NATIONAL MEDIATION BOARD
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In the Matter of the Application of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of FLIGHT OPTIONS, LLC/FLEXJET, LLC	43 NMB No. 37 CASE NO. R-7443 FINDINGS UPON INVESTIGATION-DISMISSAL August 23, 2016

This determination addresses election interference allegations filed by Flexjet, LLC/Flight Options, LLC (Carrier) involving the Pilots employed by the Carrier. For the reasons set forth below, the National Mediation Board (NMB or Board) finds that the Carrier has not stated a *prima facie* case of election interference. Accordingly, the Board finds no basis for further investigation.

PROCEDURAL BACKGROUND

On July 6, 2015, the International Brotherhood of Teamsters (IBT) filed an application pursuant to the Railway Labor Act, as amended, 45 U.S.C. § 152, Ninth, seeking a single system determination involving the Pilots of Flight Options, LLC (Flight Options) and Flexjet, LLC (FLexjet). At the time the application was received, the Pilot craft or class at Flight Options was represented by the IBT under the NMB Certification R-7072. *Flight Options*, 33 NMB 91 (2006). At Flexjet, the Pilot craft or class was unrepresented.

The Board assigned Maria-Kate Dowling to investigate. Based on its investigation, including submissions from the participants, the Board found

that Flight Options and Flexjet comprised a single transportation system for the craft or class of Pilots. *Flight Options/Flexjet*, 42 NMB 174 (2015). On November 9, 2015, the Board found that a representation dispute existed involving the Pilot employees of the Carrier and authorized an election. *Flight Options/Flexjet*, 43 NMB 16 (2015).

On December 15, 2015, the tally was conducted. The results of the tally showed that out of 644 valid votes, 330 were cast for IBT and 314 for no representation. On December 16, 2015, the Board certified IBT as the duly designated and authorized representative of the craft or class of Pilots at the Carrier. *Flight Options/Flexjet*, 43 NMB 43 (2015).

On January 8, 2016, the Carrier filed a Motion "for a Board Determination of Union Interference." On February 2, 2016, the IBT filed its response to the Carrier's Motion. The Carrier and the IBT each filed a reply.

ISSUE

Whether the Carrier has stated a *prima facie* case of election interference?

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.

Flight Options/Flexjet is a common carrier as defined in 45 U.S.C. § 181.

II.

IBT 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 employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

DISCUSSION AND FINDINGS

I.

Election Interference: *Prima Facie Case*

Section 17.0 of the NMB Representation Manual (Manual) provides, in part, as follows:

> Allegations of election interference must state a prima facie case that the laboratory conditions were tainted and must be supported by substantial evidence. Allegations not sufficiently supported by substantive evidence will be dismissed.

The Board evaluates all allegations of election interference preliminarily to determine whether a *prima facie* case has been established. *Express One Int'l.*, 25 NMB 420, 426 (1998). In this determination, the Board considers whether the allegations and evidence, if true, might reasonably taint the laboratory conditions necessary for a free and fair election.

While the Board recognizes that coercive conduct by unions may also taint the laboratory conditions, the Board also recognizes that carriers possess unique power and authority in the workplace. Therefore, while the test for carrier and union interference is the same, its application to identical factual situations may lead to different conclusions. Thus, certain campaign activity, when engaged in by an organization rather than a carrier, may not have the same coercive effect on employees. *Federal Express Corp.*, 20 NMB 659 (1993).

The Board generally holds that laboratory conditions must be maintained from the date the carrier becomes aware of the organizing drive. *Stillwater*

Central R.R., Inc., 33 NMB 100 (2006); *Mercy Air Serv., Inc.*, 29 NMB 55 (2001). In the absence of extraordinary circumstances, the Board will not consider evidence of occurrences prior to one year before the application was filed. *Delta Air Lines, Inc.*, 39 NMB 53 (2011); *Delta Air Lines, Inc.*, 30 NMB 102 (2002). In the instant case, organizing efforts began in the Fall of 2014 and the Flexjet Pilots Organizing Committee (FJPOC) formally announced its existence to the Carrier on January 30, 2015.

II.

