

**BEFORE THE NATIONAL MEDIATION BOARD**

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DELTA AIR LINES, INC. )  
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**NMB Case No. R-7148**

**RESPONSE OF DELTA AIR LINES, INC.  
TO AFA'S SUPPLEMENTAL MOTION FOR BOARD  
DETERMINATION OF CARRIER INTERFERENCE**

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## I. INTRODUCTION

After failing once again to achieve anything close to majority support among Delta’s flight attendants, the Association of Flight Attendants (“AFA”) now attempts to blame Delta — and the NMB — for AFA’s continued failure to win an election among Delta’s flight attendants. AFA asks the Board to order a second election and, as has become typical in such complaints, repeats its pre-tally demand for a Laker Ballot, which would not require that a majority of eligible flight attendants vote for AFA in order for AFA to be certified. AFA’s Supplemental Motion, however, is long on rhetoric and short on evidence. AFA complains loudly that Delta did not remain “neutral” in the election. AFA thus views the world through a distorted looking glass — as if AFA was not aware that an employer has a First Amendment right to provide accurate information and to state its view that its employees do not need union representation. *See Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969); *US Airways, Inc. v. NMB*, 177 F.3d 985 (D.C. Cir. 1999).<sup>1</sup>

While AFA’s brief is laden with harsh and conclusory rhetoric, the flimsy “evidence” submitted by AFA shows only that (a) AFA mounted a vigorous, expensive nationwide election campaign, and that Delta responded to AFA’s statements to the extent Delta deemed it necessary — but that it did so without any threats or promises or hint of retribution;<sup>2</sup>

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<sup>1</sup> Just yesterday, the Supreme Court reaffirmed the First Amendment rights of employers on issues relating to unionization in a case under the NLRA. *Chamber of Commerce of the United States v. Brown*, --- U.S.--- (June 19, 2008), 2008 WL 2445420 at \*5 (NLRA “manifested a ‘congressional intent to encourage free debate on issues dividing labor and management.’”) (citation omitted).

<sup>2</sup> It was AFA, not Delta, which called flight attendants at home, on layovers, and on private cell phone numbers. It was AFA, not Delta, which maintained a log of its contacts with each eligible voter and whether or not the voter was voting for AFA. See Exhibits A-D to AFA’s letter brief to the Board dated May 13, 2008. In contrast, Delta’s communications to flight attendants consistently contained words to the effect that Delta “respects your right to decide whether [union] representation is right for you.” AFA Exhibit 3 at 24, 41, 45, 47, 56, 58. Accord, *Id.* at 65 (“We have said from the start of this process the we respect your right to decide if unionization is right for you and we continue to honor that commitment.”)

(b) AFA's supporters were very public in identifying themselves, yet *none* were subjected to any form of discipline or to one-on-one interrogation by Delta; (c) Delta permitted AFA's supporters to engage in advocacy activities in Delta's crew lounges, where Delta's In-Flight supervisors work, and those managers properly administered Delta's non-discriminatory Advocacy Policy<sup>3</sup>; and that (d) the NMB successfully conducted a fair election among a large workforce of more than 13,000 voters. In sum, nothing in the record before the Board even remotely justifies overturning the election results.

Stripped of its rhetoric, AFA's motion is based not on unlawful interference or coercion by Delta, but on the proposition that it is — or should be — unlawful for Delta to (1) treat its flight attendants so well that they don't want AFA to be their representative; (2) communicate with its flight attendants on questions of vital interest to both the flight attendants and the Company; (3) respond to AFA's own massive barrage of communications, accusations and misrepresentations to Delta flight attendants; and (4) explain frankly why Delta believes the flight attendants should not favor AFA representation. Each of these items is obviously lawful, and the last three are constitutionally protected.

Despite AFA's extensive efforts to collect reports of "interference" from Delta flight attendants,<sup>4</sup> AFA has submitted nine declarations in support of its Motion enclosing (but failing to authenticate) e-mail descriptions of alleged incidents of harassment or interference. Most of these descriptions, however, are not first-person accounts by Declarants, but are nothing more than double or triple hearsay, often recounting alleged misconduct without identifying the

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<sup>3</sup> AFA does not challenge the terms of Delta's Advocacy Policy, presumably because the NMB found the same policy unobjectionable in 2002. 30 NMB 102, 137-39.

<sup>4</sup> The AFA website dedicated to its organizing campaign at Delta, [www.deltaafa.org](http://www.deltaafa.org), includes a copy of an AFA form document labeled "Interference Incident Report." See Delta Exhibit LL at tab 308. Despite the ready availability of such forms to Delta flight attendants, AFA's filing contains only five such reports using AFA's pre-printed form. A few additional allegations are submitted in the form of e-mail messages from AFA's organizers reporting hearsay, not first person reports from front line flight attendants.

date, location, or name of the supervisor(s) allegedly involved, making it impossible for Delta to investigate or respond to the allegations. Moreover, these derivative complaints mostly recount entirely lawful behavior by Delta managers. The Board should not consider such flimsy “I heard from X who heard from Y” allegations as sufficient to satisfy the Board’s requirement for “substantive evidence.” *See* NMB Representation Manual at §17.0. Delta responds herein to those of AFA’s specific allegations which do provide at least some basic identifying information so as to permit a response.

While Delta’s election conduct was plainly lawful and measured, AFA engaged in a campaign to mislead and overwhelm Delta’s flight attendants with misinformation and one-sided communications. AFA’s campaign included aggressive solicitation of flight attendants where they were permitted to do so — *e.g.*, in flight attendant lounges — and where they were not, *e.g.*, aboard aircraft — a work area where solicitation is properly prohibited by Delta policy. When such violations were brought to Delta’s attention, Delta addressed the violators with great restraint. One of the remarkable things about the AFA’s submission is the total absence of claims of disciplinary action — or even threats of disciplinary action — against AFA’s supporters. The most AFA can point to are a few scattered instances of counseling about the appropriate locations for solicitation activities in the workplace.

Finally, AFA rests its call for a new election on a desperate and unseemly attack on the Board itself. AFA does not demonstrate the existence of any material problems in the conduct of the election, nor does it identify a number of “questionable” circumstances that — even if true — could conceivably have had any impact on the outcome of the election. Neither Delta nor the NMB are responsible for AFA’s defeat in the election. Rather, in the best traditions of democracy, fully informed Delta flight attendants spoke loudly and clearly by rejecting AFA’s bid to represent them. The Board should respect their decision and deny AFA’s Supplemental Motion.

## II. DELTA COMMUNICATIONS MADE NO THREATS OR PROMISES, AND ACCURATELY DESCRIBED ELECTION PROCEDURES.

### A. Delta's Communications Are Protected By The First Amendment.

AFA apparently believes that a carrier has no right to respond to AFA's massive communications,<sup>5</sup> to correct AFA's misstatements and misleading or incomplete information or to "campaign" against AFA. That view is not only wrong as a matter of law, it is wrong as a matter of *constitutional* law. In *US Airways, Inc. v. NMB*, 177 F.3d 985 (D.C. Cir. 1999), the D.C. Circuit confirmed that the First Amendment and the Supreme Court's *Gissel Packing* decision apply with equal force under the RLA. In *US Airways*, the DC Circuit held that a carrier's First Amendment rights were violated when the NMB considered carrier speech, rather than carrier conduct, as evidence of unlawful interference. As the D.C. Circuit stated,

*Gissel* teaches that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Gissel*, 395 U.S. at 618. . . . [I]f unions are free to use the rhetoric of Mark Antony while employers are limited to that of a Federal Reserve Board Chairman, the employer's speech is not free in any practical sense. (citation omitted).

*Id.* at 993. *Accord NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 478-79 (1941); *NLRB v.*

*Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969). The Board has subsequently acknowledged

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<sup>5</sup> As reflected in Delta Exhibit LL, AFA's campaign communications to Delta flight attendants Delta were *far* more extensive, voluminous and contentious than those published by Delta. Noticeably absent from AFA's filing are copies of or reference to the huge number of documents (including printed publications, fliers, webcasts, emails and videos) published by AFA during its campaign, or any recital of the AFA's unsolicited and coercive phone calls to, and personal contacts with, flight attendants by union organizers and supporters. AFA's massive campaign effort provides the context for Delta's responses. In contrast to AFA's communications, most of Delta's communications were in direct response to specific AFA communications on subjects such as alleged misdeeds by Delta in the absence of a written contract, wage and benefit comparisons, union dues, seniority integration in the event of a merger, and similar union themes which are common in most such campaigns. AFA has pointed to *nothing* even allegedly coercive in the content of Delta's communications.

“the Carrier’s ability to communicate its constitutionally protected views on unionization to its employees.” *US Airways*, 26 NMB 323, 329 n.9 (1999); *accord*, *Delta Airlines*, 30 NMB 102, 126 (2002). Thus, while AFA may have preferred that Delta not respond to AFA’s communications, Delta’s communications cannot be a basis for a finding of interference unless they contain “a threat of reprisal or force or promise of benefit.” AFA, however, fails to even allege such coercive content in Delta’s communications.

