



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

(202) 692-5000

In the Matter of the
Application of the

CAPE AIR PILOTS ASSOCIATION

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

involving employees of

CAPE AIR (HYANNIS AIR
SERVICE, INC.)

37 NMB No. 9

CASE NO. R-7201

FINDINGS UPON
INVESTIGATION –
ORDER

November 18, 2009

This determination resolves election interference allegations filed by the International Brotherhood of Teamsters (IBT or Incumbent) involving employees of Cape Air (Hyannis Air Service, Inc.) (Cape Air 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) and Internet Voting.

PROCEDURAL BACKGROUND

On March 2, 2009, the Cape Air Pilots Association (CAPA or Applicant) filed an application with the Board pursuant to the Railway Labor Act* (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a representation dispute involving the Pilots at Cape Air. At the time of the application, the Pilots were represented by the IBT. *Cape Air (Hyannis Air Serv., Inc.)*, 33 NMB 291 (2006). The Board assigned Eileen M. Hennessey to investigate. On March 26, 2009, the Board authorized an election in this matter with both CAPA and the IBT on the ballot. On April 3, 2009, the Board scheduled the tally date in this case to take place on May 11, 2009. Ten days later the IBT filed its request that the

* 45 U.S.C. § 151, *et seq.*

Board investigate charges of carrier interference and carrier domination. Both CAPA and the Carrier filed position statements with the Board responding to the IBT's allegations. On May 11, 2009, the Board issued a determination addressing the IBT's April 13, 2009 allegations. The Board stated that it did not find "extraordinary circumstances that would require Board action" prior to the tally and stated that any allegations regarding conduct during the election period would be "addressed, if appropriate, after the tally date consistent with the Board's usual practice." *Cape Air (Hyannis Air Serv., Inc.)*, 36 NMB 108, 109 (2009).

The tally took place as scheduled on May 11, 2009. The results of the tally were as follows: of the 139 eligible voters, 51 voted for CAPA, 40 voted for the IBT, there were 2 valid votes for other organizations or individuals and 1 void vote. As a result of this election, on May 12, 2009, CAPA was certified as the representative of the Pilots at Cape Air. *Cape Air (Hyannis Air Serv., Inc.)*, 36 NMB 110 (2009). On May 20, 2009, the IBT renewed its allegations of carrier interference and carrier domination. On June 1, 2009, the Carrier and CAPA responded, denying the IBT's allegations. Participants submitted sworn statements and other documentary evidence in support of their positions. On June 10, 2009, the Board found that the IBT'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 submissions. However, the participants declined to supplement the record.

During August and September 2009, phone and in-person interviews with management officials and employees were conducted in Hyannis, Massachusetts and Washington, D.C. by Investigator Hennessey. On September 17, 2009, the Investigator requested additional information from the Carrier, which the Carrier provided on September 23, 2009. The Investigator gave CAPA and the IBT until October 1, 2009 to respond to the Carrier's final submission; however, neither CAPA nor the IBT did so. This determination is based upon the entire record in the case.

ISSUES

Were the laboratory conditions required for a fair election tainted? If so, what is the appropriate Board response?

CONTENTIONS

IBT

The IBT states that Cape Air CEO, Dan Wolf, sent a letter electronically to all Cape Air pilots on April 12, 2009, endorsing CAPA over the IBT and that this letter, sent one day prior to the NMB mailing ballots in this case, is *de facto* interference. The IBT states that the display and use of this letter at meetings held on April 14 and April 15 by Cape Air and CAPA, respectively, enhance the coercive effect of the letter.

The IBT contends that the Carrier has provided direct assistance to CAPA in the form of access to employee contact information; access to technical support and e-mail lists; and that one of CAPA's officers was a management official until recently. Therefore, the IBT argues that CAPA is a carrier-dominated organization.

The IBT further contends that during the election period the Carrier engaged in election misconduct including the following: the Carrier provided pilot cell phone numbers to CAPA and not to IBT; Cape Air managers and/or CAPA officials solicited authorization cards during mandatory pilot training; the Carrier posted a CAPA "Master Vote List" with the names of all the pilots who signed CAPA authorization cards on the "Google Documents" (Google Docs) web page maintained by the Carrier; CAPA and the Carrier coordinated a response attacking IBT participation in negotiations; the Carrier polled employees regarding support for CAPA and/or the IBT; and the Carrier paid employees to attend meetings where the Carrier discussed its views on the election and IBT representation.

CAPA

CAPA states it obtained pilot cell phone numbers from the Carrier by simply asking for them as all pilots may as a normal practice. Moreover, CAPA argues that since the IBT does not argue that it requested and was denied access to this information, the IBT cannot argue that it was treated unequally. CAPA states that authorization cards were not distributed by management officials during training classes. CAPA states that it mistakenly posted a list entitled "Master Vote List" on the Carrier's Google Docs and promptly removed it upon realizing the mistake. CAPA states that it had no communications with the Carrier about IBT supporter Walter Kyle's comments about negotiations and, thus, there was no "coordination" between CAPA and Cape Air. CAPA states that the CAPA supporter in question denies under oath that he "polled"

members of a ground school training class.

