



**NATIONAL MEDIATION BOARD**  
WASHINGTON, DC 20572

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In the Matter of the  
Application of the  
AMERICAN TRAIN DISPATCHERS  
ASSOCIATION  
alleging a representation dispute  
pursuant to Section 2, Ninth, of  
the Railway Labor Act, as  
amended  
involving employees of  
UNION PACIFIC RAILROAD

34 NMB No. 6

CASE NO. R-7071

FINDINGS UPON  
INVESTIGATION

November 6, 2006

This determination resolves election interference allegations filed by the American Train Dispatchers Association (ATDA or Organization) involving employees of Union Pacific Railroad (Union Pacific or Carrier). For the reasons below, the National Mediation Board (NMB or Board) finds that the laboratory conditions required for a fair election were not tainted. Accordingly, the ATDA's request for a *Laker* ballot election is denied.

PROCEDURAL BACKGROUND

On January 6, 2006, the ATDA 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 Train Dispatchers, employees of Union Pacific. At the time the application was received, these employees were unrepresented.

The Board assigned Norman L. Graber and Kendrah Davis to investigate. On February 2, 2006, the Board found

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\* 45 U.S.C. § 151, *et seq.*

that a dispute existed and authorized a Telephone Electronic Voting (TEV) election. Voting Instructions were mailed on February 21, 2006, and the tally was conducted on March 15, 2006. The results of the tally were as follows: of 588 voters, 253 cast valid votes for representation. This was less than a majority required for Board Certification. On March 16, 2006, the Board dismissed ATDA's application. *Union Pacific R.R.*, 33 NMB 149 (2006).

On March 22, 2006, the ATDA submitted allegations of election interference pursuant to Section 17.0 of the Board's Representation Manual (Manual). The ATDA supplemented its allegations on March 23, 2006. On March 31, 2006, the Carrier responded, denying ATDA's allegations. On April 12, 2006, the Board found that the ATDA'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 ATDA filed additional responses on April 19, May 3, and June 2, 2006, and the Carrier filed additional responses on April 26, May 4 and 10, 2006. Both participants submitted declarations and other documentary evidence in support of their positions.

On August 16, 2006, Susanna C. Fisher was reassigned as the Investigator in this case.

On September 13 and 14, 2006, Investigator Fisher and Investigator Davis conducted interviews with management officials, randomly selected witnesses, and witnesses proffered by the ATDA. This determination is based upon the entire record in the case including facts presented by the participants in the written submissions as well as the interviews.

#### ISSUE

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

CONTENTIONS

ATDA

The ATDA contends that during the election period, the Carrier “engaged in a pervasive, systematic campaign to ensure that the employees not vote for representation,” and that Union Pacific’s actions “tainted the laboratory conditions and interfered with a free and fair election.” Further, the ATDA asserts that the Carrier’s conduct was so egregious that the Board should order a new election using a *Key* or *Laker* ballot. See *Key Airlines*, 16 NMB 296, 311-12 (1989); *Laker Airways Ltd.*, 8 NMB 236, 253, 258 (1981).

Specifically, the ATDA alleges that the Carrier engaged in the following:

- A. Bombarded the employees with campaign communications, many of which were replete with misrepresentations regarding Board procedures and the ATDA’s policies;
- B. Conducted an unprecedented number of meetings with the Train Dispatchers;
- C. Granted wage increases;
- D. Implemented new benefits and reward programs;
- E. Solicited employees to discuss union representation;
- F. Engaged in surveillance of employees; and,
- G. Provided the Board with inaccurate employee addresses.

The Organization supported its assertions with: Declarations from Train Dispatchers; a Declaration from the Vice-President of the ATDA; a CD recording of a Union Pacific Town Hall meeting; letters written by management officials to

the Train Dispatchers regarding the ATDA's campaign; and, Union Pacific Election Updates mailings.

### Union Pacific

The Carrier denies the ATDA's allegations. Union Pacific states that it complied with all requirements of the RLA and only communicated with its employees to the extent allowable under the First Amendment. The Carrier denies that it misrepresented either Board procedure or the ATDA's policies and procedures. Additionally, the Carrier states that all information provided in its mailers was entirely accurate and not excessive in volume. Union Pacific also states that all informational meetings were strictly voluntary and there was no solicitation or surveillance of employees. The Carrier asserts that it did not institute any new benefits or rewards since the beginning of the ATDA's organizing effort. The Carrier contends that wage increases for Train Dispatchers in 2006 have been planned since 2004 and/or were part of the regular annual salary increase cycle. Furthermore, Union Pacific states that it did not make promises or threats about future wages or benefits depending on the outcome of the campaign. Finally, the Carrier denies supplying the Board with inaccurate addresses.

Union Pacific supported its assertions through:

- Declarations from management officials;
- Email "warnings to management and Train Dispatchers regarding laboratory conditions";
- Prepared comments used by management officials during a series of Safety and Communication Meetings (S&C Meetings);
- Presentation slides used by management officials during a series of S&C Meetings and Town Hall meetings;
- Presentation regarding Dispatcher attrition data, hiring plans, and dispatcher compensation options;
- ATDA campaign materials including: leaflets, posters, meeting announcements, unsigned letters, letters from "Internal Organizers," letters from union officers, election updates, and questions and answers;
- ATDA emails to Train Dispatchers;

- Information found on ATDA’s website;
- Letters written by a management official to the Train Dispatchers regarding ATDA’s campaign;
- A postcard mailed by Union Pacific with a “Voter’s Guide”;
- A postcard from Union Pacific comparing ATDA’s negotiated benefits with the Carrier’s benefits;
- UPOne article;
- Election Updates mailings;
- Union Pacific’s website devoted to election issues;
- Transcripts of telephone calls received on the “UP Election Hotline”; and,
- Copies of emails and the Carrier’s responses to the emails received through the Carrier’s dedicated election-related email addresses.

