



**NATIONAL MEDIATION BOARD**  
WASHINGTON, DC 20572

(202) 692-5000

In the Matter of the  
Application of the

**BROTHERHOOD OF  
LOCOMOTIVE ENGINEERS AND  
TRAINMEN**

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

involving employees of

**STILLWATER CENTRAL  
RAILROAD, INC.**

33 NMB No. 24

CASE NO. R-7050

FINDINGS UPON  
INVESTIGATION --  
ORDER

March 15, 2006

This determination resolves election interference allegations filed by the Brotherhood of Locomotive Engineers and Trainmen (BLET or Organization) involving employees of Stillwater Central Railroad, Inc. (Stillwater or Carrier). For the reasons below, the National Mediation Board (NMB or Board) finds that the laboratory conditions were tainted and orders a re-run election by Telephone Electronic Voting (TEV). The BLET's request for a *Laker* ballot is denied.

PROCEDURAL BACKGROUND

On June 23, 2005, the BLET filed an application with the Board pursuant to the Railway Labor Act<sup>1</sup> (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a representation dispute involving the Train and Engine Service Employees of Stillwater. At the time the application was received, these employees were unrepresented.

<sup>1</sup> 45 U.S.C § 151, *et seq.*

The Board assigned Cristina A. Bonaca to investigate. On July 7, 2005, the Board found that a dispute existed and authorized a Telephone Electronic Voting (TEV) election. Voting Instructions were mailed on July 27, 2005, and the tally was conducted on August 17, 2005. The results of the tally were as follows: of 20 eligible voters, 9 cast valid votes for representation. This was less than a majority required for Board Certification. On August 18, 2005, the Board dismissed the BLET's application. *Stillwater Central Railroad, Inc.*, 32 NMB 210 (2005).

On August 26, 2005, the BLET filed charges of election interference pursuant to the Board's Representation Manual (Manual) Section 17.0. On September 14, 2005, the Carrier responded, denying the BLET's allegations. On September 20, 2005, the Board found that the BLET's allegations stated a *prima facie* case that the laboratory conditions were tainted and that the Board would conduct further investigation. The Board established a schedule for further filings, and accordingly, the BLET filed additional responses on October 7 and 28, 2005, and the Carrier filed an additional response on October 21, 2005. Both participants submitted Affidavits, Verified Statements, and other documentary evidence in support of their positions.

During December 2005, phone and in-person interviews in Oklahoma City were conducted by Investigator Bonaca and Investigator Eileen Hennessey with management officials, former employees, and randomly selected employees. This determination is based upon the entire record in the case including submissions of the participants as well as the Board's subsequent investigation.

#### ISSUES

1. When did the laboratory conditions the Board requires for a fair election attach?
2. Were the laboratory conditions tainted? If so, what is the appropriate Board response?

CONTENTIONSBLET

The BLET contends that during the election period, Stillwater engaged in a “systematic and pervasive campaign aimed at interfering with, influencing and coercing its Train and Engine Service Employees in their right to organize and select the bargaining representative of their choice under the Act.” The Organization argues that this “campaign” of “several specific and egregious acts” tainted the laboratory conditions essential for a fair representation election.

The Organization contends that during the laboratory period, which it argues attached in late May 2005, Stillwater altered a number of policies as a result of a mandatory meeting where Carrier management asked employees what issues were causing them to consider union representation. According to the BLET, shortly after the meeting, the Carrier distributed a summary of modified policies which: 1) guaranteed employees hired beyond 90 days the right to a formal investigation prior to discipline; 2) guaranteed all operating employees the equivalent of 40 hours of work a week; 3) established that jobs would be posted for five days in a public area; and 4) established a seniority roster and made seniority the basis of scheduling assignments.

Further, the BLET argues that whether the policy changes were actually implemented during the laboratory conditions period is irrelevant, writing: “The promise or actual conferral of benefits is a distinction without a difference. Under either situation, employees are coerced and influenced in their choice of representative.” However, the BLET additionally asserts that some of the “promised” benefits were in fact provided during the laboratory period, including 40 hour guaranteed work weeks, job posting, access to purified and cool drinking water, and the removal of Trainmaster Brit Graber.

In addition, the Organization states that during the laboratory period the Carrier granted between 10-15 of the 20 Train and Engine Service Employees unscheduled pay raises, and that the Carrier failed to produce any evidence showing that the pay raises were planned before laboratory conditions

attached. Further, the BLET contends that Stillwater management interrogated employees and expressed anti-union opinions in both group and one-on-one meetings.

Finally, the BLET asserts that the Carrier's post-election interviews of 10 employees, including asking them to write statements describing whether they felt the Carrier's meetings or actions had been threatening or coercive, interfered with laboratory conditions which must be maintained through the conclusion of the Board's investigation.

Responding to the Carrier's submissions in this matter, the BLET comments: "[T]he Carrier does not deny that it made changes in working conditions during the laboratory conditions period, or that its officials engaged in one-on-one questioning of employees about their views and positions on organizing a union." Instead the Carrier, in the BLET's estimation, tries to argue that because no "major" benefit or policy changes were made and managers were "only expressing their personal views on having a union," that the laboratory conditions were not tainted. The BLET contends that the "totality of the circumstances" and Board precedent clearly demonstrate that the Carrier's actions tainted the laboratory conditions required for a free election.

The Organization supported its assertions through Declarations from three former Stillwater Train and Engine Service Employees: Richard Morton, Kris Puig, and Paul Lister; former employees who the BLET asserts were fired shortly after the election because of their support for the Organization. The BLET also provided a copy of what it characterizes as the modified Carrier policies distributed to employees, termed "SLWC Items of Adjustment for Policy."

The Organization argues that the Carrier's conduct was so egregious that the Board should order a new election using a *Laker* ballot.<sup>2</sup>

### Stillwater

The Carrier denies the BLET's allegations that it interfered in the election process. The Carrier asserts that the BLET has misrepresented the facts and "relied on the statement of a disgruntled former employee who has been terminated for insubordination." Further, Stillwater contends that nothing that occurred after the BLET began its organizing campaign was sufficient to taint the laboratory conditions. The Carrier argues that laboratory conditions did not attach until management received the Notice from the NMB on June 24, 2005, notifying them that the BLET had filed an application alleging a representation dispute.

Stillwater asserts that there were no mandatory one-on-one meetings with employees; rather there were meetings consisting of "communications between officials and employees . . . based on conveying factual information the company felt the employees needed in order to make fully informed decisions."

Further, the Carrier denies that it supplemented its employee handbook with various policy changes to address employee concerns raised during the May and June meetings. Rather, the document produced and distributed by the Carrier was "drafted to reflect discussions with employees at the May 31, meeting . . . and to get . . . input into whether the issues were accurately stated." The Carrier asserts that none of the policy changes have been implemented.

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<sup>2</sup> *Laker Airways Ltd.*, 8 NMB 236, 253, 258 (1981) (Laker's conduct was among "the most egregious violations of employee rights in memory" which required an "extraordinary" remedy; the Board ordered a rerun election with a ballot that contained a "Yes" or "No" vote as to the applicant organization with no space for write-ins, with the majority of the ballots cast determining the outcome of the election).

In regard to the Organization's contention that between 10-15 operating employees received pay raises during the laboratory period, Stillwater contends that the increases in pay were based on "objective and subjective performance criteria," and that no general wage increases were given to operating employees in 2005.

The Carrier supported its assertions through: Verified Statements (V.S.) from management officials; statements from eight Train and Engine Service Employees regarding meetings with the Carrier during the laboratory period; a chart of the wage histories for Stillwater's Train and Engine Service Employees; and wage increase forms.

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.

Stillwater is a common carrier by railroad as defined in 45 U.S.C. § 151, First.

II.

The BLET is a labor organization and/or representative 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 employers 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

The Board generally holds that laboratory conditions must be maintained from the date the carrier becomes aware of the organizing drive. *Pinnacle Airlines Corp.*, 30 NMB 186 (2003); *Mercy Air Serv., Inc.*, 29 NMB 55 (2001); *American Airlines, Inc.*, 26 NMB 412 (1999); *Key Airlines*, 16 NMB 296 (1989). Further, the Board has held that laboratory conditions must extend through the election and any subsequent investigation. *Aeromexico*, 28 NMB 309 (2001); *Petroleum Helicopters, Inc.*, 26 NMB 13 (1998).

