



**NATIONAL MEDIATION BOARD**  
WASHINGTON, DC 20572

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In the Matter of the  
Application of the  
  
ASSOCIATION OF FLIGHT  
ATTENDANTS  
  
alleging a representation dispute  
pursuant to Section 2, Ninth, of  
the Railway Labor Act, as  
amended  
  
involving employees of  
  
DELTA AIR LINES, INC.

39 NMB No. 8

CASE NO. R-7254

FINDINGS UPON  
INVESTIGATION -  
DISMISSAL

November 18, 2011

This determination resolves election interference allegations filed by the Association of Flight Attendants, CWA, AFL-CIO (AFA or Organization) involving employees of Delta Airlines (Delta or Carrier). For the reasons below, the National Mediation Board (NMB or Board) finds that the laboratory conditions were not tainted.

PROCEDURAL BACKGROUND

On July 1, 2010, AFA filed an application with the Board pursuant to the Railway Labor Act (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth), requesting the Board to determine whether Delta and Northwest Airlines, Inc. (Northwest) were operating as a single transportation system for the craft or class of Flight Attendants. At Northwest, AFA was the certified representative of the Flight Attendants craft or class pursuant to NMB Case No. R-7086. *Northwest Airlines, Inc.*, 33 NMB 289 (2006). The Flight Attendant craft or class at Delta was unrepresented. The Board determined that Delta and Northwest constituted a single transportation system. *Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 NMB 368 (2010). On September 1, 2010, the Board authorized

an election. The voting period began on September 29, 2010 and the tally was held on November 3, 2010.

The Report of Election Results reflected that less than a majority of the votes cast were valid votes for representation. Of the 18,760 votes cast, 8786 were votes for the AFA, 430 were write-in votes for representatives other than AFA, and 9544 were votes against representation. The Board issued a Dismissal on November 4, 2010. *Delta Air Lines*, 38 NMB 20 (2010).

On November 23, 2010, pursuant to the Board's Representation Manual Section 17.0, AFA filed allegations of election interference, seeking a re-run election using a mail ballot. In the alternative, AFA is seeking a standard re-run election with procedural safeguards, such as the prohibition of voting on Delta-controlled computers or in Delta work areas. Delta responded on December 21, 2010. AFA filed a reply brief on January 14, 2011 and Delta responded on February 10, 2011. On June 1, 2011, the Board notified the participants that an investigation was necessary to determine whether laboratory conditions had been tainted.

From July through September 2011, Investigators Maria-Kate Dowling and Angela I. Heverling, along with other NMB Investigators, conducted an on-site investigation and interviewed Delta management officials, randomly selected employees, and AFA witnesses in Atlanta, Georgia; Salt Lake City, Utah; Tampa, Florida; Portland, Oregon; Seattle, Washington; Detroit, Michigan; Minneapolis, Minnesota; New York, New York; Los Angeles, California; and Honolulu, Hawaii. In addition, the Investigators interviewed numerous flight attendants based at every Delta hub via telephone.

### ISSUE

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

### CONTENTIONS

#### AFA

AFA's interference allegations include the following: Delta provided misleading information about the Board's processes, specifically the write-in and decertification procedures, and created the impression that voting was mandatory; Delta established on-site polling places; Delta increased supervisory presence in crew lounges to monitor AFA activity and intimidate

flight attendants; Delta destroyed the secrecy of voting and created the impression of computer surveillance through on-site polling places open to supervisors and co-workers; Delta misapplied its advocacy policy resulting in unequal treatment of pro-union and anti-union materials; and Delta influenced the outcome of the election by making promises of wage increases. AFA also asserted that Delta's campaign, which included widespread calls to employees' homes and numerous campaign materials at work and at home, was overwhelming and pervasive and, therefore, intimidating to employees.

### Delta

Delta responded to AFA's interference allegations with the following contentions: Delta's statements about the Board's processes were truthful and constitutionally protected; Delta merely permitted employees to vote on Delta computers and in Delta work areas and did not establish "polling places"; Delta instructed managers to fairly enforce the advocacy policy; AFA provided no evidence that Delta monitored or attempted to monitor employee voting; and that Delta adhered to its obligation to honor the Northwest/AFA contract. In addition, Delta contended that AFA's campaign materials far exceeded those of Delta and many of Delta's communications were responses to misrepresentations by AFA.

### FINDINGS OF LAW

Determination of the issues in this case is governed by the Act, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

#### I.

Delta is a common carrier as defined in 45 U.S.C. § 181, First.

#### II.

AFA is a labor organization and/or representative as defined in 45 USC § 151, Sixth, and § 152, Ninth.

#### 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 . . . .

### DISCUSSION AND FINDINGS

## I.

#### **The Laboratory Period**

The Board generally holds that laboratory conditions must be maintained from the date the carrier becomes aware of the organizing drive. *Stillwater Central R.R., Inc.*, 33 NMB 100 (2006); *Mercy Air Serv., Inc.*, 29 NMB 55 (2001). However, in the absence of extraordinary circumstances, the Board will not consider evidence of occurrences prior to one year before the application was filed. *Delta Air Lines, Inc.*, 30 NMB 102 (2002). Therefore, laboratory conditions had to be maintained beginning in July 2009, one year prior to the filing of the AFA’s application.

## II.

#### **Applicable Legal Standard**

Under Section 2, Ninth of the Act, the Board is charged with the responsibility of assuring that employees are provided the opportunity to make a choice concerning representation free of interference, influence or coercion. Where there are allegations of interference, the Board has the responsibility to investigate such claims. When considering whether employees’ freedom of choice of a collective bargaining representative has been impaired, the Board examines the totality of the circumstances as established through the

investigation. In such an evaluation, each conclusion may not constitute interference in and of itself, but when combined with other factors the totality may evidence improper interference. *Delta Air Lines, Inc.*, 37 NMB 281 (2010); *Frontier Airlines, Inc.*, 32 NMB 57 (2004); *Piedmont Airlines, Inc.*, 31 NMB 257 (2004). The Board makes an evaluation of the facts developed from its investigation including submissions provided by the organization and the carrier and past Board experience. *Midway Airlines, Corp.*, 26 NMB 41 (1998); *Evergreen Int'l Airlines*, 20 NMB 675 (1993); *America West Airlines, Inc.*, 17 NMB (1990).

### III.

#### **Misrepresentation of Board Process**

AFA argues that Delta misrepresented Board rules and procedures in three ways. First, AFA claims that Delta created the misconception among flight attendants that voting was mandatory. Second, AFA argues that Delta misrepresented the Board's voting procedures regarding the write-in option. Third, AFA claims that Delta provided misleading information about the Board's decertification process.