**B. Delta’s Communications Were Both Truthful and Non-Coercive.**

AFA’s only specific complaint about Delta’s campaign materials is that they collectively constituted “a long testimonial to the reasons why Delta is superior to all other unionized carriers...” and did not “reflect neutrality on the part of Delta.” AFA Brief at 3. As explained above, Delta was not obliged to be “neutral,” and Delta welcomes the Board’s thorough examination of Delta’s campaign materials, because Delta is confident that its statements are accurate, and non-coercive. Delta’s communications repeatedly state that they are responding to questions and/or to inaccurate, incomplete or misleading information published by AFA. It is true that Delta flight attendants have competitive pay and benefits, and Delta said so. Delta also stated that that a union cannot guarantee industry leading pay. That also is true, and the same statement was upheld as non-coercive in the previous AFA election at Delta. *Delta Air Lines*, 30 NMB 102, 130-131 (2002). *See also America West Airlines*, 30 NMB 310, 339 (2003). AFA is reduced to nitpicking when it questions – wrongly, as it turns out – the accuracy of one statement made by Delta CEO Richard Anderson in a communication sent to flight attendants. In that communication, Mr. Anderson mentions a unilateral pay increase that Northwest gave to its flight attendants in 2000. Even if AFA were correct — which it is not<sup>6</sup> — the point is simply immaterial, and certainly not coercive.

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<sup>6</sup> In fact, Mr. Anderson was Executive Vice President And Chief Operating Officer of Northwest at the time, in charge of all Operations, including In-Flight , the department at Northwest which includes flight attendants. Mr. Anderson did *not* tell the Delta flight attendants that he was CEO of Northwest at the time of the 2000 pay increase, but only that he “gave” the flight attendants  
(continued...)

**C. Delta Did Not Misstate NMB Procedures.**

AFA is nothing short of frivolous in its attempt to characterize Delta's campaign slogan, "The best way to vote no is to give a rip," as coercive. "Give a rip" was merely shorthand for a description of how to vote no. As AFA acknowledges, Delta told the flight attendants that "If you do not want AFA as your exclusive union representative, DON'T CLICK; DON'T DIAL" is "the surest way to vote no...." AFA Brief at 5. The Board has repeatedly held that "accurately portraying the way an employee can vote no is not interference." *Delta Airlines*, 30 NMB 102, 131 (2002), citing *Express I Airlines*, 28 NMB 431, 454 (2001), *Delta Air Lines*, 27 NMB 484 (2000) (two videotapes sent to employees advised them to 'rip up' the ballot to vote no); *American Airlines*, 26 NMB 412 (1999) (newsletter stated "the best way to avoid a union is to tear up a ballot"). There is simply no legal or factual basis for AFA's argument that this slogan was coercive.

Delta repeatedly described the NMB voting process to Delta's flight attendants, but AFA points to nothing inaccurate in these communications. See AFA Ex. 3 at 39, 41 (Delta IFS Weekly Newsletter dated 2/15/08); 47 (Delta IFS Weekly Newsletter dated 3/20/08); 57 (Delta IFS Weekly Newsletter dated 4/4/08).

AFA alleges, in triple hearsay from an unidentified source, that Delta told one unnamed new hire flight attendant that he or she would not be eligible to vote until after one year of active service. Delta's repeated accurate statements of the NMB voting procedures demonstrate that AFA is wrong — as does the fact that AFA cannot come up with one identifiable person to confirm the allegation. The irony, of course, is that the only new hires on the eligibility list with less than one year of service are the 82 trainees who completed their IOE

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the increase, which is a completely true statement. Mr. Anderson has confirmed that John Dasburg was CEO of Northwest at the time but Mr. Anderson had responsibility for executive level decisions on labor relations matters, including the decision regarding the referenced pay increase. Declaration of Richard Anderson at ¶ 2.

just prior to the cut-off date. As the Board’s files reflect, it was AFA which sought to disenfranchise these voters — and Delta which sought successfully to have them declared to be eligible voters.<sup>7</sup>

**D. Delta’s Communications Were Responsive To, and Could Not Even Keep Up With, AFA’s Vigorous Campaign**

Instead of pointing to specific language in Delta’s communications showing unlawful threats or promises, AFA argues that the quantity of Delta’s communications was so “overwhelming” as to amount to coercion. This AFA argument discredits the intelligence and discernment of the flight attendants AFA seeks to represent. This argument also invites the Board to enter the risky business of weighing the volume or quantity of communications in a representation election — an areas where the Board is constitutionally required to tread cautiously, if at all.<sup>8</sup> If the substance of a carrier’s communications is not coercive, i.e. does not reflect a “threat of reprisal or force or promise of benefit,” the communication is constitutionally protected no matter how often it is repeated.

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<sup>7</sup> Delta posted on its website a copy of AFA’s letter to the Board challenging the eligibility of new hire flight attendants (AFA Exhibit 3 at 59), and Delta promptly and accurately reported the Board’s ruling on that issue. AFA Exhibit 3 at 62 (Delta IFS Weekly Newsletter dated 5/16/08).

<sup>8</sup> Like the courts, the Board must be especially sensitive to rulings which impinge on First Amendment rights, and take pains to avoid any rule or decision which could improperly deter either a carrier or a union from full exercise of their First Amendment rights. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (“it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. *See, e. g., NLRB v. Gissel Packing Co...*”); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980); *Thompson v. Western States Medical Center*, 535 U.S. 357, 366 (2002) (Court must determine whether that action which inhibits lawful speech “directly advances” a legitimate governmental interest and is “not more extensive than is necessary to serve that interest”, *quoting Central Hudson*, 447 U.S. at 566); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997) (“The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective...”).

AFA's communications to Delta flight attendants were far more voluminous and "slick" than those of Delta; they were also far more aggressive and high tech. AFA publicly announced its activities via press releases, newsletters and other handouts, e-mails, webcasts, and an elaborate website ([www.deltaafa.org](http://www.deltaafa.org)) dedicated to AFA's organizing effort at Delta, with hyperlinks to many videos as well. AFA supporters have engaged in one-on-one and group solicitations and in public meetings, rallies, distributing literature and other materials (including contact with Delta's passengers in airports), and a wide variety of special events designed to attract media attention. Delta Ex. LL sets out just some of the multitude of documents distributed by AFA to Delta flight attendants. (Gordon Dec. ¶ 4).

Throughout the election period, AFA advocacy and solicitation activities have been virtually a daily occurrence in flight attendant lounges and other locations at airports around the country. Delta Ex. LL ; tab 131 at 1 (AFA's "Weekly Newsletter For The Delta Flight Attendants" dated 4/14/08); and tab 114 ("Get Out The Vote" Newsletter #1). AFA has occupied solicitation tables in flight attendant lounges at all Delta flight attendant bases. *Id.* AFA has also sent numerous mass mailings to flight attendant homes and set up sophisticated phone banks and e-mail networks that its supporters use to contact Delta flight attendants at home and on their personal cell phones. Flight attendants have frequently complained to Delta about those contacts, and some have suggested that Delta somehow must have disclosed their personal information from Delta's records. *See, e.g.*, Delta Exhibits E, G, J, L, Q, S, T, U, V, and W. Delta felt compelled to respond to those concerns. In violation of Delta policy, many of these solicitations occurred at times on Delta property in work areas such as gate areas and even on board the aircraft; Delta's response, however, has not been discipline, but merely repeated requests to the AFA supporters to avoid engaging in advocacy activities in work areas or on work time. *Id.*

AFA's own exhibits confirm that many of the Delta flight attendants who support AFA's efforts — including most of AFA's Declarants — have been quite visible and vocal. *See*

AFA Exs. 4-8, 11. The AFA supporters did not hesitate to wear union pins, engage in open solicitation activities in the flight attendant lounges and in other airport areas, or to lodge complaints with Delta seeking corrective action if they believed they had been denied equal access in the lounge. This visibility undermines AFA's suggestion that Delta has created an atmosphere of fear and intimidation. Neither these visible AFA supporters, nor any other Delta flight attendants, have suffered a single material adverse consequence as a result of their support of AFA. To the contrary, there has been a free and open discussion of diverse views and opinions.

### **III. DELTA RESPECTED FLIGHT ATTENDANTS' RIGHT TO ENGAGE IN SOLICITATION AND ADVOCACY ACTIVITIES.**

As in prior union organizing efforts at Delta, Delta took appropriate steps to ensure that all Delta supervisors, and Delta flight attendants, were made aware of and had access to Delta's Advocacy Policy (Delta Ex. EE), and that supervisors were made aware of the rules applicable to their conduct during an NMB election. *See* Declaration of Andrea Bowman ("Bowman Dec."), Delta Ex. F ¶ 2; Delta Ex. HH. Delta repeated its prior training for managers and supervisors to ensure that they understood the rules of conduct (the so-called "TIPS" rules). *Id.* Delta's election campaign was conventional and respectful — in contrast to AFA representatives who violated the confidentiality of the voting process, and mounted a systematic campaign of pressure against those who would not assure AFA that they had voted pro-union.

