to get new airport security badges. Smith also submitted an affidavit which corroborates Anderson’s account of events.

C.

Supervisor “Carlos”

Brandon states that on another occasion a supervisor named “Carlos” came into the PACE meeting. “Carlos” was identified to Brandon as a supervisor and Brandon asked him to leave. An employee submitted a statement corroborating Brandon’s observations.

D.

Supervisor Trent

An employee submitted an affidavit stating that supervisor Lamar Trent came up to the door of the meeting room and observed who was entering.

Lamar Trent submitted an affidavit denying that he spied on employees to see who was attending union meetings. Trent stated that he received supervisor training during the last PACE election and was told that spying on employees is not permitted. Trent further states that sometimes he has to assist at the security station located near the meeting rooms in question from 9:00 a.m. to 11:00 a.m. Other than walking to and from work, that is the only time he would be near the meeting rooms. At 1:30 p.m., Trent states that he would have been involved in supervisory duties preparing for the next “push” and, therefore, had no opportunity to go to the meeting room to observe employees.

V.

ER Committee Formation During Election Period

According to the affidavit of Patricia Noel, Manager of Customer Service System Support for Pinnacle, the Employee Relations Committee, ER Committee, the ER Team and ER are all the same. Noel states that the ER Committee was started in October 1999 “to open a line of communication between employees and management and to suggest improvements that for the employees and the company.” The Carrier provided notices dated from 1999 to present showing that the ER Committee met approximately once per month. Topics discussed at these meetings included: airport security; buddy passes; vacation policies; ramp and gate training; uniforms; and service changes. According to the minutes submitted by the Carrier, the employees who attended the meeting varied over the years but there were several employees who regularly attended the meetings.

PACE submitted affidavits from employees stating that the Carrier established the ER Committee in February, 2002, or that most Pinnacle employees did not know of the ER Committee's existence until nominations for committee officers were announced in February 2002. PACE's affidavits also state that the June 2002 changes in bidding procedures were initially handled by the ER Committee and that the Carrier used the bidding issue to establish an alternative means of bargaining without Union representation. One affidavit submitted by PACE states that the ER Committee was allowed to use the Carrier's internal mail system to disseminate anti-union communications.

VI.

Failure to Post Notices

On April 25, 2002, the Board sent the Carrier Board Notices (Form NMB-R-1(a)) to be posted at all stations. PACE submitted an affidavit from an employee stating that on May 6, 2002, the employee was informed that the Notice had not been posted at the Tupelo, MS, or the Columbus, MS, stations.

VII.

Ballot from Another Election Intermingled with Ballots for this Election

On July 9, 2002, Investigator Hennessey conducted the ballot count in this case. One ballot from another case was included with the ballot envelopes for this election. This ballot was set aside.

DISCUSSION

During election campaigns, a carrier must act in a manner that does not influence, interfere with, or coerce the employees' selection of a collective bargaining representative. *Metroflight, Inc.*, 13 NMB 284 (1986). When considering whether employees' freedom of choice of a collective bargaining representative has

been impaired, the Board examines the totality of the circumstances as established through its investigation. *Mercy Air Serv.*, 29 NMB 55 (2001); *US Airways*, 26 NMB 323 (1999); *Petroleum Helicopters*, 25 NMB 197 (1998); *Evergreen Int'l Airlines*, 20 NMB 675 (1993); *America West Airlines, Inc.*, 17 NMB 79 (1990).

In investigating allegations of carrier interference, the Board examines whether the employees' freedom of choice has been impaired. The use of a modified ballot by the Board in response to established interference is designed to mitigate the effects of an election environment in which the voters' "independence of judgment" has been eroded by the carrier's conduct. *Evergreen Int'l Airlines*, *above* at, 20 NMB 675, 715 (1993).

For example, in *Laker Airways, Ltd.*, 8 NMB 236 (1981), the Board found that the carrier had violated the Act by actions such as soliciting employees to turn in their ballots to carrier officials, increasing pay immediately prior to the election period, and polling employees as to their representation choice. As a remedy, the Board ordered a re-run election using a "Laker" ballot. A "Laker" election involves the use of a "yes" or "no" ballot. No write-in space is provided, and the majority of votes actually cast determines the outcome of the election. A "Laker" election was also used as a remedy in *Mid Pacific Airlines*, 13 NMB 178 (1986), where the Board found the carrier had violated the Act by polling its employees and by implying that its financial future hinged on the employees' rejection of union representation.