Allegations of Election Interference

Use of Improper Means of Communication

A. The December 18, 2014 Email to Flexjet Owners

The Carrier alleges that the IBT misused private customer and employee data to influence employees during the election. With regard to the customer data, the Carrier states that on December 18, 2014, an anonymous email was sent to all Flexjet owners, "ostensibly from a fellow Flexjet owner," criticizing Kenn Ricci, the founder of Flight Options and the Chairman and Chief Executive Officer of One Sky Flight, Inc., the holding company of the Carrier. The Carrier states that the email also raised concerns that a planned move of the Flexjet headquarters from Dallas to Cleveland would be detrimental to Flexjet and its level of service. Concerned about the potential misuse of customer information, the Carrier states it conducted an investigation that determined the emails had been sent by an individual who was a "college friend" of a Flexjet pilot. The Carrier contends that the Flexjet pilot in question not only facilitated the misappropriation and misuse of the company's confidential customer information, but did so at the behest of the IBT. In support of this allegation, the Carrier referenced statements from other pilots that this individual recruited members of the FJPOC and connected fellow pilots with IBT organizer Rick Dubinsky.

The IBT concedes that the pilot involved with these emails did help recruit several original members of the FJPOC, but states that he refused to publicly declare his support for the IBT. In his sworn statement, Dubinsky states that he was the only official organizer for the IBT, that no other person

had authority to speak for or bind the IBT, and that his first contact with the pilot involved with the emails was on December 30, 2014, after the emails were sent. Dubinsky also states that, once the pilot refused to publicly announce his name as a union supporter, Dubinsky ended the pilot's involvement in the organizing effort.

The Board finds that the Carrier has failed to support its allegation of customer data misuse by the IBT with substantial evidence. Even assuming that the pilot misused customer data, the connection between that misuse and the election is attenuated at best. There is also no evidence that his actions are attributable to the IBT. The evidence submitted by the Carrier shows only that this pilot spoke to his co-workers about joining the union or suggested that a fellow pilot contact Dubinsky and join the organizing effort. This evidence falls short of establishing that this person was acting with actual or apparent authority of the IBT or even at the behest of the IBT.

B. Use of Private Pilot Addresses and Phone Numbers

The Carrier also alleges that the IBT improperly obtained and used private pilot contact information including home addresses and contact information. The Carrier states that pilots "who had never given contact information to the IBT" received communications from the IBT on personal phone numbers and at personal addresses. In support of this allegation, the Carrier noted that one pilot stated that he was contacted by the IBT on his wife's cell phone that he had given to the Carrier as part of his "private contact information." Another pilot, who moved during the election, told the Carrier that prior to providing his new address to the Carrier, he received IBT communications forwarded by the United States Postal Service, but after he provided his new address to the Carrier, he received IBT communications at the new address. The Carrier also states that pilots reported receiving communications in support of the IBT from NJASAP, the union representing NetJets pilots. The Carrier asserts that the "method of contact used for these communications indicates they were made using the company's private list of pilot addresses and telephone numbers."

The IBT states, and the Carrier concedes, that the IBT was copied on an email to the NMB containing a list of eligible voters along with their home addresses. The email contained no restriction limiting the use of information

in that email by the IBT. In addition, the IBT states that it also obtained contact information through other "lawful and traditional means" including looking up the names and numbers of pilots in phone books and on the internet, speaking with other pilots about contact information for their co-workers, and using information provided to the IBT on authorization cards. The IBT also states that there is nothing unlawful in engaging in an act of solidarity by enlisting the support of another union representing the pilots of another fractional ownership carrier.

The Carrier has presented no evidence that the IBT unlawfully obtained or misused pilot contact information. While the Board does not require a carrier to provide an organization with the home addresses of employees in the craft or class, the Board also does not prohibit such a disclosure. While the disclosure in the instant case may have been inadvertent or mistaken, use of that information as well as information obtained by other means by the IBT does not rise to the level of election interference.

C. Coercion, Intimidation, Harassment, and Misrepresentation

The Carrier alleges that the IBT engaged in a pervasive campaign of coercion, intimidation, harassment, and misrepresentation. According to the Carrier, this conduct included inappropriate and unwarranted personal attacks, threats, and intimidation directed at pilots known to oppose the union. The Carrier also asserts that the IBT improperly influenced the voting process and invaded the confidentiality of the voting process by "coercively demanding to know whether and how pilots voted." Finally, the Carrier contends that the IBT's attacks on management included "misrepresentations calculated to cloud the pilots' decision-making about whether to select union representation or a direct relationship with their employer."