### 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.

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

#### II.

The ATDA 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.” This section also provides as follows:

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

### FINDINGS OF FACT

#### A. Campaign Communications

The ATDA began organizing the Train Dispatchers on Union Pacific in March 2005. During the ATDA’s election campaign, both Union Pacific and the ATDA distributed campaign materials. The Board’s investigation revealed that campaign materials published by the Carrier and the ATDA were posted on bulletin boards, placed on employees’ desks, and mailed to employees’ home addresses. Additionally, the Carrier: set up a toll-free “UP Election Hotline” for employees to call with questions about the election; provided two email addresses for employees to use to inquire about the election; posted election information on a web page; and, issued Election Updates throughout the campaign.

According to the declaration of Richard D. Meredith, Assistant Vice-President, Labor Relations:

There were four parts to UP’s message – to explain how the National Mediation Board election rules work, to highlight some of the benefits of non-agreement employees, to respond to questions raised by train dispatchers and to respond to any electioneering efforts of the ATDA.

UP's campaign communication plan to make accurate information available included the following: voluntary town hall meetings, an "800" number, an e-mail contact, a web site and home mailings. . . . I did review all home mailings to ensure they satisfied the "don't lie/don't threaten/don't promise" test. . . .

UP's communication plan for home mailing material since January 4, 2006, had three parts – five letters, two postcards, and four Election Updates.

Most of the Carrier's campaign materials discussed the Board's voting procedures and included statements about the ATDA. The following are examples of such materials:

A letter dated January 16, 2006 from Steve Barkley, Vice President, Harriman Dispatching Center (HDC) & Network Operations to Train Dispatchers included the following:

[I]n my experience with previous unionization efforts on the UP, there are some NMB procedural issues that have the potential to be misunderstood or misrepresented.

First of all, the application by the ATDA to the NMB to determine if there should be an election does not mean there will be an election. It merely means that the ATDA is asking the NMB to investigate whether or not enough UP Dispatchers are interested in pursuing a union election. Secondly, if the NMB decides that enough Union Pacific Dispatchers are interested in unionizing to hold an election, the election does not mean that the Dispatchers will be unionized. Thirdly, if you are opposed to the idea of having the ATDA represent Dispatchers, you need to understand how the NMB's voting rules work. If you do not want to be unionized, it is important to know how to indicate a preference of "no union."

The only way to indicate a preference of “no union” is to **not vote**. . . .

If there is an election, at the completion of the voting process the ballots will be counted. If 50% plus one of all Train Dispatchers cast votes in the election, the NMB will certify the representative on the ballot that obtains the majority of votes cast. In other words, if a simple majority of those ballots indicate a desire to be represented by ATDA, it will be certified as the bargaining representative for Dispatchers. As you can see, it would be possible for ATDA to obtain the right to represent all Dispatchers on Union Pacific by receiving votes from one more than 25% of all Dispatchers.

Letter dated February 2, 2006, from Barkley to Train Dispatchers included the following:

The NMB has also advised that they will conduct the election by secure telephone electronic voting. The only way to vote “no union” is **to not vote**. Therefore, a telephone call to the NMB is a vote for the union. The only way to vote no union is to not place a telephone call to the NMB. Union Pacific believes it has a proven record of better treatment of our Dispatchers compared with what the ATDA typically believes for Dispatchers it represents. You are a part of the Union Pacific’s management team, and we would like you to stay that way.

Due to the significance of this election, it is critical that you make an informed decision based on truthful information. To ensure you receive accurate information, UP will make available:

- Regular Election Updates.
- A telephone “Hot-Line” to answer questions, or discuss broader concerns. The number is 800-537-4142 and the passcode is 52267.



- A web page for easy on line access to all information regarding this important issue.
- Town-hall meetings to address any questions or concerns.

If the ATDA wins the right to represent you, negotiations to establish wages and benefits begin with a “clean slate.” The fact is no one can guarantee what will happen at the bargaining table. The ATDA does not win the right to start the bargaining at current wages and benefits or, for that matter, at any level. The ATDA cannot guarantee that wages and benefits will not be reduced any more than it can guarantee wages will be increased. All ATDA can do is sit down at the bargaining table with management and negotiate a new collective bargaining agreement.

A letter dated February 7, 2006 from John Marchant, Vice President, Labor Relations to Train Dispatchers ended with the following:

- Union members are generally required to pay dues. The amount of dues is a matter that is decided by the union. On BNSF, the total annual dues paid by each dispatcher is approximately \$860.00.
- Unions have executive officers and other staff paid with membership dues. In 2005, ATDA filed reports with the Department of Labor showing that the ATDA president and three ATDA vice-presidents each received total compensation of more than \$100,000.

A letter dated February 13, 2006 from Dennis J. Duffy, Executive Vice President – Operations to Train Dispatchers included the following:

I am writing to you today as the Executive Vice President Operations and a former Train Dispatcher . . . .