In *Key Airlines*, 16 NMB 296 (1989), the Board ordered a different remedy for carrier interference. In *Key*, the Board found that the carrier had violated the Act by: discharge and reassignment of leading union organizers; denial of a scheduled pay increase to one group of employees immediately after a representation application was filed; granting of a pay increase to another group of employees immediately prior to the filing of its application; and threats to employees' job security should they vote for representation. This was the second time in three years that the Board found that Key Airlines had violated its employees'

representation rights. As a remedy in the *Key* case, the Board ordered a new election in which the organization would be certified unless a majority of eligible voters returned votes opposing union representation. No write-in space was provided.

In contrast, “isolated incidents” of potentially questionable carrier activities are insufficient to warrant a finding that the laboratory conditions necessary for a fair election have been tainted. *See Northwest Airlines, Inc.*, 19 NMB 94 (1991) (During an organizing campaign, supervisors may have been involved in certain incidents favoring one union over another but this is insufficient to warrant any remedial action by the Board); *USAir, Inc.*, 18 NMB 290 (1991). (The carrier’s disparate enforcement of its policy on access to employee break rooms is insufficient basis for a finding of interference.)

I.

Discharge of Crutcher and Mattox

The issue before the Board is whether laboratory conditions have been tainted, not whether the Carrier’s discharge of Crutcher and Mattox was unlawful under the Act. The Board, therefore, considers whether the actions taken against Crutcher and/or Mattox impaired employee freedom of choice.

A.

Crutcher

The Carrier states that there have been other employees “who received counseling for violating the policy against no solicitation and/or were instructed to refrain from doing so in the future.” According to the Carrier, unlike Crutcher, once employees were warned, they did not continue to violate the policy.

The Carrier’s January 30, 2002, memorandum singles out union literature as violative of the Carrier’s no solicitation policy. The record is replete with examples of violations of the Carrier’s no solicitation policy including Avon, Girl Scout cookies, food, lotions, and clothing. Yet Crutcher is the only employee who received a written reprimand for violating the policy. The timing of this reprimand also makes the Carrier’s enforcement of its policy against Crutcher suspect. The written reprimand/final warning came just weeks after Crutcher’s performance appraisal in which he was told that he “always gave [his supervisor] 110%” and “sometimes you give the impression that you don’t have the company’s best interests at heart” and that Crutcher should “give the impression that whatever changes the company wishes, you should support them wholeheartedly.” Moreover, the written reprimand came approximately one month before PACE filed its representation application and approximately four to six weeks after laboratory conditions attached. It is undisputed that the Carrier knew that Crutcher was an active union supporter. Both PACE and the Carrier submitted affidavits that Crutcher’s union involvement was known among his fellow employees as well. This suspicious timing causes the Board to examine the circumstances surrounding Crutcher’s termination closely.

The Board has determined that the timing of actions taken by a carrier may lend credence to allegations of interference. The Board determined in *American Trans Air, Inc.*, 28 NMB 163 (2000), that the announcement and timing of a general wage increase and shift differentials tainted the laboratory conditions. In *Key*

Airlines, 13 NMB 153 (1986), the dismissal of union officials the same day the Board Investigator met with carrier officials was a factor in the Board's interference determination.

The Carrier provided evidence that two employees were discharged for insubordination between 1999 and 2002. Both of these employees were terminated for insubordinate behavior for failing to do their job. Crutcher's behavior is not comparable to those employees terminated for insubordinate behavior. In fact, Crutcher's 2002 performance appraisal stated that he performed his duties satisfactorily and "always gave [his supervisor] 110%."

The evidence submitted by the Carrier is insufficient to establish that Crutcher violated the no-solicitation policy. The no-solicitation policy does not address the manner in which solicitation may be carried out. Nor does it contain any provisions for otherwise permissible solicitation which makes employees "uncomfortable." The policy addresses only when and where solicitation is **impermissible**. The Carrier's witness states that the solicitation took place "at approximately 7 a.m." while the witness and two other Pinnacle employees were standing in a smoking area. Crutcher's shift started at 7 a.m. and Crutcher states that he did not solicit on work time.