In response, the IBT states that the Carrier relies on unattributed and ambiguous statements and hearsay or describes actions that are not within the union's control.[1]

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[1] The IBT also asserts that the Carrier discharged and disciplined pro-union pilots as well as threatened to cease operations if unionized, promised pay increases to pilots who voted against unionization, and made anti-union statements in videos. The Board finds it unnecessary to pass on these

In support of its allegations, the Carrier submitted two declarations from a Flexjet pilot identifying two pilots who were IBT activists and "posted messages that I had crashed a simulator during a training event, which was untrue and potentially very damaging to my professional reputation." This employee also stated an "IBT organizer threatened me about my seniority and said if I did not vote for IBT my seniority status would drop," while other "IBT supporters posted on the Virtual Union Hall that they would make 'shark chum' out of me." He also noted in his declaration statements from "other pilots" that "union organizers called them numerous times" to ask how they would vote and "to pressure them to change their vote for the IBT." He noted that "union organizers" told him the IBT had "many supporters and would clearly win so he should not vote." He also stated that another Flexjet pilot was sent a picture of his house by "an IBT organizer who said he knew where the pilot lived." In his first declaration, he added that he felt "anxious, threatened, harassed and intimidated by the IBT" and that other pilots informed him that "they felt so threatened and intimidated by union organizers that they were afraid to speak their minds." This pilot also stated that he reported his concerns to his supervisor. Finally, this pilot stated:

> The IBT promised during the campaign that the members of the Flexjet Pilot Merger Committee would be neutral and fair. Almost immediately after the election results in December, IBT removed one or more members of the Merger Committee and replaced them with FJPOC committee members who I believe are strong IBT supporters and will not be fair and neutral toward the Flexjet pilots concerning their seniority.

The Carrier also submitted two declarations from another Flexjet pilot stating that "IBT organizers" told him he would "never fly a Gulfstream G650 if the IBT failed to win the election," and that a member of the FJPOC told him that if the pilot "did not vote for the IBT, the [FJPOC member] would lose his job." This pilot also stated that a FJPOC member "cornered his wife in person and pressured her" to get him to vote for and support the IBT.

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allegations in light of its conclusion that the Carrier has failed to state a *prima facie* case of election interference.

The evidence of coercion and intimidation presented by the Carrier consists of two statements that might be construed as physical threats; a statement of subjective reaction to the electioneering; two threats of retaliatory actions, such as limiting the equipment that an individual could fly or that a FJPOC member would be fired if the IBT lost the election; and harassment in the form of unwanted calls, contact with a family member, and an instance of personal disparagement. These incidents, however, were isolated, not made by IBT agents and included actions not within the IBT's control. The NMB has found that isolated threats are insufficient to justify setting aside an election. *United Airlines*, 39 NMB 385, 401 (2012). Isolated incidents of harassment are not typically considered evidence of election interference where, as in the instant case, they are not part of a systemic campaign to interfere with employee choice. *Continental Airlines*, 21 NMB 229, 251 (1994). Statements of individual employees' subjective feelings of intimidation or invasion of privacy or belief that the Union would retaliate against them in a manner not within the union's power are, without more, insufficient to trigger an interference investigation. *Federal Express Corp.*, 20 NMB 486, 534 (1993). Further, the Board has long held that while employees may be irritated and annoyed by telephone calls to their private numbers and the receipt of election mailings at their homes, this activity is a normal part of the campaigning involved in any election and is not interference. *Delta Air Lines*, 39 NMB 53 (2011); *Delta Air Lines*, 35 NMB 271 (2008).

With regard to alleged misrepresentations about management, the Board notes that hyperbole, exaggerated claims, and inaccurate attacks on opponents are a traditional part of both political and representation campaigns in the United States and are not interference where, as here, the Carrier had the opportunity to clarify inaccuracies and fully disseminate its position with regard to unionization. *Delta,* 39 NMB at 61 n. 2.