Matthew W. Long, Stillwater General Manager for the Oklahoma City Yard (OCY), testified that in May 2005, he first heard that the BLET might try to organize the Train and Engine Service Employees at Stillwater from a former employee. Long further stated that in the days immediately following the BLET’s May 28, 2005 organizational meeting in Oklahoma City, he spoke with three employees confirming that the meeting in fact occurred. Long stated: “I was concerned about the meeting and recognized the employees might be upset about certain things . . . . I did not ask who was there and I did not ask how many were there.”

Another employee testified that shortly after the organizational meeting, Trainmaster Brit Graber<sup>3</sup> asked him whether he had attended the meeting and his thoughts on the union. Chief Operating Officer (COO) Patrick J. Cedeno testified that at the end of May 2005, Long told him that he had heard rumors that there was going to be a meeting with union representatives, and that Long verified the meeting had taken place with several employees. Cedeno testified: "I told Long that I wanted to get together with our folks because obviously there were issues going on that we weren't aware of." James R. Horner<sup>4</sup>, Director of Railroad Operations for Watco's Central Region, testified that in late May, Cedeno notified him about the BLET's organization meeting at the OCY.

On May 31, 2005, Cedeno, Horner, Long and Graber held meetings for all operating employees at Cyril and the OCY. Management conceded that it took the BLET's presence and employee attendance at the organizational meeting as a sign of employee dissatisfaction and wanted to understand why.

The investigation, including testimony and statements submitted by Stillwater management, establishes that the Carrier became aware of the BLET's organizing drive in late May 2005 and laboratory conditions attached at that time. *Pinnacle Airlines Corp., above; Mercy Air Serv., Inc., above.*

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<sup>3</sup> Brit Graber was the Trainmaster at the OCY until removed in June 2005. Carrier management point to Graber as the source of much employee discontent. One employee interviewed during the investigation testified that: "Brit Graber was the scapegoat for the company's problems." Another employee commented that management considered Graber the route of union organizing, because he helped contribute to employee dissatisfaction.

<sup>4</sup> Horner was working as General Manager of Stillwater until September 2005 when he was promoted to Director of Railroad Operations for Watco's Central Region.



## FINDINGS OF FACT

### I.

#### **General Background**

Stillwater is a short line railroad owned by parent corporation Watco Companies, Inc. (Watco). Watco owns 16 railroads and is headquartered in Pittsburg, Kansas. Dick Webb is Chairman of the Board, and his son Rick Webb is the Chief Executive Officer (CEO). Stillwater was formed in 1998 with lines running from Stillwater to Pawnee and from Oklahoma City to Sapula.<sup>5</sup> In 2001, Stillwater added the line running from Oklahoma City to Snyder and employed approximately 12 operating employees. In December of 2004, Stillwater took over the operation of an additional 15 miles of track in Oklahoma City, including the OCY, and increased the number of Train and Engine Service Employees from 12 to 20<sup>6</sup>.

### II.

#### **BLET Organizational Meeting**

Former employee Richard Morton testified that in early May 2005, he contacted the BLET about organizing the Train and Engine Service Employees at Stillwater. Morton stated that on Friday, May 27, 2005, Long called him on the phone. According to Morton, Long sounded frantic and was asking lots of questions but knew where and when the organizational meeting was going to occur. Morton stated: “When Matt was a Conductor . . . he seemed to think it was a good idea for me to contact the union . . . . [therefore] I was surprised that Matt was so upset and surprised . . . . I did not feel threatened by the phone call but it was obvious I could not remain anonymous.”

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<sup>5</sup> All cities mentioned are located in Oklahoma.

<sup>6</sup> The number of employees has changed since the BLET’s initial application was received in June 2005, because of terminations, resignations, and hiring.

As a result of Morton's call, the BLET organizers conducted a meeting with some of the Carrier's Train and Engine Service Employees at the Bricktown Central Plaza Hotel in Oklahoma City on Saturday, May 28, 2005. A number of employees attended the organizational meeting where the union's history and employee concerns were discussed. Authorization cards were also distributed and signed.

### III.

#### **Discharge of Richard Morton, Kris Puig and Paul Lister**

Richard Morton, Kris Puig and Paul Lister ceased working for Stillwater shortly after the election on August 17, 2005. Morton was terminated. Stillwater contends that Puig and Lister resigned; they contend they were terminated. Morton, Puig and Lister filed a Complaint in the U.S. District Court for the Western District of Oklahoma on January 26, 2006, Case No. CIU-06-88-F, alleging retaliatory discharge and seeking reinstatement, back pay, and compensatory and punitive damages.

Morton worked as an Engineer/Conductor for the Carrier for a year and a half and was terminated on August 19, 2005, two days after the ballot count. Puig worked as a Conductor from November 30, 2004 through August 25, 2005. Lister worked as a Conductor from March 2005 through August 30, 2005.

Both management officials and employees testified that it was widely known that Morton, Puig, and Lister were supporters of the BLET. Morton stated that "Lister was a very strong union supporter but tried to keep it quiet. Puig was very vocal and was definitely associated with the union." Long testified that, "Puig was clearly a union guy," and Horner stated, "Kris [Puig] was a pretty vocal union supporter." Cedeno stated: "Morton was a very strong union supporter of BLET . . . . Puig was supportive of the seniority system but he wasn't like Mr. Morton in terms of his support of the union."

In one of its submissions to the Board, Stillwater noted that it has no specific disciplinary procedures that must be followed before assessing discipline. Rather, Stillwater's

employees “are employees at will, who retain their positions as long as their supervisors are satisfied with their work or believe that with additional training they can improve.”

#### **A. Rick Morton**

Long testified that shortly after being promoted to General Manager, he began to document Morton’s performance problems including tardiness and absenteeism, and described Morton as an uncooperative and unproductive employee. Long testified that Morton was ultimately terminated for insubordinate conduct on August 19, 2005, following several months of performance problems. Cedeno testified that Morton had a number of performance problems, was observed to be working in a non-productive and inefficient way, and acted belligerently towards his supervisor when approached about these issues. Horner testified that it was his personal belief that Morton contacted the BLET, because he realized that he was about to the end of the road with the company’s willingness to tolerate his behavior and he believed that somehow the union could prevent him from being terminated.

On May 20, 2005, Long issued Morton a letter of reprimand which stated: “Towards end of shift, Rick became very angry. He [said] . . . he was ‘too angry to operate an engine.’ He came to me and said that he was going home sick.” The reason for reprimand was listed as “misconduct,” and the corrective action taken was listed as “counseled.”

In addition, the Carrier submitted an “anonymous” email sent by Morton on August 12, 2005, to CEO Webb after his termination where he accused Long and another employee of ruining the railroad and that “all hell is breaking loose . . . .” The Carrier characterized Morton’s email as “demonstrat[ing] the lack of respect he had for his supervisors . . . which ultimately led to his termination.”

Morton stated that during his last weeks with Stillwater, he was being “rode real hard” and was punished by working on Sundays, and getting fewer hours. Morton stated that Long kept changing his hours and making him work very long and hot shifts. Morton testified that Long, “would make me work on the days we were scheduled to have union organizing

meetings . . . . Long would change my work schedule so that the union organizing meeting couldn't happen."

Morton testified to the incident which led to his termination from Stillwater:

One day Kris [Puig] and I came back from a long shift and we 'died' once we arrived in the yard (meaning our FRA time ran out and we had worked our maximum number of hours). We stopped and tied the engines down and came into the yard office. Matt Long . . . was fuming . . . and said in passing, "You are working Sunday" . . . . The Company thought I was deliberately dragging out time.

The following week, same day as vote, Kris and I were called into the office and got a notice of investigation . . . . The alleged rule violations were . . . all minor. . . . Two days after the tally . . . I was getting our power together. Kris was called in to see Matt Long. Kris came out with papers and told me to go in. Matt handed me a second set of papers . . . . We exchanged a couple of words, he took the paper back, and said, "your services are no longer required." There was no heated conversation but I was fairly shocked but did not attack Mr. Long . . . . I honestly don't know if anything I said to Matt could be construed as insubordinate.

Long testified that, five days before Morton's termination, he was being investigated for a terminable offense (operating a locomotive across a public grade crossing with lights off; although Puig testified that the lights were actually on). Long notified Morton that there would be an investigation into the incident and asked him to sign an acknowledgment document. Long stated that Morton walked into his office and said, "Hello Brit [Graber, former Trainmaster] . . . . you are no longer an honorable man." Long testified that Morton had been making personal attacks against him for a long time and that he told Morton that his services were no longer needed.