Cape Air

The Carrier states that the “honestly held” and “non-coercively” expressed views of CEO Dan Wolf that the “IBT and Mr. Kyle had not well served the pilots over the past years, and [his] hopes that representation by others with interests focused on the needs and futures of the pilot group at Cape Air, would open the door to improved communication and a strong future for all concerned” are “constitutionally protected.”

The Carrier states that it maintains an electronic rolodex and all pilots are aware of this rolodex. The Carrier further maintains that pilots routinely request and are given access to the rolodex. The Carrier states that it does not inquire about the reasons for a pilot’s request for another pilot’s contact information. The Carrier also states that in December 2008 CAPA requested a copy of a list of pilot cell phone numbers from the Managing Director of Operations (MDO) and that the MDO, unaware of any restrictions to access to the list, gave the list to CAPA. The Carrier states that the IBT did not request access to the pilot telephone numbers.

The Carrier maintains that it restricts access to its “All Pilot” e-mail distribution list and it denied the IBT access to this list. The Carrier states that CAPA never requested access to this list. The Carrier states that it did not restrict access to pilots via their individual @flycapeair.com company e-mail addresses and CAPA did send material to pilots at those addresses. The Carrier also states that, as far as it is aware, management officials and CAPA did not solicit authorization cards during mandatory pilot training. If it did occur, the Carrier states that it was done by line pilots eligible to vote in the election and not management officials.

The Carrier states that for several years it has maintained a Google account which allows individuals with password access to review documents posted to Google Docs. Google Docs is used most commonly at Cape Air by Crew Scheduling to display flight assignments, which is a Google Doc called “Pilot Strips.” Cape Air maintains that anyone with the password to the group account can post and share documents without any authorization or identification of the person doing the posting. In early December 2008, the Carrier learned that someone posted and within hours removed a “Master Vote List” document to its Google account. The Carrier does not know who posted and removed the document.

The Carrier denies that there was any coordination of responses between it and CAPA during the election period. The Carrier states that its response to the IBT's statements regarding contract negotiations, published in a Carrier newsletter, was not made in coordination with CAPA and was based upon the Carrier's experience at the bargaining table. The Carrier states that it has no knowledge of any polling taking place during ground school instruction and, if it happened, the pilot in question is a line pilot and was at no time acting as an agent of the Carrier. Moreover, the Carrier states that the training class in question had only two eligible voters in it and therefore, even if the events occurred as described by the IBT, it would be an isolated event with *de minimus* effect. Finally, Cape Air states that it has historically paid its pilots for attendance at meetings, whatever the subjects, on precisely the same basis as pilots were paid to attend the Carrier's April 14, 2009 meeting.

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.

Cape Air is a common carrier as defined in 45 U.S.C. § 181.

II.

CAPA and the IBT are labor organizations and/or representatives as provided by 45 U.S.C. § 151, Sixth.

III.

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

IV.

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

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

STATEMENTS OF FACT

1. Gualtieri's Management Status and CAPA

Larry Gualtieri is a line pilot who was eligible to vote in the most recent pilot representation election at Cape Air. Gualtieri is also CAPA's Secretary/Treasurer. Gualtieri has flown for Cape Air since approximately 1993. In 1999, he became Chief Pilot and was promoted to Director of Operations in 2000 and became VP-Director of Operations in 2004. Cape Air terminated Gualtieri in November 2006. Gualtieri returned to Cape Air as a line pilot in July 2007. In addition to his duties as a line pilot, Gualtieri is also a member of the Carrier's Training Department.

Scott Okun is CAPA's President. He is also a Cape Air pilot and was eligible to vote in the most recent pilot representation election. In a sworn statement to the Board's Investigator, Okun testified:

I had been speaking with Cape Air pilots on a regular basis and we were unhappy with the representation we were receiving with the IBT. One of those pilots was Larry Gualtieri. During one of those conversations, Larry mentioned that NetJets had recently decertified from the IBT and formed their own in-house pilot union. So, in the summer of 2008, I started doing some research on the internet. I searched for information on Google about "decertification and airline". One of the first sites I found was the National Right to Work Foundation; it was the most helpful. I e-mailed them questions and they responded. Then I went to the NMB's website. . . .

During this period, I continued to have conversations with pilots who were dissatisfied with IBT representation and the consensus was that we did not just want to get rid of the IBT but that there was support to form an independent Cape Air pilots union to represent the pilots in contract negotiations and to better the quality of life of the pilot group.

My research then took me to the Department of Labor and I learned that we would have to file an LM-1 Form. So we set about creating CAPA's Bylaws and Constitution which we did in October, November and December of 2008. I believe we filed the Constitution and Bylaws in December 2008.

We began collecting authorization cards in the summer of 2008.

...

CAPA had no outside advisors that I hired. I spoke with pilots at [NetJets Association of Shared Aircraft Pilots] NJASAP—the independent union at NetJets because they did what we wanted to do. I spoke with the NMB. I spoke with an attorney at the National Right to Work League and I spoke with pilots at Cape Air because there was a wealth of knowledge there about their experiences with unions at other carriers.

...

CAPA has been funded in part through donations from our members and from Larry and myself. . . . So far CAPA has spent \$5500 in attorney fees and \$200-\$300 in administrative fees in addition to \$300 Larry has spent.

...