Delta responded that the information it provided to flight attendants about the voting procedures was both truthful and constitutionally protected. It argued that its campaign materials encouraged but did not direct employees to vote. Delta claims that it accurately represented how a write-in vote could influence the outcome of an election and the process for decertifying a union under Board procedures.

On July 1, 2010, following notice and comment rulemaking under the Administrative Procedure Act (APA), the NMB's representation rule change (Rulemaking) became effective. Under the new rule, in order to be certified as the collective bargaining representative, a union must receive a majority of the valid ballots cast rather than valid votes from a majority of eligible voters. The representation election in the Flight Attendant craft or class at Delta would be one of the first elections run under the new election rule.

Beginning on July 23, 2010, Delta adopted "Decision 2010" as the brand for its campaign and campaign material. Delta changed the name of its InFlight Service's (IFS) newsletter from "Our Airline Our Future" to Decision 2010 and stated that the name change reflected the "importance of the upcoming election." According to Delta, the name change also reflected the fact that "as a result of a recent change to NMB voting rules - all flight

attendants must cast a vote in the election in order for their voice and their views on representation to be counted.” Delta’s campaign materials, including its banners, posters, mailings, phone calls and pop-ups on IFS computers all emphasized voter turnout: “you will need to cast a vote to make your choice count,” “your vote matters Decision 2010,” “Don’t give up your voice – Vote!,” “To be counted, you must vote,” “Whether you are for or against representation, you will need to cast a vote to make your voice count.” Once the voting period began, Delta constantly reminded the flight attendants exactly how much time remained until the tally. For example, mailings to their homes stated “voting window closes on November 3, 2010 at 2:00 P.M. ET.”

Delta also produced and distributed a “Voter’s Guide.” The introduction to the Voter’s Guide, a message from Joanne Smith, Senior Vice President, In Flight Service, stated that the booklet includes “information on the election process, how the new rules impact the voting process and facts about decertification.” The introduction again stressed the importance of voting: “[W]hether your decision is ‘yes’ or ‘no’ you must vote to be counted.”

The “Voting 101” section of the Voter’s Guide stated that voters would have the following three choices:

- **YES, I vote for AFA.** (You are voting specifically for AFA to represent you)
- **YES, I vote for Any Other Organization or Individual.** (If you select this option, it may be considered a vote for representation which would likely help AFA win.)
- **NO. I vote for no representative.** (This is a vote to be union-free)

(emphasis in original).

Question 16 in the “Election Q & A” section asked, “I am considering voting for another union because I don’t want the AFA. What method should I use?” The answer:

Casting a write-in vote for another union actually is likely to help the AFA get elected (see Q[uestion]17). If you do not want the AFA but would prefer another union, the best way to get that opportunity is to vote “No” in this election, then another election can be obtained any time after one year by submitting authorization cards from 35% of the flight attendant group. But if the AFA is elected, no new election can be obtained for two years,

and authorization cards would be required from 50% +1 of the flight attendant group.

Question 17 in that section asked, “could the write-in option help AFA win?” The answer stated,

Under the NMB’s rules, almost anything entered into the “write-in” section may be considered a vote for union representation, which ultimately is likely to help AFA win. If there are write-in votes and none of the choices get a majority of total votes, then there will likely be a run off. Since the NMB counts most write-ins as votes for representation, write-in votes and votes for AFA are added together and compared against “No” votes. If the total combined votes for AFA and write-ins are greater than the “No” votes, “No” is deleted from the run-off, virtually guaranteeing a victory for AFA.

Another Delta campaign flyer, mailed to employees’ homes, had the heading “Important Information on the Write-in Option” and the statement “if you want to be AFA-free choose option 3.” The flyer explained:

Under the NMB rules, almost anything entered into the write-in section by a voter – including a blank vote<sup>1</sup> – may be considered either a vote for union representation or a void vote, either of which could help AFA win.

If you don’t want AFA, the “write-in” – the second option on the ballot – is NOT the option to choose, because it will result in fewer “NO” votes and can actually help AFA win.

Whether you are voting by internet or phone, you should wait to see or hear the third option – ‘NO. I vote for no representative’ – if you do not want AFA

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<sup>1</sup> Subsequent to the election, in a Notice to carriers and organizations dated February 16, 2011, the Board revised its write-in procedures to require voters who select the write-in option to affirmatively speak-in (telephone) or write-in (Internet) the name of the individual or organization in order for the vote to be counted as valid. *Revised Materials for the NMB’s New Voting Procedures – Procedures for Write-in Votes and Run-off Elections*, 38 NMB 83 (2011).

The Voter's Guide also included a section entitled "Decertification 101." Decertification was defined as "[t]he ability to return to union-free status." The section continues, apparently in reference to the NMB's recent rulemaking:

AFA representatives may tell you the National Mediation Board (NMB) has an equal process to become union-free. That is not true.

By opposing an equal decertification process, the AFA wanted to make it easier for them to be voted in and nearly impossible for Delta's flight attendants, once unionized to be able to become union free.

. . .

When the NMB changed the voting rules, it did not provide flight attendants with a simple and equal process to return to union-free status should you elect AFA now and are unhappy later.

The section also stated that

[h]istory has shown it is virtually impossible for a large, widespread group like ours, once unionized, to become union-free under rules like these. To our knowledge, a return to union-free status has never been accomplished in a group the size of Delta's flight attendants in the airline industry. . . . The NMB will not accept authorization cards that seek to return to non-union status.

The section referred flight attendants who wanted to learn more about decertification to Delta's "Our Airline Our Future" newsletter #66 (Newsletter #66) (June 10, 2010 and June 11, 2010) that stated

Under the NMB's new voting rules, it would be easier for unions to get elected using a yes/no ballot, but the employees would **not** use the same process to vote out a union and return to non-union status that they used to vote them in.

(emphasis in original).

The newsletter then described the NMB's existing decertification procedure, often referred to as the "straw man" procedure, and gave sample

tallies in which employees split their votes between the incumbent union, write-in votes for representation, the applicant or “straw man” and no union.