Several employees interviewed during this investigation testified that Morton was a “flawless Engineer.” However, several also stated that he acted in a threatening manner during the election period. One employee commented that “Rick dug his own grave with his attitude,” and that he was a good Engineer with a bad work ethic who was not terminated for union activity.

Another employee stated, “I believe Rick’s role with the union had some part in his being fired.” Another employee testified: “It was my personal belief that he [Rick] was fired for his union activity . . . . I would say that most people believed that Rick Morton was fired for his involvement with the union – too much coincidence that he was fired two days after the union vote.”

### **B. Paul Lister**

The Carrier submits that Lister resigned when he “walked-off” the job, and provided as evidence a statement from another employee documenting the incident. The statement provides that on August 19, 2005, Lister failed to report to duty at 1300 hours and was called by Long at 1330. Lister stated that he had overslept, and reported to duty one hour late. Upon arriving to work, Lister apologized for his tardiness. His Engineer had begun to build the train and when Lister arrived he asked what had been said about him. His Engineer replied that he (Lister) was an hour late. Lister then stated: “Everyone expects him to do more than he can handle. I should start looking for a better job. Stop the train, I’m done.” The Engineer stopped the train and Lister departed with his gear and was later seen driving off in his car in an unsafe manner and at a very high speed. Later that afternoon, Lister called Long and said that he was reporting in sick. The following week, Lister returned his equipment to Clint Chestnut, telling him that he felt people were out to get him and that it was time for him to go. The report concluded that Lister voluntarily terminated his employment with Stillwater without notice to management.

Long testified about Lister’s resignation and confirmed the incident as recorded in the employee statement. Long further commented: “Paul Lister did not attempt to get his job

back . . . . I did not think he was well suited to the job of working on an American railroad.”

Lister testified that in the days leading up to his separation from Stillwater, the atmosphere got very hostile and he felt that management was waiting for him to “mess up.” During this period, he was forced to see his doctor for stress-related symptoms. He testified to his account of his last day at Stillwater:

I got a call from Long to be on duty at 1 pm. Then I got a call from my Engineer to come in at 2:00. Then I get a call from Long saying “where are you?” It seemed like a set-up . . . . I got there and I’m flustered because I’m “late” and they are criticizing my paperwork from the night before. Long drove me down there [to the train] and my co-worker said he heard Long say I had two weeks and was out. I said I can’t take this – I’m going home sick.

Lister left messages with management and got a sick note from his doctor over the incident. Lister left messages with Long but didn’t speak to him until five days after the incident. Lister asked if Long wanted him to come back or whether he should bring in his stuff. Long responded that he should bring in his stuff. Lister testified: “I did not resign. I was terminated because of my union involvement . . . . I think the company manipulated people through raises, promises, intimidation or fear to prevent the union from coming on.”

### **C. Kris Puig**

The Carrier contends that Puig resigned from Stillwater on August 25, 2005, and provided a statement from another Stillwater employee who witnessed the events leading to Puig’s separation from the Carrier. The employee stated that he had been working with Puig in Dayton that day. As they entered the OCY, Long requested a specific hook up and Puig was “mouthing off” in the background, stating that he was tired of “this yard switching stuff,” and thought his job should only include work in Dayton. According to the employee, Kris had a pattern of being upset about extra work. Then there was some miscommunication between Long and Puig, and Long “yelled at

Kris, not in an angry way, but to make sure that we were going to pull the whole train.” While Kris was on the train he said “he was done with this [expletive],” gathered his stuff and walked off the train. The employee remarked, “I was dumbfounded but thought he had quit.”

Long stated that he considered Puig’s desertion of the job as his resignation. Long testified that after Puig walked off, he called to ask what happened. Puig responded that he had been under a lot of stress. Long told him that he couldn’t take him back as he had walked off the job. Long stated that Puig did not ask for his job back.

Horner testified about Puig: “Kris was a great employee and took care of his job. Matt was General Manager and I supported his decision. If I had been in his shoes, I might have handled it differently . . . .”

Puig testified that he began to be harassed by management as soon as the BLET’s campaign ended. Puig stated that the day the union lost, “Morton and I were called in for a rule violation,” and management told us they were going to conduct an investigation. They began citing us for minor violations – like failing to tie down the engine hand brake when the new crew was on its way to the train, and inadvertently coming down the track without lights on. “The headlights were on – I knew the Company was harassing us . . . . Others received no discipline for much more major offenses.”

Puig described the events of August 25, 2005, as follows:

I wasn’t clear on Long’s instructions so I was double-checking. Matt told me to shut-up and raised his voice at me and used profanity. He did not need to raise his voice as he was using the radio. I walked on to the engine and got my stuff, and went to the office and filled out paperwork. My shift was over but I did not finish the last task assigned by Mr. Long . . . . I thought the incident would be forgotten but Matt said [after talking to management] . . . that the company couldn’t take me back. I think walking-off was an offense worthy of a five day suspension.

Puig testified: "Although the Carrier has never disclosed to me verbally or in writing the reason for my discharge, there is no doubt in my mind that I was discharged in retaliation for my outspoken support of the union."

#### **IV.**

#### **Meetings**

#### **A. May 31, 2005 Meetings -- Cyril and OCY**

On May 31, 2005, according to testimony from management officials and employees, Cedeno conducted meetings for all operating employees at the OCY and Cyril offices -- one for the morning shift employees, and one for the afternoon shift employees. Other Carrier officials in attendance included Horner, Long, and Graber.

Cedeno testified that he scheduled the May 31, 2005 meetings for operating employees so that management could speak with them during business hours about any work-related concerns. Horner stated that while the meetings were not mandatory, "we did expect people to attend." Cedeno stated: "We asked employees what issues were bothering them because we knew employees had attended the May [organizational] meeting." Horner confirmed that Cedeno ran the meeting "to talk to employees about the issues they were having. Pat was taking notes and they were reflected on the "SLWC Items of Adjustment for Policy" document which was distributed at a later meeting. Long testified that management did not ask the employees what had happened during the meeting with the BLET, rather "our interest was in finding out what the employees were concerned about . . . ."

Based on the testimony and written submissions received during this investigation, the employee issues raised in the meeting included: 1) the lack of a discipline policy; 2) establishment of a seniority system; 3) the lack of cool, purified water for employees; 4) the lack of toilet paper and safety equipment; 5) guaranteeing 40 hours of work a week for employees; 6) safety issues; and 7) job posting and scheduling. Pay issues were also discussed: first, that new hires were



being paid at higher rates than employees with more experience, and; second, that some employees had not yet received wage increases promised in January 2005.

An employee commented that management “asked for a list of specifics that they would try and address. It was obvious they didn’t want the union in.” Another employee stated: “Most of what we talked about was how we can fix the problems that brought the union there. They asked what our concerns were and how they could make things better.”

According to former employees Lister and Puig, Cedeno said he knew about the union meeting over the weekend and “wanted to know what complaints employees had that would make them want to have an outsider come in and speak for them.” Former employee Morton testified that employees seemed scared, so he did most of the talking. Morton said that he raised safety issues and the fact that “there was a very dysfunctional environment and people who were violating rules were rewarded.”

Both employees and Carrier management confirmed that Cedeno was listening and taking notes, and told employees that he would look into addressing the employee concerns.

**B. June 20, 2005 Meetings – Cyril and OCY**

**i. Distribution of “SLWC Items of Adjustment for Policy”**

Following their meetings<sup>7</sup> and discussions with employees, Cedeno and Horner drafted a summary of the issues voiced by employees. This was established by testimony from management officials and employees. They distributed the summary document, “SLWC Items of Adjustment for Policy,” at meetings with operating employees at Cyril and at

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<sup>7</sup> Cedeno testified that he met with employees about a week after the May 31, 2005 meeting to discuss additional employee concerns. At this meeting, employees commented about the lack of cool and clean water.

the OCY on June 20, 2005. Timothy D. Lundberg, Director of Human Resources for Watco, was also present at this meeting.

The following are key points of the document distributed by Cedeno to employees at the June 20, 2005 meetings.

*SLWC ITEMS OF ADJUSTMENT FOR POLICY*

- 1) Discipline-
  - a. Anyone employed beyond 90 days will have [the] right to formal investigation prior to discipline.
  - b. Employee will be notified of the specific infraction(s) within 5 calendar days of the date the incident become common knowledge of the company. . . .
  
- 3) Weekly Hours-
  - a. All active and assigned RR operation employees will be guaranteed the equivalent of 40 hours in each week . . . .
  