CAPA hired counsel, Paul Rooney in March or April of 2009. Mr. Rooney's firm was recommended to me by another attorney, Mark Schwartz, who does real estate

work in Manhattan. I have known Mr. Schwartz for a number of years and to my knowledge he has no association with Cape Air.

Gualtieri stated the following under oath to the Board Investigator:

During the time period from June 2008 until the tally, CAPA was financed by Scott and myself. After the tally, we received two donations: one from a former Cape Air pilot in the Pacific (I do not know why), and the other from a pilot working the line.

CAPA's expenses so far have been paid by using our own personal credit cards. Our expenses have been legal counsel; refreshments for meetings; postage; rental of a mailbox; and payment for a domain name and host provider for our website.

...

Approximately in the summer of 2008, I began designing a website for CAPA. Designing a website for CAPA was one of the first things we did as an organization because Cape Air is a very geographically spread out system . . . Capt. Okun and I thought a web site was a good way to get information out to all the pilots.

2. The April 12 Wolf Letter

On April 12, 2009, Cape Air CEO, Dan Wolf sent the following letter to all pilots via the Carrier's electronic mail system:



660 Barnstable Road
Barnstable Municipal Airport
North Ramp
Hyannis, Massachusetts 02601
508-790-3122
508-778-1870 FAX
Reservations (800) 352-0714
(800) 635-8787

April 12, 2009

To: Cape Air/ Nantucket Airlines Pilots
From: Dan Wolf

I have been asked by a number of crew members to share my thoughts and hopes regarding the very important representation decision you will be making in the weeks ahead. Through this process you have a huge opportunity to help build upon our 20-year legacy and to continue to shape this company for a very exciting and rewarding future.

While I do have strong feelings regarding which outcome will best advance our mutual interests, I completely respect that the decision is yours to make. Whatever the outcome, I will continue to do my best to make this a successful company and a great place to work.

At Cape Air, we have made every effort to align the interests of front-line employees and leadership, where both work together towards common goals. Consistent with this endeavor, we believe that it is healthy for employees to own a part of the company and share in the value of the company that they help to create. This is the reason for our Employee Stock Ownership Plan (ESOP). We also believe that employees should share in, and benefit from, the profit that they create. This is the reason for our Profit Sharing Bonus Plan. It is also the reason that most of the profit we have made this past 20 years has been reinvested in our company so that we might continue to improve and grow.

We also believe in open communication, offering all employees the opportunity to examine and challenge our decisions and practices. This is the reason for our numerous communication channels, including our internal web site, town meetings, 129 messages and other vehicles for communication and participation embedded in our practices and culture.

I hope that you vote with a vision of the kind of company you want this to be, mindful of our history, culture, values and beliefs. At Cape Air, our people have always been - and will always be - our most important asset critical to achieving

our mutual goals and aspirations. I am proud of the relationships we have built based on trust, credibility and mutual respect.

With all of this in mind, I have come to believe that representation by you and your peers, directed by the interests of Cape Air pilots and reflective of our unique model would be the best fit here. Let me explain why.

Over the past 20 years, we have been approached by major airlines to become a "regional airline partner." These proposed "partnerships" would have resulted in our being absorbed into a major airline brand such as an "Express" or "Connection" product. Although attractive at first and something that many regional airlines strive for, being represented by a major airline brand would not have been a good fit for Cape Air, except under very limited circumstances (Micronesia being the most obvious example). Among our greatest strengths are our independence and flexibility.

A major airline brand partnership would have placed decision-making regarding our schedules in the hands of those who don't live in our communities. It would have impaired our ability to apply policies in flexible ways, sensitive to the individual needs of our customers and employees. In addition, it would have undermined our culture, as no one except those who work at Cape Air really understands the unique organization we truly are.

In making your representation decision you face a similar choice. You can choose to continue with a major union brand and its attendant industry-forged agenda, hierarchy (and even internal disputes) and costs. Or you can re-assert control over the unique relationship that will help to define our future. The best partner we can have is our own employees, who are members of the communities we serve, who understand what we all stand for and who share the same long-term interests; a partner who understands the true meaning and spirit of MOCHA HAGoTDI. I hope you recognize and embrace this by choosing representation that is focused on you, your fellow pilots, Cape Air and our success.

I expect that there will be a lot of communications in the weeks ahead. I will make myself as accessible as possible to answer any questions you might have. I look forward to continuing this journey as we move forward together building this very different and wonderful company.

Warmest regards,



Dan Wolf

The Carrier in its April 22, 2009 and June 1, 2009 submissions to the Board "acknowledged that 'the letter certainly can – and should – be read as an endorsement of CAPA over IBT.'"

3. The April 14 Carrier Meeting

In a sworn statement given to the Board Investigator, Cape Air Chief Operating Officer Dave Bushy stated that the Carrier holds three to five pilot meetings per year in Hyannis and pilots at other continental and Caribbean

locations call in. There are pilot meetings at the other bases coinciding with the visits of management officials. Bushy testified that “the purpose of the meetings in general is to get the pilots together to talk—about operations, Carrier finances; it’s an open forum. Some are focused such as post-accident discussions, EAP, fuel conservation or safety programs.”

