NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the Application of the TRANSPORT WORKERS UNION OF AMERICA alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of AVGR INTERNATIONAL BUSINESS, INC., d/b/a UNITED SAFEGUARD AGENCY	31 NMB No. 93 CASE NO. R-6981 FINDINGS UPON INVESTIGATION July 2, 2004

This determination resolves election interference allegations filed by District 6, International Union of Industrial, Service, Transport & Health Employees (District 6 or Organization) involving employees of AVGR International Business, Inc., d/b/a United Safeguard Agency (United Safeguard or Carrier). For the reasons below, the National Mediation Board (Board) finds that the laboratory conditions required for a fair election were not tainted. District 6's request "that the pre-election status quo be restored"[1] is denied.

[1] District 6 also requested that "the Board refrain from conducting any election with respect to the subject employees, until such time as laboratory conditions may be ensured." The Board's decision in this matter renders that request moot.

PROCEDURAL BACKGROUND

On November 13, 2003, the Transport Workers Union of America (TWU) filed an application with the Board pursuant to the Railway Labor Act[2] (RLA or Act), 45 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a representation dispute involving Skycaps, employees of United Safeguard. At the time the application was received, these employees were represented by District 6.

The Board assigned Eileen M. Hennessey to investigate. On December 4, 2003, the Board found that a dispute existed and authorized a Telephone Electronic Voting (TEV) election. Voting Instructions (Instructions) were mailed on December 19, 2003, and the tally was conducted on January 9, 2004. The results of the tally were as follows: of 109 eligible voters, 49 cast valid votes for representation[3]. This was less than the majority required for Board certification. On January 12, 2004, the Board dismissed TWU's application. *AVGR Int'l Business Inc., d/b/a United Safeguard Agency*, 31 NMB 110 (2004).[4]

On January 21, 2004, District 6 filed allegations of election interference pursuant to the Board's Representation Manual (Manual) Section 17.0. On February 11, 2004, the Carrier responded, denying District 6's allegations. TWU did not file any written submissions in this matter.

On February 17, 2004, the Board found that District 6's allegations stated a prima facie case that the laboratory conditions were tainted and that the Board would conduct

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2 45 U.S.C § 151, *et seq.*

3 45 votes were cast for TWU and 4 votes were cast for District 6.

4 On January 14, 2004, District 6 filed a Motion for a Temporary Restraining Order (TRO) in United States District Court for the Southern District of Florida. The court denied District 6's TRO request on January 20, 2004. A complaint filed by District 6 against the NMB pursuant to the RLA is currently pending before the district court.

further investigation. The Board established a schedule for further filings. On February 24, 2004, District 6 filed a supplement to its allegations of interference. On March 2, 2004, United Safeguard responded to District 6's supplemental filing. Both participants submitted affidavits and other documentary evidence in support of their positions.

On March 31, 2004, District 6 sent a letter to the Carrier and the Board, "remind[ing the Carrier] . . . that District 6 is still the bargaining agent . . . ." and requesting that the Carrier remit dues and handle ongoing grievances. District 6 requested that the Board "take immediate steps to rectify the situation." On April 7, 2004, District 6 notified the Board of disciplinary action which was taken against a former District 6 shop steward. District 6 stated that it "is still the bargaining agent and. . . [its] collective bargaining agreement should still be enforced."

On April 16, 2004, Investigator Hennessey notified District 6 that the Dismissal issued by the NMB on January 12, 2004, remains in effect until such time as the NMB issues a new Certification or Dismissal in this case. The Investigator also notified the participants of her availability to conduct witness interviews in Miami, Florida.

From May 5-13, 2004, the Investigator conducted witness interviews, interviewing witnesses proffered by District 6, TWU, and the Carrier. This determination is based upon the facts presented by the participants in the written submissions as well as these interviews.

ISSUES

Did United Safeguard's actions taint the laboratory conditions required by the Board for a fair election?

CONTENTIONS

District 6

District 6 alleges that the Carrier engaged in conduct which interfered with, influenced and coerced employees' choice of representative in the January 9, 2004 election. Specifically, District 6 alleges that the Carrier engaged in the following:

> A. Terminated two District 6 supporters for the purpose of intimidating other employees and to prevent these employees from engaging in activities in support of District 6;
>
> B. Refused to submit the dispute regarding the termination of these two employees to binding arbitration pursuant to the Collective Bargaining Agreement (CBA) in place between District 6 and the Carrier, and;
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> C. Stated to several employees who were eligible to vote in the election that the Carrier did not have to engage in bargaining with District 6 and that the Carrier was going to 'get rid' of District 6.

District 6 requests that "the pre-election status quo be restored, including the certification of . . . [it] as the exclusive bargaining representative."

United Safeguard

The Carrier denies District 6's allegations. United Safeguard states that it terminated the two employees in question for just cause. Furthermore, the Carrier states that these two employees were not known to be union activists. The Carrier denies that it refused to submit the grievances filed regarding the terminations to arbitration in order to influence the outcome of the election. The Carrier states that the grievances were untimely filed under the CBA. Finally, the Carrier denies that it made any anti-union remarks and states

that District 6's allegations in this regard are "rank hearsay" and should be given no credence by the Board.