- 4) Seniority-
  - a. All employees will be placed on a single seniority roster for the RR based on their hire date with Watco Companies, Inc. . . .
  
- 5) Job Preference-
  - a. Will be based on seniority (within the company).
  - b. Jobs will be posted (for 5 days) on bulletin boards . . . .
  - c. . . . Jobs will be awarded to the senior qualified employee submitting a preference for the assignment . . . .

Cedeno testified that the summary was given to employees at the June 20 meeting “to get their input as to whether I had accurately described the issues we discussed.” Cedeno told employees that he would take the policies up to management to get approval and get back to them. The assumption was, according to Cedeno, that if management approved these things, polices would be implemented.

An employee testified that Lundberg “made some statements . . . . [and] said that at the last company he worked for, if production dropped [because of the union], they would just adjust your pay downward.” Another employee stated that the company distributed the document and said if “we were interested in these ideas, the company could put them in place.” Another employee commented:

I felt like [the] document represented what the company could do if they felt like it. The Company was trying to fix everything and push it under the carpet. A company like that is not going to want a union. It takes power away. I think the way Mr. Cedenó presented it – I felt like these changes were going to go in effect.

**ii. Policy Changes Implemented After June Meetings**

Webb, when asked about the document distributed by Cedenó, commented about the 40 hour guaranteed work week: “I felt that a guarantee was a rigid thing . . . but Cedenó could grant this . . . . I gave Cedenó, Horner, and Long the freedom to do what they wanted to run the railroad. Some things they might have done – weekly hours, cross training, etc. however [they] were not enacted as completed policy changes.”

An employee who attended one of the June 20 meetings with Cedenó commented:

We discussed problems we were having – water, [and Brit] Graber’s unfulfilled promises [regarding guaranteed 40 hours each week]. The meeting was characterized as, ‘let’s get together and work this out, I’m scared of the union.’ I can’t remember when but there was a water change. All the employees after the meeting were receiving 40 hours . . . . We started rotating jobs – we stayed at a job for a month and moved. This rotating job schedule was an employee concern that was addressed.

Another employee testified about changes after the June 20, 2005 meetings:

Some people's pay got better after the meeting – not sure who or when. Before the meeting, I finally got moved up to the \$16 so I was topped out . . . . I think that the BLET campaign expedited employees getting the raises. Same with water. I think two guys got pay raises in Cyril and OCY. The biggest change was when they fired the old Trainmaster Brit Graber . . . . If nothing else, we got rid of Brit Graber through the union attempt, as well as pay raises and water.

Puig stated that Cedeno went over the items in the document and “told us that they were going to be put into effect.” Mr. Cedeno further said, that he “did not want to see employees have to pay . . . money in dues because the issues employees had would be addressed.”

Puig testified that he was asked by Horner what he thought about the union, and he responded he thought a union would be best as the Carrier did not guarantee employees anything. Puig stated that Horner responded: “What do you mean? They already gave it to them in writing, they addressed the complaints.”

Lister testified that: the supplement addressed many of the problems employees had discussed with the Carrier during earlier meetings; no manager ever communicated that the document was just a summary of discussions; and that he understood the document to be an adjustment to the Carrier's policies.

Cedeno testified: “To this date none of those changes have been implemented on SLWC.” However, management and employee testimony confirmed that a number of policies changed after the June 20, 2005 meetings.

**a. Discipline Policy**

Long testified that it was his understanding that Stillwater did not have a specific discipline policy as its employees are “at will.” Stillwater confirmed that its “employees are employees at will, who retain their positions as long as their supervisors are satisfied with their work . . . .”

Cedeno testified that the discipline policy “was corrected” because of issues with Trainmaster Graber. Other management officials denied that there had been a change to the procedures.

However, in August of 2005, Long testified to Morton and Puig receiving a written notice of investigation when the Carrier decided to investigate their alleged rules violations. See *Discipline (b), SLWC Items of Adjustment for Policy* (“Employee will be notified of the specific infraction(s) within 5 calendar days of the date the incident become common knowledge of the company. . .”).

One employee interviewed testified that after the June meeting and distribution of the “SLWC Items of Adjustment for Policy” by Cedeno, “they [management] did implement the discipline policy as discussed in the document.”

#### **b. Water**

Cedeno, Horner, and other employees interviewed all confirmed that water was made available to employees in Cyril, Owasso, and the OCY during the June-July 2005 period. Cedeno testified that he had the authority to approve the “water issue,” without permission from upper management. Cedeno stated: “We ultimately installed a filtration system rather than bottled water.” Horner testified: “After the meeting, I bought one pallet of bottled water and then had a water filtration system installed in Cyril and at the OCY.”

An employee testified: “Cold, drinkable water was the number one issue down here. And after the meeting we got bottled drinking water and then a filtration system and ice machine were installed.” According to Puig, within a week from the June 20 meeting, the Carrier began bringing in cases of bottled water for employees, and several weeks later a water filtration system and vending machine were installed. A Cyril employee testified that before the vote, employees got an ice machine and a water dispenser and that in his opinion, “they would not have appeared without the upcoming BLET union vote.”

**c. Guaranteed 40 Hours Per Week**

When asked whether employees started to receive guaranteed 40 hours a week after the meeting, Cedenó testified:

The 40 hour work week “guarantee” may not be the best word because it was not a guarantee. We were going to try to get employees involved in other railroad work to give them the opportunity to work more hours . . . . Maybe employees worked more hours – we were trying to be fair to employees.

Horner commented: “Employees would have to work to get 40 hours a week.” Further, in the Carrier’s written submission to the Board, it stated: “Employees expressed concerns and some of them may have been addressed. It is a long way from giving a guy more hours of work to suggesting that major benefit and policy changes were made.”

An employee testified: “I thought Cedenó was saying these polices were going to happen. After the meeting, I began to get a 40 hour guaranteed work week.” Another employee testified that “the 40 hour work week was implemented as of the meeting.”

**d. Job Posting/Rotating Jobs**

Horner stated that after the second June meeting with Cedenó: “We began posting a schedule of jobs in OCY like we had done in Cyril.” Prior to the change, employees at the OCY were notified of their assignments through a phone call from the General Manager.

An employee testified: “The Company started to rotate people to other jobs, which was a concern employees had voiced with Cedenó in the prior meeting, [and began] to write jobs on the dry eraser board . . . .” Another employee said: “We started rotating jobs – we stayed at a job for a month and moved. This rotating job schedule was an employee concern that was addressed.”

Stillwater did not deny that it began posting jobs after the employee meeting, rather it responded that it does not post jobs in the manner traditionally used by employers subject to a collective bargaining agreement (CBA). The Carrier wrote in its submission: “What SLWC does is post a schedule of when certain jobs will work.”

**e. Safety And Other Equipment**

After the June meeting with Cedeno, an employee testified to receiving better microphones. Former employee Puig also testified that shortly after the meeting, the Carrier began supplying other items requested by employees including: toilet paper; microphones for radios; and safety equipment, including gloves, safety glasses and earplugs.

**C. BLET Application Filed/Mandatory Webb Meeting**

On June 23, 2005, the BLET filed its application with the NMB for an Investigation of a Representation Dispute involving the Train and Engine Service Employees at Stillwater. The same day, a docket letter and “Notice to Employees” went out to the Carrier.

Also on June 23, 2005, according to testimony from management officials and employees, the Carrier held a mandatory meeting for all Stillwater operating and non-operating employees, including all employees from Owasso and Cyril, in a break room at the OCY. CEO Rick Webb led the meeting along with Cedeno, Horner, Long, and Lundberg. Webb stated: “The Company expanded in December of 2004 into Oklahoma City but I hadn’t spoken to the groups since the expansion.”

Webb testified that the purpose of the meeting was to let employees know his views on the “situation at hand (union election), as well as the direction and growth of the company.” Webb stated that he did tell employees that he knew an election had been requested and advised them that the decision was theirs to make. Webb further testified that at the meeting he said:

I'm not anti-union, I'm pro-customer. And if joining a union makes us better – I would join a union too. We had all better stay focused on the customer. If I ever lose my focus, then you (employees) better find a new place to work, because we will soon be out of business.

Webb denied making a statement that his father would have fired all the employees if he had been at the meeting.

Horner recollects Webb saying to employees: “If you don't want to head in the direction of the company by following our foundation principles you can quit,” but that Webb made no reference to the union in that sentence. Long testified that he was present during the entire meeting and at no point did he hear Webb say he would fire any employees. Long testified: “He is not that kind of guy and did not say that the railroad would be shut down if the BLET came on board.”