Delta's Advocacy Policy confirms: (1) that Delta employees who support or oppose a union have the right to communicate their views and to solicit support during non-work time and in non-work areas, provided they also respect the rights of those who do not wish to be subject to such activities; (2) that employees who support or oppose a union are subject to the same rules and guidelines regarding solicitation and advocacy activities on Delta property; and (3) that all Company rules and policies must be applied in a non-discriminatory manner. Delta Ex. EE, Bowman Dec. ¶ 4-5. Delta Supervisors were instructed to enforce Delta's rules on

distribution of literature and other materials and to remove any such materials left in crew lounges in violation of Delta's guidelines. *Id.*

AFA's declarations and other documents do not support the exaggerated rhetoric of AFA's brief. Most notably, AFA does not even allege that there was *any* disciplinary action against a flight attendant related to union organizing conduct. Nor does AFA allege intimidating one-on-one conversations. Indeed, some of AFA's documents confirm that Delta's supervisors were careful to enforce the rules. (*See, e.g.* AFA Exhibit 11, p. 1, which confirms that the AFA supporter was asked to move when he was standing in a doorway but was otherwise unhindered.) Nor does AFA's evidence even rise to the level of a *prima facie* case of coercion in a workforce of over 13,000 employees. AFA's brief identifies sixteen incidents of alleged harassment by Delta — out of a group of more than 13,000 flight attendants over AFA's lengthy campaign period. Yet, over the many months of AFA's campaign, Delta had more than one million flight attendant workdays, every one of which presented multiple opportunities for carrier interference or coercion by one or more of the more than 100 managers and supervisors in Delta's In-Flight Service department — if that had been Delta's plan.<sup>9</sup> In this context, the handful of alleged “incidents” proffered by AFA amount to no more than isolated conduct, even assuming for purposes of argument that the assertions were all accurate.<sup>10</sup> The assertions, however, are far from accurate.

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<sup>9</sup> This assumes approximately 15 work days per month. For 13,000 flight attendants, over six months that amounts to approximately 1.1 million workdays.

<sup>10</sup> The Board often has held that “isolated incidents” do not amount to interference. *Express Airlines I*, 28 NMB 431, 451 (2001) (“isolated” incidents do not taint laboratory conditions); *Continental Airlines*, 21 NMB 229, 235-36, 251 (1994) (union documented few instances where supervisors requested a show of hands of employees who were going to vote in the election; Board found no interference, stating “These allegations of isolated incidents of conduct by supervisors, which are not supported by evidence of carrier coordination or authorization, do not warrant a finding that the laboratory conditions were tainted.”). “[I]ndividual activities” that are “‘isolated’ [are] not indications of carrier interference absent evidence of a systematic pattern of such activity.” *American Airlines, Inc.*, 26 NMB 412, 452 (1999) (although CWA alleges that a number of “location -specific” incidents demonstrate system-wide coercion, the NMB finds  
(continued...)

**A. Delta Did Not Engage In Surveillance of AFA's Organizing Activities.**

AFA's allegations of surveillance amount to nothing more than complaints that Delta supervisors were "conspicuously" present in the flight attendant lounges at times when AFA representatives were present. AFA fails to acknowledge, however, two facts critical to evaluating their allegations of surveillance: (1) that AFA's representatives were present in Delta's crew lounges almost continuously throughout the election period;<sup>11</sup> and (2) that Delta's flight attendant supervisors' offices are located in the flight attendant lounges and that supervisors are regularly present in the same lounges at various times to perform their own job duties.<sup>12</sup> In other words, the presence of supervisors in crew lounges is no evidence of surveillance or harassment.

Indeed, it appears that, in the absence of evidence of intimidation and coercion, AFA has gone out of its way to characterize the events reported by its supporters. Virtually all of AFA's complaints consist of hearsay, speculation or conclusion, with no supporting facts at all that demonstrate intimidation or coercion. Yet, as set forth in the Gordon Declaration<sup>13</sup> Delta's flight attendant supervisors are often in the crew lounges, participating in pre-flight briefings, interacting with flight attendants as part of their management duties, conducting Delta-sponsored events, or taking their own breaks. The presence of In-Flight managers and supervisors in the flight attendant lounges or other non-work areas, without more, does not even arguably amount

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incidents were isolated and did not support finding of interference); *Petroleum Helicopters*, 26 NMB 13, 36-37 (1998) (obstruction of election notice and certain meetings were isolated and did not taint laboratory conditions); *Express One Int'l*, 25 NMB 420, 427 (1998) (improper electronic messages are isolated incidents and did not justify setting aside an election); *Northwest Airlines, Inc.*, 26 NMB 269, 293 (1999) ("isolated" incidents do not give rise to finding of interference).

<sup>11</sup> Declaration of Sandra Gordon at ¶ 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

to interference.<sup>14</sup> Nor are these allegations strengthened by conclusory assertions that a supervisor “stared” at the union organizers or the flight attendants speaking with them. *See America West Airlines*, 30 NMB 310, 324 (2003) (supervisors’ “dirty looks” and “one-on-one encounters” insufficient to support finding of interference); *American Trans Air, Inc.*, 28 NMB 163, 176, 180 (2000) (supervisor’s interaction with employees and IAM representative in smoking area does not support finding of interference); *Aeromexico*, 28 NMB 309, 335 (2001) (despite union allegation that managers heightened their presence in hallways and break rooms “the weight of relevant, material evidence does not support the conclusion that Aeromexico engaged in or even created an impression of engaging in [surveillance.]”); *accord Monfort, Inc. v. NLRB*, 145 L.R.R.M. 2923, 2939 (magistrate’s findings), *adopted*, 29 F.3d 525 (10th Cir. 1994) (rejecting allegation that employer’s encouragement of supervisors to eat in cafeteria constituted interference: “[Neither] the presence of an increased number of supervisors or their activities in the cafeteria could reasonably be considered intimidating, harassing, or otherwise violative . . . NLRB has failed to sustain its burden . . . that the supervisors in the lunchroom were engaging in surveillance of prounion activities, or that their presence could have reasonably created the impression of such surveillance”)<sup>15</sup>.

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<sup>14</sup> “[W]here organizations [have] asserted that the laboratory conditions were tainted due to increased supervisory presence, the Board has found insufficient evidence of interference. In *Delta*, the Board stated ‘it is not unusual for carrier management to increase their presence in . . . crew lounges during particular time periods to ensure compliance with carrier policies.’” *America West Airlines*, 30 NMB 310, 340 (2003), *quoting Delta Airlines*, 30 NMB 102, 117 (2002). *See also Aeromexico*, 28 NMB 309 (2001); *American Trans Air*, 28 NMB 163 (2000); *American Airlines*, 26 NMB 412 (1999).

<sup>15</sup> Under the National Labor Relations Act, “it is firmly established that management officials may observe public union activity, particularly where such activity occurs on company premises, with violating [the NLRA], unless such officials do something “out of the ordinary.” *NLRB v. Southern Md. Hosp. Ctr.*, 916 F.2d 932, 938 (4th Cir. 1990) *quoting Metal Indus., Inc.*, 251 NLRB 1523 (1980); *accord Local Joint Executive Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) and *Albertson’s Inc. v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998).

Delta has attempted to investigate, where possible, the allegations contained in the attachments to AFA's Declarations.<sup>16</sup> Delta Exs. E, G, J, L, Q, S, U and V are declarations from supervisors at Delta's flight attendant bases. In addition to responding to specific allegations, the Declaration of Andrea Bowman confirms that Delta trained its managers and supervisors in what constitutes permissible and impermissible conduct and that Delta's solicitation rules were applied consistently across its system. The remainder of this section discusses the specific AFA interference allegations and shows why they are without merit.<sup>17</sup>

**B. Delta Did Not Harass or Coerce Flight Attendants Regarding The Representation Election**

AFA's brief argues that Delta "interrogated flight attendants about their union sympathies<sup>18</sup>, harassed AFA supporters, and constantly surveilled the Union activists..." resulting in a climate "where fear seems to be the most effective way to keep the employees in line." AFA Brief at 8. AFA's own documents (including AFA's exhibits), however, tell a very different story. Those documents show that AFA's supporters were well briefed on their legal rights under the RLA, and on Delta's Advocacy Policy. Delta Ex. LL at tabs 306-314. AFA's solicitors were armed with cameras and with printed forms on which to report management interference with their activities. AFA's own exhibits show that AFA supporters repeatedly

<sup>16</sup> AFA has made many allegations which are not sufficiently specific as to permit investigation and response by Delta (*e.g.*, do not identify the date, location, or supervisor involved). Others only describe Delta's lawful communications to flight attendants. Still others contain unsworn hearsay that does not comply with Board rules or constitute the type of evidence upon which the Board should base a finding of interference.

<sup>17</sup> A few AFA supporters complain about their access to non-work areas in or around an airport or a hotel being restricted by the police or by management. *See* AFA Exs. 4 and 6 at 4. Every airport and hotel maintains and enforces its own solicitation and access rules; Delta had no control over the conduct of those agencies or over the actions of airport hotel managers responding to complaints of harassment by AFA.

<sup>18</sup> AFA has not offered a single instance of alleged interrogation. To the extent that AFA contends that a conversation by In-Flight Supervisor Terry was an interrogation, AFA has offered no probative evidence to support such a characterization, and Mr. Terry's testimony discussed below, confirms that the conversation was initiated by flight attendants.

challenged local managers who questioned the propriety of certain activities, urging the supervisors to check with others in management. Thus, it is apparent that AFA (a) was very familiar with Delta's actual policies; and (b) told their supporters that Delta management would properly enforce the policies if questions arose. Indeed, in some of the alleged "incidents" reported by AFA, the local supervisor involved promptly modified his or her initial response after consulting with others in management about the propriety of certain activities. *See, e.g.*, AFA Exhibits 5 at 3-4 and 10 at 1-3.