### **Discussion**

Carriers have the 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.” *Air Logistics, L.L.C.*, 27 NMB 385 (2000); *America West Airlines, Inc.*, 17 NMB 79 (1990). The Board examines the content of carrier communications to determine whether the communications are coercive, contain material misrepresentations, particularly about the Board’s processes or the Act, or combined with other carrier actions, influence the employees in their choice of representative.<sup>2</sup> The Board has found interference where the communications included threats about consequences of voting for an organization in *Mid Pacific Airlines*, 13 NMB 178 (1986); promises or withholding of benefits in *Petroleum Helicopters*, 25 NMB 197 (1998); and misrepresentations of Board procedures in *USAir, Inc.*, 18 NMB 290 (1991), and *Allegheny Airlines, Inc.*, 4 NMB 7 (1962).

With regard to the misrepresentations of its processes, the Board has admonished participants in Board-conducted representation elections to “present the full and accurate story when informing employees about the election procedures of the Board.” *Zantop Int’l Airlines*, 6 NMB 834, 836 (1979). In *Zantop*, the Board found that the carrier contaminated the laboratory conditions necessary for a fair election by, inter alia, misinforming its employees about the Board’s voting procedures. The misrepresentation was the statement in posters and letters to employees that employees should vote “no union” without indicating that such action would invalidate those ballots.<sup>3</sup>

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<sup>2</sup> During the investigation, many of the flight attendants interviewed by the Investigators complained about misrepresentations regarding flight attendants’ terms and conditions of employment contained in campaign material from both Delta and AFA. Hyperbole, exaggerated claims, and inaccurate attacks on opponents are a traditional part of American campaigns, both in political elections and in representation elections. The campaign materials in this case did not contain threats of reprisal or promises of benefits. The information presented was within the knowledge of the employees to whom they were addressed or was otherwise obtainable by those employees if they sought to test the veracity of the information. Additionally, throughout the campaign, Delta and AFA had and took the opportunity to clarify perceived inaccurate information or falsehoods.

<sup>3</sup> Prior to the Rulemaking, the Board’s practice required a majority of eligible voters to cast valid ballots for representation in order for a union to be certified. A void ballot did not

6 NMB at 835. In contrast, the Board has also repeatedly held that accurately portraying the way an employee can vote against union representation is not interference. *Delta Airlines*, 35 NMB 271 (2008); *Delta Air Lines*, 30 NMB 102 (2002); *Express I Airlines*, 28 NMB 431 (2001); *American Airlines*, 26 NMB 412 (1999).

### Voting is Compulsory

Without doubt, Delta's campaign was focused on voter turnout. The change in the way the NMB counts ballots – from majority of all eligible voters to majority of ballots cast -- now requires carriers as well as unions to get out the vote and Delta adapted its campaign accordingly. While AFA asserts that Delta's emphasis on the importance of voting contradicts the clear statement in the Board's Telephone and Internet Voting Instructions that "[n]o employee is required to vote," the Board finds that nothing in Delta's campaign materials state that voting is mandatory or that there will be employment consequences for a failure to vote. Delta's neutral statements that voting in the NMB's election is important, that employees must vote to be counted, or that an individual, whether for or against representation, must vote for their voice to be heard is permissible and did not mislead employees into thinking voting was mandatory. Further, the flight attendants interviewed during the investigation made it clear to the investigators that they understood that voting was not mandatory. For example, one flight attendant stated, "I have participated in so many representation elections" that he knew no employee was required to vote. Another flight attendant responded that she was not "required to vote, but encouraged to vote." One flight attendant told an Investigator, "I thought it would be stupid not to vote." Another flight attendant said "I wanted to vote and I knew there was no penalty." Accordingly, given the clear statement in the Board's voting instructions that no employee is required to vote and the neutral language used by Delta in its campaign to get out the vote, the Board finds no interference in this regard.

### Write-In

AFA asserts that Delta's discussion of the Board's write-in procedure was inaccurate, created the impression that there were only two possible outcomes in this election, namely AFA's certification or Delta flight attendants remaining unrepresented, and was intended to persuade employees to reject the write-in option. The Board disagrees. If Delta had simply instructed employees, as AFA

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count and under the procedures set forth in its Representation Manual, the Board would void a ballot cast for no representative.

alleges, to vote “No” in the election even if they supported a union other than AFA, rather than cast a write-in vote, it would have been a misrepresentation. While it is troubling that Delta described voting “No” as the *best* way to vote if an employee supported another union, Delta did accurately explain how a write-in vote could contribute to an AFA victory under the Board’s procedures. Delta accurately explained that should the election result in a run-off between AFA and write-in votes for representation, the option to vote “No” would no longer be available making it more likely that AFA would be certified. Delta also accurately described the Board’s rules regarding what is required to get an election in an unrepresented craft or class and a represented craft or class. While AFA might disagree with Delta’s viewpoint and scenarios, Delta’s reasoning was made clear to the employees and the Board’s processes were not misrepresented

### Decertification

Taking Delta’s statements regarding decertification as a whole, the Board finds that Delta did not materially misrepresent the process and interfere with the election. While Delta erroneously suggests that decertification under the RLA was affected by the Rulemaking, the gist of Delta’s campaign materials accurately describes the process employees would need to follow to change from a represented status to non-represented status. While Delta’s Newsletter #66 includes examples carefully chosen to support its position, the Board cannot say that the procedure described is inaccurate. The Board’s decertification process has long been known and described as a “straw man” procedure, and the showing of interest needed to trigger an election in currently represented crafts or classes (50 percent +1) is higher than that for an election in an unrepresented crafts or classes (35 percent). 29 C.F.R. 1206.2.

Delta did not suggest as the carrier did in *USAir*, 17 NMB 377, 390 (1990), that the Board has no process for decertification or that there was no process to vote the union out as in *Era Aviation*, 27 NMB 321, 338 (2000). The NMB has never had a direct decertification application. It has the same application for employee groups who wish to become represented, who wish to change representation, and who wish to become unrepresented. This was true before the Rulemaking and remains unchanged after the Rulemaking. Further, the Board does not distinguish between an application seeking to change representative and an application from a “straw man” seeking to decertify. In each case, the application must be supported by authorization cards from individuals naming the applicant. The Board does not currently accept applications supported by authorization cards stating that the individual no

longer wishes to be represented by his or her incumbent union. Accordingly, the basic information conveyed by Delta about the process for obtaining an election to replace or remove a certified union representative was not a misrepresentation of NMB processes.

#### IV.

### **Increased Supervisory Presence in Crew Lounges**

In its allegations, AFA claimed that there was a “pervasive presence of supervisors in crew lounges” during the election period and that these supervisors were monitoring AFA activity or engaging in discussions regarding the election. AFA provided declarations reporting that supervisors began circulating throughout the crew lounges, engaging flight attendants in discussions about the election, “hovering” around AFA advocates in crew lounges, and explaining how to vote during pre-flight briefings.