An employee testified that Lundberg also spoke about a railroad where Watco agreed to give the employees prevailing union pay, benefits, and working conditions without having a union. The employee further testified that after the meeting, a bunch of the employees got together and talked. “We interpreted Lundberg's comment to mean that Stillwater would give employees what they wanted if they didn't vote the union in.”

Morton testified that he understood the meeting to be a lot of “thinly veiled threats.” Morton recalled Webb saying: “You are all lucky my father isn't here because he would fire all of you.” After discussing the history of Watco, Morton recalls Webb stating four or five times in reference to employees seeking union representation, “If you do not like it here you can quit.”

One employee commented that he felt the only reason Webb was there was because of the union organizing campaign and further that Webb told us “he would take care of our concerns.” The employee also confirmed Puig, Morton, and Lister's recollection that Webb did state that his father would have fired all the employees if he had been around. The employee further stated that the comment “might have been



tongue and cheek but people were upset by the comment and it was not taken as a joke.”

Webb said, according to one employee’s testimony, “that he wouldn’t change core values and if we were unhappy or dissatisfied, employees could go ahead and quit.” The employee further stated, “Since Webb was the owner of the company, most people were quiet – the meeting was a reminder that Webb was in control.” Another employee testified that Webb said, “If we didn’t like how Watco was paying us we should feel free to go somewhere else. I was struck by the side of my head by what he said.”

#### **D. One-on-One Meetings**

Between June and August 2005, the BLET alleges that Cedeno, Horner, and Long, together and individually, conducted one-on-one meetings with employees both in offices and in yard common areas. Management officials testified to meeting with employees, individually and in groups, in yard common areas and offices. However, the Carrier denies that it interrogated and polled employees; rather, Stillwater characterizes the actions of its management as an effort to turn things around and make them better.

Cedeno stated that no mandatory meetings were conducted with individual employees, but there may have been informal one-on-one discussions “on mutual matters of interest.” Cedeno testified that management did make themselves available to talk to employees to explain, “the requirements of the RLA that would change things from direct dealings with individuals to working through the union . . . .”

Long testified that he talked to employees who were going on or coming off duty, and they discussed the union and other employee complaints. He testified: “I never required any employee to meet with me one-on-one behind closed doors . . . . all my communications with employees occurred during their tours of duty, and if they came into my office to talk, I never closed the door.”

Testimony from employees and management officials confirmed that during the laboratory period, Stillwater made available a copy of a labor agreement between another short line Watco Railroad, Eastern Idaho Railroad (EIRR), and the BLET. Cedenó, Horner, and Long showed employees certain portions of the agreement and “discussed the fact that when the agreement had been negotiated, the company and the BLET started from blank paper. Things the employees had before got traded for other things they wanted.”

Horner testified that he spoke to employees at the yard, both in his office and in the common area, and asked what they thought about the union and their feelings. Horner stated: “I laid out the contract and told them they could look at it and answer any questions. They seemed to focus on pay and discipline . . . .”

Long stated that he was present for some of the meetings with Horner where employees looked at the EIRR/BLET contract. Long testified: “The contract served as an eye-opener for employees – in terms of wages . . . . I thought that the contract was rather disappointing on how the BLET had negotiated on the employees behalf.” Long also mentioned having several conversations with employees in the common area of the break room and expressed his opinion that, “state law protected me as much as a union ever could.”

One employee testified to having a 45 minute one-on-one meeting with Horner about the EIRR/BLET agreement:

Horner told me that he was surprised that I was pro-union, because Watco has been good to me . . . . He asked if the union had made any specific promises and why I thought the union would be better. I told him, looking at the agreement, I think it is a good contract – they have everything in writing. He said, “you have everything in writing too in the employee handbook”. . . . Bottom line I told him that I thought union could get us more money and Watco knew it too that is why they were having all these meetings.

One employee stated that Cedeno, Horner and Long were asking employees to come in one-at-a-time before their shift and wanted “our views on the union and how the union could help us. They showed us a contract with the EIRR and BLET which showed lower pay than we were getting . . . I was glad the union didn’t win, contract might have been as bad as the BLET’s agreement with EIRR.” Another employee confirmed that “the pay on that contract was worse than what we had.”

Morton stated that he had quite a few informal meetings with Long. He stated: “Some of the meetings with Long made me uncomfortable, he had anger issues . . . and could be intimidating.” In addition, Morton testified to having several lengthy one-on-one meetings with Horner during June and July. Morton said that Horner: asked him why he was pursuing union representation; asked what could be done to resolve the issues causing employees to seek representation; offered him a General Manager position on another Watco railroad in Kansas; and referenced the CBA between the BLET and EIRR as an example of where benefits and pay could be lost by selecting a union.

Morton testified that, “all of a sudden, the company was trying to . . . give me the impression that they were going to do something about these issues they had previously ignored.” When asked about being offered the General Manager position by Horner, Morton stated: “I told him I didn’t think it was appropriate. It seemed like it was a back hand way of making me an offer in hopes that I would back off with all the union stuff.”

Horner confirmed that he did talk to Morton about the EIRR contract and “told him that it was my understanding that negotiations did not start with everything they [employees] already had and then add on.” Horner denied that the meeting with Morton lasted for three hours, and also denied offering him a General Manger position on another railroad.

Lister testified that Long approached him several times over the course of the election period to ask about his feelings about having a union. Lister stated that while he was in favor of a union, he “felt intimidated that Mr. Long would approach [him] in such a manner. . . .” Lister said he told Long he wasn’t

sure what he thought about having a union and that Long responded by telling him that the union would not do the employees any good. Lister stated: "At this point, I was feeling very intimidated by Mr. Long's questioning because he had . . . told me to be careful with Rick Morton. Mr. Morton was extremely open in his support of the union, and I understood Mr. Long's warning to be careful with Mr. Morton for this reason."

Lister also testified to being approached and questioned by Horner and Lundberg in Horner's office. Lundberg offered advice on how to vote "no" in an NMB election. Horner pointed out portions of the BLET's CBA with EIRR, and Lister testified:

It was very obvious that some parts of the contract like wages, were inferior to our current wages and Mr. Horner wanted me to be afraid that our wages or benefits would be cut if the union won . . . . Being approached . . . was very stressful because, while I was in support of the Union, I feared that if I told them so, my job would be in jeopardy. . . ."

Puig stated that during a one-on-one conversation after the June 20, 2005 meeting, Long offered him the lead position in charge of the OCY at night. Puig testified that he declined the position and felt that he was being offered the job in return for a vote against the union.

Long confirmed that he did offer Puig the lead position as he had just been informed the position was going to open up, and Puig was one of only two other Conductors working at the property. Long testified that the lead job did not offer better pay or hours, and that it was his belief that Puig said no because "he was afraid of the yard."

## **V.**

### **Pay Increases**

In Stillwater's position statement to the Board, the Carrier denied giving its operating employees a general wage increase in 2005. The Carrier stated:

[E]mployees did get pay increases . . . nine of those were because they satisfied the criteria that qualified them for the next pay level, not because [Stillwater] . . . increased the overall rate of pay. One other was given an increase because he had been receiving the wrong rate of pay . . . . [Stillwater] gave increases pursuant to a *performance schedule* set well in advance of the election campaign and for compelling business reasons when they learned that an employee was not being paid the correct rate.

(emphasis added).

Stillwater provided no general policy documenting its wage “performance schedule” for Conductors and Engineers. Instead, as evidence of its “objective and subjective performance criteria,” Stillwater provided: 1) a chart documenting the wage histories of its Train and Engine Service Employees<sup>8</sup>; 2) “wage increase” forms; 3) a section of the Watco Employee Handbook illustrating its 90 day “Introductory Period”<sup>9</sup>; and 4) a declaration from Horner where he testifies to the specific reasons why certain employees received pay increases during the election period.

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<sup>8</sup> The wage history chart was generated at the request of the Board Investigator.

<sup>9</sup> The Watco Employee Handbook, available at [www.watcocompanies.com](http://www.watcocompanies.com), contains a section titled “Introductory Period,” which states, in relevant part: “During the first ninety (90) calendar days of continuous employment with Watco, all new employees are considered to be in an Introductory Period.” There is conflicting testimony as to whether all new employees received a copy of the handbook at their hire date, but it is available on the Internet.