**1. Alleged "Incidents" Described in AFA's Brief.**

AFA's brief (at pages 8 through 11) itemizes sixteen alleged "incidents." (AFA pads its alleged "documentation" with multiple unsworn e-mail reports of the same events from different individuals. Eight of the sixteen alleged incidents involved either or both of two individuals : John Jablonski and Toni Weinfurtner.) Delta's response to each alleged incident is set forth below in the same sequence, identified to the extent possible by the date, location, and name of the complainant identified in AFA's exhibits:

**1. April 24-Atlanta Base (Jablonski & Weinfurtner):** AFA's own witnesses confirm that when a supervisor questioned their sign, they told the supervisor that their sign was permissible and to check with others in management. The supervisor did just that, and then *relented*. Such a result demonstrates the consistent application of Delta's policy and is more likely to embolden, rather than intimidate, AFA supporters. AFA Ex. 6 at 3-4.

**2. April 26-Atlanta Base (Jablonski & Weinfurtner):** AFA's own witnesses identify the person whose sign and comments they found offensive as another (unidentified) flight attendant, not a supervisor. Delta, of course, is not responsible for the views expressed by individual flight attendants; those employees have as much right as AFA to express their views and opinions.

AFA's brief argues that the same flight attendant "then used the Delta PA system to invite flight attendants over to speak to him about AFA. (*Id.* at 2)." The e-mail cited as support, however, does *not* say that the unidentified flight attendant used the Delta PA system "to invite flight attendants over to speak to him about AFA." Instead, it makes clear that the unidentified flight attendant was on special assignment in the lounge that day to familiarize flight attendants with changes to Delta's business class services. That was the only purpose for which the flight attendant on special assignment was authorized to use the PA system. If the AFA supporters believed that the other flight attendant was behaving unprofessionally, harassing others or otherwise acting in violation of Delta's advocacy policy, they could have brought the matter to the attention of a supervisor, who would have investigated. There is no indication that they did so.

**3. April 28-Atlanta Base (Cinotto):** AFA supporter Jean Marie Cinotto complains that a supervisor counseled her for the tone of her communications with Delta personnel who were trying to address a record-keeping error that she had called to the Company's attention. In fact, as set forth in the Declaration of Colleen Atherly, the staff person who was dealing with Ms. Cinotto had complained to Ms. Atherly about Ms. Cinotto, and Ms. Atherly relayed the complaint to Ms. Cinotto. Such counseling is quite unexceptional, and unrelated to the AFA election campaign. On the next day, however, Ms. Cinotto responded that she had decided that the counseling was due to her involvement in the AFA campaign. *Id.* Ms. Cinotto offers no facts or circumstances, however, which show such a relationship. In contrast, Ms. Atherly expressly denies that the counseling was in any way related to AFA. *Id.*

**4. April 28-Boston Base (Jacob Easter, Northwest flight attendant/AFA Officer):** Mr. Easter reported his surprise at seeing a Delta supervisor in uniform. The Delta flight attendants told him that this was not unusual, that "this happens so that when their supervisors are at work

and need to fly, they are ready.” AFA Ex. 7 at 3. Nonetheless, AFA includes Mr. Easter’s report as a complaint. The reason for inclusion of this complaint is not readily apparent.

**5. April 26-Atlanta Base (Jablonski & Weinfurtner):** AFA identifies Kevin Chapas as a Delta supervisor and complains that Mr. Chapas called the AFA supporters “scum” in the crew lounge. As with many of their allegations, however, AFA is, at best, mistaken.<sup>19</sup> Mr. Chapas is not a supervisor; he is a frontline flight attendant. *See* Gordon Declaration at ¶ 13. As such, Mr. Chapas is entitled to his views and Delta is not responsible for his conduct. If the AFA supporters believed that Mr. Chapas was behaving unprofessionally, harassing others or otherwise acting in violation of Delta’s advocacy policy, they could have brought the matter to the attention of a supervisor, who would have investigated. There is no indication that they did so.

**6. April 23-Atlanta Base (Jablonski):** AFA complains that two Delta supervisors stood in front of the AFA table “for the majority of the time AFA activists manned the table” and one of them, Jackie Reilly “was wearing a flight attendant uniform at the time.” Ms. Reilly testifies, however, that she works in and around the flight attendant lounge continuously, that Atlanta base supervisors all wear their uniforms on Wednesdays, that April 23 was a Wednesday, and that “at no time did I stop and stand in front of Mr. Jablonski’s table nor did I observe anyone at his table or intimidate other flight attendants from speaking with Mr. Jablonski.” Reilly Declaration, ¶ 2, 3. The complaint does not identify the other supervisor.

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<sup>19</sup> A letter written by AFA’s John Cornelius, AFA Ex. 8 at 11, references an instance in which “a former supervisor was allowed to sit across from the “union table” and yell “scum.” This suggests that AFA did know that Mr. Chapas was not a supervisor at the time the alleged remarks were made.

**7. No Date/No Base (Jablonski):** AFA relies upon double hearsay to assert that an individual flight attendant was the victim of “massive” interference when she “was called at home and asked where she got her AFA pin, and was asked not to speak about the union.” However, the flight attendant involved apparently did not confirm the allegation, even though Mr. Jablonski urged her to respond “with more details” of this incident. AFA Ex. 5 at 10. As Mr. Jablonski notes in his message to the flight attendant, “Without your first hand testimony (email with names, dates, what was actually said) it is only conjecture...” Without such details, of course, Delta is unable to investigate or respond.

**8. April 28-Atlanta Base (Cinotto):** AFA complains that a supervisor initially told AFA’s solicitors to remove a yellow bag tag from the AFA table, but the supervisor came back 15 to 20 minutes later and told the AFA representatives that she had been mistaken and that the bag tag was acceptable. Once again, however, AFA’s own exhibits confirm that (a) the Delta supervisor confirmed that she had made a mistake and *relented*; and (b) the AFA supporter involved, Jean Marie Cinotto, was not at all intimidated; indeed Ms. Cinotto vigorously challenged the mistaken instruction and prevailed.

**9. April 29-30-LAX Base (Corsello):** AFA alleges that AFA supporter Denise Corsello was told by a supervisor to take down an AFA sign. See also incidents 15 and 16. As set forth in the Declaration of Kimberly Barrasso, Ms. Corsello repeatedly sought to use large poster board signs in the LAX flight attendant lounge, and management repeatedly told her that the large sign was not permitted, which is Delta policy.

**10. April 27-SLC Base (Dewey):** AFA alleges that Delta Supervisor Cory Lindquist told AFA supporter Jon Dewey that he could not distribute AFA materials “in the lounge.” According to

AFA, an AFA supporter challenged the supervisor, however, and the supervisor promptly *relented*. In fact, Mr. Lindquist testifies that the alleged “incident” related only to Mr. Dewey’s efforts to *stand in the doorway* to hand out AFA literature; that “Mr. Dewey and other AFA representatives were free to –and did hand out materials” in the non-work areas of the crew lounge. Declaration of Cory Lindquist at ¶6. Mr. Lindquist adds that “[m]y exchange with Mr. Dewey was professional and polite, he complied with my request and the matter was concluded.” *Id.*

**11. May 6-Atlanta Base (Jablonski):** AFA alleges that a Delta flight attendant engaged in anti-AFA activity, Candace Bruton, was *not* harassed by managers. AFA also alleges impropriety based upon a snippet of conversation between Ms. Bruton and supervisor Janet Payne, allegedly overheard by AFA supporter John Jablonski. AFA argues that the implication of the conversation was that Delta would pay Ms. Bruton’s expenses for anti-AFA campaign activities. AFA provides no information from which Delta or the NMB can know the meaning or context of the alleged remarks. In fact, however, the supervisor involved, Janet Payne, testifies that Ms. Bruton was on non-work time in a non-work area and was therefore permitted to wear an anti-AFA t-shirt, just as the AFA supporters were permitted to wear pro-AFA t-shirts. Declaration of Janet Payne at ¶ 2. In addition, Ms. Payne testifies to a completely benign conversation with Ms. Bruton about Ms. Bruton’s expense statement for a Delta marketing event. *Id.* ¶ 3. Ms. Payne testifies under oath that at no time did she assist Ms. Bruton in handing out pro-Delta materials, or make any statements at all relating to paying for bag tags or lapel pins, because Delta does not pay for or reimburse such expenses. *Id.* ¶ 3, 4.