TWU

The TWU filed no submissions in this matter but did proffer witnesses regarding Carrier conduct during the election period.

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.

The Board asserted jurisdiction over United Safeguard in *AVGR Int'l Business, Inc. d/b/a United Safeguard Agency*, 27 NMB 383 (2000).

II.

The District 6 and TWU are labor organizations and/or representatives as provided by 45 U.S.C. § 151, Sixth.

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 . . . .

FINDINGS OF FACT

A. Relevant Provisions of the CBA and Carrier Policy Manual

Article XIX of the CBA between the Carrier and District 6 sets forth the union security clause and dues check-off provisions in place between District 6 and the Carrier. All employees must be members of District 6 and the Carrier deducts union fees and dues from employees' pay and remits the dues to District 6 on a monthly basis.

Article VII of the CBA provides for a two-step grievance process. Article VII, Section 1, Step 1 of the CBA states:

> The employee having such grievance with or without the Steward, shall present the grievance to his immediate supervisor, who will give his answer within seven (7) working days (excluding) weekends and holidays. If the grievance is not thus satisfactorily settled, then the grievance may be appealed to Step 2.

Article VII, Section 1, Step 2 of the CBA states:

> The grievance appeal shall be put into writing and presented by the Steward and/or aggrieved employee to the General Manager or his designated representative within five (5) business days after receipt of the determination made in Step 1. Receipt will be deemed to have occurred on the day

> it was presented orally or hand delivered in writing to the grievant or to his union representative or if mailed, on the date received by the grievant at his home address. A determination will be made within five (5) business days after being presented with the grievance appeal. If the grievance is not satisfactorily settled, then the grievance may be processed as defined in Article VIII "System Board of Adjustment."

Article VI of the CBA states that the Carrier shall not discharge or impose disciplinary action against any employee except for just cause. The CBA also states that the Carrier shall have the right to establish reasonable rules of conduct of employees not inconsistent with the agreement.

In February 2003, the Carrier issued a revised Skycap Policy and Procedures Manual (Policy Manual) which had provisions on the following:

> Uniform and Dress Code
> Attendance
> Scheduling
> Shift Swaps
> Breaks
> Food, Drinks, and Reading Material at Curbside
> Cell Phones and Smoking
> Wheelchair Assignments
> Checking Baggage
> Solicitation of Tips
> Counting Tips
> Disciplinary Procedures

The disciplinary procedures outlined in the Policy Manual state:

> Unless otherwise stated in this policy manual, the procedures for disciplinary action will be as follows:

1. Skycaps will be verbally warned for the first time for any violation of policies and procedures.

2. A written report will be made for the skycap and must be signed by him/her. There will be two (2) written warnings.

3. Skycaps will be suspended and asked to turn in their ID badges until they return to work.

4. Skycap will be terminated.

Carlos Yedo, Vice President of Operations for United Safeguard, testified that he had been a full-time employee with United Safeguard since August 2001 when he was hired as Assistant Manager. Yedo was promoted to General Manager in August 2002 and became the Vice President of Operations in late 2003. He reports to Evelio Yedo, the President of United Safeguard and AVGR. Carlos Yedo stated that the Policy Manual was distributed to all employees at a meeting held in February 2003.

B. Termination of Meite and Contreras

The Carrier states that it did not become aware of TWU's organizing campaign at United Safeguard until it received notice of the application from the NMB on November 14, 2003. No evidence was submitted in support of District 6's contention that Meite and Contreras engaged in union activities.

1. Yamil Meite

Yamil Meite was employed as a Skycap with the Carrier for over two years. On or about October 8, 2003, Meite was terminated by the Carrier for "engaging in horseplay" at work. In deciding to terminate Meite's employment, the Carrier states that it considered his extensive disciplinary record. The Carrier submitted documentation that, from February 2002 until his dismissal in October 2003, Meite committed numerous violations of the Carrier's policies, including: at least three time

and attendance violations; one violation of having an expired airport identification badge; three violations of the Carrier's uniform policy, and; two missed wheelchair assignments. In addition, on July 2, 2002, Meite received a written warning regarding "2 unexcused absences due to not calling." In December 2002, Meite was suspended for three days for complaining to a passenger about the tip he received and then handling the passenger's bag roughly. The Employee Disciplinary Report for the December 2002 suspension, which Meite signed, states, "We gave him final warning. Any more discipline problems will be cause for dismissal."

There is no record that District 6 filed any grievances on Meite's behalf for any of the disciplinary incidents prior to his October 2003 termination.

According to Meite, on October 6, 2003, at approximately 5 p.m., he was standing at curbside after his shift waiting for a bus to take him to the employee parking lot. Another Skycap, Jonathan Folmar, tossed a ball to Meite which Meite tossed back to Folmar. Meite said that he told Folmar that he had to go because the bus was coming. Folmar tossed the ball to Meite who missed the ball. The ball hit a USAir agent in the neck. This agent lodged a complaint with United Safeguard. United Safeguard looked into the incident and terminated Meite when he returned to work two days later.