Horner testified to the following pay increases<sup>10</sup>:

1. An Engineer/Conductor received a **\$2.50** increase on **6/4/05**, making his wage \$15.50. The June wage increase was to bring him up to the rate promised when he was hired.
2. An Engineer/Conductor received a **\$1.50** increase on **6/4/05**, making his wage \$14.50. His rate was increased but not to a full Engineer's rate due to performance problems.
3. An Engineer/Conductor received a **\$1.50** increase on **6/18/05**, making his wage \$16.00. His wage increase was due to his certification to run across the Burlington Northern Santa Fe Railway (BNSF) as an Engineer.
4. An Engineer/Conductor received a **\$1.15** increase on **6/18/05**, making his wage \$16.50. He received a wage increase when moved to a Lead Operator position in Cyril.
5. An Engineer/Conductor received a **\$1.00** increase on **6/20/05**, making his wage \$14.00. The rate was increased to conform to other certified Engineers.
6. An Engineer/Conductor received a **\$1.00** increase on **6/20/05**, making his wage \$14.00. His rate was increased to conform to other certified Engineers.
7. A Conductor received a **\$3.00** increase on **7/2/05**, making his wage \$14.00. He received an increase as he was transferred from another Watco railroad and began Engineer training.
8. A Conductor received a **\$2.00** increase on **7/2/05**, making his wage \$14.00. He received an increase when

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<sup>10</sup> These wage increases were granted in early June (after commencement of laboratory conditions) through the tally date on August 17, 2005.

he completed the 90 day probation period and qualified as a Conductor.

9. A Conductor received a **\$2.00** increase on **7/2/05**, making his wage \$14.00. He received a wage increase when he completed the 90 day probation period and qualified as a Conductor.
10. An Engineer/Conductor received a **\$2.00** increase on **7/2/05**, making his wage \$16.00. He received an increase when he became certified to run across BNSF as an Engineer.
11. An Engineer/Conductor received a **\$1.00** increase on **7/16/05**, making his wage \$16.00.<sup>11</sup>

The Carrier stated that its practice is to increase hourly employees' rates of pay based on objective and subjective performance criteria. Generally, Stillwater hired Conductors in at \$12; Engineers were hired in at \$13-14. However, Horner testified that when Stillwater acquired the OCY, Graber was hiring employees at higher rates than normal; hiring Conductors at \$14, and Engineers at between \$14-16.

Cedeno, Horner, and Long testified that all employees are salary reviewed: 1) after a 90 day probationary period, with the amount of increase they receive depending on performance; 2) approximately every six to nine months for merit at the discretion of the General Manager, until they have reached top pay; 3) or when they have received a certification. Once employees receive top rates of pay, they get COL adjustments, with Watco HR monitoring salary patterns. The Trainmaster is tasked with keeping track of submitting pay increase/wage increase forms to payroll and HR. However, Carrier management testified that employees could fall through the tracks as there was no formal system.

Horner testified that "the campaign did bring a greater focus to wages . . . ." Cedeno stated: "Jim Horner makes me

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<sup>11</sup> This increase was reflected on the chart but Horner did not provide a rationale for the wage increase.

aware of salary increases and I need to sign off . . . [It is] not a perfect system.” Cedeno also acknowledged that Watco HR was paying more attention because of the organizing drive and employee discontent. When asked about employee pay increases, Webb commented: “The Company tries to link pay and performance together . . . I give my team the freedom to give pay raises to employees as they see fit.”

Morton testified that one of the employees had been promised a raise and whether “he received it before the election was going to be the determinative factor in whether he voted for or against the union . . . I think they [employees] were maneuvering to get raises and it was clear to everyone that raises were the way to get their vote.” Morton further testified that prior to the union campaign, the Carrier had never announced that employees would be receiving raises.

During his interview, Puig commented that:

People most definitely felt there was a link between receiving a pay raise and the union campaign. There was big variance in pay between employees at Cyril with more experience and new hires at the OCY. About a month after the [BLET's] organizational meeting, all promised raises finally came through. Even without a union, the company was giving us what we wanted.

Another employee testified that he personally knew two employees who received pay raises during the election campaign. The employee stated: “They were due raises and the union motivated the company to put the raise through.”

Lister stated that after the BLET had filed for an election, he was granted a \$2.00 an hour pay raise. Lister stated: “I am aware that they [Stillwater] have claimed that this raise was given at the end of my alleged 90 day probation; however, I was never told by anyone at the Carrier I even had a 90 day probation period . . . I certainly understood it as an attempt to buy my vote in the election.”

## **VI.**



### **Post Election Interviews/Employee Statements**

As part of its submission to the Board, Stillwater submitted eight employee statements, signed between August 19 and September 8, 2005. Horner stated that after learning about the BLET's charge of election interference, he called some employees on the phone and talked to some at work. Horner denied threatening any employees or asking how they had voted in the election. Horner testified:

I told them that the BLET sent a letter and said, 'It's up to you, write down on a piece of paper if you were coerced by either side or anything else.' The employees gave the statement back to me or Matt Long and we sent them to Craig Richey [Carrier General Counsel]. I don't think the employees felt pressured even though the statements went to their supervisors.

One employee stated that Horner contacted him and asked him to make a statement about whether he had felt coerced by management. The employee testified:

Horner asked me if I had spoken to the BLET and I said yes because I had questions. He asked no specifics . . . . He did not tell me what to put in the statement . . . . Horner knew that I did not support the union.

### 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. *AVGR Int'l Bus. Inc., d/b/a United Safeguard Agency*, 31 NMB 419 (2004); *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. In such an evaluation, each conclusion may not constitute interference in and of itself, but when combined with other factors, the totality evidences improper interference.

*Frontier Airlines, Inc.*, 32 NMB 57 (2004); *Piedmont Airlines, Inc.* 31 NMB 257 (2004); *Mercy Air Serv., Inc.*, 29 NMB 55 (2001); *USAir*, 17 NMB 377 (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. *Piedmont Airlines, Inc.*, *above*, at 278; *Evergreen Int'l Airlines*, 20 NMB 675, 715 (1993).

For example, in *Laker Airways, Ltd*, 8 NMB 236 (1981), the Board found that the carrier had violated the RLA 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. See also *Aeromexico*, 28 NMB 309, 342 (2001) (Board ordered re-run election using *Laker* ballot because of carrier's mandatory and one-on-one meetings, post-election interviews, and misrepresentation of Board procedures); *Petroleum Helicopters, Inc.*, 25 NMB 197, 235-36 (1998) (Board ordered re-run election using *Laker* ballot because of carrier's egregious conduct including promising wage and benefit increases during the election period, collecting ballots, and holding coercive and mandatory group and one-on-one meetings).

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) (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); *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).

**I.****Discharge of Richard Morton, Kris Puig and Paul Lister**

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

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. *See Pinnacle Airlines Corp.*, 30 NMB 186, 217-220 (Board found a nexus between two employees' union involvement, the timing of the employees' terminations, and the carrier's disparate treatment towards other employees who violated the same policy); *Key Airlines*, 13 NMB 153 (1986) (dismissal of union officials the same day the Board Investigator met with carrier officials was a factor in the Board's interference determination).

The terminated/resigned employees and Stillwater have provided differing accounts of the events leading to their discharge. Stillwater additionally produced a letter of reprimand issued to Morton for his behavior on May 20, 2005, prior to the BLET's organizational meeting or attachment of laboratory conditions, and an "anonymous" email sent to CEO Webb after his termination in August 2005. The Carrier also provided two employee statements documenting Puig and Lister's "resignations."

All three employees were terminated shortly after the election on August 17, 2005: Morton was terminated on August 19, 2005; Puig resigned/was terminated August 25, 2005; and Lister resigned/was terminated August 30, 2005. Further, the evidence provided illustrates that both management and other employees knew that all three men,

especially Morton, were vocal supporters of the BLET. In addition, there is some evidence that Morton, Puig and Lister received unusually harsh discipline for their on-the-job violations/infractions.

However, there is insufficient evidence to conclude that Morton, Puig and Lister's separation from Stillwater was motivated by anti-union animus or that their separation tainted the laboratory conditions.

## II.

### **Stillwater's Group and One-on-One Meetings with Employees**

Carrier meetings with employees are not improper unless they are mandatory, coercive, or significantly increase in frequency during the election period. *Piedmont Airlines, Inc.*, 31 NMB 257 (2004); *Mercy Air Serv., Inc.*, 29 NMB 55 (2001); *LSG Lufthansa Serv., Inc.*, 27 NMB 18 (1999). In addition, the Board examines the content of carrier communications at the meetings to determine whether the communications are coercive, contain material misrepresentations, or combined with other carrier actions, improperly influenced the employees in their choice of a representative.