**12. May 8-Atlanta Concourse E (Weinfurtnr):** AFA alleges that a Delta airport manager (not in the In-Flight Service department) “verbally harassed” AFA supporter Toni Weinfurtnr

by approaching a group of AFA supporters and asking questions as to whether they were authorized to be on Concourse E. AFA Ex. 6, p.4. Another unidentified AFA participant, however, characterizes the situation differently: “we were having ‘light’ conversation with him” and “then Toni (a delta fa) came over from talking to another fa.” AFA Ex. 8 at 7. Both versions agree, however, that Ms. Weinfurtner declared that she had a right to be where she was, and that the Delta manager *relented*. In response to Ms. Weinfurtner’s complaint to Joanne Smith, Delta’s Senior Vice President - In-Flight Service, Delta’s In-Flight management promptly sent a supervisor to Concourse E, and issued follow-up instructions to Delta managers, including both In-Flight and Airport managers<sup>20</sup> to “refer such matters to our In-Flight team” because “the In-Flight management team has been more closely involved in the day-to-day application of our advocacy policies and generally has been able to handle questions and potential disagreements in a low-key manner.” Ms. Smith wrote back to Ms. Weinfurtner with this information and concluded “[t]o my knowledge, this was an isolated incident and did not reoccur. Thanks very much for your commitment to customer service and professionalism.” *See* Delta Exhibit II.

**13. May 16-SLC Crew at LAX (Caretto):** AFA alleges, on the basis of hearsay, that Delta Supervisor Jim Terry “approached” two flight attendants “to talk about how their seniority would be in jeopardy if they voted for a union.” Mr. Terry, however, testifies that he went aboard the aircraft for business reasons and that the two flight attendants initiated a conversation with him, which included a discussion of the pros and cons of choosing a union. Terry Dec. at ¶ 6. AFA repeatedly told Delta’s flight attendants that it could protect their seniority better in the event of a merger, thus making this claim a campaign issue. (That issue is discussed at length in both

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<sup>20</sup> Delta’s airport managers are part of Delta’s Airport Customer Service (“ACS”) department, which is a separate department from Delta’s In-Flight Service department. Gordon Declaration ¶ 2.

company and AFA communications.) AFA does not allege that there was anything coercive about the conversation.

**14. May 8-Atlanta (Weinfurtner):** This involves the same events described in item 12. AFA alleges that a Delta airport manager “verbally harassed” AFA supporter Toni Weinfurtner. The manager involved disputes AFA’s characterization of the events, but when this allegation was reported to Delta, Delta’s Senior Vice President – In-Flight Service promptly issued clarifications to the airport managers Delta Ex. II.

**15. May 1-LAX Base (Corsello):** AFA alleges that AFA supporter Denise Corsello was told by supervisors to remove AFA logo t-shirts from the AFA table because it resembled a poster. The supervisor allegedly involved in this incident is unavailable prior to the deadline for this filing. Delta will be happy to file a supplemental response if the Board deems this material.

**16. May 2-LAX Base (Corsello):** AFA alleges that AFA supporter Denise Corsello was told by Delta supervisor Kimberly Barrasso that no AFA posters were permitted to be used. In fact, Ms. Barrasso testifies that she did indeed tell Ms. Corsello that a “sign made from a large piece of poster-board” was not permitted, because “there was no real place to mount signs of the size she had brought and therefore it was prohibited.” Barrasso Dec. at ¶ 6. In response to Ms. Corsello’s objections, Ms. Barrasso consulted with Delta’s Law Department and confirmed that large poster board sized signs were not permitted in the lounges, but that small signs that could easily be displayed on tables were permitted, and that this was Delta policy systemwide. Ms. Barrasso also testifies that AFA representatives were in the LAX flight attendant lounge almost continuously during the campaign, and that Delta flight attendants “engaged with the AFA representatives without comment or harassment of any sort by Delta managers and without

demonstrating any outward signs of hesitancy.” *Id.* at ¶ 7. Ms. Barrasso also says that no AFA representative ever complained to me that any manager had harassed or attempted to intimidate them or any other flight attendant in the exercise of their rights.” *Id.*

In sum, while AFA has alleged that Delta engaged in “continuous” harassment over the five week election period, involving 13,000 flight attendants at seven bases, AFA provides details for only sixteen alleged “incidents” and of these<sup>21</sup>:

- five (numbers 1-8-10-12-14), are, by AFA’s own account, situations in which, in response to objections from AFA, the Delta supervisor involved promptly relented from his or her initial complaint or request.
- one (number 4) is a situations where, even if the allegations are credited, there is no conduct which is even arguably a violation of the rights of AFA supporters
- two (numbers 2 and 5) are situations where the alleged violator was another flight attendant, not a manager, and there is no indication that a complaint was made to Delta.
- three (numbers 9, 15, 16) involve signs, and the uniform application of Delta’s policy, which prohibits large poster-board size signs in crew lounges, but allows smaller signs which fit on a table top. In fact, these reports confirm Delta’s efforts at consistent administration of its policy as to all flight attendant solicitations, whether pro-union, anti-union, or otherwise.
- three (numbers 7,11, 13) are situations for which AFA offers no first person testimony at all, relying entirely upon double and triple hearsay.
- two (numbers 3,6) are situations where Delta’s witnesses contest AFA’s description of events and testify under oath to events which are entirely lawful and which differ markedly from AFA’s reported version.

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<sup>21</sup> AFA’s brief also refers to the primarily hearsay allegations of an Alaska Airlines flight attendant, John Cornelius, who worked in the AFA campaign at Delta and wrote an undated “catch-all” letter to AFA’s counsel. AFA Ex. 8 at 11-12. Most of the allegations that Mr. Cornelius repeats are broad denunciations of Delta, with no specific names or dates that would permit Delta to investigate and respond. Delta responds elsewhere in this brief to all alleged incidents which it has been able to identify.

## **2. Other Alleged Incidents Described Without Attribution in AFA's Exhibits.**

AFA's exhibits also contain additional captions on photographs and other allegations which are not attributed to any individual witness. While Delta may not be required to respond to such allegations, Delta does have responses to certain of the allegations—and those responses demonstrate that AFA has gone to great lengths to misrepresent what is shown in the photographs and to twist the true facts far beyond recognition.

- AFA Exhibit 4 at page 7-8 (Campbell) consists of a photograph with an unattributed caption which states that the picture shows a Delta supervisor “continually harasses” an AFA supporter “with frivolous requests to move table an additional 2 inches.”
  - In response, Delta General Manager Sylvester Holmes testifies about an incident on April 23, 2008, in which AFA supporters removed a table from the Atlanta flight attendant lounge break area and placed it in a heavily trafficked area in front of a mirror. When Mr. Holmes asked the AFA supporters to move the table back into the break area, they “moved the table a couple of inches toward the break area” and repeated this conduct in response to a second request. They complied only after a third request. Holmes Dec. ¶ 2. Thus, if this is the incident to which AFA Exhibit 4, page 7 refers, the alleged “incident” does not reflect any form of “harassment” by Delta, but only begrudging compliance by AFA with Delta’s valid and non-discriminatory rules. Indeed, the most remarkable aspect of this incident is Delta’s restraint.
- AFA Exhibit 4 at p. 7 (Campbell) consists of a photograph with an unattributed caption which states that the picture shows Delta supervisors Irma Contreras and Maureen Mariano attempting to distract AFA supporters Al Corry and Silvio Corporale in separate instances

while Mr. Corry and Mr. Corporale were manning a table in the Atlanta flight attendant lounge, and thereby “clearly intimidating flight attendants from approaching the AFA table.” Delta encloses Declarations from both Ms. Contreras and Ms. Mariano. (Notably, AFA does not proffer any testimony from either Mr. Corry or Mr. Corporale.)

- In response, Ms. Contreras testifies that one day in early May she was in the ATL International flight attendant lounge and saw Mr. Corporale, a personal friend who has been a guest in her home. Mr. Corporale waved at Ms. Contreras, and she “went over to the table he was sitting at and sat down” for a “personal conversation regarding ourselves as well as our mutual friends.” During that conversation, neither Mr. Corporale nor anyone else indicated to Ms. Contreras that she was interrupting them or preventing others from talking to them. She adds “[i]n fact, Silvio was very cordial and seemed genuinely glad to see me.” Contreras Dec. at ¶ 2, 3. While she was engaged in conversation with Mr. Corporale, however, ‘an individual who was sitting at the same table as Silvio and I got up and took a picture of the two of us talking.’ *Id.* at ¶ 2.
- Ms. Mariano testifies to a similar instance, in which she saw Mr. Corry in the ATL International flight attendant lounge. Ms. Mariano testifies that “Al and I had worked together at Delta several years before. I greeted Al and he gave me a hug. We spoke for approximately five minutes about his family including his daughter who was preparing to go off to college.” Mariano Dec. ¶ 2. During this conversation, an individual took a picture of Ms. Mariano talking to Mr. Corry. *Id.* at ¶ 2. At no time, however, did Mr. Corry, or anyone else, indicate to Ms. Mariano that she was interrupting them or preventing others from talking to them. *Id.* at ¶ 3. At the

conclusion of their conversation, Mr. Corry “hugged me again and told me to ‘take care.’” *Id.* ¶3.