The Carrier's witness does not state that the solicitation took place on work-time or in a work area. The Carrier's witness states that the solicitation made him "uncomfortable". According to the evidence provided by the Carrier's own witness, Crutcher complied with the no-solicitation policy and solicited in a non-work area on non-work time. Thus, there was no basis for the discipline Crutcher received on March 28, 2002, because he did not violate the Carrier's no-solicitation policy. If there was no violation in March then the sole basis for Crutcher's termination was the event in May 2002. Even if the events of May 22, 2002 took place as the Carrier's witnesses described them, Crutcher's termination for distributing union literature was disproportionate to the Carrier's treatment of other violations of the no-solicitation policy.

Crutcher states that on May 22, 2002, he picked up a PACE flyer he found in one of the terminals and put it on his clipboard. Crutcher states that he did not give the flyer to the Tower Supervisor, rather the Tower Supervisor saw the flyer and tore it off of Crutcher's clipboard.

The Carrier asserts that it is immaterial that it was union literature that Crutcher was allegedly distributing. This assertion is not credible for two reasons. First, the Carrier singled out union literature in the memo it distributed on January 30, 2002 reminding employees of the Carrier no-solicitation policy. Second, the Carrier was unable to introduce any evidence that any other employee who violated the no-solicitation policy was disciplined in any way. According to multiple employee affidavits the no-solicitation policy was routinely violated during the laboratory conditions period.

The Carrier turned Crutcher's alleged violation of the no solicitation policy into a performance issue by stating "his harassment of other employees, his repeated violation of company policy, and his insubordination in ignoring a final warning to cease from violating the no solicitation policy show he was far from a 'model employee'." However, apart from the accusation of harassment from one employee, there is no evidence of unacceptable performance to support the Carrier's claim. Moreover, it is unclear from the facts presented whether Crutcher did in fact violate the no-solicitation policy. The difference in Crutcher's conduct compared to the conduct of others discharged for insubordination, combined with the lack of evidence of poor performance, insubordination or violation of the no solicitation policy, leads the Board to conclude that Crutcher's termination for violations of the no solicitation policy is a pretext for disciplining him for his union involvement. *See Key Airlines, above.*

The Board finds that Crutcher's discharge tainted the laboratory conditions. This finding is based on the following factors:

1. the Carrier's disparate treatment of other employees who violated the no solicitation policy;
2. the contrast between Crutcher's behavior and that of the other employees who were terminated for insubordination;
3. the timing of Crutcher's discipline;
4. the comments on Crutcher's performance evaluation which was given just two weeks after the Carrier's memo regarding union solicitation;
5. the fact that Crutcher's union involvement was well known among employees and the Carrier; and
6. the timing of Crutcher's termination just one week prior to the mailing of the ballots to employees.

Crutcher's termination had a chilling effect on employees' free choice and tainted laboratory conditions.

B.

Mattox

According to Carrier policy, "fighting or threatening violence in the workplace and rowdy or disruptive behavior in the workplace" are infractions of rules that may result in discharge. No one other than Mattox and Nolen witnessed what transpired between Nolen and Mattox in Nolen's office on April 26, 2002. The two individuals involved give differing accounts of the incident.

The Carrier provided evidence that 10 employees were discharged for "similar" offenses between 1999 and 2002. However, the facts surrounding these discharges are significantly different from the facts of Mattox's discharge. First, the majority of the other discharges involved behavior that had multiple

witnesses and documentation. Second, the majority of the other employees were discharged for making profane and/or violent threats such as: “you’ve really done it now, you better watch your back”; threatening to kill a supervisor if a paycheck was not correct and saying that they are not afraid of going back to jail for killing the supervisor; striking an employee; cursing at subordinate employees; threatening to cut an employee’s throat; and stating that they are going to go home, get their gun, and start shooting. Even if the Board accepted the Carrier’s version of the events surrounding Mattox’s discharge as more credible, Mattox’s conduct is not comparable to the conduct listed above.