The Board has stated:

When rank and file employees are interviewed in carrier offices in small groups by carrier officials . . . discussion of antiunion opinions take on a meaning and significance which they might not otherwise possess. The coercive effect may be subtle, but it is nonetheless present. Such a technique in and of itself is conduct which interferes with a free choice by employees of a representative.

*Allegheny Airlines, Inc.*, 4 NMB 7, 13 (1962).

In *Delta Air Lines, Inc.*, 27 NMB 484 (2000), the Board found that laboratory conditions were tainted in part by the carrier's conduct of holding numerous, mandatory, small group

and one-on-one sessions to promote its message regarding the election. *See also Aeromexico*, 28 NMB 309 (2001) (Board has found one-on-one meetings with employees where anti-union opinions are expressed by management officials during the laboratory period are inherently coercive); *America West Airlines, Inc.*, 25 NMB 127 (1997) (carrier actions such as interrogating employees as to their representation choices constitutes improper interference); *Laker Airways, Ltd.*, 8 NMB 236 (1981) (interrogating or polling employees on their views is a per se violation).

During the laboratory period beginning in late May 2005, Stillwater conducted: 1) at least two meetings for operating employees, at both Cyril and the OCY; 2) one mandatory meeting for all employees at the OCY; and 3) multiple one-on-one and small meetings with employees, both in management offices and in yard common areas.

**A. Cedeno's May & June Meetings with Operating Employees**

Cedeno, Horner and Long conducted two meetings for operating employees at both the OCY and in Cyril. The first meetings on May 31, 2005 were just several days after the BLET's organizational meeting. There is conflicting evidence as to whether these meetings were mandatory, but it is clear that employees felt they were expected to be there.

Testimony from both management officials and employees confirm that the May meetings were conducted because the Carrier knew about the BLET's May 27, 2005 organizational meeting and wanted to know the reasons for employee dissatisfaction. Employees viewed the meetings as management asking for their help in fixing the problems that brought the union to Stillwater. Cedeno recorded employee concerns and said he would get back to them. The message conveyed by the Carrier's words and actions was that any and all employee issues could be handled without resort to a union. While there is no evidence that Cedeno or other management officials said anything specifically against the BLET, employees testified that it was clear that the Carrier did not want the union in. Employees also testified that Cedeno said he did not

want employees to pay money in dues since the Carrier was going to resolve these issues.

At the second meetings on June 20, 2005, in Cyril and at the OCY, Cedeno and Horner circulated the "SLWC Items of Adjustment for Policy" document which addressed the concerns raised by employees during the May meetings. The majority of employees interviewed felt that the document represented actual changes to policies.

### **B. Webb's Mandatory June Meeting for all Stillwater Employees**

Webb conceded that the purpose of the June 23, 2005 mandatory meeting for all Stillwater employees was to "address the situation at hand" and he told employees that he knew an election had been requested. While Webb discussed the history of the company, and its focus on customer service, he also said that he would address the employees' concerns. In addition, while there is conflicting testimony over the exact words he used, it is clear that he told employees: they should feel free to go elsewhere if they were not happy with the pay; and further, that if employees didn't stay focused on the customer, the company would go out of business.

Employees testified that Director of HR Lundberg talked about the acquisition of another short line railroad where Watco agreed to give employees prevailing union pay, benefits, and working conditions without having a union. An employee testified that employees understood his comments to mean that Stillwater would give employees what they wanted if they didn't vote the union in.

### **C. One-On-One Meetings**

Carrier officials repeatedly questioned employees outside of the group meetings, before and after shifts, in yard common areas, and in Horner's and Long's offices. Specifically, Stillwater management asked employees about their feelings on the union and what specifically the BLET had promised them. There is conflicting testimony about the length of these one-on-one meetings and whether office doors were actually closed. However, it is uncontested that employees, individually and in

groups, were called in to Horner's office, sometimes with Cedeno and Long present, and shown provisions of the BLET's agreement with EIRR – provisions that evidenced inferior benefits to those in effect at Stillwater.

Puig and Morton testified to being offered jobs during one-on-one discussions with Carrier officials, in their view, to get them to stop their vocal support of the union. Lister testified at being fearful during a on-one-on meeting with Horner and stated that Horner “wanted me to be afraid that our wages or benefits would be cut if the union won . . . . Being approached . . . was very stressful because, while I was in support of the union, I feared that if I told them so, my job would be in jeopardy. . . .”

The record does not show that the Carrier had a history of holding infrequent ad hoc meetings for the purpose of discussing policies and current issues affecting the Carrier. Cedeno testified that he only visited the OCY every several months, but confirmed that he visited on numerous occasions during the laboratory period.

The June 23 meeting was the first time Webb had spoken to the employees since the December 2004 acquisition of the OCY. Further, it is also relevant that this mandatory meeting for all employees took place on the same day that the NMB's “Notice to Employees” of the BLET's application to represent the Train and Engine Service Employees at Stillwater was sent to the Carrier for posting. It is clear that these meetings did not take place on a set annual schedule, rather they were organized in response to the Carrier learning about the BLET's organizing campaign.

The record establishes that Stillwater's frequent mandatory, group, and one-on-one meetings during the laboratory period, where management: conveyed the message that the union was unnecessary; indicated that representation could result in employees receiving lesser benefits and wages; and repeatedly interrogated and polled employees on their view of the union, interfered with the employees' free choice of a representative and constitute election interference. *Delta Air Lines*, 27 NMB 484 (2000); *America West Airlines, Inc.*, 25 NMB

127 (1997); *Laker Airways, Ltd.*, 8 NMB 236 (1981); *Allegheny Airlines, Inc.*, 4 NMB 7 (1962).

### III.

#### **Changes to Employee Policies**

In *Laker Airways, Ltd.*, *above*, at 251, the Board held that: “[T]he offer of benefits to influence the outcome of an organizing campaign is a violation of the Railway Labor Act . . . . If the mere offer of benefits during an organizational campaign violates the Act, a fortiori, the granting of benefits almost contemporaneous with an election violates the Act.” The Board has clearly held that either the promise or actual conferral of benefits during the laboratory period has the effect of coercing and influencing employees in their choice of representation. *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998); *Key Airlines*, 16 NMB 296 (1989).

On June 20, 2005, the Carrier distributed the “SLWC Items of Adjustment for Policy” document, which directly addressed concerns voiced during the May 31, 2005 meetings for operating employees. Testimony from employees confirmed that they believed the document, taken in sum with Cedeno’s presentation, to represent actual policy changes. Further, there is ample evidence both from management and employee testimony that certain of the “Items of Adjustment” in fact went into effect after the meeting. Policy changes after the June 20, 2005 meeting included: 1) the provision of bottled and filtered water at the various yards; 2) posting of job assignments for the first time at the OCY, and rotating of job assignments; 3) guaranteed 40 hours each week; and 4) the removal of Trainmaster Brit Graber.

The Carrier’s intent, in guaranteeing employees 40 hours a week; in providing clean and cool water at the yards; in posting jobs; in removing Trainmaster Brit Graber; and in distributing the “SLWC Items of Adjustment” which promised further changes, was to influence employees and convey the idea that the union was unnecessary. The Board has found such deliberate conduct intended to influence employees in their selection of a representative to be contrary to Section 2, Ninth of the RLA. *See Evergreen Int’l Airlines*, 20 NMB 675



(1993) (Board held that a carrier letter distributed to employees in response to a union organizing campaign where it promised certain benefits and made actual policy changes tainted the laboratory conditions); *see also Laker, above*, at 251. The Board finds that Stillwater's changes to working conditions and promises of future changes tainted the laboratory conditions.

#### IV.

##### **Pay Increases During the Laboratory Period**

Generally, the Board finds changes in pay which were pre-planned before laboratory conditions attached or where there is "clear and convincing evidence of a compelling business justification" do not taint laboratory conditions. *Pinnacle Airlines, Corp.*, 30 NMB 186 (2003); *Delta Air Lines, Inc.*, 30 NMB 102 (2002); *Mercy Air Service, Inc.*, 29 NMB 55 (2001); *American Trans Air, Inc.*, 28 NMB 163 (2000). For instance, the Board has not found interference when pay increases were granted as part of a company-wide audit completed prior to the Carrier's knowledge of the organizing campaign. *Dakota, Minnesota and Eastern R.R. Co.*, 25 NMB 302 (1998).