Delta responded that supervisors have always been present in crew lounges and are required to be there as part of their job. According to Delta, supervisors were present in the lounge even when AFA advocates were not present and are required to be there to perform routine job duties. Delta also argues that there was no “systemic carrier effort” to have supervisors influence how flight attendants voted and any incidents described by AFA were merely isolated incidents that could not rise to the level of interference in an election of this size.

Many flight attendants reported an increase in supervisor presence, specifically when AFA advocates were present in the lounges, while others reported no such increase. Often flight attendants reported increased supervision in lounges where they had not previously spent time. Accordingly they were unable to accurately describe normal practice prior to the election period. Several AFA advocates reported that they felt there were additional supervisors present when they sat at an AFA table in the lounge; however, as will be discussed below, Delta’s advocacy policy prohibited certain activities, limited the location of these tables, and did not allow advocacy materials to remain unattended. Managers were required to enforce this policy. Smith reported that management ensured compliance with the advocacy policy by having supervisors present in lounges to address violations with both union and anti-union advocates.<sup>4</sup>

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<sup>4</sup> During the campaign period, a group of flight attendants who were opposed to representation by the AFA were also present in crew lounges. No-Way AFA, as the group called

Flight attendants' perceptions of supervisory presence in the lounges were influenced by the differing cultures at the two pre-merger carriers. Most of the flight attendants who reported an increase in supervisory presence reported that the change occurred in lounges in pre-merger Northwest bases. Delta has always had managers present in lounges; and duty desks are arranged in a way that they can view the lounges. In contrast, pre-merger Northwest flight attendants were accustomed to crew lounges that were out of view of managers and confirmed that in their statements to Investigators. The investigation indicates that, following the merger, supervisory presence did increase in pre-merger Northwest lounges, such as Detroit and Minneapolis, and flight attendants at those bases were uncomfortable with this increase. Much of the reported increase can be attributed to the merger and the introduction of the Delta style of management at pre-merger Northwest bases. Pre-merger Delta flight attendants were less likely to report a change in the amount of supervisory presence during the election period, specifically in bases such as the one in Atlanta where managers have always been visible in all areas in the lounge.<sup>5</sup> In her declaration, Smith described the role of Field Service Managers (FSMs) at Delta. She stated that

[t]he role and responsibilities of FSMs at Delta differs substantially from the role of front line supervisors at other carriers. In addition to promoting respect and trust between Delta and its employees, Delta's workplace culture is truly unique in stressing the importance of maintaining strong relationships between leadership and frontline employees. . . . Because of their unique roles, Delta's Operational FSMs do not spend most of their time in their offices; they are expected to be visible and accessible in the airport operation, including at the flight attendant duty desk, in the lounges and on the concourses . . . In fact, as a major component of their annual employment review process, IFS leaders are evaluated on the areas of their performance which include communications and interaction with flight attendants, and individual flight attendant feedback is considered among other items in evaluating individual leader performance. . . . FSMs have

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themselves, sat at tables in crew lounges and handed out literature. It appears that some flight attendants independently advocated for or against AFA representation by creating literature and distributing it in lounges.

<sup>5</sup> Delta's management style has been described in prior Board determinations. For example, in a previous interference decision, it was noted that a Delta executive emphasized "visible leadership" and managers' offices were in close proximity to or overlooked crew lounges. *Delta Air Lines*, 30 NMB 102, 117 (2002).

been encouraged for many years to create opportunities for positive interaction with our flight attendants in the lounge, and in response, the FSMs have often hosted events to provide educational opportunities about new services or initiatives – or to simply show appreciation for the job our flight attendants do.

According to some flight attendants, these events were more prevalent during the election period. Some reported events where managers provided flight attendants with foods such as cakes and pizza when AFA advocates were present. Some AFA advocates felt this was an attempt to distract flight attendants. There were some flight attendants, however, who reported that the increased supervisory presence and activities continued in the months following the election.

In their statements to Investigators, Delta supervisors and executives reported additional reasons why there may be an increase in supervisors. For example, Deb Mozell, Base Director in Minneapolis, reported that when a base is opened up for transfers, additional supervisors may be present to assist with the process. Other initiatives may require a greater than normal number of supervisors in a lounge. One such event was an employee benefits open enrollment period in October 2010, during the flight attendant election. Some flight attendants reported that supervisors seemed to be in the crew lounges for merger-related activities.

The Investigators questioned flight attendants about whether supervisors discussed the election with them or whether they witnessed supervisors having such discussions with other flight attendants. The vast majority of flight attendants reported that supervisors did not discuss the election in briefings or in crew lounges. There were a small number of reports of supervisors expressing that a union was unnecessary or asking AFA-represented flight attendants to consider “giving it a year” without a union. There were also incidents where supervisors expressed disappointment over a flight attendant’s support for AFA, by, for example, making a comment about an AFA pin or bag tag. These were isolated incidents, however, and few flight attendants who reported them had firsthand knowledge of these statements.

### **Discussion**

Increased supervisory presence can be an element of surveillance or creating the impression of surveillance among employees. In some cases where organizations have asserted that laboratory conditions were tainted by the increased presence of supervisors, the Board has found insufficient evidence of

interference. *Delta Air Lines, Inc.*, 37 NMB 281, 313-14 (2010); *Delta Air Lines, Inc.*, 30 NMB 102, 117-18 (2002); *Aeromexico*, 28 NMB 309, 335 (2001) (Board found the evidence surrounding the organization's allegation of “surveillance, based on a heightened presence of management officials in hallways and break rooms, is contradictory and speculative.”); *American Trans Air, Inc.*, 28 NMB 163, 176, 180 (2000) (A supervisor’s interaction with employees and a union organizer in smoking area did not support finding of interference based on surveillance).

As the Board has found in prior cases, actions which might be objectionable if found to be part of “a systematic carrier effort,” do not taint laboratory conditions when they occur in isolated instances. See *USAir*, 18 NMB 290, 334 (1991); *Northwest Airlines*, 19 NMB 94, 110 (1991). The Board has also previously found that the increased presence of supervisors at very large carriers may be the result of normal business practices. See *Delta Air Lines*, 30 NMB at 117 (Stating that “it is not unusual for carrier management to increase their presence in . . . lounges during particular time periods to ensure compliance with carrier policies.”).

Based on the findings of the investigation, there is an insufficient basis to find that Delta engaged in an effort to monitor AFA’s activities or other flight attendants interactions with AFA in the crew lounges. While there were isolated incidents of supervisors “hovering” near AFA tables or making statements about the election, the Board finds there was no system-wide effort to monitor AFA’s advocacy.