There is no evidence that the Carrier treated this incident as an assault at the time. Specifically, there is no evidence that Nolen filed an incident report; that Nolen contacted airport police; that Nolen sought medical attention; that Nolen notified other Pinnacle managers; that Nolen created any contemporaneous document to file memorializing the incident. In all of the other incidents of discipline for “fighting or threatening violence in the workplace” the Carrier provided one or more of the above forms of evidence, documenting the threatening behavior. There was no contemporaneous documentation submitted for the Mattox incident.

Nolen did have Mattox escorted off the property immediately after the incident. However, Nolen took no further action against Mattox until almost 3 weeks later, after Mattox called Nolen to find out what his employment status was. Nolen states that this 3 week delay was because “it is my typical practice to suspend an employee with pay pending an investigation and final determination of a serious discipline matter.” This is not borne out by the other disciplinary incidents submitted by the Carrier. In those cases discipline was swiftly meted out. There is no evidence that the Carrier conducted any further investigation. Moreover, Nolen fails to state why he needed three weeks to investigate an incident that he witnessed.

The Board finds that Mattox's discharge tainted the laboratory conditions. This finding is based on the following factors:

1. The disparity in conduct for which Mattox was discharged when compared to the conduct of other employees who were discharged for threatening conduct;
2. Mattox's vocal union support; the Carrier's undisputed knowledge of Mattox's union support; his fellow employee's knowledge of his union support;
3. The timing of Mattox's discharge - approximately three weeks after this case was docketed and one month before ballots were mailed.

The Board concludes that Mattox's discharge had a chilling effect on employees' free choice and tainted the laboratory conditions necessary for a fair election.

II.

Changes in Benefits

The Organization contends that the Carrier introduced new benefits or changed existing benefits during the period when laboratory conditions attached.

Generally, the Board finds changes in pay or benefits which were pre-planned or where there is "clear and convincing evidence of a compelling business justification" do not taint laboratory conditions. *Delta Air Lines*, 27 NMB 484 (2000); *Air Logistics, L.L.C.*, 27 NMB 385 (2000); *American Airlines, Inc.*, 26 NMB 412 (1999).

The evidence shows the changes in the 401(k) plan, health insurance benefits and buddy pass benefits were planned in advance of the date when laboratory conditions attached and were

not taken for the purpose of influencing or coercing employees. The temporary changes in the AIM program and the June 2002 re-bid were for the compelling business justification of maintaining adequate staffing. Therefore, the Board determines that changes in these programs did not taint laboratory conditions.

III.

Campaign Video

In *Mercy Air Serv., Inc.*, 29 NMB 55, 73 (2001), the Board cited its long-standing policy on carrier campaign communications:

Carriers have a right to communicate with their employees during election campaigns, but this right is “not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election.” In reviewing communications, the Board examines their content to see if they are coercive, contain material misrepresentations about the Board’s processes or the Act, or combined with other Carrier actions, influence the employees in their choice of representative.

(Citations omitted.)

The video, when viewed in its entirety, is not coercive nor does it make material misrepresentations of the Board’s processes. The Board finds that the actors are not linking the benefits changes with the outcome of the election in order to coerce employees. Rather, the actors are conveying a view against unionization. The video does not taint laboratory conditions.

IV.

Surveillance

The Board has held that surveillance is a per se violation. *American Trans Air*, 28 NMB 163 (2000); *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998); *Arkansas and Missouri R.R. Co.*, 25 NMB 36 (1997); *Sky Valet d/b/a Commercial Aviation Servs. of Boston, Inc., (Sky Valet)* 23 NMB 276 (1996); *Egyptair*, 19 NMB 166 (1992); *Key Airlines*, 16 NMB 296 (1989). In addition, as the Board first stated in *Laker Airways, Ltd.*, 8 NMB 236 (1981), the appearance or impression of surveillance is a sufficient basis for a finding of interference. However, in the cases where the Board found the carrier interfered by surveillance, there were other egregious carrier actions, such as ballot collection in *Laker, above*. In *Sky Valet, above*, a management official informed employees she knew who signed authorization cards and that those individuals would be discharged. Employees actually *were* discharged for signing authorization cards. See *Sky Valet, above*.