In *American Trans Air, Inc., above*, the Board found that laboratory conditions were tainted by a pay increase and shift differential granted to employees. Although the carrier had submitted evidence that the pay increases had been discussed prior to the attachment of laboratory conditions, the Board found significant the fact that employees were surprised by the amount and the timing of the increases and some employees stated that "the pay raise definitely influenced how people voted." *Id.* at 172-73, 180.

From commencement of the laboratory period in late May 2005 until the tally on August 17, 2005<sup>12</sup>, 11 out of 20, or 55 percent of Stillwater's Train and Engine Service Employees received wage increases. The burden then shifted to Stillwater to show either that the wage increases had been pre-planned, or to provide "clear and convincing evidence of a compelling business justification" for the wage increases. See *Frontier Airlines, Inc.*, 32 NMB 57, 61, 65 (2004) (where carrier had granted pay raises and satisfied burden by producing: a compensation program review; a declaration from a compensation analyst; a chart showing increases awarded annually over a four year period; and various communications bulletins, etc.; Board found no interference and that raises had been pre-planned). *Pinnacle Airlines, Corp., above*, at 220 (carrier satisfied burden by producing proposal to change 401(k) plan approved by Board of Directors prior to attachment of laboratory conditions); *Delta Air Lines, Inc.*, 27 NMB 484 (2000) (carrier provided significant evidence that pay increases were pre-planned and applied to all carrier employees; therefore, increases were found not to taint laboratory conditions).

Stillwater provided no general policy documenting its wage structure/performance schedule for Conductors and Engineers, nor did it provide evidence that the wage increases had been pre-planned. Instead, as evidence of its "objective and subjective performance criteria," Stillwater provided: 1) a chart documenting the wage histories of its Train and Engine Service Employees (generated at the Investigator's request); 2) "wage increase" forms which merely provide the date and amount of an employee's pay increase; 3) a section of the Watco Employee Handbook illustrating its 90 day "Introductory Period"; and 4) a declaration from Horner where he testifies to the specific reasons why certain employees received pay increases during the election period, including completion of the 90 day introductory period, bringing employees up to "promised" rates of pay, and increases because of certifications and performance.

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<sup>12</sup> Laboratory conditions extend through the conclusion of the Board's investigation. *Petroleum Helicopters, Inc.*, 26 NMB 13 (1998).

Stillwater failed to satisfy its burden and show that the large number of pay increases during the laboratory period were pre-planned or pursuant to a set schedule. Further, employee testimony reveals that many perceived a link between receiving wage increases and the union organizing campaign. One employee testified that the presence of the union “motivated the company to put the raises through.” Another employee stated: “I think that the BLET campaign expedited employees getting the raises . . . . If nothing else, we got rid of Brit Graber through the union attempt, as well as pay raises . . . .”

The Board finds that the granting of wage increases to 11 out of 20 employees in the Train and Engine Service Employees craft or class, during the laboratory period, tainted laboratory conditions. *See American Trans Air, Inc., above*, at 178-179.

## V.

### **Post Election Interviews/Employee Statements**

In *Aeromexico*, 28 NMB 309 (2001), the Board held that the carrier’s interviewing of 10 employees after the union filed allegations of election interference was coercive and interfered with laboratory conditions, which must be maintained through the conclusion of the Board’s investigation. *See also Petroleum Helicopters, Inc.*, 26 NMB 13, 35 (1998) (laboratory conditions must extend through the election and any subsequent investigation).

Similar to the facts in *Aeromexico, above*, Stillwater sought to rebut the BLET’s allegations of election interference by getting post-election statements from its Train and Engine Service Employees. *Id.* at 340-42. Horner confirmed that he spoke with eight employees, on the phone and at the yard, after receiving the BLET’s charges of election interference. Horner asked these employees to submit a statement indicating whether they felt “threatened or intimidated” by Stillwater’s meetings or by the BLET, and to return the statements to him or Long. Horner testified that he did not pressure employees or ask them how they voted in the election. The employees returned their signed statements to Horner and Long, who then sent the statements through their General Counsel to the NMB.

Stillwater's interviews of employees in the craft or class interfered with the Board's investigation and powers set forth in Section 2, Ninth. The investigation establishes that these "one-on-one" interviews during the period when laboratory conditions must be maintained are inherently coercive. *Aeromexico, above.*

### CONCLUSION

The Board finds that the laboratory conditions required for a fair election were tainted. This conclusion is based on the totality of circumstances which include: the numerous "one-on-one," mandatory, and group meetings; the conferral of benefits during the laboratory period, including: a water filtration system at various yards; guaranteed 40 hour work weeks; a new job posting system; the removal of Trainmaster Brit Graber; and wage increases during the laboratory period to a majority of the Train and Engine Service Employees.

In *Florida East Coast Railway Co.*, 17 NMB 177 (1990), the Board cited *Key Airlines*, 16 NMB 296 (1989) in discussing "its broad discretion in fashioning appropriate remedies for carrier interference," pursuant to Section 2, Ninth. The Board has ordered various remedies in cases where it finds interference. See *Laker Airways, Ltd.*, 8 NMB 236 (1981). These remedies are intended to eliminate the taint of interference on the election and are fashioned in accord with the extent of the carrier interference found. See *Emery Air Charter*, 19 NMB 337, 350-51 (1992). Here, the Board finds that the level of interference was not egregious enough to warrant the use of a *Laker* ballot, which is considered an "extraordinary remedy." See *Laker, above*, at 253. As such, the BLET's request for a *Laker* ballot is denied. Therefore, the Board ORDERS a re-run election using TEV and the Board's standard voting procedures.

Pursuant to the Manual Section 12.1, the Carrier is hereby required to furnish, within five calendar days, 1" x 2 5/8", alphabetized peel-off labels bearing the names and current addresses of those employees on the list of eligible voters (List). The List will include those employees eligible in the first election with the exception of those employees who

have left the craft or class.<sup>13</sup> The cut-off date will be June 17, 2005.

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 and a copy of the alphabetized list on a diskette or CD as a Microsoft-Excel file. The format of the list of potential eligible voters must be prepared in five columns or fields exactly as the enclosed sample format below displays. There must not be any other information or data in the file or on the diskette or CD except as displayed in the five columns or fields on the sample format. The column or field 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.**

**SAMPLE FORMAT OF THE SPREADSHEET LIST FIELDS**

<b>SeqNum</b>	<b>LastName</b>	<b>FirstName</b>	<b>JobTitle</b>	<b>DutyStation</b>
1	Able	John, Jr.	Pilot	Chicago, IL
2	Baker	Mary A.	Pilot	Tampa, FL
3	Charles	William J.	First Officer	Detroit, MI

The count will take place in Washington, D.C. Copies of the attached "Notice to Train and Engine Service Employees of Stillwater Central Railroad, Inc." 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

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<sup>13</sup> Morton, Puig and Lister will remain on the List pursuant to Manual Section 9.203 which provides, in relevant part, that: “Dismissed employees are ineligible to vote unless . . . an action for reinstatement has been filed before a court . . . .” As Morton, Puig and Lister filed a claim for reinstatement on January 26, 2006, before the U.S. District Court for the Western District of Oklahoma, Case No. CIU-06-88-F, they are eligible to participate in the re-run election.

duration of the re-run election period. Copies of the attached Notice will also be included in the Telephone Electronic Voting Instructions sent to employees.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in cursive script that reads "Mary L. Johnson".

Mary L. Johnson  
General Counsel

Copies to:

Craig R. Richey, Esq.

Pat Cedenó

Jo A. DeRoche, Esq.

Edward W. Rodzicz

Thomas C. Brennan, Esq.

Roland P. Wilder, Jr., Esq.

**NOTICE TO TRAIN AND ENGINE SERVICE EMPLOYEES OF  
STILLWATER CENTRAL RAILROAD, INC.**

After an investigation conducted by the National Mediation Board (Board) in which Stillwater Central Railroad, Inc. (Stillwater) and the Brotherhood of Locomotive Engineers and Trainmen (BLET), had the opportunity to present statements and evidence, the Board found that Stillwater'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 conducted coercive, mandatory, and one-on-one meetings, and conferred various benefits during the election period.

Accordingly, the Board authorizes a second election by Telephone Electronic Voting (TEV) among Stillwater's Train and Engine 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.

Stillwater 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 20005, telephone: (202) 692-5040.**