- AFA Exhibit 6 at 2 (Weinfurtner) purports to be an e-mail message from Toni Weinfurtner dated May 15, 2008, in which she reports that “ifs [In Flight Supervisor] Lawrence Tutt interrupted my conversation with an fa who just returned to the line from a yr off to ask her to see him. I asked that he not interrupt my conversation again and wait until they walk away from us.”
  - In response, Mr. Tutt testifies that he had a conversation earlier that morning with the flight attendant involved in this situation, in which she asked for training on an M-2 device (a device to account for sales of items on board the aircraft), and Mr. Tutt told her that he would let her know when the trainer arrived. The “interruption” which Ms. Weinfurtner complains about consisted of Mr. Tutt approaching to advise the flight attendant that the person she wanted to see had now arrived. According to Mr. Tutt “I politely stood to the side waiting for a break in the conversation. Once there was a pause in the conversation, I said “excuse me” and proceeded to advise Sandra that the M-2 trainer had arrived in the lounge. Ms. Weinfurtner then accused me of being rude and claimed that I did this all the time....Subsequently the flight attendant named Sandra approached me at the duty desk and shared with me she did not think that I was being rude. Rather, she said it was Ms. Weinfurtner who had been rude to me. Declaration of Lawrence Tutt at ¶¶ 2-4.
- AFA Exhibit 6 at 3 (Weinfurtner) purports to be a report of an instance in which Delta supervisor Norma Huger “interrupted activist Danny Valdez while he was writing info for fa

frank cavalcanti regarding election, she pulled frank away from table, resulting in conversation ending.”

- In response, Ms. Huger testifies that she did indeed greet Mr. Cavalcanti one day in early May in the International flight attendant lounge in Atlanta. “I greeted Frank and he responded by hugging me as he typically does. We engaged in a short conversation regarding his schedule.” Huger Dec. ¶ 2. Ms. Huger also testifies that at the time she greeted Mr. Cavalcanti, “he was not in conversation with another person, nor was he sitting at a table. Thus, I did not “pull” him away from another conversation. *Id.* ¶ 3.

Thus, in its Exhibits – as in its brief – AFA has characterized events in an exaggerated and one-sided manner which does not withstand even minimal inquiry into the actual facts. Delta’s sworn evidence shows that AFA’s allegations of improper conduct or harassment are completely unfounded.

#### **IV. A BROAD-BASED EARLY OUT PROGRAM AND A BROAD-BASED WAGE INCREASE THAT WERE MADE IN ACCORDANCE WITH A PRIOR BUSINESS PLAN, BOTH OF WHICH WERE EXTENDED ACROSS EMPLOYEE GROUPS, ARE NOT INTERFERENCE.**

##### **A. The Early Out Program Was Launched For Compelling Business Reasons And Made Available Across Employee Groups.**

In March, 2008, Delta announced a series of steps designed to improve Delta’s financial performance in the face of ongoing increases in the price of jet fuel and worsening conditions in the U.S. economy. *See* Declaration of Michael H. Campbell (“Campbell Dec.”) ¶ 8; see also AFA Exhibit 15.<sup>22</sup> These steps included continued expansion of Delta’s international

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<sup>22</sup> Many other carriers have announced a similar series of dramatic actions in response to the financial crisis caused by the unprecedented increase in the cost of jet fuel. One of those actions  
(continued...)

capacity and reductions of Delta's domestic capacity, including the retirement of aircraft. *Id.* One element of the program announced that day was an Early Out/Early Retirement program which Delta hoped would enable it to reduce at least 2,000 positions throughout the company without involuntary furloughs.

The Early Out/Early Retirement program was made available to all non-pilot employees who satisfied the eligibility requirements, which totaled approximately 39,000 employees. *Id.* The program announcement contemplated the first Early Out departures on June 16, and the first Early Retirement departures on July 1, with the remainder over subsequent months. AFA Ex. 15 at 5. In positions relating to Delta's flight operations, however, including flight attendants, it was made clear that most employees would not be able to leave until after the end of the Summer season, in order to have sufficient staffing for Delta's busy Summer flight schedule. For that reason, Delta announced that for flight attendants no departure dates would be available in June and only a limited number in July, with most of the departures to be set in the Fall. *Id.* at 17; Campbell Dec. at ¶ 9.

Had Delta excluded its flight attendants from the offer of an Early Out/Early Retirement program that was available to other groups, AFA no doubt would have argued that withholding the benefit violated the laboratory conditions accompanying the election. Delta thus was in a "damned if you do, damned if you don't" situation, and properly chose to treat its flight attendants on a non-discriminatory basis by making the same offer available to them as it had to its other non-pilot employees.

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(...continued)

was a similar "Early Out" program which AFA agreed to with United Airlines. Delta Ex. Y.

**B. The 3% Wage Increase Was Made In Accordance With A Prior Business Plan and Was Extended Across All Non-Contract Employee Groups.**

The 3% pay increase that AFA challenges as interference was part of an across the board, general base pay increase for all of Delta's frontline, U.S.-based non-contract employees. (There was an equivalent 3% pool for merit increases to management employees below the officer level.) Campbell Dec. ¶ 5. This general increase was made in accordance with Delta's restructured business plan which was formulated during Delta's Chapter 11 bankruptcy proceedings between September 14, 2005 and April 30, 2007, as part of Delta's public commitment to raise all Delta employees to industry standard wage levels. During Delta's bankruptcy proceedings, Delta committed to its employees that it would make every possible effort to restore their wages to industry standard levels in a series of steps beginning on July 1, 2007. Campbell Dec. ¶ 3; Delta Exs. Z & AA (DVD). In conjunction with its emergence from bankruptcy in April, 2007, Delta announced that eligible frontline employees (including flight attendants) would receive equity (stock) in Delta, plus profit sharing, plus a 4% pay increase on July 1, 2007. *Id.* As the next step toward meeting Delta's commitment, on January 21, 2008, Delta CEO Richard Anderson committed to non-contract employees in his weekly message ("RIGHT FROM RICHARD") that there would be general pay increases in 2008 with a July 1 effective date:

... in the next few weeks by the end of the first quarter, we are going to complete our evaluation of base pay increases for all employees and operate on a similar timeline we operated on last year with a July 1 effective date. We're continuing our commitment to all of you. We know that our goal is industry standard compensation. We're working hard on a business plan with operational earnings and the cash flow to be able to provide you a good place to work and a good return for our shareholders. Stay tuned. I will keep you posted on this audio line about where that's headed. We will make a decision here shortly. It will be announced by the end of first quarter.

Delta Exhibit BB. Mr. Anderson subsequently addressed the subject of general pay increases twice in his weekly messages. On February 8, he announced:

A number of you have asked about pay adjustments. As part of our commitment to move frontline employee compensation to industry standard, we are completing the pay adjustment review, as we speak. The announcement will be made about the pay adjustment in the first week of March. So stay tuned.

Delta Exhibit CC.<sup>23</sup> Subsequently on February 29, 2008, Mr. Anderson told Delta employees that an announcement about the size of general pay increases would be delayed, but reaffirmed that there would be general increases effective July 1, 2008:

Speaking of making the best decisions, let's talk a minute about the pay rate evaluation we've been working on. In my message back in the third week of January, I told you that we were going to have that decision on what the pay rate increase would be for 2008 and announce a decision by the end of the first quarter.

Then on February 8<sup>th</sup>, I told you we would be making the announcement during the first week in March instead. As soon as I said that, the price of fuel climbed to over \$100 a barrel, and it doesn't look like it's going to come down any time soon. I want us to make the very best decision that we can make for you, so we are going to drop back to the original schedule, take a little bit more time to study the oil situation, and scrub the numbers. We'll make the announcement on the amount of the 2008 pay increase by the end of the first quarter. Appreciate your patience. Just like last year, it will be effective on the first of July. We will announce the size of the increase by the end of the first quarter."

Delta Exhibit DD. Delta subsequently announced on March 18, 2008 that it was temporarily deferring the 2008 general pay increase announcement because of other issues — most notably the cost of jet fuel and economic difficulties in the travel marketplace. AFA Exhibit 15 at 3. (AFA does not bother to note that this announcement, of course, was also made during the election period and could well have disappointed some flight attendants and made them more likely to vote *for* AFA.) Delta proceeded with the increase only after Delta's management was satisfied that the increase was prudent in light of other positive developments in the interim,

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<sup>23</sup> On the same date, February 8, Delta's In-Flight Service department told flight attendants to expect "details of companywide pay increases soon." AFA Ex. 3 at 36

including a merger agreement with Northwest, a multi-year extension to Delta's pilot collective bargaining agreement (which included pay increases and provisions to help Delta realize the financial benefits of the merger), and material improvements in Delta's revenue per available seat mile ("RASM"), a standard unit measure of an airline's ability to generate revenue. Campbell Dec. ¶ 5; AFA Exhibit 12.

Once Delta determined to proceed with the 2008 increase for other non-contract employees, Delta was again in a "damned if you do, damned if you don't" position with regard to flight attendants. Campbell Dec. ¶ 6. If Delta excluded flight attendants from the across the board general 3% increase for front line employees, AFA would surely be arguing that the denial of the pay increase violated laboratory conditions. Instead, since Delta included the flight attendants in the general increase, AFA argues that the inclusion of the flight attendants in the pay increase violated laboratory conditions. AFA ignores what actually happened – that Delta simply wanted to keep its promises and not exclude the flight attendants from a general increase for the first time in Delta history. Flight attendants were not singled-out for special treatment; they were included with other frontline non-contract employees in this process, and they received the same increase (3%) as all other front line employees. *Id.* In addition, when a question arose following the announcement of the increase, Delta promptly confirmed that the increase would go into effect whether or not AFA won the representation election. Campbell Dec. ¶ 7; AFA Ex. 3 at 60 (Delta IFS Weekly Newsletter dated 5/8/08).