Meite states that on October 8, 2003, he met with his supervisors and was informed that he was being terminated. Meite states that he asked for a union representative to be present and his request was denied. On October 17, 2003, District 6 filed a grievance on Meite's behalf alleging that his termination was not for just cause. The Carrier maintains that the grievance is untimely under the CBA.

In a declaration submitted to the Board, Yedo denied refusing to submit Meite's grievance to arbitration in order to intimidate employees or interfere with the union election. Yedo further stated:

> [Meite failed] to attach to [his] declaration the grievances [he] claims that District 6 filed on [his] behalf; thus, it is difficult to respond to this allegation with specificity. However, my recollection is that their grievances were untimely under the collective bargaining agreement between District 6 and United Safeguard ("CBA"). . . . Under Article VI[5] of the CBA, grievances must be submitted within 5 business days of the employer's action giving rise to the grievance, or they are deemed waived. *See* Art. VI section 2 . . . . It is not clear from his affidavit when Mr. Meite claims that District 6 submitted a grievance on his behalf. However, Meite was also terminated on or about October 8, 2003, and my recollection is that a grievance was submitted on his behalf at the same time as Contreras' grievance, which also means it is untimely.

As of the date of this decision, this grievance has not been submitted to the System Board of Adjustment provided for by Article VIII of the CBA between District 6 and the Carrier.

2. Luis Contreras

Luis Contreras was employed by the Carrier for over one year. He was terminated on October 10, 2003 by the Carrier for his involvement in the same incident of "horseplay" for which Meite was terminated. Contreras states that on October 6, 2003, at approximately 12 p.m., Skycap Folmar asked Contreras to toss him a tennis ball which was on the podium. Contreras did. A supervisor observed this and told Contreras and Folmar not to toss the ball because someone could get hurt. Contreras states that at or around 5 p.m. that same day, Folmar was bouncing the ball and hit a USAir agent. Three days later Contreras states that he was called into his supervisor's office and was told he was being terminated for the

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[5] The grievance procedures are actually outlined in Article VII of the CBA.

ball throwing incident. Contreras states that he asked for a shop steward at this meeting and was told that "this is not union business, this is our business." At the meeting, Contreras stated that he had no involvement in the USAir agent getting hit and requested that the Carrier investigate further. The Carrier agreed to do so. When Contreras called his supervisor to find out the outcome of the investigation he was told to contact General Manager Carlos Yedo. According to Contreras, Yedo told him that he had decided to terminate him. Contreras states he told Yedo that the Carrier needed to notify the union and Yedo stated, "[expletive] the Union." Yedo denies making this statement.

Yedo states that he decided to terminate Contreras because of his extensive disciplinary record. The Carrier submitted documentation of at least nine incidents of violations of the Carrier's time and attendance policy in the year and a half that Contreras worked there. In addition, he received two written warnings: one for violations of the time and attendance policy, and one for using his personal cell phone while on duty. In April 2003, he was suspended for one week for falsifying his attendance record.

On October 17, 2003, District 6 filed a grievance on Contreras' behalf alleging that his termination was not for just cause. The Carrier maintains that the grievance is untimely under the CBA.

In a declaration submitted to the Board, Yedo denied refusing to submit Contreras' grievance to arbitration in order to intimidate employees or interfere with the union election. Yedo further stated:

> [Contreras failed] to attach to [his] declaration the grievances [he] claims that District 6 filed on [his] behalf; thus, it is difficult to respond to this allegation with specificity. However, my recollection is that their grievances were untimely under the collective bargaining agreement between District 6 and United Safeguard ("CBA"). . . . Under Article VI of the CBA, grievances must be

> submitted within 5 business days of the employer's action giving rise to the grievance, or they are deemed waived. See Art. VI section 2. Mr. Contreras was terminated on or about October 8, 2003. By his own admission, District 6 did not submit a grievance on Contreras' behalf until October 17, more than 5 business days later.

As of the date of this decision, this grievance has not been submitted to the System Board of Adjustment provided for by Article VIII of the CBA between District 6 and the Carrier.

3. Jonathan Folmar

Skycap Jonathan Folmar was suspended for two weeks for his involvement in the October 2003 ball throwing incident. According to the Employee Discipline Report documenting his suspension, this was Folmar's third offense in his over two years of employment with the Carrier. Yedo stated that he did not terminate Folmar because he did not have an extensive disciplinary record. There is no record that Folmar's discipline was grieved by District 6.

4. Other Terminations in 2003

The Carrier submitted evidence that in 2003, it terminated six employees in addition to Meite and Contreras for the following infractions: job abandonment; revocation of access badge because of failure to pass FBI criminal history check; repeated violation of Carrier time and attendance policies (employee had signed a last chance agreement); failure to follow instructions and loss of Carrier property (employee had signed a last chance agreement), and; checking in passengers for an airline the carrier did not service (progressive discipline). Two of these terminations were for violations of a "last chance agreement" negotiated by the District 6. In one case the "last chance agreement" was negotiated by District 6 on January 6, 2003. The other agreement was negotiated by District 6 on November 4, 2003, approximately one month after the terminations of Meite and Contreras and approximately 10

days prior to the Carrier's notification that an application had been filed in this case.