The investigation revealed that there were legitimate business reasons for the increase in supervisory presence reported by some of the flight attendants. It was also clear that flight attendants had differing perceptions as to what was an appropriate amount of supervisory presence. The pre-merger Northwest flight attendants were, following the merger with Delta, for the first time exposed to the management style of Delta. This was a style that was more visible and more involved in the day-to-day activities within the crew lounge.

## V.

### **Establishing On-Site Polling Places**

AFA alleged that Delta established on-site polling places or “voting booths” by encouraging flight attendants to vote on company computers or

through the DeltaNet system.<sup>6</sup> According to AFA, this destroyed the secrecy of voting by creating polling places in areas that were visible to managers, other employees, and security cameras. In its brief, AFA described how Delta transformed its flight attendant lounges during the election period in the following way:

[I]mmediately following the NMB's single carrier determination Delta flooded the In Flight departments and crew lounges with campaign posters, banners, and leaflets. At the same times and in the same spaces that Delta was bombarding Flight Attendants with its message to vote against AFA, it was encouraging them to cast their ballot by using the Delta computers located in In-flight and the crew lounges. In fact, in its Voting Guide distributed to every Flight Attendant, Delta poses the question "Will we be able to vote in the Flight Attendant lounges?" and supplies the answer "Yes, Flight Attendants may use their own personal devices or *Delta phones or computers to vote on Delta premises.*"

(emphasis added by AFA).

AFA also argued that by hanging campaign materials and voting instructions in computer work stations, Delta "conveyed a clear message to flight attendants that these areas were the appropriate place to vote." AFA notes that the Board has rejected on-site elections and prefers that employees vote in private.

Delta responded that it did not create "polling places" in the crew lounges and that it merely notified flight attendants of their right to vote on company computers if they wanted to.

Delta's In Flight departments include computer work stations. Investigators visited and toured the In Flight lounges, including the computer work stations, at Atlanta, New York, Salt Lake City, Minneapolis, and Los Angeles. During the election period, these areas were covered with Delta's Decision 2010 materials, as discussed above. The Decision 2010 materials in the lounges included a poster entitled "How to Vote by Phone." The vast

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<sup>6</sup> AFA also alleged that Delta usurped the NMB's role in conducting the election. The Investigators found no credible evidence of this allegation. As veterans of multiple representation elections, the flight attendants understand the NMB's role in conducting the election. For example, one flight attendant stated that "Delta and AFA were campaigning but the NMB was running the election."

majority of flight attendants interviewed for this investigation reported that they saw no other changes to the computer work stations during the election period. Additional computers were not added to the work stations and there were no changes to flight attendants' ability to access the internet. Computer work stations were treated as work areas under the advocacy policy and neither pro-AFA nor anti-union literature or campaigning was permitted in this area.

As noted above, when flight attendants used computers in these areas, they were presented with reminders to vote and other information about the election. These reminders to vote did not explicitly encourage flight attendants to vote on Delta-owned computers. Most flight attendants did not read the pop-up reminders and did not use them to access the NMB website and vote. In fact, the Investigators' review of the election data revealed that only 297 flight attendants actually voted from a company computer. Most flight attendants reported that they voted at home. The reasons for this varied, but some noted that they voted as soon as they received the voting materials in the mail. Many were unsure of the security of voting on a work computer and did not have an expectation of privacy when using a Delta-owned computer.

The Investigators received reports of managers either reminding flight attendants that they could vote on Delta-owned computers or encouraging them to do so. Most of these were unsubstantiated secondhand reports. It appears that there may have been isolated incidents of supervisors encouraging flight attendants to vote in the computer work stations. In addition, some flight attendants reported that they witnessed other flight attendants talk about or encourage voting on company computers.

AFA also alleged that shortly before the ballot count on November 3, 2010, the following was heard over Delta's PA system in the crew lounge: "32 minutes left to vote! Everyone must vote! If you have not voted, bring me your VIN and PIN and I will vote for you." In response, Delta argues that it is not responsible for the conduct of non-management employees and that the announcement referenced by AFA was made by another flight attendant.

During the investigation, many flight attendants told the NMB that they had heard rumors from co-workers about this announcement but only one flight attendant said that she had heard a similar announcement:

When I was in the Atlanta lounge during the election period, I heard an announcement over the loudspeaker. The voice said something like, "If you have not yet voted, please bring your VIN

and PIN to the duty desk.” The voice belonged to a female manager. I know this was a manager because when I arrived at the lounge from a flight, I went to the duty desk to ask questions. There were two female managers working that day and the voice I heard belonged to one of them. I did not hear this on the final day of voting; this occurred earlier during the election period.

In addition, no flight attendant told the NMB that they or anyone else responded to this or any similar announcements by turning over their VIN and PIN numbers. Atlanta-based flight attendants denied hearing any discussion of the election over that PA system during the election period.

In response to questions from the Investigators, Delta Management stated that use of the PA system in the Atlanta lounge was not limited to managers. An Atlanta-based flight attendant reported that AFA supporters made announcements over the PA system, stating that they were in the lounge and available to answer questions. Investigators toured the Atlanta In Flight lounge as part of the investigation and heard announcements being made over the PA system. What the investigators heard confirmed that flight attendants were permitted to make announcements over the PA system. For example, flight attendants were using the PA system to swap trips.

### **Discussion**

The Board has stated that employees should be “free to vote in the privacy of their own homes, without being subject to pressure from carrier or union officials.” See *Mercury Services, Inc.*, 9 NMB 312, 320 (1982). The Board prohibits the creation of polling places and has long recognized the importance of providing employees with the opportunity to vote in private. Actions that impair the confidentiality of the voting process may constitute evidence of election interference. *United Air Lines, Inc.*, 22 NMB 288, 320 (1995) (“The Board hereby reaffirms its policy that NMB elections are to be conducted in such a manner as to ensure ballot secrecy.”).

There is no evidence to support AFA’s claim that Delta established on-site polling places within its computer work stations or unduly influenced flight attendants to vote from these work stations. This is evidenced by the small number of flight attendants who voted on Delta-owned computers. The investigation disclosed that employees voted where and how they felt most comfortable and, for the overwhelming majority of flight attendants, that did not include company computers. In addition, there is insufficient evidence that Delta management systematically used the PA system in Atlanta or in any

other base to recruit flight attendants to vote on company computers or to convince flight attendants that voting was mandatory.