[B]ecause of the experience gained in dispatching, Train Dispatchers make excellent candidates for promotion within the dispatching organization, the Operating Department, and other departments within Union Pacific.

Regardless of your career choice, as a non-agreement employee, it is your individual performance that determines your compensation, your promotional opportunities, and your future. When I was a Train Dispatcher, I believed the opportunity to prove myself on the merits of my own performance was one of the great benefits of the job. With a union, compensation is a negotiated group settlement and promotion is often tied to seniority.

In Election Update Number Four, in an article entitled “A Response to the President of the American Train Dispatchers Association,” the Carrier published the following as part of this article:

ATDA: “UP . . . padded the list” of eligible voters.

The Truth: There has been a dispute over 20 of the people included on the Union Pacific’s initial list of potential eligible voters. On March 2, the National Mediation Board ruled in favor of Union Pacific on 17 of the 20 individuals. So much for the union’s allegations of “list-padding.”

The ATDA challenged 29 names on the Carrier’s List of Eligible Voters. Investigator Graber removed nine individuals’ names due to status changes. From the remaining 20 challenged employees, the Investigator ruled that three were not eligible to vote in the election.

The ATDA asserts that another article in Election Update Number Four entitled, "The ATDA Constitution," unfairly characterized the Organization's constitution. This article listed some of the procedural rules found in the ATDA's Constitution. For example, under the heading, "Member Prosecution," the Carrier states, "Once an individual is accepted for membership, he/she is subject to 'Charges and Trials' and penalties." Under "Seniority Rules," the Carrier states, "The ATDA constitution also notes that it is the policy of the union to support 'consolidation of seniority rosters.' As stated, this policy would allow senior dispatchers at any location on a rail system to displace more junior dispatchers anywhere."

The Organization also communicated with the employees. They distributed flyers in the parking lot of the HDC, made home visits to the Dispatchers, telephoned the employees at home, and held Town Hall meetings. The ATDA also had a website and a toll-free hot line. These materials set forth the benefits of joining the ATDA, and stated the ATDA's response to the Carrier's campaign materials.

#### B. Carrier Meetings

The Carrier held a series of Town Hall meetings during the election period. Both the Carrier and the ATDA submitted statements from employees regarding these meetings. In addition, the Carrier submitted a set of prepared presentation slides that Carrier officials spoke from in these meetings.

In his testimony to NMB Investigators, Barkley stated that he meets with the Train Dispatchers twice annually to provide updates regarding dispatching operations, and that there were additional meetings during the election period "to communicate with the Train Dispatchers about the election specifically." In his declaration, Duffy states, "As EVP-Operations, my work takes me to the Dispatch Centers on a regular basis. . . . I have frequent meetings with Dispatch Center staff on a variety of topics."

In Barkley's declaration he states that between March 31, 2005 and April 11, 2005, he conducted a series of S&C Meetings with the Train Dispatchers. Barkley also states that "At each of these S&C Meetings, I spoke from a prepared text to assure that Railway Labor Act prohibitions against interference, influence, or coercion were strictly followed." Additionally, Barkley asserts that he "conducted a series of Town Hall meetings regarding representation issues between February 8 and February 23, 2006, in Omaha, Spring, and San Bernardino." Barkley testified that he spoke from a prepared text at these meetings, as well. Barkley adds that "between February 19 and February 23, 2006, I and other carrier representatives spoke from a set of prepared presentation slides."

According to the declaration of James L. Krajicek, Director, Budgets, Administration & Quality at the HDC:

Open Town Hall meetings have been conducted at the HDC for many years. Although the organizational structure has changed many times over the past 17 years of my employment at the HDC, it is a well established communication process for the leader(s) of the dispatching and train management organization to conduct meetings with Train Dispatchers and other employees . . . .

The representation election required similar informational meetings be conducted with dispatching personnel. . . . These types of "Town Hall" meetings are part of the ordinary course of business at Union Pacific.

A "Harriman Dispatching Center Communiqué" dated July 19, 2006 from Barkley states:

Topic of this Communiqué: HDC Train Dispatcher  
Town Hall Meetings

I would like to invite all HDC Train Dispatchers to attend Townhall meetings on the following dates:

Omaha HDC – Main Boardroom:

July 26<sup>th</sup> – 7am, 3pm & 11pm

July 27<sup>th</sup> – 7am, 3pm & 11pm

July 28<sup>th</sup> – 7am & 3pm

Spring Dispatch Center – North Conference Room

Aug 2<sup>nd</sup> – 3pm & 11pm

Aug 3<sup>rd</sup> – 7am, 3pm & 11pm

Aug 4<sup>th</sup> – 7am

Attendance is optional so time in attendance will not count against/towards hours of service. Train Dispatchers are encouraged to discuss any issues of interest or concern in this open forum. I will conduct these meetings personally.

A conference line has been set up for any Train Dispatchers who would like to call in.

According to Duffy's declaration, "these meetings were scheduled in batches of three, so as to allow people on all shifts and rest day schedules an opportunity to attend and receive information if they so chose." Dean D. Matter, General Director, Labor Relations, states that "from March 2005 through February 2006, the Carrier conducted 53 Town Hall meetings . . . to explain the "A" card process or the NMB's election process." In one of the Town Hall meetings, an employee asked Matter why the "voting procedures were skewed toward the union." According to Matter's declaration, "I offered what I thought was a plausible explanation concerning the historical difficulties labor unions faced in organizing efforts. I felt the question needed a response and I did my best to answer in a fashion that was not in any way misleading or inaccurate."