C. December 2003 "Mandatory" Employee Meeting

1. "Mandatory" Meeting

In December 2003, approximately two to three weeks prior to the tally, the Carrier held a meeting for all skycaps. The meeting took place at approximately 8 p.m. in a meeting room at the Miami International Airport Hotel. Skycaps were notified of the meeting by a notice posted where they sign-in at the beginning of their shifts and in person by their supervisors. Skycaps were told that the meeting was mandatory. Yedo stated that he termed the meeting "mandatory" to encourage attendance. At the December meeting, there was a sign-in sheet. The Carrier was unable to produce a copy of the sign-in sheet.

According to the witness interviews, although the December meeting was termed as "mandatory", not all of the skycaps attended the meeting. Testimony regarding the number of skycaps who attended the meeting varied. One skycap stated, "[W]e were told that if we did not attend the meeting we would be suspended for 1 week . . . approximately everyone who worked for United Safeguard attended this meeting." Another skycap stated that he was told the meeting was mandatory but did not attend the meeting. A third skycap stated, "approximately 60 people attended the meeting. We had to sign in. I do not know of anyone who was disciplined for not attending the meeting."

Willie Turner Jr., Supervisor, stated, "about 60 people attended the meeting. No one was disciplined for not attending the meeting. We just use mandatory to try and get a good turn-out otherwise we would not get a turn-out at all." Paul Gold, Manager of Skycap Operations, stated that approximately 80 employees attended and that none of the employees who did not attend were disciplined. Mario Ruz, Assistant Manager, stated that "about 60 people attended the meeting." Ruz also

stated, "employees were not paid to attend the meeting. No one was disciplined for not attending the meeting."

Based upon the above testimony, the Board concludes that approximately 20-40 percent of the eligible voters did not attend the December 2003 meeting. Furthermore, there is no evidence that any of the skycaps who did not attend the meeting were disciplined. Nor was there evidence that Skycaps were paid to attend the meeting.

2. Frequency of Employee Meetings

Carlos Yedo stated that he had been with the Carrier for over two years and that he believed the Carrier had meetings like the December 2003 meeting approximately once per year. The last such meeting the Carrier held was in February 2003 to distribute the revised Policy Manual.

Again, witness testimony regarding the frequency of the employee meetings differed. One skycap testified, "we had had meetings previously maybe about 10 in the [last] 8 years. The meetings were not regularly scheduled but held as issues arose." Another employee stated that [the December 2003 meeting] was approximately the third meeting in 10 years. A third skycap testified, "I have been to meetings where Evelio Yedo has addressed all employees. This was years ago. We talked about how the Company was doing."

Assistant Manager Mario Ruz testified that he believed there was a company-wide meeting in 2000 regarding a class action lawsuit involving the skycaps against the Carrier. Paul Gold testified that he had been employed with United Safeguard for approximately 10 years. Gold stated that the Carrier had held other employee meetings. Prior to the 2003 meeting, he stated, "the last one I believe was 2000 – around Christmas."

The Board concludes that the Carrier had held prior employee meetings. These meetings occurred infrequently and were scheduled on an ad hoc basis rather than annually. Although the record shows that in the approximately two years

that Carlos Yedo was employed by the Carrier, he held two meetings, this does not establish that the December 2003 meeting was an "annual meeting."

3. Purpose of the Meeting

Carlos Yedo stated that 2003 had been a good year. He stated the following about the purpose of the December 2003 meeting:

> To me it was an end of year thing. Christmas was coming and I wanted to do something for the skycaps. Every year we have something in the E office - the guards' office - the skycaps can come. But this year I wanted to do something special for the skycaps. So I had the meeting and the raffle. . . . Both the February and the December meeting were similar in format.

Carlos Yedo was the primary speaker at the meeting. Yedo stated that the purpose of the meeting was "to go over the year" and go over certain Carrier policies. Yedo stated that as a result of the new policies implemented in February, the Carrier had received several new contracts. Yedo stated he was pleased with the progress the Carrier was making and he wanted to communicate this to the skycaps. Yedo stated he spoke about election procedures and the relevant dates in the upcoming election. Yedo testified that he "wanted it to be clear that they could choose either of the unions or they could choose not to vote." The meeting lasted approximately one hour.

Two of the employees who attended the meeting testified that Yedo made anti-union remarks during the meeting. One skycap testified that Yedo only talked about the election at the meeting. This skycap testified that during the meeting Yedo said: "We were a family company." "Why pay union dues?" "Save yourself $10."

Another skycap stated that Yedo said: "a union was not necessary; he [Carlos Yedo] was a fair person; he [Carlos Yedo] knew in the past under his father's management things weren't as 'kosher', but he was different; he [Carlos Yedo] had an open door policy, and; 'the old union did not do anything for you.'" This skycap also stated, "approximately half of the meeting was spent discussing general practices and one half was spent discussing the union."