In other cases, where organizations asserted that the laboratory conditions were tainted due to increased supervisory presence, the Board has found insufficient evidence of interference. *Aeromexico*, 28 NMB 309 (2001); *American Trans Air, above*; *American Airlines*, 26 NMB 412 (1999); *Federal Express Corp.*, 20 NMB 7 (1992).

Recently, in *Delta Airlines*, 30 NMB 102, 118 (2002), the Board stated, “[o]n smaller carriers, even the appearance of increased supervisory presence during the laboratory period may lead to a Board finding of interference.” *Delta* involved a craft or class of approximately 19,000 employees. In this case the craft or class consists of substantially fewer employees, approximately 700.

There is sufficient evidence that there was prolonged supervisory presence outside of union meetings which created the appearance among employees that they were being observed by the Carrier. The Carrier’s assertions that management presence outside of union meetings was “coincidence” is not credible.

The supervisors’ statements lack credibility for three reasons. First, the supervisors’ claims that they were unaware

of the union meetings is not credible because flyers announcing the meetings were circulating on Pinnacle property and in fact a memo from Elwood Nolen regarding these notices issued in January 2002. In addition, supervisory training from management during a union organizing campaign is not a *per se* defense to allegations that they spied on employees. Finally, the assertion that the supervisors were not in the area and would have no reason to be in the area is undermined by the contradictory claim that if they were in the area it was purely by coincidence. These assertions conflict— either they specifically remember that they were not in that area at the time or they are often in the area and their presence at the time of a union meeting is a coincidence. Both assertions cannot be true.

The appearance or impression of surveillance has a chilling effect on employee behavior and is a sufficient basis for a finding of interference. *Laker Airways, Ltd., above*. The Board has determined that surveillance taints laboratory conditions when considered with other egregious carrier actions such as ballot collection in *Laker, above*, and discharges of employees for union activity, *Sky Valet, above*. When the Board considers the allegations of surveillance in this case in conjunction with its findings concerning Crutcher and Mattox, the Board finds that the Carrier tainted laboratory conditions by engaging in surveillance of employees.

V.

ER Committee

The Board has held that the mere existence of employee committees is not evidence of interference. *American Airlines, above*; *US Airways*, 24 NMB 354 (1997); *Continental Airlines/Continental Express*, 21 NMB 229 (1994). In *US Airways, above*, the Board found that, viewed in the “totality of the circumstances” the Carrier’s use of employee committees to expand benefits or make other material changes tainted the laboratory conditions. See also *Delta Airlines, above*; *Horizon Airlines*, 24 NMB 458 (1997).

Based on the evidence, the Board concludes that Pinnacle formed the ER Committee in 1999, long before laboratory conditions attached for this election. There is no evidence in the ER Committee meeting minutes that it was meant by the Carrier to provide employees a substitute for a union. There is insufficient evidence that the ER Committee had any involvement in the first June schedule bidding. Even if true, both PACE and the Carrier agree that the initial June bid was a “disaster”. Therefore, any attempt on the part of the Carrier to establish the ER Committee as an alternate means of bargaining with employees about the bidding process was significantly undermined by the failure of the initial June bid.

VI.

Failure to Post Notices

The Carrier provided evidence that these notices were sent by Patricia Noel via facsimile to all station managers on April 26, 2002, the day after receiving the Notices from the Board. Noel states in her affidavit that she received confirmation from each manager, including Tupelo and Columbus, that the Notice was posted. The evidence establishes that the Notices were posted at all stations in a timely fashion.

VII.

Ballot from another Election Intermingled
with Ballots from this Election

The Board has investigated this matter and finds that no PACE ballots were misfiled. All valid votes cast in this election were counted and recorded on the Report of Election Results completed July 9, 2002.

CONCLUSION AND ORDER

The Board finds that the laboratory conditions required for a fair election were tainted. This conclusion is based on the totality of the circumstances which include the chilling effect created by the dismissal of two PACE activists during the election period and the appearance of surveillance of employees attending union meetings after laboratory conditions attached. PACE's request for a Laker election is denied. Therefore, the Board ORDERS a re-run election using Telephone Electronic Voting (TEV), with the Board's standard voting procedures.