One Train Dispatcher asserts that, "I personally witnessed a Corridor Manager circulating amongst the Train Dispatchers in the office soliciting them to attend the last series of Town Hall meetings." According to the declaration of

Richard R. Brown, Director, Train Management at the HDC, “[I] did not at any time during the time when union activities were ongoing observe any Corridor Managers soliciting Train Dispatchers to attend Town Hall meetings.” Duane L. Kind, Jr., Corridor Manager at the HDC, also states that he did not solicit Train Dispatchers to attend Town Hall meetings nor did he witness any Corridor Managers soliciting employees to attend. All employees interviewed said they understood attendance at these meetings to be voluntary.

### C. Wage Increases

According to Barkley’s declaration, following his appointment as Vice President at the HDC in July 2004, he approached Union Pacific executive leadership with a multi-year hiring campaign strategy to resolve the issue of declining levels of Train Dispatchers. Barkley maintains that Carrier attrition records indicated early attrition of the Train Dispatchers (more than 40 percent) within three years of employment. Barkley states that he immediately began working with Human Resources, the Compensation and Benefits Department, and his staff at the HDC to address this problem. Barkley describes the process:

Following our initial discussion in July 2004 about compensation adjustments, employment market analyses were done, program adjustments and options were discussed and a final proposal was prepared for presentation to Executive Vice President Operations, Dennis Duffy on July 22, 2005. I conducted the initial Train Dispatcher compensation review meeting on August 17, 2004, with Robert Kraft, General Director Human Resources Customer Services, Don Murray, Director Human Resources Customer Services for the HDC, and members of my dispatcher support staff to review Dispatcher attrition data, hiring plans, and various Dispatcher compensation options. . . . This meeting marked the beginning of the company’s research, planning, development, approval, and implementation process for an adjusted wage structure for newly hired

Dispatchers. . . . During the first half of 2005, various adjustments to the plan were considered and a meeting was conducted with . . . Duffy on July 22, 2005, to review final recommendations. The estimated annual increased operating expense for the wage adjustments recommended was in excess of \$800,000. A budget authority increase of this magnitude required approval of the President of the company, and we included a request for funding for the program in our 2006 operating expense budget request.

In August, 2005, I met with Company President Jim Young and the executive staff to review the 2006 Harriman operating budget request. . . . Final Operating Expenses Budget Authority for year 2006 was received in November 2005. . . .

The August 17, 2004 presentation entitled “Dispatcher Projected 2005 Hiring Needs and Compensation Proposal” outlines historical attrition data, age demographics, hiring proposals, and compensation options for Train Dispatchers. According to this document, “the entry-level pay rate and pay progression scale for Train Dispatchers has remained unchanged since 1998. During the past three years, the percentage of resignations from qualified Train Dispatchers with three years of service or less has increased from 10 percent to 77 percent of the resignations received.” Based on this data, Barkley recommended that Union Pacific extend the six month step increases for Train Dispatchers from one year after training to two years after training. Additionally, Barkley recommended that Train Dispatchers who had recently qualified would also get salary increases so that they would not be earning less than the newer hires.

Barkley testified that Union Pacific provides regular annual salary increases for all non-agreement employees, including Train Dispatchers. This performance-based salary program is known as the Merit Award Program, and the cycle for administering the annual wage increase is March 1 of each year. Barkley states that after he received final approval for the increase in November 2005, he and his staff determined that

he would announce the wage enhancements in January of 2006 and administer the wage increase on April 1, 2006. Barkley continues, “[t]he timing of the April 1, 2006, increases was designed in order to allow for administration of the annual Merit Award Program wage increases on March 1, and to follow that with additional wage adjustments for affected Dispatchers on April 1, 2006.”

In January 2006, Barkley announced that beginning on April 1, 2006, newly promoted Train Dispatchers who were scheduled to get \$250 raises in their monthly salaries after they became fully qualified would now get \$500 raises. Additionally, the \$250 raises that they were scheduled to receive six months after they qualified would be doubled to \$500. Barkley also announced that Train Dispatchers who had recently qualified would get salary increases as well.

The Carrier also submitted numerous emails between management officials regarding the proposed wage increases for Train Dispatchers. These emails date from August 2004 until the wage increases were announced in January 2006.

The ATDA submitted declarations from Train Dispatchers describing Barkley’s announcement of the raises. The employees’ testimony is the same as Barkley’s testimony.

#### D. Benefits and Rewards Programs

The ATDA submitted declarations from several Train Dispatchers stating that Union Pacific provided new benefits and rewards to the Train Dispatchers, including the following: (1) Fuel Masters Award program; (2) Safety Award program; and, (3) Employee of the Month program. These employees state that the programs were not in place before the ATDA began circulating authorization cards.

##### 1. Fuel Masters Award Program

According to the declaration of Wayne A. Kennedy, General Director Fuel Conservation, Union Pacific developed the Fuel Masters program in May 2004 to help control the rising cost of fuel. Kennedy states that the Fuel Masters



program began as a pilot program to reward locomotive engineers for fuel conservation in North Platte, Nebraska. This program awards employees up to \$150 per month in personal gas cards for fuel savings for the Carrier. According to the February 24, 2006 edition of UPOnline, in an article entitled "U.S. Transportation Secretary lauds Union Pacific Fuel Masters":

Since the pilot began, the Fuel Masters program has decreased fuel consumption by 6 percent on the 175-mile run between North Platte and South Morrill, Nebraska. Other locations have experienced improvements between 4 and 8 percent.