Ruz, Gold, and Turner all stated that Carrier policies were discussed at the meeting. Turner testified that Yedo:

> [S]poke about grooming. [He] said the airlines were watching us so he warned us to be on our best behavior so we can get those contracts. He said his door was open. He was listening if they had problems or suggestions. He was willing to work out any problems with regard to wheelchair rotations, etc. He said they could come to him. He let everyone know what their voting rights were. If you want to vote for the union then you can vote. If not, then you don't have to vote.

Ruz testified that Yedo:

> [W]anted to thank employees for their hard work. He went over certain policies regarding communication with leads and wheelchair policies . . . . He also spoke about the election. He said the union election was coming up; Yedo told them how the vote process was. If you want TWU, select TWU. If you want District 6, then select District 6. If you don't want a union then don't vote.

The Board concludes that the election was discussed at the December 2003 meeting. All of the employees interviewed who attended the meeting, testified that the election was discussed. However, there is insufficient evidence that the election was the primary purpose of the meeting.

4. Door Prizes

At the end of the meeting, door prizes were handed to meeting attendees. The prizes were: several Carrier ballcaps; a $50 gift certificate to Best Buy; and, a television set. Yedo states that the Carrier had held such raffles in the past, usually around the holidays and that the purpose of the prizes was to show appreciation to employees. Yedo testified:

> I wanted this to be a surprise. I didn't want it to be we are going to have a raffle so come to the meeting. I had never done this before. At Christmas time we had done this before. We got away from it in previous years when we were doing poorly. I am not sure when the last skycap raffle was. I wanted to re-implement this to reward employees and show them that the company recognizes their effort and improvement and appreciates it.

Gold testified that the raffle was "to bolster pride in the Company. It was like a Christmas bonus . . . . I recall that the Company did this at least once before. Probably more."

Turner stated:

> I think the reason for the meeting was to restore old Company values. When we had more contracts we had more money and we had an annual raffle. This was around 1995-1998. These were Christmas-time raffles. The prizes were electronics. I think a VCR and a stereo.

Ruz stated:

> The raffle was for Christmas. In previous years-2000 and before, United Safeguard would have like a buffet/party in December. Each division would also be given about three electronic items (TV,

> stereo, etc.) to raffle off among the division. Then there was the [class-action] lawsuit and they stopped the raffle. In 2003, they did the raffle again.

None of the eligible voters interviewed by the Investigator could remember the Carrier ever holding a raffle before. However, several long-time Carrier employees gave credible testimony that the Carrier had raffled off electronic items to employees in the past. The Board concludes that the Carrier had a past practice of raffling electronic items to employees.

D. The Carrier's Post Election Conduct

1. Abraham Melendez

Abraham Melendez was a District 6 shop steward who was terminated, by the Carrier on March 5, 2004. Prior to his termination Melendez worked for the Carrier for 10 years. Melendez stated that during the election period management officials were "very friendly." Melendez stated that in October 2003, he attended a grievance meeting with another shop steward and management officials. A main topic of this meeting was the termination of Meite and Contreras. According to Melendez, the owner of United Safeguard, Evelio Yedo, said, "you are a good worker Melendez; you don't need a union. Meite and Contreras are trouble makers. They don't want to work. People like that need a union."

Melendez states that after the election, he began having problems with his new supervisor. On February 27, 2004, the Carrier issued Melendez a written warning for failing to complete a wheelchair assignment. Melendez testified that he refused to sign the warning and told his supervisor "do what you want, I won't sign it." Melendez testified that he refused to sign the reprimand because "according to the rules he was supposed to give me a verbal warning before writing me up." Melendez states that two hours later his supervisor spoke with him and stated that Carlos Yedo told the supervisor to suspend Melendez for one week if Melendez did not sign the written reprimand. Melendez testified that he told his supervisor, "do

what you want. I won't sign. I did not do anything wrong." Melendez states that his supervisor suspended him and told him not to come back to work until March 10, 2004. Pursuant to its discipline policy, the Carrier asked Melendez to surrender his identification badge while he was on suspension. Melendez refused, stating that the badge was not Carrier property, it belonged to the Airport Authority and left the airport. When Melendez returned from suspension he was terminated for failing to surrender his identification badge.

Melendez testified as follows:

> I reported to work on March 5. At the end of my shift I was called into Yedo's office. He asked me why didn't I give Malik my badge on February 27, 2004, when he asked for it. I said because it did not belong to him, it belonged to Dade County. Yedo said he was terminating me effective immediately. He asked for my badge. I gave it to him. I said 'you are firing me because of the union.' He replied 'whatever.'
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> Subsequently, I applied for unemployment insurance. The Company opposed this saying I had been terminated for cause. The state denied my benefits. I appealed. At my appeal hearing, the Company presented evidence of two other discipline infractions for me: one in January or February of 2004 for not following shift swap procedures correctly and another for violation of 'no call/ no show' policy. These infractions were not brought to my attention at that time. I never received any discipline other than these instances in my 10 years with the company. I believe I was terminated for my union involvement and the events of February 2004 were just an excuse to fire me.