## VI.

### **Surveillance or the Impression of Surveillance of Employee Voting on Company Computers**

AFA also argues that Delta compromised security and created the impression of surveillance by allowing flight attendants to vote on company computers and in the view of other employees and supervisors. According to AFA, “[w]hether or not Delta actually did review how or whether employees voted, a Flight Attendant, having logged on to a work computer, would have reasonably believed Delta could and would.” Because Delta warns employees that it may monitor activity on the DeltaNet Employee Portal and allowed employees to vote through that portal, AFA argued that “[e]mployees, ultimately, were left with the choice to decline solicitations to vote at work, which would create the impression that they had something to hide, or to vote at work with the reasonable belief that the employer could determine whether and how they voted.”

AFA requests that the Board provide a mail ballot in the event that it orders a re-run election, stating that such a ballot “will reassure voters that the process is secret and that the Company cannot know whether they voted, much less how.” In the alternative, AFA requests that the Board prohibit voting in Delta In Flight areas during a re-run election.

Delta replies that AFA provided no evidence that it even attempted to breach the security of the voting website to determine how employees voted on Delta-owned computers. AFA’s allegations, Delta argues, are “a thinly disguised attack on the integrity and security of the NMB’s procedures for telephone and internet voting – not only in the election at issue here, but in every election that had been or will be conducted under these procedures.” According to Delta, “AFA’s entire argument on this issue is premised upon a ‘risk’ of monitoring inherent in all modern-day computer systems. Like nearly all employers, Delta reserves the right to monitor or investigate possible misuse of its systems or equipment.” Further, even if Delta did seek to determine who had voted, under the Board’s new election rule, this would not indicate how these individuals voted.

Delta has policies which allow it to monitor employees' computer use. Delta's Extranet policy includes the following stipulations, which employees agree to by logging in:

3. Delta may monitor activity on the DeltaNet Employee Portal. Violations of company policy regarding the use of the DeltaNet Employee Portal may result in disciplinary action, up to and including termination of employment. To review the policy regarding corporate intranet use, please read HRPM1119.13

4. All transactional records, reports, email, software, and other data generated by or residing upon this system are the property of Delta Air Lines and may be used by Delta for any purpose. Report suspected violations immediately to the Information Security/Privacy Office (ISPO).

Delta's Human Resources Manual also states that "Delta reserves the right to access or monitor – without notice – any use of the Internet or intranet and any transmission made via the Internet or intranet, including review of individual files maintained by users on hardware, tape, or diskette."

Delta has approximately 45,000 personal computers system-wide. Jay Fredericks, Managing Director-Information Technology at Delta, reported the following about whether Delta monitors employee use of computers:

All of these computers are enabled for some form of internet access. While there may be a record of what internet website(s) a user had accessed, Delta does not have the capability of monitoring how long the user was on an external website and what the user did once they accessed the website. If a flight attendant used a Delta computer to link to the NMB website and from there went to the NBM voting website, it is not possible for Delta to monitor what the employee did when they accessed the NMB's voting website.

Fredericks reported that Delta does not monitor flight attendant use of Delta computers or DeltaNet, does not have information regarding how or where flight attendants voted, and has not "accessed or used, and will not access or use, computerized historical data to determine how many persons have used company computers to access any website connected with a representation dispute . . ." Further, DeltaNet has no "memory" and does not retain information about the websites visited.

In addition to revealing that Delta did not monitor how employees voted, the investigation also revealed, as previously discussed, that the vast majority of flight attendants did not vote on Delta computers. One of the reasons for this was that flight attendants did not have an expectation of privacy on these computers. Most flight attendants could not specifically recall the language in the privacy disclaimers quoted above or whether any such disclaimer was visible every time they used a company computer. Many did not, however, feel comfortable using a Delta computer for something as private as voting and expressed the view that any employer has the ability to monitor its employees' internet usage. Flight attendants reported that there were rumors among some flight attendants that Delta knew *whether* they voted and that Delta's reminders calls were only to those flight attendants who had not yet voted. There was no evidence to support these rumors and most flight attendants did not believe these rumors.

It should also be noted that, unlike in elections conducted prior to the NMB's rule change, whether an employee voted in this election did not indicate his or her support for the union. Before the rulemaking, the only way to vote "no" was to not vote so that asking an employee if they voted or discovering that an employee voted necessarily meant that the employee had voted for representation. With the rule change, voting no longer means voting for representation only. The mere fact that a person is known to have voted no longer carries the potential threat of reprisal or potential coercive effect as in prior elections.

### **Discussion**

The Board has found that surveillance or creating the impression of surveillance can be the basis of an interference finding, although generally only as part of a "totality of the circumstances" analysis. The Board has stated that "the appearance or impression of surveillance has a chilling effect on employee behavior." *Pinnacle Airlines, Corp.*, 30 NMB 186, 223 (2003). Although the Board has stated on occasion that surveillance is a per se violation of laboratory conditions, *American Trans Air, Inc.*, 28 NMB 163 (2000); *Petroleum Helicopters*, 25 NMB 197 (1998); *Arkansas & Missouri R.R. Co.*, 25 NMB 36 (1997), it has also refused to make this finding in the absence of egregious carrier actions. *See Union Pacific R.R.*, 34 NMB 21 (2006).

Based on the findings of the investigation, there is an insufficient basis to find that Delta engaged in an effort to monitor AFA's activities or other flight attendants' interactions with AFA in the crew lounges. While there were isolated incidents of supervisors "hovering" near AFA tables or making

statements about the election, the Board finds no system-wide effort by Delta to so closely monitor AFA supporters' advocacy as to interfere with the election.

The investigation revealed that there were legitimate business reasons for the increase in supervisory presence reported by some of the flight attendants. Delta permitted advocacy by AFA supporters in the crew lounges but it also required supervisors to monitor compliance with the Advocacy Policy. It was also clear from the investigation that flight attendants had differing perceptions as to what was an appropriate amount of supervisory presence. The pre-merger Northwest flight attendants were, following the merger with Delta, for the first time exposed to the management style of Delta. This was a style that was more visible and more involved in the day-to-day activities within the crew lounge.

## VII.

### **Unequal Application of the Advocacy Policy**

AFA alleges that Delta discriminatorily applied its Advocacy Policy to disfavor employee advocates for AFA. While conceding that Delta's Advocacy Policy is neutral on its face, AFA states that, despite this policy, Delta favored "No Way AFA" supporters and forced AFA supporters into less prominent areas in the crew lounges. In addition, AFA asserts that Delta attempted to disrupt the ability of AFA supporters to communicate with their fellow employees in layover hotels in Narita and Amsterdam by dispatching managers to those hotels for purposes of surveillance and by attempting to get hotel management to remove AFA supporters from public lobbies.