On April 14, 2009, the Carrier held a pilot meeting in Hyannis, Massachusetts. Wolf testified to the Board Investigator that he:

was invited by pilot management who called the meeting so that I could be present to address any questions on my memo dated 4/12/09 or clarify if necessary the opinion I had expressed in that memo which was distributed by e-mail to all pilots as well as being posted on company bulletin boards. I sent it out to express the opinions I had as people were preparing to vote. To my recollection this was during the time that people could cast their vote for representation.

I spoke briefly at the start of the meeting and said that I was there to speak as CEO about what was going on at Cape Air and obviously one of the things which was going on was the election. I said I was there to answer any questions or clarify any points in the letter. I do remember stating that nothing in the letter was meant to influence how the pilots voted but was rather an expression of my opinion. I spoke as someone who believes in the right to organize and had been an organizer. I told them that I had worked a long time on the letter and it spoke for itself but that it was based on 20 years building a company that people felt passionately about.

I do not recall any one asking me questions about the letter or the election, but I do not believe anyone did. I absolutely did not make any statements regarding what effect voting for CAPA, the IBT or no union would have on negotiations or pay. Attendance at pilot meetings is not mandatory but we do pay pilots who attend. Generally we have a call in number so pilots who can not attend the meeting can participate by phone. I do not know if pilots who participate by phone

are paid and I am not sure if any pilots participated by phone at the April 2009 meeting.

4. CAPA's April 15 Meeting

Gualtieri stated under oath that CAPA had one meeting with pilots. This meeting took place at the Hyannis Airport in the Rectrix building. According to Gualtieri:

Although Cape Air leases space from the Rectrix building, we did not use Cape Air leased space. We used another room. We did not have to pay to use the space. I do not know if people usually have to pay to use rooms in the Rectrix for short periods of time. The meeting took place right around the time the Carrier held a pilot meeting in mid-April. We timed this meeting as a last push to see if anyone had any questions before the vote. Pilots from other stations could call in. I don't know if any did. People floated in and out—about 15 pilots attended. We had a presentation. As far as I am aware, pilots were not on duty if they attended the meeting. Roughly the meeting was 3 hours long. No one from management attended. We also tried to do it online – so that if any one wanted to follow the presentation remotely they could. We opened the meeting with a 13 slide Powerpoint presentation and then opened it up for Q&A.

Okun gave a sworn statement to the Board's Investigator in which he stated that CAPA had one meeting for pilots in April 2009. Okun testified:

We timed the meeting because the ballots were going out and because of the availability of Alan Davis, our featured speaker, who is a NJASAP member. He is a Net Jets pilot and a part-time Cape Air pilot. He was at NetJets when they were IBT and when the NJASAP/IBT representation election was going on. He had a perspective that I thought was valuable to share with other pilots. About 15 pilots attended this meeting.

5. Access to Pilot Telephone Numbers

Walter Kyle is the Chair of the IBT's Negotiating Committee with Cape Air. In a sworn statement to the Board he stated, "I never asked [the Carrier] for a list of phone numbers for pilots. I did not think that I would get the list if I asked for it. I based this conclusion over the difficulties that we had in using the company e-mail addresses to communicate with the pilots during negotiations."

Okun stated that, in late 2008, he requested a pilot telephone list from Craig Bentley, Cape Air's Managing Director of Operations, and Bentley gave him the list. Okun also stated that Bentley did not ask the purpose of his request.

6. Access to the Carrier's Email System

On March 23, 2009, Kyle contacted Bushy requesting "use [of] the Cape Air e-mail system to get a message out to the pilots regarding these changes [in negotiations] and my expectations." In an e-mail dated March 26, 2009, Bushy responded stating, "[a]s to your request for access to the Cape Air email system, access is limited to Company-initiated communications and official Cape Air business. Therefore, it would not be proper to provide you with access to the system for the purposes you indicate."

However, in Bushy's August 2009 statement to the Board's Investigator, he noted that the Carrier did not have an e-mail policy and stated that it was not access to the Carrier's e-mail system that was restricted but access to the "all pilots" distribution list:

By practice we have not allowed anyone other than management to have access to the "all pilot" distribution list. On one occasion, Bill Field tried to send an e-mail using the "all pilot" distribution list and the moderator stopped it. This was in 2008, and on another occasion the IBT attempted to use the "all pilot" distribution list, I believe in March 2009, and then during the election period Walter Kyle specifically requested access to the distribution list and was denied. To my knowledge CAPA did not ask to or use the distribution list. I also do not know if CAPA used Cape Air e-mail addresses to communicate with pilots.

According to Gualtieri, from 2008 until the election, CAPA communicated with pilots primarily through e-mail, text message, and telephone. Currently, CAPA communicates with pilots primarily through e-mail and CAPA's website. Gualtieri stated:

CAPA sends e-mails to pilots at their Cape Air e-mail account. I set up a list using the standard format for creating employee e-mail addresses: first initial, last name @ flycapeair.com. I never used a company "all pilots" distribution list to send CAPA e-mails. We are not allowed.

Cape Air Fleet Manager William Cush testified that CAPA has used the Carrier's e-mail addresses to send out organizing material. He stated that the Carrier has a practice of monitoring and restricting use of the Cape Air "all pilot" distribution list in order to cut-down on spam or non-company related e-mail.