When interviewed by the Investigator, Yedo testified that his decision to terminate Melendez was based on a lengthy disciplinary record. Yedo testified further that:

> Melendez was identified to me as a shop steward at some point - maybe the end of 2002. District 6 sent me a letter identifying shop stewards. The only time I interacted with him as a shop steward was the meeting I had with him and others in 2003. . . .
>
> In March 2004, Melendez missed a wheelchair flight. Because this was not his first offense he was suspended. At his suspension meeting his supervisor, Malik Adam, asked for his i.d., per company policy. Melendez refused to give up his i.d. and walked out. Malik let me know that he had repeatedly asked for the i.d. and they had words and Melendez left. I reviewed Melendez's file. I saw that he had been suspended before and had other discipline. Based upon this I decided to terminate Melendez when he returned from suspension for failing to turn in his i.d. prior to going out on suspension as directed by his supervisor. . . .
>
> All of the material I relied upon in my decision to terminate him I brought with me to the recent [unemployment insurance] hearing [concerning Melendez]. Melendez reviewed these documents. He disputed facts within the [discipline reports]. Melendez did not state that the documents were created after his termination. His unemployment claim was denied because he was terminated due to misconduct related to work.

The Carrier submitted the following documents to the Board concerning Melendez's disciplinary record:

> 1. Employee Disciplinary Report (verbal warning) dated January 4, 2004 for failing to follow company procedures for "shift swap." The report states Melendez "refused to sign."

2. Employee Disciplinary Report (written warning) dated January 28, 2004, for unexcused absence- "no call/ no show." The report states Melendez "refused sign." [sic]

3. Employee Disciplinary Report (seven day suspension) dated February 27, 2004, for failing to meet a wheelchair assignment. The report states Melendez "refuse to sign." [sic]

4. Employee Disciplinary Report (dismissal) dated February 27, 2004, for failing to follow company procedures regarding surrendering his airport i.d. badge prior to serving his suspension. Report says that "Melendez will be terminated upon his return" from suspension. The report states Melendez "refused to sign."

5. Facsimile transmission from District 6 to the Carrier grieving Melendez's suspension dated March 3, 2004.

6. Letter dated March 5, 2004, from the Carrier to District 6 stating that United Safeguard cannot process the grievance because of the "decertification of District 6 as the representative of the skycaps" on January 12, 2004.

7. Decision of Appeals Referee (Decision) dated April 30, 2004, denying Melendez's appeal of the denial of his unemployment insurance claim. The Decision states:

> The hearing record shows that the claimant was discharged on March 5, 2004, when the general manager informed the claimant that he had been discharged for failure to turn in his ID badge while on suspension. The employer has the right to establish policies and procedures regarding ID badges. The employee has a duty to adhere to such policies and procedures when

> made aware of them. The claimant was made aware of the policies and procedures on February 12, 2004. The claimant's action on February 27, 2004, of not turning in his ID badge while on suspension demonstrates a material breach of his duties and obligations to the employer. Accordingly, it is held that the claimant was discharged for misconduct connected with work.

2. Edward Brown

Edward Brown worked for United Safeguard from 1994 until September 2003 when he went out for abdominal surgery. Until he left the Carrier in 2003, Brown states that he was an active union supporter and attended all of the meetings District 6 held. When Brown tried to return to work, he was told he had to produce a doctor's note which Brown did. District 6 states that the Carrier refused to reinstate Brown because of his union involvement. The Carrier states that it refused to reinstate him because his doctor has not said Brown can return to work without restriction.

The Carrier provided a copy of the Work Status Report completed by Brown's doctor which states that Brown is "able to work with the following restrictions --- cannot lift more than 75 lbs."

DISCUSSION

A. Carrier's Conduct During the Election Period

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. *Pinnacle Airlines Corp.,* 30 NMB 186 (2003); *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., Inc.*, 29 NMB 55 (2001); *US Airways*, 26 NMB 323

(1999); *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998); *Evergreen Int'l Airlines*, 20 NMB 675 (1993); *America West Airlines, Inc.*, 17 NMB 79 (1990).

"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) (finding that although supervisors may have been involved in certain incidents favoring one union over another during an organizing campaign, the conduct was insufficient to warrant any remedial action by the Board); *See also US Air, Inc.*, 18 NMB 290 (1991) (finding that the carrier's disparate enforcement of its policy on access to employee break rooms is an insufficient basis for a finding of interference).

B. Termination of Meite and Conteras

The issue before the Board is whether laboratory conditions have been tainted, not whether the Carrier's discharge of employees was unlawful under the Act or whether the terminations were for just cause. The Board, therefore, considers whether the actions taken against Meite and/or Conteras impaired employee freedom of choice.

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.

In examining the nexus between discipline and employee union involvement, the Board has considered the following factors: the timing of the discipline; the disparity of treatment between union supporters and other employees committing similar infractions; and, the extent to which a terminated or disciplined employee's union involvement is known to other

employees and the Carrier. *Pinnacle Airlines Corporation,* 30 NMB 186, 217-220 (2003). In *Pinnacle*, the Board found a nexus between two employees' union involvement and the employees' termination. One employee was well known as a union organizer who was disciplined approximately four to six weeks after laboratory conditions attached and was terminated for distributing union literature. The other employee was terminated for disruptive behavior in the workplace after making pro-union comments in a staff meeting.