In its response, Delta states that it enforced its longstanding Advocacy Policy in an evenhanded manner and that AFA advocates maintained a constant presence in crew lounges throughout the election. With regard to Narita and Amsterdam, Delta states that it sent managers to the layover hotels in response to reports of harassment and intimidation by AFA supporters. Delta further states that its response was limited to asking AFA supporters to refrain from harassment and coercion and requesting hotel management to enforce their own policy regarding solicitation in order to provide a safe and comfortable environment for all guests.

In a memorandum dated July 8, 2009 from Joanne Smith, Delta announced its decision to apply its existing Advocacy Policy to both pre-merger Delta and pre-merger Northwest flight attendants. The Advocacy Policy provides that solicitation or advocacy activities may never be undertaken in a harassing manner or a manner that interferes with people who do not wish to

be solicited. The Advocacy Policy “is designed to accommodate employees’ rights to express their views, whether on union representation or other issues . . .” Thus, it only applies to employee activities. Under the Advocacy Policy, solicitation or advocacy activities by Delta employees on Delta premises is permitted only in “non-work and non-operation areas,” such as lounges and break rooms, and only during a person’s non-working time. An aircraft is always a “work/operations” area where solicitation or advocacy is not permitted. The Advocacy Policy also states that if “an area in a lounge or break room is used for work and non-work purposes, solicitation or advocacy activities are permitted in that area only when it is not being used for work purposes.” The July 8, 2009 memorandum states that the definition of non-work and non-operation areas “may vary by base.” In her statement to the Investigators, Smith stated that a crew lounge is both a work area and a non-work area, but “even small crew lounges had an area [in which] advocacy was allowed.” The Advocacy Policy also provides that advocacy material “may not be left unattended.” According to Smith, AFA “could set up tables but they could not leave materials unattended” and this “requirement was the same for any advocacy group in the lounge.”

The Advocacy Policy also prohibits the wearing or display of buttons or other items that “convey a message or advocate a position” in work areas or on work time, but buttons or items that express support for or opposition to a union could be worn in non-work and non-operations areas and on non-working time. Smith told the Investigators that “on the airplane, Flight Attendants could wear AFA pins but not “No Way AFA” pins. Smith also stated that Delta “approached the AFA and No Way AFA groups the same.”

The majority of flight attendants interviewed stated that they wore pins and/or bag tags supporting their position, whether for or against representation. A No Way AFA supporter stated that “I had a ‘No Way’ bag tag and a ‘Vote No’ button. There was some confusion over wearing it. I stuck it on my lanyard so it could be tucked out of sight.” One No Way AFA supporter stated that “I had a small ‘No’ pin on my uniform and a company supervisor told me to take it off – that it wasn’t allowed under the Advocacy Policy.” Another flight attendant, who identified herself as “anti-AFA,” was told by a supervisor to take off her “No Way AFA” pin. She said that she complied but then later put the pin back on. An AFA supporter stated that “Jim Rodriguez, a supervisor, told me to take an AFA sticker off my lapel.” Another flight attendant stated, “I saw a lot of people with pins and bag tags. AFA had a table by the coffee pot where they were giving out pins and tags. I took a tag and put it on a while. The whole time I waffled so I had a Delta tag on for a while too.” Another flight attendant stated that “a supervisor in Narita told me that I could

no longer wear an AFA pin. I got the Advocacy Policy and showed it to the manager. I kept the pin on.”

Several flight attendants stated that No Way AFA supporters were allowed to have larger signs at their advocacy tables in flight attendant lounges or were able to wear No Way AFA pins in contravention of the Advocacy Policy. For example, one flight attendant stated, “In my view, AFA supporters conformed to the Advocacy Policy but No Way AFA people pushed the envelope and were not stopped.” A flight attendant stated that No Way AFA supporters often had signs that were larger than permitted and that “I complained to Raul Alvarez. Raul would go and speak to them but the non-conforming signs always reappeared.” Another flight attendant stated that “I saw No Way AFA bag tags on Delta crews’ bags but the managers would comment on the AFA bag tags. The managers didn’t say anything to the No Way AFA people. The No Way AFA people seemed to be treated differently.”

Many flight attendants who sat at the AFA “visibility tables” in lounges reported that if they left the table for any amount of time, a manager would remove the literature. Other flight attendants said that managers would prevent them from talking about the union if such conversations were conducted away from the area designated for AFA visibility. A flight attendant who often sat at AFA visibility tables stated when she was helping another flight attendant with bidding, the supervisor came over to make sure that she wasn’t helping them vote or discussing the union. She also stated that No Way AFA supporters would bring up the union in the briefing area and leave anti-union material in the briefing rooms and around the computers.

As previously noted, the Advocacy Policy by its terms is applicable only to Delta premises. In her statement to the Investigators, Sandra P. Gordon, Vice President In Flight Service Field Operations, stated that Delta has “general policies regarding employee conduct” when in public, but she did not mention any specific policies applicable to layover hotels.

Delta operates major international hubs in Narita and Amsterdam and there is a substantial complement of flight attendants on layover every day. Prior to the merger, these had been Northwest hubs and the pre-merger Northwest flight attendants stated that the layover hotel lobbies were frequently used as places to provide information regarding union issues such as contract ratification or for campaigning during elections to change representation.

With regard to Narita, many pre-merger Northwest flight attendants stated that managers became a constant presence during the election. According to Gordon, Delta had received reports from crew members that they were “uncomfortable and in some cases intimidated by the aggressive campaigning of AFA supporters in Narita and Amsterdam.” Based on these reports, Gordon decided that “managers needed to assess what was really going on.” According to Gordon, there was an initial visit by a combination of managers and Base Directors and, that over the period of the election, Delta “had Leaders present throughout the time of the election.”

Flight attendants stated that both Delta managers and AFA advocates, who were flight attendants on leave campaigning on behalf of the union, were in the lobby of the Narita layover hotel. The managers would stand near the doors greeting crews and others were just sitting in the lobby observing the activity. The AFA advocates would also greet crews and would distribute AFA material including pins and bag tags from pockets in specially made AFA aprons. Some flight attendants also had t-shirts similar to the Decision 2010 shirts worn by Delta managers during the election but printed with “Vote Yes.” According to the AFA advocates, they met with hotel management on a regular basis to explain what was going on and what they were doing in the lobby.