7. Solicitation of Authorization Cards

Kyle testified in a sworn statement that while CAPA was collecting authorization cards, CAPA officer, Larry Gualtieri, was assigned to teach ground school on GPS systems and "reportedly pushed CAPA and CAPA authorization cards. When assigned to teach ground school in the Caribbean, Mr. Gualtieri pushed CAPA cards in the pilot's rest area in San Juan."

Gualtieri testified that, during the summer of 2008, he and Okun began collecting authorization cards. In addition to his duties as a line pilot, Gualtieri conducts pilot training. Gualtieri teaches Initial, Recurrent, and GPS Ground Training. He also conducts Flight Training, Check Rides, and IOE (Initial Operating Experience). Gualtieri testified that he "never handed out cards during training" but he "did hand them out before or after training." Gualtieri testified:

To my knowledge no one from management ever saw me handing out a-cards. No one from management ever stopped me from distributing a-cards. Class training is pretty structured. If I handed out cards, it was while we were clearly at lunch or after class was over and tests had been graded. I never distributed cards before, during or after a check ride. When you are doing a check ride you are acting as an arm of the

FAA. When I was working as an Instructor I considered myself as a pilot. . . . There was an allegation that I went to the Caribbean [to collect a-cards while conducting training]. I paid for that trip (hotel and ground transportation). I jump-seated there, on my own time, as I would for any personal trip. I did it on my day off. I handed out cards in the San Juan break room. I just showed up in the break room and told pilots I was there to answer any questions, comments or insults about CAPA.

The Board's Investigator interviewed 13 randomly selected Cape Air pilots from Massachusetts bases. Eleven of those interviewed stated that the election or the organizations were not discussed at training events that they either conducted or attended as a student.

One pilot stated: "I had a GPS Ground class where Larry [Gualtieri] was the Instructor and I think that someone may have joked at the beginning of the class that it was time to turn in your CAPA a-cards."

Another pilot stated that in January 2009:

I overheard some new pilots talking to Larry [Gualtieri] on break for an initial ground school class which Larry was teaching and a new pilot said something like "Yeah that sounds like a good idea, let me give you that CAPA card now." I don't know if they were on break or what. It looked like a class was going on and that this should not be a topic of conversation that one should have with the Instructor during ground school training.

8. Posting of a "Master Vote List" on the Carrier's Google Document Site

Cush stated:

The Carrier does use Google Docs. Prior to and during the election period we used Google Docs to post and share certain documents. We did not have a server so the only way that we shared documents other than through e-mail was through Google Docs and this was

how pilots were informed of daily flight schedules, training schedules, and other things of that nature.

A Cape Air pilot gave the Board's Investigator the following sworn statement:

Earlier this year, in January 2008 I went into Google Docs and I saw a file called "submissions" or something like that. So I clicked on it and it was a list called "Master Vote List" or something like that and I figured it out that it was a list of people who had submitted CAPA authorization cards. I was not pleased because I thought that it was supposed to be confidential. Obviously someone has to collect the cards but I did not think that it should be posted for everyone to see. I made a posting voicing my displeasure about this on the Yahoo Groups Cape Air pilots message board and it [the list] was taken down soon thereafter. I have no idea how long the list was up there; I would say at most the list was maybe up for a week.

Gualtieri stated that he had created a Google Docs page for CAPA. Gualtieri further testified that:

The intent was that Capt. Okun and I be able to share/view documents regarding the CAPA organizing drive. I set this up in the summer of 2008. . . . Only Capt. Okun and myself had access to the account. We created a document called "Master Vote List" to keep track of who and how many pilots signed a-cards. In December 2008, I was looking at a Yahoo Groups message board for Cape Air pilots where a pilot posted a message asking why the Master Vote List was posted on a Carrier Google Docs page. I was surprised. Upon checking the Carrier's Google Docs page, I saw it was there and I immediately removed it.

Both Scott and I used the Carrier's Google Docs application to do things like check schedules. And we think that one or the other of us had been signed into the Carrier's page instead of CAPA's when we had

uploaded it [the list]. I think this list was posted for less than one day because I had made changes to the list and less than one day later I saw the Yahoo Groups posting and removed it. No one from management ever asked me about the "Master Vote List" I do not know if anyone from management saw the list while it was posted on Google Docs. I posted the list with the intent that only Capt. Okun would see the list. We were the only two with access to CAPA's Google Docs page.

A Portable Document Format (PDF) file of the "Master Vote List" was submitted to the Board's Investigator. The list does not identify its author. It contains the names of 194 Cape Air pilots and has the following column headers: Seniority, Name, DOH, Base Status, LOA/PT Date, Place 1 if eligible, Place 1 if a yes vote. Several of the pilots interviewed by the Investigator testified that they either saw the document on Google Docs or were aware of its posting on the Carrier's Google Docs page. Some pilots stated that they were confused as to who created and posted the document. Other pilots stated that they were uncomfortable with this information being posted on a page maintained by the Carrier.