United Safeguard's discipline of Meite and Contreras stands in stark contrast to the terminated *Pinnacle* employees. United Safeguard has a policy of progressive discipline. Both Contreras and Meite had lengthy discipline records. The record produced shows that the discipline they received is consistent with Carrier policy and practice. There is no evidence of Meite's and Contreras' union activity. Their terminations took place well before the Carrier knew of the TWU's organizing so there is no evidence that their terminations were motivated by anti-union animus. The Carrier has stated that it is challenging the timeliness of the grievance. Again, there is no evidence that this challenge is a pretext motivated by anti-union animus. The timeliness of the grievances is an issue to be decided by the arbitrator if and when the cases go before a System Board of Adjustment. The Board finds that the dismissals of Meite and Contreras did not taint laboratory conditions.

C. December 2003 Mandatory Employee Meeting

In *Mercy Air Serv., Inc.*, 29 NMB 55, 73 (2001), the Board cited its longstanding 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 employees in their choice of representative.

(Citations omitted).

Carrier meetings with employees are not improper unless they are mandatory, coercive, or significantly increase in frequency during the election period. *Mercy Air Serv., above; LSG Lufthansa Serv.*, 27 NMB 18 (1999).

For example, in *Delta Air Lines, Inc.,* 27 NMB 484 (2000), the Board found that laboratory conditions in an election involving Fleet Service Employees were tainted in part by the carrier's conduct of numerous, mandatory, small group and one-on-one sessions to promote its message regarding the election. The Board stated:

> The Carrier presented credible evidence that its officials attempted to coordinate a campaign which communicated Delta's views without interfering with employee free choice. The investigation established, however, that supervisors and managers at various stations went further than necessary, crossing the line between permissible and impermissible activity. . . . There is substantial record evidence that across the system Delta supervisors used the daily mandatory briefings to discuss Delta's point of view on the election. . . .

Id. at 507.

In *America West Airlines, Inc.,* 17 NMB 79 (1990), the Board found the timing of a profit-sharing party approximately two weeks prior to the ballot count and the presence of carrier officials at the party tainted laboratory conditions. The Board noted that the checks were distributed in 1985, but that no checks were distributed in 1986 or 1987. The carrier then distributed checks to eligible employees in 1988, at a party two weeks prior to the ballot count. *Id.* at 88.

To determine whether United Safeguard's December 2003 meeting crossed the line from permissible to impermissible activity, the Board looks to the Supreme Court's definition of "influence" as stated in *Texas & New Orleans R.R. Co. v. Bro. of Ry. and Steamship Clerks*, 281 U.S. 548, 568 (1930). The Court stated:

> The meaning of the word 'influence' [in Section 2, Ninth] may be gathered from the context . . . . The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.'

It is undisputed that the Carrier discussed the upcoming election. Neither organization alleges that the Carrier misrepresented the Board's processes. However, the organizations argue that the Carrier made additional statements at the meeting that a union was unnecessary. The organizations argue that these additional statements and that the distribution of prizes at the meeting were coercive and tainted laboratory conditions. The Carrier states that it had a tradition of handing out prizes at the holidays and that the meeting's primary purpose was to discuss the Carrier policy and the state of the business.

The record shows that the Carrier had a history of holding infrequent ad hoc meetings for the purpose of discussing policies and current issues affecting the Carrier. These meetings did not take place on a set annual schedule. However, on average, these meetings took place once per year. In this case, while the December 2003 meeting was termed as "mandatory," a substantial percentage of the skycaps did not attend the meeting and no action was taken against these skycaps. Only one meeting was held and it lasted approximately one hour.

It is undisputed that at the meeting approximately four door prizes were given. The prizes were a television, a $50 gift certificate, and two United Safeguard caps. Several long-time employees stated that the Carrier had a history of handing out prizes or holding a raffle around the holidays, but had not done so for several years. Other long-time employees state that they could not recall the Carrier ever holding a raffle. While the Board concludes that the Carrier had, in the past, raffled similar prizes among employees, this practice had not taken place in a number of years. The revival of the raffle practice one month prior to the tally is troubling to the Board. Nonetheless, there is no evidence that the Carrier "coerced" or enticed skycaps to attend the December 2003 meeting with the prizes. In fact, Yedo testified that he did not publicize the door prizes prior to the meeting. None of the employees interviewed knew about the door prizes prior to the meeting. Most of the employees who attended did not receive a prize; only two prizes of value were given out.

The distribution of prizes at the meeting is, at most, evidence of an "isolated incident" of potentially questionable Carrier conduct and is 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). Yedo discussed the election procedures in this meeting. There was no misrepresentation of Board procedures. In addition, Yedo may have made statements emphasizing his "open door policy" or questioning the value of union representation. These statements, in and of themselves, are not enough to taint laboratory conditions.

As noted above, the Board looks at the totality of the circumstances when determining whether employees' freedom of choice has been impaired. Unlike the conduct in *America West, above*, where a benefit was conferred to a large number of employees, here only two employees received prizes. The record does not establish that the December 2003 meeting rose to the Supreme Court's definition of influence, i.e. "the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization."