The Carrier also asserts that during the campaign, IBT repeatedly made promises that it would remain neutral during the seniority integration process and respect the original merger committee. Instead, the Carrier states that following the tally, the IBT removed a neutral merger committee member and replaced that pilot with a FJPOC member. Accordingly, the Carrier argues that the IBT's "false promises" during the campaign "targeted pilots' valid insecurities on the seniority integration process and constitute election

interference." The Board recognizes that seniority integration is an important issue to employees in the context of a merger, but finds that no substantive evidence has been presented that the IBT's post-tally action to replace one member of the informal Flexjet merger committee member was a material misrepresentation that impaired laboratory conditions.

Seniority integration is a contractual matter outside the Board's jurisdiction. *American Airlines/US Airways*, 41 NMB 174, 195 (2014). In its single carrier determination, the Board found that the collective bargaining agreement between the Flight Options and the IBT contained a number of provisions regarding mergers and acquisitions and any resulting integration of the pilot groups. *Flight Options/Flexjet*, 42 NMB 174, 178 (2015). Section 1.5(c)(1) provides that the two pilot groups may not be integrated until the seniority lists have been combined in a "fair and equitable manner" as defined by Sections 3 and 13 of the Civil Aeronautics Board's Allegheny-Mohawk Labor Protective provisions. The contract also provides that outstanding issues may be resolved in interest arbitration. Thus, the parties have agreed to a mechanism for seniority integration with appropriate protections. It is also clear that during the election seniority integration was an issue, but it was an issue well within the knowledge of the pilots and information was available to pilots if they wanted to learn more. The Carrier insinuates that the IBT's post-tally action may have led to voter remorse. Such remorse, while possibly inherent in any major decision, is entirely speculative here and speculation is insufficient to justify an interference investigation.

D. IBT Grant of Benefits

The Carrier argues that the IBT unlawfully provided tangible benefits to employees during the election campaign. On April 24, 2015, after the IBT had begun its organizing efforts, six non-union Flexjet employees filed a complaint in federal district court alleging that Flexjet unlawfully terminated three of them and harassed and intimidated the others. Counsel for IBT represented the employees in the litigation and in an arbitration proceeding over the terminations. In addition, the IBT and FJPOC solicited funds online to benefit the terminated employees. An IBT International representative and local vice president contributed to the fund, along with FJPOC members.

The Carrier cites the Board's recent determination in *American/USAirways*, 42 NMB 80 (2015) for the proposition that providing something of value to employees during an election campaign may be grounds for a finding of election interference. In response, the IBT argues that this is a frivolous claim due to the Carrier's own violation of the RLA and controlling NMB precedent.

As cited by the IBT, the courts have addressed the issue raised by the Carrier here. In *Pinnacle*, a case with strikingly similar facts to the instant case, the Board stated that the provision of legal assistance to employees prior to union certification was not a grounds for a claim of election interference as a matter of law. *Pinnacle Airlines v. NMB*, 2003 WL 23156630 *2 (D.D.C. Nov. 5, 2003). Two former employees filed a lawsuit claiming that Pinnacle terminated them in violation of the RLA and the union offered to pay their legal fees. *Id.* at *3. This occurred prior to a re-run election after the Board had determined that the carrier had engaged in election interference. *Id.* The court upheld the Board's determination. Even before *Pinnacle*, the Board has held that the provision of legal services to eligible employees is not election interference. *LSG Lufthansa Serv.*, 27 NMB 214, 216 (2000) ("The Carrier's first allegation, concerning HERE's legal and other assistance to employees in craft or class, does not state grounds for a claim of election interference.")

The Carrier's allegation is made all the more remarkable by the fact that an arbitrator determined that the Carrier engaged in conduct that would be sufficient for the Board to find election interference and re-run the election. Likewise, in both *Pinnacle* and *Lufthansa*, the organizations provided legal service to employees following a Board finding of carrier interference. Although the Board has not made a determination of carrier interference in the instant case, following his review of the evidence Arbitrator Javits stated the following about the Carrier's conduct: "[T]he Arbitrator finds that the Carrier violated the protections of the RLA by discharging (3) strongly pro-union pilots in the middle of a union-organizing drive. . . . The arbitrator finds that the Carrier's discharges of the Employees were unlawful because they were based on retaliation for what was a protected activity."