Kennedy asserts that the engineers encouraged the Carrier to expand the program to include the Train Dispatchers to "optimize our fuel conservation efforts." Based on this request, and after the Fuel Conservation group obtained additional resources in the summer of 2005, the Carrier began rewarding Dispatchers in October 2005.

According to two Train Dispatcher's declarations, "The Train Dispatchers were told that this [Fuel Masters program] would be applied in the Northern Region first and, if successful, extended to half the system by the end of 2006. However, the Carrier accelerated the program in 2006 during the election period to include other train dispatching regions."

## 2. Safety Award Program

In January 2006, the Carrier rewarded Train Dispatchers in the Western Region with a "windbreaker-style jacket" for superior safety performance. According to declarations from Barkley, Krajicek, and Jo Lynne Lehan, General Director, HDC Operations Support, the company has awarded employees with numerous benefits over the years including "cash awards, jackets, hats, watches, and clocks, brief cases."

Several Train Dispatchers submitted declarations listing the safety awards and other recognition they received from the Carrier including: 2005 Safe Dispatching Award (clock); 2004

Safe Dispatching Award (tool kit); 2003 Safe Dispatching Award (plate); 2002 Safe Dispatching Award (shoulder bag); 2001 Safe Dispatching Award (watch and plaque); 2004 Guardian Award (plaque); and, 2005 Velocity Improvement Team Recognition (shirt).

### 3. Employee of the Month Program

In a declaration, Lehan states that during a late 2004 trip to the Spring facility, she learned that officials there developed an Employee of the Month program to recognize employees for safety or performance. Employees are rewarded for outstanding safety or performance with a designated parking spot. Lehan asserts that she decided to extend the idea to the Omaha office at that time and implemented the program in the Omaha, Nebraska, office in July 2005. The Employee of the Month program is open to all employees at the HDC.

### 4. Threats and Promises

Elroy J, Schroer, Assistant Vice President – Employee Benefits, states in his declaration:

Union Pacific has clearly stated, including for considerable time prior to March 2005, that it can not make guarantees regarding the current benefits package. . . . [I]n our meetings and communications to Dispatchers, we made it clear that wages and benefits negotiated under collective bargaining could be better or worse than what they currently enjoyed as management employees. So, there were no threats or promises relative to the outcome of the election, and there were no guarantees about future wages and benefits.

The ATDA submitted letters from management officials regarding the collective bargaining process. In a letter dated March 29, 2006 to all Train Dispatchers from Barkley, he states:

How would the collective bargaining process work if ATDA were selected to represent Union Pacific dispatchers? Under the Railway Labor Act (the law governing Labor Relations in our industry), ATDA would serve a notice on Union Pacific requesting to negotiate an agreement covering work rules, wages, and benefits. While ATDA would arrive at the negotiating table with a “wish list,” in reality, the parties would be starting with a blank sheet of paper. The amount of money you earn, your entire health and welfare package and the conditions under which you work would all be decided through the collective bargaining process. The ATDA may cite lucrative contract provisions “cherry-picked” from other properties; however, the negotiating process involves a lot of “give and take” and no one can predict the outcome of the negotiations. The simple truth is, no one can assure you that the negotiations will result in a wage and benefit package as favorable as what you currently enjoy.

In one Train Dispatcher’s declaration submitted by the Organization, the employee describes the Town Hall meetings and states:

At those meetings, Barkley and the other UP officers discussed the wages, benefits, and working conditions of Train Dispatchers. They acknowledged that there had been some problems and areas of legitimate concern that they either were in the process of addressing or would address in the future. They strongly implied that the employees are now and would continue to be better off without a union. They emphasized that voting for a union “put everything at risk” – they called it “a throw of the dice” – and that no one could say what would happen to our current wages and benefits if ATDA became our representative.

### E. Solicitation of Employees

The Carrier established a "UP Election Hotline" that the Train Dispatchers could use to ask any questions regarding the election process. According to Matter, the Carrier only received four calls on the hotline and he personally handled two of those calls. One caller asked a question regarding the negotiation process. "The second call was a complaint received from a pro-union individual at Spring, Texas, stating, 'there are several anti-union personnel – or they're not for the union – that are making memos and papers and handing them out to people while they're at work on the job.'" Matter states that he shared this information with Barkley who addressed the caller's complaint. The Carrier also submitted transcripts of these telephone calls.

Justin T. Wayne, Labor Relations Officer, fielded the other two calls. Wayne states, "The first caller was the wife of a Dispatcher. She left her contact information, and I returned her phone call. She asked me how long this 'election thing' was going to last. I explained when the voting period started and ended, and that any result is subject to change based on interference. . . ." With respect to the second call, Wayne states that it was "a message left by a caller thanking us for distributing information. He said that all they have been hearing is the Union side and he was happy we finally started to respond to it. I did not return this call."