Texas & New Orleans R.R. Co. v. Bro. of Ry. and Steamship Clerks, 281 U.S. 548, 568 (1930). Therefore, the Board finds that the meeting did not taint laboratory conditions.

D. The Carrier's Post Election Conduct

In *Petroleum Helicopters, Inc.*, 26 NMB 13 (1998), the Board addressed the question of whether laboratory conditions continued through its investigation of allegations of election interference. The Board concluded that the question must be answered affirmatively stating:

> [T]he purpose of requiring that laboratory conditions be maintained is to permit an election to take place free from interference, influence, or coercion. In the event that impermissible interference, influence, or coercion is alleged, a new election may be necessary to determine the choice of employees. That election too must be free from interference, influence, or coercion. Therefore, the laboratory conditions must extend through that election and any subsequent investigation.

Id. at 35. *See also Aeormexico,* 28 NMB 307, 340-342 (2001) (finding one-on-one post-election interviews between employees and carrier counsel and carrier officials are inherently coercive and interfered with the Board's investigation).

Since laboratory conditions extend through the election and the subsequent Board investigation, the Board considered the allegations raised concerning Melendez and Brown. As with cases of pre-election discipline, the issue before the Board is whether laboratory conditions have been tainted, not whether the Carrier's discharge of employees was unlawful under the Act. The Board, therefore, considers whether there is a nexus between the actions taken against Melendez and/or Brown and each employee's union involvement. The Board looks to the factors outlined in *Pinnacle Airlines Corp.,* 30 NMB 186, 217-220 (2003).

Melendez was a shop steward. According to the documentation submitted, most of Melendez's discipline took place after the tally. Therefore, it could not have affected the outcome of the election. However, the Board examines Melendez's discipline for its effect on laboratory conditions.

The evidence shows that Melendez was suspended for missing a wheelchair assignment and that he was terminated for refusing to hand in his airport security badge prior to going out on suspension. Melendez stated that prior to the tally he had no problems with the Carrier as a result of his union involvement. Melendez also claims that he had no disciplinary incidents prior to his suspension and that he did not miss any wheelchair assignment. Even if he had missed the assignment, Melendez claims that the appropriate penalty for the missed assignment would have been a written warning. Melendez states that the Carrier's termination of him for failing to relinquish his badge to the Carrier prior to going out on suspension was a pretext to fire him for his union involvement.

The Carrier submitted written documentation that Melendez had a history of disciplinary infractions. The Board is troubled by the fact that a majority of Melendez's disciplinary record dates back to just after the tally. However, the Carrier submitted credible evidence that Melendez's termination was consistent with its policy and practice.

Yedo states Melendez was suspended for missing a wheelchair assignment because it was not Melendez's first infraction. This policy of progressive discipline is set forth in the Policy Manual and is supported by the documentation of discipline submitted for Melendez and other employees terminated by the Carrier within a one-year period. The Carrier states that it is its policy to ask for employees' airport identification badges upon termination and suspension for security reasons and because it faces fines and other legal action for lost or improperly used badges. In support of this, the Carrier submitted its Policy Manual promulgating this provision. In addition, while Melendez was a shop steward, the only evidence that he was actively involved in the union was the October 2003 meeting he participated in along with another

shop steward. His initial discipline took place over three months later and his termination took place approximately five months after the meeting. Moreover, there is no evidence that the Carrier took any action against any of the other Shop Stewards including the other steward who attended the October meeting.

The Board finds an insufficient nexus between Melendez's union involvement and his termination for refusing to relinquish his badge to the Carrier. The events which Melendez was terminated for took place approximately two months after the election, and approximately five months after Melendez's last known union activity. There is no discernable relationship between Melendez's union activity and his termination. The Carrier supported its decision to terminate Melendez with evidence of prior discipline, promulgated policies of progressive discipline and of confiscation of employee identification badges for suspended employees, and documentation of similar discipline among similarly situated employees. The timing of Melendez's termination further belies any nexus between his union involvement and his termination. When considering the totality of the circumstances, the Board concludes that Melendez's termination did not affect the outcome of the election and did not taint laboratory conditions.

Edward Brown was an active member of District 6. In September 2003, Brown took a medical leave of absence and as of May 2004, Brown had not returned to work at the Carrier. Brown has not been terminated. The Carrier submitted evidence that it has not allowed him to return to work because he has not submitted documentation stating that he can return to work without limitations. There is insufficient evidence that the Carrier is refusing to allow Brown to return to work because of his support of District 6.

CONCLUSION

The Board has considered the totality of the circumstances as established through its investigation. Although troubled by the re-establishment of the raffle weeks before the tally, the Board concludes that this is an isolated

incident. Similarly, the discipline and discharge of a union steward after a tally is troubling. However, the Board is unable to conclude that these actions affected the outcome of the election, or that the discipline was connected to his union activities.

The Board finds that the laboratory conditions required for a fair election were not tainted. This conclusion is based on the totality of the circumstances. Therefore, as there is no further basis to proceed, the Board closes its file in this matter.

By direction of the NATIONAL MEDIATION BOARD.

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