In its reply brief, the Carrier argues that the Board is not bound by the arbitrator's decision and even if the Carrier interfered, it would not excuse

interference by the organization. The Carrier may be correct on these points, but there is long-standing precedent that legal assistance to unrepresented eligible employees in proceedings alleging Carrier violations of the RLA does not amount to election interference. The Carrier does not make a *prima facie* case of interference because Board precedent holds this is not interference as a matter of law. The Carrier provides no reason for the Board to change its policy here. In fact, the Carrier never even acknowledged this Board precedent.

Regarding the online support fund created by the IBT and FJPOC for the terminated employees, the Carrier again cites *American/USAirways*, 42 NMB 80 (2015) for its argument that this was interference. In *American,* the organization provided $500 gift cards to employees and the Board found that the timing of this distribution so close to the collection of authorization cards tainted the laboratory conditions. *Id.* at 81. The organizations at issue here were not collecting authorization cards as that was not part of the process in this merger election. There is no evidence here that the organizations provided this support, either creating the fund or the donation provided by an organization representative, in order to induce employees to do anything. Employees and members of the public, including union representatives, were free to donate or not as they saw fit. The money was provided to employees who an arbitrator determined had been unlawfully terminated by the Carrier. It is unlikely that donations in the amount of $200 and $100 from union representatives influenced how they voted in this election.

There may be circumstances in which the Board would find election interference when officials in a local or international union donate funds to an individual. There is no evidence here that it was intended to influence voters or did so. Here, due to the small amount of support and the surrounding circumstances discussed above, the Board finds that the Carrier has not presented a *prima facie* case of interference.

By direction of the NATIONAL MEDIATION BOARD.

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Member Geale concurring in part and dissenting in part.

I write separately because I believe this case represents a close call as to whether or not to conduct further investigation. In fact, the changing of just eight votes would have altered the result of this hotly contested election. Based on the evidence proffered by several Carrier employees, there is certainly an argument that the results were impacted by potentially inappropriate conduct by individuals who may or may not have been representatives of IBT. I, however, do not fault my colleagues for their overall decision here as it is based on precedent generally and would ordinarily be appropriate absent the gifts to class members, allegations of coercion and intimidation as well as the close nature of this election.

The NMB's role is in part to ensure secret ballot election results actually reflect the democratic decision of the craft or class, and we enforce longstanding rules aka "laboratory conditions" as a prophylactic generally so that labor and management do not improperly influence that decision. Here, employees provided some evidence of potential coercion and/or intimidation. While there appears to be no specific evidence of a coordinated attempt to improperly coerce or intimidate class members by the IBT, and the carrier only provided evidence from two employees, that is enough in my mind to believe that a more thorough investigation would be in order when only eight votes could change the results.[2] Furthermore, the majority decision in part relies on the fact that carriers and labor organizations are held to different standards

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[2] I suggest a more thorough investigation would be preferable to me in this particular case because of the specific issues raised in totality, and do not want anyone to infer a desire on my part to require investigations generally.

during elections, which is albeit longstanding NMB precedent, but something I believe should be changed. A level playing field where both sides are held to similar standards would better protect the craft or class from undue influence.

I concur with the majority that there is certainly existing precedent with regard to the allowable nature of legal support for craft or class members impacted by discipline by the Carrier during the pendency of an organizing campaign. There seems little possibility that those actions by the IBT and its attorneys tainted laboratory conditions – particularly given the separate arbitrator finding of possibly improper discipline by the Carrier.[3]

Legal support is one thing, but the setting up and possible gifting of funds from IBT leadership/ treasuries directly to six individuals, along with the inherent knowledge of that activity within the class or craft is more problematic. The NMB recently held in *American/ US Airways*, 42 NMB 80 (2015), that the gift of something of value by the union to craft or class members in the course of an organizing campaign would taint laboratory conditions for purposes of the showing of interest. I described how I disagreed with certain aspects of the majority's conclusion in a dissent for that particular case, but stated that I would uphold that generalized principle going forward. I see no reason to differentiate between the $200 or $100 cash payments here and $500 dollar gift cards as were present in the *American* case.

Those two issues – the specter of intimidation and coercion without further investigation combined with cash payments to several class member in the context of a close election – leads me to dissent in part. I otherwise concur in the opinion.

[3] The Carrier is correct that the Arbitrator's decision is not controlling for the NMB's determination, but it can be persuasive.