The Train Dispatchers were also able to submit questions regarding the election process electronically through Matter's "Lotus Notes" email address. Additionally, the Carrier established a second email address to allow Train Dispatchers to submit questions. Matter received seven emails through his Lotus Notes address and two through the second email address. Matter asserts that, "The emails received all involved issues relating to wages, benefits, the voting process, or other discreet election issues. To the extent that these emails called for a response, I made sure that our responses were purely factual and accurate." Union Pacific submitted copies of all emails and the Carrier's responses to those emails.

### F. Surveillance of Employees

The ATDA submitted a declaration from one employee stating:

UP knew I was one of the Train Dispatchers actively organizing for the ATDA. When I walked around the workplace to talk to other Train Dispatchers, I often was followed by a Western Region Director who seemed to be constantly “keeping an eye on me.” This surveillance took place on almost a daily basis from November through the end of voting. On more than one occasion, when I put something about the union up on a bulletin board, the director took it down almost immediately. Other Dispatchers were reluctant to talk to me during breaks at work because they didn’t want the company to know they were interested in talking about the union. This made it virtually impossible to discuss the union in the break rooms at work or anywhere else on UP property.

The Carrier submitted emails from management officials to supervisory personnel providing instructions regarding the posting of information on bulletin boards. In an email dated February 1, 2006, from Krajicek, he states:

The posting of information on our bulletin boards is of course covered by other UP policies and rules, for example we are prohibited from posting derogatory information, pornography, or other inappropriate postings. Beyond that, we should leave ATDA postings that do not otherwise violate any rule or policy up on the bulletin boards.

As an example of the type that we should remove, we recently removed an ATDA posting entitled “GOT QUESTIONS,” which provided a toll-free number and the web site address being used for ATDA information. We removed it because the UP shield logo, which is a trade marked brand identity

symbol, was altered to include the message to vote ATDA. This is a violation of UP's brand identity program rules, so it was OK to remove it.

However, to be sure we do not violate any NMB rules regarding the posting of ATDA information on UP bulletin boards, please check bulletin boards regularly and give me a copy of anything you see posted. We will review and if necessary have our legal counsel review to see if appropriate to remain posted or remove.

Also please continue to check bulletin boards to be sure the NMB Notice to Employees posted during the first week of January is not removed.

Krajicek also stated that he included a copy of the Carrier's Brand Identity Quick Reference Guide to the above-referenced email detailing the guidelines and prohibitions for the use of the Union Pacific shield logo. Krajicek stated in his declaration, and testified, that he personally removed the ATDA posting entitled, "GOT QUESTIONS" because it violated Union Pacific's brand identity program rules. The Carrier states that the only union postings that were ever removed from bulletin boards by management were ones that infringed on Union Pacific trademark rights.

#### G. Employee Addresses

The ATDA asserts that several employees never received TEV Instructions (Instructions). As evidence, the Organization submitted a declaration in which the employee states that another Train Dispatcher never received Instructions from the Board, but received every mailing that the Carrier sent. The ATDA submitted an additional declaration from an employee stating that two employees never received the Instructions from the Board, but they did receive all Carrier mailings. The employee states that the Instructions were sent to "older, long-outdated, or incorrect addresses." This employee also stated, "[n]one of the many mailings UP sent us to 'explain' the election process alerted the Dispatchers about what to do in case they didn't get the package from the NMB."

The Carrier states that: (1) at the March 15, 2006 tally, the Board announced that there were no undeliverable voting instructions; (2) the mailings produced by the Carrier for the election were based on the same set of addresses supplied to the Board; and (3) even if two employees did not receive voting Instructions, that would not have materially affected the outcome of the election since the ATDA lost by more than 40 votes.

According to Matter's declaration:

During the election period, the Carrier became aware of issues with only two of the addresses on the list. For one of those individuals – Ronald Anderson – the Carrier received word from the NMB of a problem with the mailing address and immediately provided updated information received from the employee.

The other individual was Aswad Gardner. The mailing address provided to the Board for Mr. Gardner is in Dallas, Texas, and this is the address that Mr. Gardner himself continues to designate as his home address in the company database. However, Mr. Gardner was hired to work in the Spring, Texas office and apparently maintains a residence there as well. As a result of information received from the U.S. Post Office during the midst of the campaign, the Carrier began using Mr. Gardner's Spring address instead of his Dallas address for some of its later mailings. But because Mr. Gardner has never formally changed his address and because there was no indication from the Board that any materials sent to Mr. Gardner's Dallas address were undeliverable, the Carrier did not believe that it was necessary (or even accurate) to inform the Board that Mr. Gardner's address had changed.

Stephen A. Abolafia, Director, Human Resources Customer Service, stated in his declaration, and testified, that he provided the list of mailing addresses to the Board utilizing a reporting tool in Peoplesoft, the Carrier's system of record. He also stated that this was the same tool used to produce addresses for Union Pacific's mailings.

### 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. *Stillwater Central R.R., Inc.*, 33 NMB 100 (2006); *AVGR Int'l Bus. Inc., d/b/a United Safeguard Agency*, 31 NMB 419 (2004); *Piedmont Airlines, Inc.*, 31 NMB 257 (2004); *Pinnacle Airlines Corp.*, 30 NMB 186 (2003). When considering whether employees' freedom of choice of a collective bargaining representative has been impaired, the Board examines the totality of circumstances as established through its investigation. *Frontier Airlines, Inc.*, 32 NMB 57 (2004); *AVGR Int'l Bus., above*; *Mercy Air Serv., Inc.*, 29 NMB 55 (2001); *US Airways*, 26 NMB 323 (1999); *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998).