**C. The NMB Has Repeatedly Held That Changes Which Are Made Pursuant to Earlier Plans And Which Apply Broadly Across Employee Groups Do Not Violate Laboratory Conditions**

Delta's 3% pay increase for non-contract employees effective July 1, 2008 was necessary to satisfy Delta's commitment to move toward industry standard pay levels for all non-contract employees — not by AFA's organizing activity. Campbell Dec. at ¶ 6. Delta announced in January 2008 that an ongoing pay review would lead to increases effective July 1, leaving only the size of the increase unresolved. Thereafter, Delta delayed the final

announcement from March to May in light of other business developments. The increase was the same for flight attendants as for all other front-line employees. *Id.* Likewise, the Early Out Program was dictated by current economic conditions and the unexpected need for even more cost reductions than those achieved in Delta's recent bankruptcy proceedings. Campbell Dec. at ¶ 8. Delta has offered similar Early Out programs in earlier years as part of Delta's efforts to avoid involuntary furloughs. *Id.* Thus, both the pay increase and the Early Out program were company-wide, consistent with past practice and were done for bona-fide business reasons.

The NMB has repeatedly held that carrier actions of this nature do not violate laboratory conditions. *Petroleum Helicopters, Inc.*, 26 NMB 13, 38 (1998) (“coincidental timing of a previously planned change in compensation is not, by itself, sufficient grounds for finding interference.”); “changes in pay that were planned before the laboratory conditions attached, or where they were planned before the laboratory conditions attached, or where there is ‘clear convincing evidence of a compelling business justification’ do not taint laboratory conditions.” *Union Pacific R.R.*, 34 NMB 21, 47 (2006), citing *Frontier Airlines*, 32 NMB 57 (2004) and *Delta Air Lines*, 30 NMB 102 (2002); *American Airlines, Inc.*, 26 NMB 412, 454, *recons. denied*, 27 NMB 120 (1999) (a pay increase while an election is pending is not interference “when these actions were pre-planned, or if there is ‘clear and convincing evidence of a compelling business justification.’”); *US Air*, 17 NMB 377, 425-26 (1990) (finding no interference based upon wage increase because the carrier had “established a historical pattern of granting wage increases . . . every July 1”); *America West Airlines*, 17 NMB 79, 97 (1990) (no interference when airline implemented a 401(k) plan that had previously been under development); *Federal Express Corp.*, 20 NMB 7, 46 (1992) (improved jumpseat benefit not interference because agreement with another carrier “was the result of several months of negotiations [that predated the union campaign], and the announcement of the agreement [shortly after the ballots were mailed] was made in the regular course of business.”); *Continental*

*Airlines*, 21 NMB 229, 254-55 (1994) (no interference despite the carrier’s implementation of substantial wage and benefit increases).

In *Delta Air Lines, Inc.*, 27 NMB 484, 509 (2000), in remarkably similar circumstances the NMB found that pay increases during the election period did not constitute interference:

The record establishes that the 3% pay increase, benefit enhancements, and computer purchase plan, in and of themselves, did not taint laboratory conditions. The Carrier provided evidence that all of these changes were pre-planned. In addition, the changes pertained to all employee groups at Delta.

*Id.* Under these circumstances, AFA does not make even a prima facie case of interference necessary to invoke a Board investigation.

**V. AFA — NOT DELTA — INTERFERED WITH EMPLOYEES’ FREE CHOICE.**

In contrast to Delta’s conventional, measured, and restrained messages, AFA supporters relied on pressure tactics to gain flight attendant votes. AFA committed *per se* violations by replicating the official NMB seal and website,<sup>24</sup> thereby calling into question the Board’s neutrality. AFA also coercively demanding that flight attendants disclose to the AFA supporters whether they voted or intended to vote for AFA, thereby violating the confidentiality of the election process. AFA apparently kept a master list of eligible voters, and checked off the names of those who responded that they had returned ballots for AFA, and continued to badger the others, asking if they voted for AFA, and pressuring them to do so. AFA told flight

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<sup>24</sup> See Delta’s letter to the Board dated May 1 and 2, 2008 and exhibits thereto. In response, the NMB required the posting of a special statement advising all Delta flight attendants of the Board’s neutrality. 35 NMB 158 (2008). See *Midway Airlines*, 26 NMB 154 (1999) (AFA attributed a phone conversation to an NMB attorney and NMB said phone call never took place. In response to “AFA’s misrepresentations,” Board “notes that it will treat future misrepresentations regarding the Board by any participant in a representation matter with increasingly severe sanctions.”).

attendants that the only way to stop the harassing, unsolicited phone calls was to vote for AFA and disclose to AFA that they had done so. These harassing telephone calls also gave false information to flight attendants about the Board’s voting procedures, as Delta learned from flight attendants around the system.<sup>25</sup> For example:

- Flight attendant Geraldine Kelly was called at home and urged by AFA to “make sure [she would] vote . . . one way or another. Kelly was confused because she had understood that the most effective way to express her desire for “no representation” was to refrain from voting. *See* Declaration of Kathleen Brennan ¶ 2.
- Flight attendant Marguerite Pahl was called repeatedly by AFA supporters and was advised that AFA knew that she had not voted; an AFA representative demanded to know when she intended to do so. She asked that she be taken off of AFA’s “call list,” but AFA refused to do so and she continued to receive harassing calls. *See* Declaration of Dana Bartell ¶2.
- Flight attendant Helen Tallon complained to Delta supervisors that she had been called repeatedly on her unlisted home number. She reported that she had been asked by AFA representatives how she had voted. She considered the telephone calls to be harassment. *See* Declaration of Ken Gomez ¶ 2; *see also* Declaration of Jim Terry ¶7 (flight attendant Sheri Paul concerned that AFA had accessed her private phone number without permission to make repeated, unwanted phone calls about how she intended to vote).
- Flight attendant Cindee Gennaro was advised in emails and telephone calls from AFA supporters that the only way to be removed from AFA’s call list was to tell them that she had voted. *See* Declaration of Beth Graham ¶ 2.

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<sup>25</sup> AFA spread similar disinformation in one-on-one exchanges with flight attendants. For example, flight attendant Debra Kommaire complained that AFA supporters had confronted her in the LAX flight attendant lounge about her intentions in the election. This AFA supporter told Kommaire that AFA had a list of those who had not voted and pressured Kommaire to vote for representation. Kommaire also reported that earlier a different AFA supporter had told Kommaire that it was not possible for her to vote “no” unless she sent a signed card to that effect to the NMB. *See* Declaration of Jim Terry ¶9. Similarly, flight attendant Jennifer Anderson reported that she was approached by an AFA supporter in the SLC flight attendant lounge and was informed that AFA knew she (Anderson) had not voted because AFA had a list of those who had. *See* Declaration of Nancy Perong ¶ 2.

- When flight attendant Joy Finnegan advised AFA supporters on repeated phone calls that she was still deciding whether she desired representation, she was told to “get her vote in.” Ms Finnegan asked AFA supporters not to contact her again, but instead they began asking similar questions via her personal email account. *See* Declaration of Renee Pace ¶ 2.
- One flight attendant asked a supervisor whether it was true that AFA could tell if she had voted because AFA supporters had told her in phone calls to her home that they would continue to call until she voted yes. *See* Declaration of Heather Shepherd ¶ 2; *see also* Declaration of Maureen Smith ¶ 2.<sup>26</sup>

Throughout the Delta system, flight attendants have complained to supervisors about AFA’s aggressive tactics. AFA has essentially admitted that this conduct was not isolated, but rather was part of its strategy. See Delta’s submission to the Board of May 13, 2008, and exhibits thereto. AFA supporters “buttonholed” flight attendants in the workplace and called their homes, and coerced them to get their votes, even after they said no. Such behavior is a far cry from the “laboratory conditions” that enable an employee to make a reasoned choice in the privacy of his or her own home.

The NMB repeatedly has decried efforts to collect ballots, by either the union or the carrier, because the very fact of knowing who has voted violates the secrecy of the voting process, in a system where entering a vote almost certainly is a vote for unionization. As the NMB stated in *Laker Airways, Ltd.*, 8 NMB 236, 249 (1981), “[g]iven the procedure used in Board elections requiring that the majority of eligible employees cast valid ballots for representation in order for there to be a certification, soliciting employees to turn in their ballots . . . is analogous to polling employees about their views.”

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<sup>26</sup> Delta recounts these allegations of AFA misconduct to illustrate why it felt the need to respond with accurate, measured information and to show the nature and extent of AFA’s campaign. Delta has provided these reports in this form because of the Board’s decision in *Aeromexico*, 28 NMB 399 (2001) draws into question the extent to which a carrier is permitted to engage in post-election interviews with non-management employees in response to union allegations of misconduct.