Pursuant to Manual Section 12.1, the Carrier is hereby required to furnish, within five calendar days, alphabetized peel-off labels bearing the names and current addresses of those employees on the list of eligible voters. The list of eligible voters will include those employees eligible in the first election with the

exception of those employees who have left the craft or class.⁵ The cut-off date will be April 20, 2002.

The Carrier must deliver to the Board's Office of Legal Affairs within five calendar days of the date of this ORDER, three copies of an alphabetized list of potential eligible voters (list) and a copy of the list on a diskette or CD in 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. A sample format of the spreadsheet list follows:

SAMPLE FORMAT OF THE SPREADSHEET LIST FIELDS

SeqNum	LastName	FirstName	SSN4	JobTitle	DutyStation
1	Able	John, Jr.	1234	Pilot	Chicago, IL
2	Baker	Mary A.	5678	Pilot	Tampa, FL
3	Charles	William J.	9101	First Officer	Detroit, MI

Important Notes:

The Carrier's list of potential eligible voters must be delivered to the NMB as a Microsoft-Excel file. The format of the list of potential eligible voters must be prepared in six columns or fields **exactly** as displayed above. There must not be any other

⁵ On July 8, 2002, the Investigator ruled that Crutcher and Mattox were ineligible to vote because there was insufficient evidence that "an action for reinstatement had been filed before either a court or government agency of competent jurisdiction, pursuant to Manual Section 5.304 and NMB Rules 1206.6." PACE did not appeal this ruling. Because Crutcher and Mattox were not eligible to vote in the first election they are ineligible to vote in the re-run election.

information or data in the file or on the diskette or CD except as displayed in the six fields or columns above. The field or column headers must be contained on one row only. The Carrier must not include any **hidden** columns or fields in the Excel File. Note that employee middle initials appear with the first name. Do not make a separate column or field for the middle initial. **If you have any questions about the correct format for this list of potential eligible voters, contact the NMB election Administrator at 202-692-5040.**

All other submissions must comply with the simultaneous service requirements of the NMB Representation Manual (effective November 1, 2001) Section 1.201, including service on the Chief of Staff.

The count will take place in Washington, DC. Copies of the attached "Notice to Fleet and Passenger Service Employees of Pinnacle Airlines" must be posted within five calendar days of the date of this decision on Carrier bulletin boards where employee notices are normally posted. The Notice shall be clearly visible and remain in place for the duration of the re-run election period. Copies of the attached notice will also be included in the Telephone Voting Instructions sent to employees.

By direction of the NATIONAL MEDIATION BOARD



Benetta M. Mansfield
Chief of Staff

Copies to:
Mr. Philip Trenary
Joseph L. Manson, III, Esq.
Douglas W. Hall, Esq.
Mr. Ben Brandon
Mr. Ron G. Spann
Marianne G. Robbins, Esq.

**NOTICE TO FLEET AND PASSENGER SERVICE EMPLOYEES
OF PINNACLE AIRLINES**

After an investigation conducted by the National Mediation Board (Board) in which Pinnacle Airlines Corporation (Pinnacle) and the Paper, Allied-Industrial, Chemical, and Energy Workers International Union, (PACE), had the opportunity to present statements and evidence, the Board found that Pinnacle's conduct interfered with, influenced, or coerced employees' choice of representative in an election conducted pursuant to Section 2, Ninth, of the Railway Labor Act (Act), when it discharged union supporters and engaged in surveillance of employees during the election period.

Accordingly, the Board authorizes a second election by Telephone Electronic Voting (TEV) among Pinnacle's Fleet and Passenger Service Employees. The list of eligible voters will consist of those eligible to vote in the first election, with the exception of those who have left the craft or class. A copy of this Notice will also be mailed to all eligible voters with the election materials. During the election period, the Investigator will be available to immediately investigate any further allegations.

Section 2, Fourth, of the Act allows employees the right to select representatives without carrier influence or interference.

Pinnacle is not permitted to influence, interfere, or coerce employees in any manner in an effort to induce them to participate or refrain from participating in the upcoming election.

For questions concerning this notice or compliance with its provisions, communicate with the National Mediation Board, Washington, DC 20572, telephone: (202) 692-5040.