9. CAPA and the Carrier "Coordinated" Responses to the IBT

In a sworn declaration, Kyle stated:

On April 10, 2009, at approximately 7a.m., I had a conversation with CAPA leader Scott Okun in which we discussed whether the tentative agreements reached by the former negotiator for Cape Air pilots, Don Treichler, and Cape Air management would remain valid in light of Mr. Treichler's replacement as bargaining representative by the IBT-AD. Mr. Okun became visibly upset with my position that the tentative agreements would no longer remain valid, and argued that an agreement should be concluded quickly without any improvements to wages and benefits. Within hours of our discussion Cape Air . . . sent all Cape Air Pilots a memo entitled "Cape Air Negotiations Update #31". . . . The Update stated that Carrier negotiators "have been surprised to learn that Walter Kyle, who has always acted as Chief Cape Air

Pilot Negotiator, now appears to be distancing himself” from the prior negotiations. This refers clearly to my conversation with Mr. Okun, thus making clear that Mr. Okun and Cape Air management were coordinating their response to my earlier statement to Mr. Okun.

Okun testified that he never had any conversations with Bushy, Wolf, or Markham [Linda Markham, Cape Air Director of Human Resources] or any management official about the IBT, negotiations, CAPA, representation, or the election during the election period.

In a sworn statement to the Board Investigator, Bushy stated:

Historically we sent out e-mails or e-mail attachments with negotiations updates and we usually sent them out after a bargaining session and also to inform for things like requests for mediation. Bill Cush provided me with a copy of an e-mail from Walter Kyle which was sent out in the first week of April. In my opinion, Kyle’s email distorted facts and re-wrote history, regarding collective bargaining negotiations. Cush got the e-mail from a yahoo-groups pilot message board. I used Negotiations Update #31 to address the issue raised in Kyle’s April 2009 email. I could have called it Elections Update but kept the Negotiations Update title because we had established a communication vehicle to keep pilots informed regarding the negotiations and this was an update dealing with the distortions regarding negotiations in Kyle’s email.

Negotiations Update #31 stated, in part:

Q. How were the channels of communication between Walter Kyle and the Company representatives at negotiations?

Unfortunately, very poor. Repeatedly during negotiations Dave offered Walter to discuss—outside of the formal negotiation sessions—any matters of concern to him, his committee or the pilot group. Walter did not take up our offer, even once, in the past

2 ½ years. He did, however, sprinkle negotiations with caustic and inaccurate comments about the company, our staff and leadership. When it occurred, we were forced to demand explanations and set the record straight.

During the course of the on-the-property investigation several pilots referred to a Yahoo Groups message board open to all Cape Air pilots. This message board is administered by a Cape Air pilot in his personal capacity. Several pilots testified that several of the events that are at issue in this investigation were topics of discussion on this message board during the election period.

10. Polling

Kyle stated in his sworn statement the following:

I have been informed by another pilot that during the election period, Cape Air ground and flight instructor Brian Shewokis, while teaching a Recurrent Ground School Training class, asked each student in the class how they felt about their choices in the election. When an issue arose about management interference, Shewokis projected an image of Dan Wolf's April 12, 2009 letter to the pilots to explain how this was not interference. Shewokis discussed the election, and individually polled the employees present about which organization they supported, while making clear that he (and impliedly the Carrier) supported CAPA.

Bryan Shewokis is a pilot at Cape Air and was eligible to vote in the recent election. Shewokis gave the following sworn statement to the Board's Investigator:

In 2009, I taught recurrent ground school training in April in Florida. I had three students. The training is broken up into sections and there are tests after each section. The tests are multiple choice. Students grade their own tests and we go over any questions and they turn them in to me at the end of training. We had just finished a test and I told people they could take a 15 minute break before we began the next section.

During this break, one guy brought up Wolf's April 12, 2009, letter and I pulled it up on the internet from the web site and put it up on the projector screen so everyone could see it. One of the members of the class said he thought it was interference and I said that I had been told by another pilot that since the letter did not threaten reprisal against pilots who did not support CAPA it was not interference. The person who thought it was interference did not agree with me and was basically done talking to me. I don't recall either of the other two students saying anything about it. Then we might have stepped out to get coffee or something and then we continued. I did not collect or distribute any authorization cards at this meeting.

None of the 13 randomly selected pilots interviewed by the Board's Investigator were polled by management regarding their support of either organization.

DISCUSSION

A. Applicable Legal Standard- Carrier Domination

Carrier interference, influence, or coercion which fosters, assists, or dominates an organization may disqualify the organization as an employee representative. *Northern Air Cargo, Inc.*, 29 NMB 1, 24 (2001). Under these circumstances, the Board has found that the organization "is not qualified to act as an employee representative nor accordingly, to invoke a representation dispute on the employees' behalf." *Mackey Int'l Airlines*, 5 NMB 220, 221 (1975). In addition, when the facts tend to show that an organization's authorization cards were the product of carrier influence, the Board will not take cognizance of the cards by directing an election under Section 2, Ninth. *Southwest Airlines*, 21 NMB 332, 350 (1994).