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. *Stillwater Central R.R., above*; *Piedmont Airlines, above*; *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 a 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, above*, at 235-36 (1998) (Board ordered a re-run election using a *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" or 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 finding of interference).

#### A. Campaign Communications

In *AVGR Int'l Bus., above*, the Board restated its long standing policy that:

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

See also *Mercy Air Serv., above*; *Air Logistics, L.L.C.*, 27 NMB 385, 404 (2000).

As the Board stated in *American Airlines, Inc.*, 26 NMB 412 (1999), “the Board’s evaluation of allegations regarding campaign communications does not focus on ‘pure speech,’ but on whether the speech in the context of the ‘totality of the circumstances’ impermissibly interferes with employee free choice.” Additionally, the RLA does not require silence on the carrier’s part during an organizing campaign. *America West Airlines, Inc.*, 30 NMB 310 (2003).

In this case, the Carrier significantly increased its communications with employees during the laboratory period. However, this increase alone is insufficient to prove that laboratory conditions were tainted. *American Airlines, above*; *Air Wisconsin*, 16 NMB 235 (1989).

Inaccuracies, misstatements, and misleading statements about the Board’s procedures have been held to constitute election interference. *Allegheny Airlines, Inc.*, 4 NMB 7, 13 (1962). While most of the Carrier’s communications to the Train Dispatchers contained information regarding the ATDA, the record shows that these communications had a factual basis. Additionally, the Carrier did not misrepresent the Board’s voting procedures or how to vote against the union. The Carrier’s views on the issues of unionization were permissible communications.

Therefore, the Board finds that Union Pacific’s campaign communications did not interfere with employees’ free choice.

#### B. Carrier Meetings

Carrier meetings are not improper unless they are mandatory, coercive, or significantly increase in frequency during the election period. *AVGR Int’l Bus., above*; *Piedmont Airlines, above*; *Mercy Air Serv., above*. 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 representative.

The record establishes that while Union Pacific conducted a large number of meetings during the campaign, attendance was strictly voluntary. The record further shows that the Carrier representatives conducting those meetings followed strict guidelines to ensure that they were in compliance with the RLA's prohibitions against influence or coercion. Witness testimony establishes that the information provided in the meetings paralleled that provided in the written guidelines submitted to the Board.

It is undisputed that the Carrier discussed the upcoming election. However, the ATDA has offered insufficient evidence that either the number of Town Hall meetings or the content tainted laboratory conditions.

Therefore, the Board finds that the Carrier meetings did not interfere with employee free choice.

### C. Wage Increases

Changes in pay that were planned before the laboratory conditions attached, or where there is "clear and convincing evidence of a compelling business justification" do not taint laboratory conditions. *Frontier Airlines, Inc.*, 32 NMB 57 (2004); *Delta Air Lines, Inc.*, 30 NMB 102 (2002). Further, 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 & Eastern R.R. Co.*, 25 NMB 302 (1998).

The record established that Union Pacific provides regular annual salary increases on March 1 of each year.

As stated in the "Dispatcher Projected 2005 Hiring Needs and Compensation Proposal," the entry-level pay rate and pay progression scale for Train Dispatchers had remained unchanged since 1998. Additionally, the attrition rate for Train Dispatchers was more than 40 percent within the first three years of employment. The Carrier demonstrated that pay increases were necessary for it to retain qualified Train Dispatchers. Furthermore, the evidence proves that this pay raise was pre-planned, with initial planning taking place in

July 2004 and approved in November 2005, to be effective in April 2006.

The Carrier has submitted sufficient evidence that the pay increases were pre-planned, consistent with practice, and independently justified by business considerations. Therefore, the evidence establishes that the pay increases did not taint the laboratory conditions.

#### D. Benefits and Rewards Programs

The record confirms that the Fuel Masters program began as a pilot program for Locomotive Engineers in May 2004. Additionally, the evidence confirms that, if successful, the program would extend throughout the system. The program proved to be successful, and after the Fuel Conservation group received additional funding, the program was extended to the Train Dispatchers in October 2005. The ATDA acknowledges these facts, but argues that the Carrier accelerated the program in 2006, during the election period, to influence the election outcome. There is insufficient evidence that Union Pacific coerced employees by expanding the Fuel Masters program faster than originally announced.

The declarations submitted by the Carrier and the interviewed witnesses state that the Carrier has consistently given awards for superior safety performance. The Board has found that when a Carrier has a history of granting benefits and rewards to employees, benefits given during the laboratory period do not constitute interference. *USAir/Shuttle*, 20 NMB 162 (1993). There is no evidence to support the Organization's contention that this was a new program designed to influence the Train Dispatchers.

The evidence shows, and the participants agree, that the Employee of the Month program began in Spring, Texas, was extended to the Omaha, Nebraska, office in July 2005 and is open to all employees at the HDC. There is no evidence to support the ATDA's assertion that this program interfered with employees' freedom of choice of a collective bargaining representative.

The overwhelming evidence is that the Carrier repeatedly told employees that if the ATDA was elected, employee benefits would be subject to the collective bargaining process. This is not inaccurate or coercive. *America West Airlines, Inc.*, 30 NMB 310 (2003); *Express Airlines I, Inc.*, 28 NMB 431 (2001). Therefore, the Board determines that the Carrier's statements regarding pay and benefits did not taint laboratory conditions.