By transforming the balloting into a public spectacle, AFA made it clear to flight attendants that people would know whether they did or did not vote for AFA. In *America West Airlines, Inc.*, 26 NMB 195 (1999), union locals distributed meeting notices asking employees to bring their ballots to meetings at one of the largest stations — ostensibly so they could make sure the outer envelope was filled out correctly. At the meetings, employees put their ballots in an open U.S. Postal Service bin that the union representative then took to the U.S. mailbox. No employee filled out their ballots in the meeting room and the union representative did not handle them directly. Nonetheless, the Board found that “[t]his constitutes activity which compromises the secret ballot process,” and that “ballot collection undertaken and attempted by the TWU in [one station] raises serious concerns about the confidentiality of the voting process, and therefore calls for responsive action.” *Id.* at 208, 210.

Similarly, in *Northwest Airlines*, 26 NMB 269, 283-84 (1999), the union did not disavow wide-scale efforts of some union supporters to get employees to copy their ballots, in order to “check” the NMB’s election process. The NMB held that “collecting copies or promoting the wide-scale copying of ballots for potential receipt from members with identification attached violates the secrecy of the ballot. The fact that it is a copy and not the actual ballot is immaterial.” *Id.* at 297. The Board stated “it will not tolerate ballot collection” and “issue[d] another strong warning . . . .” *Id.* at 299. The Board found the union effort was systematic, because the union knew messages encouraging the activity appeared on web sites but the union did not repudiate the message. *Id.* at 298.<sup>27</sup> In these cases, the appropriate action to

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<sup>27</sup> *Accord, United Air Lines, Inc.*, 22 NMB 288, 320 (1995) (ballot collection by union supporters remedied by shortening certification bar; “NMB elections are to be conducted in such a manner as to ensure ballot secrecy. The collection of ballots is inconsistent with such secrecy. The NMB’s ballot, the instructions . . . and the Representation Manual all emphasize the need for confidentiality in the election process. Simply stated, the ballot materials are mailed to the employee and the ballot system rests on the premise that the employee is to return the ballot directly to the NMB . . . if the employee intends to vote for representation.”).

correct for the union's misconduct was to reduce the normal bar period. Here the appropriate action is to dismiss AFA's allegations of interference.

## **VI. AFA'S ATTACKS ON THE NMB ARE UNFOUNDED**

AFA's rhetoric reaches a new low when it attacks the NMB's motives and its conduct of the election in this matter. AFA lost the election by a decisive margin (greater than 60%-40% among 13,340 eligible voters), but now complains of alleged irregularities that, even if true, would affect only a handful of flight attendants. Moreover, AFA offers no real evidence to demonstrate that its complaints are well founded. Unlike *United Airlines*, 27 NMB 221 (2000), there is no evidence here like that in *United*, where "the Board received numerous inquiries from United employees indicating confusion in the balloting process and the eligibility of voters." *Id.* at 226. Thus, the cases which AFA cites are inapposite here, because there is no showing of irregularity which warrants correction. We address below each of AFA's complaints about the Board's administration of this election.

**Change of Ballot Deadline.** AFA complains that the Board shortened by six days the time initially allowed for the balloting period. AFA shows no abuse or prejudicial impacting on the election connected with this change, however. The change was made early in the election process, with ample time remaining for all flight attendants to vote in the time available. The actual election period was five weeks, from April 23 to May 28, 2008. In the era of Internet and telephone voting, a much shorter voting period would surely be justified, since voting is virtually instantaneous and can be conducted from virtually anywhere in the world. Nonetheless, the Board allowed five full weeks for voting. Such a voting period is well within the proper exercise of the Board's broad discretion in such matters. *Assn. for the Benefit of Non-Contract Employees v. Brotherhood of Railway & Steamship Clerks*, 380 U.S. 650 (1965). Other recent elections have had similar voting periods – the election period for the US Airways pilots' election was from March 20, 2008 – April 17, 2008 (four weeks), and the election period for the United mechanics' election was from February 26, 2008 – March 31, 2008 (four weeks, six

days). AFA hypothesizes that this change “undoubtedly confused” many voters and “clearly suppressed” the number of votes for AFA — without naming a single “confused” or “suppressed” flight attendant — and suggests that this confusion “raises serious questions about the Board’s motives.” AFA Brief at 31. Unfortunately for AFA, as with many of their allegations, they have provided absolutely no factual support for this hostile and conclusory rhetoric.

**Failure To Receive Voting Instructions/VIN/PIN/or Duplicates.** AFA has submitted the names of 58 individuals whom AFA alleges did not receive the Voting Instructions, VIN, or PIN, or a duplicate ballot that was reportedly requested. AFA Ex. 14, pp. 6-8.<sup>28</sup> Even if true, of course, 58 votes would not have been material to the outcome of this election. AFA did not, however, bother to submit any sworn statement from any of these individuals attesting to the accuracy of AFA’s representations as to them.

In fact, as AFA is well aware, the NMB Representation Manual contains provisions for the Board’s handling of undeliverable voting materials (§13.207) and requests for duplicate voting materials. (§13.207). The Board quite properly follows up on official voting materials which are returned to the Board as undeliverable, seeking alternative addresses from the carrier, and Delta provided alternative addresses for all of the requests Delta received from the NMB. Thus, it would appear that the official voting materials were in fact delivered by the U.S. Post Office to the residence address on file with Delta for all voters.<sup>29</sup> As AFA repeatedly states, this election was widely publicized among Delta’s flight attendants, both by AFA and by Delta.

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<sup>28</sup> AFA’s brief, at p. 31, refers to this exhibit as a list of persons who requested duplicate ballots, but the text on p.6 of the exhibit states only that it is a list of “those telling us they do not have their VIN and PIN”—*not* that they had never received the VIN and PIN. Of the 58 names on the list, only 13 have annotations that a “dupe” had been requested. The remainder have little or no explanation.

<sup>29</sup> This residence address is the address to which Delta would mail all Company correspondence and documents intended for that flight attendant, such as W-2 tax notices.

Thus, any flight attendant who wanted to vote for AFA had ample notice that the election was in progress and ample opportunity to ask the Board, or AFA, for information on how to secure a duplicate of any of the official voting materials if the originals were not received. The Representation Manual clearly describes the process for requesting and receiving duplicate voting materials, including a provision that “[r]equests received less than five (5) days before the tally will not be honored.” §13.206. Thus, even if some individuals did not receive their voting materials, AFA is plainly wrong in suggesting that the Board is somehow at fault for that situation. With the massive resources it expended on this campaign, AFA could surely have assisted any eligible voter in securing a duplicate ballot in a timely manner if the voter wished to vote for AFA. It is hard to see what more the Board could have done to ensure accurate delivery.<sup>30</sup>

**Allegedly Unsealed Or Misdirected Envelopes.** AFA alleges that the security of the voting process may have been compromised by the fact that some of the voting materials mailed by the Board to eligible voters may not have been sealed, or not completely sealed. It is, of course, impossible for either Delta or the Board to know to what extent this assertion — apparently relating to a small number of ballots — is true. Certainly, the flimsy information provided by AFA demonstrates, at most, that (1) AFA received hearsay comments from two flight attendants who were “disturbed” that the envelope received from the Board was not completely sealed — but both of those flight attendants affirmatively told AFA that they were “not voting.” (AFA Exhibit 16, p. 2); and (2) that one other flight attendant received her voting materials in the mail, but with a notation on the envelope that it had been stuck to another envelope and misdirected. (AFA Ex. 7, p. 4-6) In both of these instances, of course, the eligible

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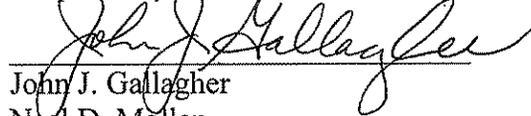
<sup>30</sup> AFA’s objection to the inclusion of Janette Wood on the list despite her death prior to the election is of no consequence. It appears that AFA, like Delta, was also unaware of her death. In these circumstances, the Board is under no obligation to accept an uncorroborated representation of a party, or to vary from the provisions of the Representation Manual which provide that the Investigator “is not obligated to accept status changes ... provided less than seven (7) calendar days before the scheduled count.” §12.3.

voters actually received the voting materials. AFA has submitted absolutely no evidence<sup>31</sup> that unsealed or misdirected envelopes were commonplace, or that AFA was prejudiced thereby.

## VII. CONCLUSION

For all the aforesaid reasons, the NMB should dismiss AFA's Motion.

Respectfully submitted,



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<sup>31</sup> AFA does make conclusory allegations that some flight attendants may have been deterred from voting because of concerns about the security of the voting process. AFA's inability to identify or secure first person testimony from such persons speaks eloquently to the inherent weakness and unreliability of AFA's submission on this point. Indeed, in light of the aggressive nature of AFA's campaign, including polling and telephone coercion of voters, it is highly unlikely that any AFA supporters were deterred from voting because of concerns about ballot secrecy. Indeed, the only two individuals AFA identifies by name on this issue are noted in AFA's internal message as "not voting." AFA Ex. 16, p. 2.

**CERTIFICATE OF SERVICE**

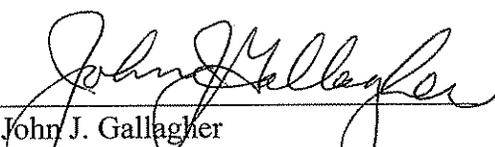
I hereby certify that a true and correct copy of the enclosed Response of Delta Air Lines, Inc. to AFA's Supplemental motion for Board Determination of Carrier Interference and Exhibits A – LL were served via hand delivery, on the following:

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