In contrast, the Board found that the applicant was not fostered, dominated, or assisted by the carrier where the applicant obtained a list of employee addresses without carrier permission and used portions of carrier letters to employees without obtaining carrier assistance or advice. *Wisconsin Central/Fox Valley & Western*, 24 NMB 64 (1996). In *Orion Lift Serv., Inc. (d/b/a Orion Air)*, 15 NMB 358 (1988), the Board found an organization independent of the carrier where it had asked for voluntary recognition and the carrier refused and had campaigned for one of the two bona fide labor

organizations on the ballot. The Board determined that these acts were not characteristic of a carrier dominated union. *Id.* In *Virgin Atlantic Airways*, 24 NMB 575 (1997), the Board found that the carrier interfered in a manner which benefitted the applicant. However, the Board also determined that there was insufficient evidence that an applicant union was carrier dominated where the applicant and the carrier did not act in concert to promote the applicant's candidacy. *Id.*

The IBT's argument that Gualtieri's prior status as a management official renders him ineligible to represent Cape Air pilots is without merit. Gualtieri is a line pilot. The IBT did not challenge his membership in the craft or class; it cannot now argue that his prior status renders him ineligible to represent the craft or class of which he is currently a member.

The record establishes that Okun and Gualtieri formed CAPA without carrier assistance. Okun independently conducted research concerning his representation options. As a result of this research, Okun and Gualtieri formed CAPA, created CAPA's Constitution and Bylaws and registered CAPA as a labor organization with the Department of Labor. Okun and Gualtieri created a CAPA web site, collected authorization cards, filed an application to represent Cape Air pilots with the NMB, and hired legal counsel to represent CAPA. All of this was financed primarily by Okun and Gualtieri. There is no evidence that Cape Air management officials financed, consulted with, or otherwise assisted CAPA in any of the above listed activities. Nor is there evidence that Okun and Gualtieri sought management's assistance in the formation of CAPA.

In this case, as in *Virgin Atlantic, above*, although the Board finds that the Carrier interfered in the election by engaging in a pattern of assistance of CAPA as discussed below, the Board also finds that there is insufficient evidence that CAPA and the Carrier acted in concert to promote CAPA's candidacy or that CAPA is otherwise not qualified to act as an employee representative.

B. Applicable Legal Standard- Carrier Interference

In *Texas & New Orleans Railway v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 568 (1930), the Supreme Court stated:

"Interference" with freedom of action and "coercion" refer to well-understood concepts of the law. The meaning of the word "influence" in this clause may be gathered from the context... The use of the word is

not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. "Influence" in this context plainly means pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this act than in relation to well-known applications of the law with respect to fraud, duress and undue influence.

. . . .

. . . [C]ongress may facilitate the amicable settlements of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both

Id. at 570 (citations omitted).

The Carrier relies on *National Labor Relation Board v. Gissel Packing Co*, 395 U.S. 575 (1969) and *US Airways, Inc. v. National Mediation Board*, 177 F.3d 985 (D.C. Cir. 1999) (finding that an employer's right of free speech as articulated in *Gissel* applies under the RLA) to support its argument that its endorsement of CAPA is protected by the First Amendment. However, *Gissel* and *US Airways* dealt with employer views on unionization, not an employer endorsement of one union over another as part of a pattern of assistance timed to influence the outcome of an ongoing election.

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. *Stillwater Central R.R.*, 33 NMB 100 (2006); *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).

A carrier is free to communicate its views regarding representation in a non-coercive manner during an election to its employees. *Federal Express Corp.*, 20 NMB 659 (1993); *USAir/Shuttle*, 20 NMB 162 (1993); *USAir*, 17 NMB 377 (1990). However, the Board also has found that a carrier's right to communicate "is not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election." *America West Airlines*, 17 NMB 226 (1990). See also *Horizon Airlines*, 24 NMB 458, 506 (1997) (the Board found that Horizon's communication of the message that pilots were "best represented by fellow pilots" and an "in-house" union was a factor in its determination that the carrier interfered with employee's free choice of representative).

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, above* (1990).

"[I]solated incidents" of potentially questionable carrier activities are insufficient to warrant a finding that the laboratory conditions necessary for a fair election have been tainted. *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).

There is no evidence that polling took place during training or that authorization cards were collected by management officials or collected during training sessions. The record establishes that authorization cards were collected by pilots eligible to vote in the election. While the IBT argues that the Carrier's supplying a list of pilot telephone numbers to CAPA is misconduct because the same list was not provided to the IBT, the record establishes that the IBT did not request the list and CAPA did. Unlike access to the e-mail system discussed below, the Carrier did not treat the organizations disparately because the IBT never requested a copy of the list.

There is insufficient evidence that Negotiations Update #31 was a coordinated effort between CAPA and the Carrier. The IBT has not established that the only source of the information contained in Negotiations Update #31 was Scott Okun. Bushy's statement that he obtained the information from the Yahoo Groups message board is credible given the extent to which these matters were discussed on the message boards.

The Board notes, however, that the Carrier distributed Negotiations Update #31, which was highly critical of the IBT's and Kyle's representation of the pilots, to all Cape Air pilots just three days prior to the mailing of Voting Instructions to pilots and two days prior to Wolf's memo endorsing CAPA; which was followed the next day by a pilot meeting in which the CEO reiterated his endorsement of CAPA. Bushy acknowledges that the focus of the update was the upcoming representation election - "I could have called it Elections Update but kept the Negotiations Update title because we had established a communication vehicle to keep pilots informed." The Board finds that these endorsements of CAPA over the IBT deliberately were timed to coincide with the start of the voting period and demonstrate a pattern of support assistance which tainted the laboratory conditions necessary for a fair election. While CAPA did not seek Carrier assistance, it nonetheless benefitted from it.