#### E. Solicitation of Employees

The Organization asserts that the Carrier solicited employees to contact Union Pacific's General Director through the "UP Election Hotline" or by email with questions regarding the election process. The ATDA argues that "such carrier actions are an invitation to influence employees during one-on-one sessions."

The Board has consistently found "one-on-one" meetings with members of the craft or class, where anti-union opinions are expressed by management officials during the laboratory period, are inherently coercive. *Aeromexico*, 28 NMB 309 (2001); *Key Airlines*, 13 NMB 153 (1986); *Zantop Int'l Airlines, Inc.*, 6 NMB 834 (1979).

In *Stillwater Central R.R. Inc.*, 33 NMB 100 (2006), the Board found that laboratory conditions were tainted in part by the carrier's frequent mandatory, one-on-one meetings where management said the union was unnecessary and repeatedly interrogated and polled employees on their view of the union. *See also Delta Air Lines, Inc.*, 27 NMB 484 (2000) (carrier's conduct of holding numerous, mandatory, small group and one-on-one sessions to promote its message regarding the election constitutes interference); *Aeromexico, above* (one-on-one meetings when employees did not want to talk about the election are inherently coercive); *Continental Airlines, Inc./Continental Express, Inc.*, 27 NMB 463 (2000) (carrier was attempting to influence employees with "one-on-one" regular performance evaluations that included an anti-union speech from a manager).

Unlike the conduct in *Delta*, *Aeromexico*, and *Continental, above*, the Train Dispatchers in the present case were not forced to use either the Election Hotline or the email addresses. These services were completely voluntary. There is no evidence that the employees were influenced or coerced to use these resources. In fact, there were only four calls to the Election Hotline and nine emails regarding the election process.

Because such contacts are both employee-initiated and voluntary, the Organization's argument that the Election Hotline and the email addresses are essentially one-on-one meetings is insufficient to support a charge of election interference. Therefore, there is insufficient evidence that the Carrier was engaging in solicitation of employees.

#### F. Surveillance of Employees

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

In *Pinnacle Airlines Corp.*, 30 NMB 186 (2003), the organization asserted that there was prolonged supervisory presence outside of union meetings. The Board found that the supervisors' statements regarding these meetings conflicted and, therefore, were not credible. As a result, the Board found that the carrier tainted laboratory conditions by engaging in surveillance of employees. The Board reached this finding after considering the allegations of surveillance in conjunction with

its findings that two employees' terminations of employment tainted laboratory conditions. *See Pinnacle, above.*

In other cases, where organizations asserted that the laboratory conditions were tainted due to increased supervisory presence, the Board has found insufficient evidence of interference. *Aeromexico, above* (organization's claim of surveillance based on a heightened presence of management officials in hallways and break rooms is insufficient evidence that the carrier engaged in or created the impression of surveillance); *American Trans Air, above* (organization's assertion that the carrier improperly monitored employee conversations is insufficient evidence that the carrier engaged in surveillance of employees); *Federal Express Corp., 20 NMB 7 (1992)* (None of the randomly selected witnesses interviewed perceived any attempt on the part of the carrier to determine their position on the organization).

The ATDA submitted a declaration from a Train Dispatcher stating that the employee was followed by a director and that on more than one occasion, when the employee posted union related materials on the bulletin board, the director took them down.

The Carrier submitted numerous emails from management personnel to supervisors providing instructions outlining the rules regarding posting on bulletin boards. Krajicek testified that he personally removed an ATDA posting because it violated Union Pacific's brand identity program rules.

Based on the evidence, only postings that violated the Carrier's brand identity program were removed from bulletin boards. Additionally, management was well versed as to what constituted trademark infringement. Finally, none of the randomly selected employees interviewed by the Investigators perceived any surveillance by Union Pacific. There is insufficient evidence to indicate that any Train Dispatchers were followed during the election period. Therefore, there is no evidence to support ATDA's allegation that the Carrier was engaging in or even creating an impression of surveillance of Train Dispatchers.

G. Employee Addresses

The Board has procedures in place for requesting duplicate ballots and removing the names of voters from the list for whom Instructions were undeliverable. The Board's Notice of TEV Election (Notice), posted throughout the Carrier's system, provides a mechanism for employees who do not receive their voting Instructions and VINs to obtain duplicates. In this case, the Notice provided, in relevant part:

If you do not receive your VIN/PIN by February 26, 2006, you may contact the NMB to request a duplicate VIN/PIN. Your request must be in writing and signed by you. The request must be made in an individual envelope. No group requests are accepted. Requests by telephone and facsimile are not accepted. Mail the request to: NMB, Office of Legal Affairs, 1301 K Street, NW, Suite 250 East, Washington, DC 20005. **No requests will be accepted after March 10, 2006.**

The same information was provided in the Instructions mailed to each employee.

The Board received and processed duplicate Instructions/VINs requests. Therefore, the record demonstrates that employees were aware of and utilized these procedures.

Additionally, the Board contacted the Carrier regarding undeliverable Instructions and the Carrier supplied better addresses. At the tally, the Board stated that no Instructions/VINs were returned as undeliverable. Therefore, there is an insufficient basis to find that the Carrier deliberately provided the Board with inaccurate addresses in order to interfere with the election.



CONCLUSION

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

By direction of the NATIONAL MEDIATION BOARD.

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

Mary L. Johnson  
General Counsel

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