In addition, CAPA routinely used the Carrier's e-mail system to communicate to pilots with management's tacit approval. In March the IBT requested access to the e-mail system and was denied access. In its denial of the IBT's request, the Carrier did not make the distinction between the e-mail system and the distribution list. Instead, the Carrier stated that "access [to the Cape Air e-mail system] is limited to Company-initiated communications and official Cape Air business." The Board finds that the Carrier applied its e-mail policy disparately to CAPA and the IBT and that this disparate treatment

tainted laboratory conditions.

In light of the Carrier's pattern of support of CAPA, the Board finds that CAPA's posting of the "Master Vote List", on the Carrier's Google Docs page, however inadvertent, created the appearance that employee support for a union was being monitored and therefore, also tainted laboratory conditions.

C. Applicable Legal Standard- Remedy

Under Section 2, Ninth of the Act, the Board has broad discretion to tailor its investigation to the facts and circumstances of each case. *Evergreen Int'l Airlines*, 20 NMB 675 (1993); *Florida East Coast Ry.*, 17 NMB 177 (1990); *Key Airlines*, 16 NMB 296 (1989). When the Board has found carrier interference, it has employed a variety of special ballots and notices intended to eliminate the taint of interference on the employees' freedom of choice of representative. The Board's methods of determining the employees' choice of representative vary on a continuum determined by the extent of the carrier interference found. The continuum begins with a finding that the carrier had not interfered with the employees' choice of representative. *USAir*, 18 NMB 290 (1991). The continuum ends with interference so outrageous that, in the Board's judgment, alternate means of gauging employee sentiment other than a secret ballot election are appropriate. *LSG Lufthansa Servs., Inc.*, 27 NMB 18 (1999); *Sky Valet d/b/a Commercial Aviation Servs. of Boston, Inc.*, 23 NMB 276 (1996).

Frequently the Board has found that the level of interference warranted a re-run election using the Board's standard ballot procedures and a notice. See *e.g.*, *Stillwater Central R.R.*, 33 NMB 100 (2006) (carrier conducted coercive mandatory one-on-one meetings and conferred benefits during election period); *Pinnacle Airlines*, 30 NMB 186 (2003) (carrier dismissed two union activists during the election period and appeared to conduct surveillance of employees attending union meetings); *Mercy Air Serv.*, 29 NMB 55 (2001) (carrier changed wages and benefits after application was filed); *Delta Air Lines, Inc.*, 27 NMB 484 (2000) (Board released confidential showing of interest information and mailed ballots for another election to Delta employees; carrier conducted mandatory, small group, and one-on-one sessions to promote its message regarding the election); *America West Airlines, Inc.*, 25 NMB 127 (1997); (carrier interrogated employees during the election period); *Horizon Airlines*, 24 NMB 458 (1997) (carrier communicated to employees that an in-house committee was a substitute for collective bargaining and used the committee to provide work improvements during the organizing campaign); *USAir*, 17 NMB 377 (1990) (carrier denied union access to employees post-certification, made

campaign misstatements, enforced telex use policies unevenly, and maintained a pervasive and sustained anti-union posture); *America West Airlines, Inc.*, 17 NMB 79, 102 (1990) (carrier conferred new profit-sharing benefits during election period); *Zantop Int'l Airlines, Inc.*, 6 NMB 834 (1979) (carrier conducted small group meetings and misrepresented Board procedures); *Auto-Train Corp.*, 5 NMB 343 (1975) (carrier distributed literature during the election campaign which constituted interference); *Chicago & S. Air Lines, Inc.*, 2 NMB 1 (1948) (carrier issued memoranda containing erroneous directions to employees as to how to mark ballots).

As in the cases above, the Board finds in this case that the Carrier interference warrants a re-run election using the Board's standard ballot and a posting of the attached Notice in the workplace. The Board will also send the Notice to all eligible voters along with the Voting Instructions.

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: Cape Air's endorsement of CAPA and campaign against the IBT; CAPA posting a list of its supporters on a web site maintained by the Carrier for official business; and the Carrier's denial of the IBT's request to use CAPA's e-mail system to contact pilots while implicitly granting access to the system to CAPA. Therefore, the Board ORDERS a re-run election using Telephone Electronic Voting (TEV) and Internet voting, with 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. The cut-off date will be February 20, 2009.

The count will take place in Washington, D.C. Copies of the attached "NOTICE TO PILOTS OF CAPE AIR (HYANNIS AIR SERVICE, 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 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

NOTICE TO PILOTS OF CAPE AIR (HYANNIS AIR SERVICE, INC.)

After an investigation conducted by the National Mediation Board (Board), in which Cape Air (Hyannis Air Service, Inc.) (Cape Air), the International Brotherhood of Teamsters (IBT), and the Cape Air Pilots Association (CAPA) had the opportunity to present statements and evidence, the Board found that Cape Air'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 (RLA).

Accordingly, the Board authorizes a second election by Telephone Electronic Voting (TEV) and Internet Voting among Cape Air's Pilots. 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 RLA allows employees the right to select representatives without carrier influence or interference.

Cape Air 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 at legal@nmb.gov.