When the election period was announced, AFA advocates rented a room from the hotel off in the annex off the lobby in the old wing on the first floor. It was a union information and resource room. Shortly thereafter, the room immediately next door was rented by Delta as a Delta information and resource room. It was staffed by Delta managers and had the same posters and campaign materials present in crew lounges. Both rooms remained open throughout the election period.

Flight attendants stated that at first the company did not do anything about the AFA activity in the lobby but after a period they started “challenging” the AFA supporters. According to Gordon, Delta’s response was to ask the hotels to enforce their own solicitation/distribution policies regarding the setting up of tables in the lobby. A flight attendant in Narita at the time stated that he heard “a Delta manager and the hotel manager have a heated discussion” about the Advocacy Policy. The following day, the hotel manager informed the AFA advocates that “AFA was within its rights” and could continue its activities in the lobby. According to an AFA advocate, the hotel manager stated that Delta would not tell him specifically what they wanted and he did not have an issue with AFA’s activities. The AFA advocates and the hotel manager agreed that AFA would “downsize the amount of material” it was displaying on lobby tables. The AFA advocates also pointed out that the AFA

advocates were hotel guests and that their activity was limited to a few hours each day when crews were arriving and departing. The hotel manager again met with Delta managers but subsequently assured the AFA advocates that “everything was fine.” Delta managers continued to stand or sit in the lobby.

On another occasion, Delta managers told AFA advocates that they could not wear the aprons and t-shirts in the lobby. The AFA advocates objected and insisted that they were within their rights to wear these things in the lobby. A discussion ensued between the managers and one of the AFA advocates about whether the Advocacy Policy was applicable in the Narita hotel lobby. The AFA advocate told the Delta managers that the Advocacy Policy did not apply in the hotel, but that AFA supporters would be reminded to keep their activities “business-like.” While the AFA advocates limited their use of aprons, their activities in the lobby continued.

Gordon stated that “whenever there were reports of overly aggressive behavior, we would investigate and if warranted those involved were counseled about proper conduct and behavior.” There was no evidence, however, that any flight attendants received any form of discipline as a result of any activity in Narita.

Gordon also decided to send managers to Amsterdam in response to reports from flight attendants. Robert Waples, Base Manager in Atlanta, was part of making that decision. He received complaints from flight attendants that they could not walk through the hotel lobby without being approached by AFA and reports of flight attendants feeling intimidated by the behavior of AFA advocates. Flight attendants reported feeling “beaten up” by the atmosphere in the lobby. One Atlanta-based flight attendant told an Investigator that when she travelled through Amsterdam, AFA advocates insulted and jeered her.

Waples was one of the managers who travelled to Amsterdam. When he arrived, he observed the AFA advocates in the hotel lobby and reported that he was not recognized because former Northwest flight attendants were not familiar with him. He spoke with one of the hotel’s managers who told him that the hotel policy did not allow AFA to “set up shop” as they were doing in the lobby. Waples later met with the hotel’s general manager who claimed that the security guards had not been paying attention and agreed to increase security. Waples never directly addressed the AFA advocates about their behavior in the lobby. He reported that it was the hotel’s responsibility to enforce the advocacy policy.

As in Narita, many pre-merger Northwest flight attendants stated that managers became a common presence in the Amsterdam hotel lobby. Some reported seeing these Delta managers take only pre-merger Delta crews out to dinner and for drinks while in Amsterdam. One said, “they were targeting Atlanta flight attendants” for these dinners. A flight attendant also reported to the NMB that managers “asked some Northwest (flight attendants) to dinner but they said ‘no thanks’.” Unlike in Narita, however, the evidence indicates that the AFA advocates were prevented from continuing some of their activities in the lobby of the layover hotel.

Prior to the election period, AFA advocates contacted hotel management and were assured that they could advocate in the lobby as they had done in prior elections. At some point in October, several flight attendants arrived for the purpose of campaigning on behalf of AFA and following their first day of activities, they received a phone call in their room. Someone on the hotel’s security staff said “we have problem with what you are doing.” The AFA advocates were told that the rules have changed and they were no longer able to continue their activities in the lobby. The hotel staff member refused to provide a copy of the hotel’s policy. When the advocates returned to the lobby the following day, they did not wear their uniforms or AFA pins. They sat in the café in the lobby and ordered food. When other pre-merger Northwest flight attendants arrived, they approached the advocates and began discussing the election. A security guard yelled at the AFA advocates, telling them that they could not discuss the election. He asked the AFA advocates to leave the lobby and they went outside and sat on a bench. The AFA advocates approached flight attendants as they got off crew busses and polled them about their support for the union. When flight attendants approached the AFA advocates, the guard threatened to call the local police. One of the advocates stepped aside with the guard and asked why the hotel’s policy on their advocacy had changed. The guard reportedly said that Delta had called and said “that you can’t be here.” When told that the hotel had initially given them permission to be there, the guard responded that there was “a new policy and we don’t have it written yet.” After discussion, the AFA advocates agreed to return to the hotel café and only respond to questions from flight attendants if they were approached. They were not permitted to approach flight attendants returning from flights. At the end of the day, one of the hotel’s managers approached the advocates and said “Delta is calling us and they don’t want you here.”

A resolution was reached when the hotel agreed to rent the advocates a conference room at a reduced rate. Pro-AFA flight attendants continued their advocacy in this resource room. Delta also had a resource room next to AFA’s resource room that was staffed by a manager from Atlanta.

### Discussion

A carrier is permitted to have a solicitation policy that reasonably restricts employees' rights to solicit during work hours. *See Delta Air Lines, Inc.*, 30 NMB 102, 134-35 (2002). If a carrier's solicitation policy is applied unevenly, i.e., only enforced against labor organizations, the Board has found that this may be evidence of election interference, when combined with other anti-union carrier activity. *USAir*, 17 NMB 377, 423 (1990). Where there is insufficient evidence of systematic, uneven, or discriminatory enforcement of the carrier's rules of solicitation, the Board will not find interference. *Delta*, 30 NMB at 134.

In the instant case, the Board finds insufficient evidence of widespread systematic discriminatory application of Delta's Advocacy Policy as applied to employee groups who support and opposed representation. To be sure, there were isolated incidents in which AFA supporters and No Way AFA advocates were treated in an unequal manner. In *American Airlines*, 26 NMB 412 (1999), the Board found no system-wide interference where variations in the carrier's enforcement of its solicitation policy across stations resulted in isolated incidents of discrimination. This case involved approximately 20,000 flight attendants assigned to approximately 15 bases and covering an even greater number of layover stations. The fact that some flight attendants were told to remove pins they had the right to wear or that other flight attendants wore buttons they should not have worn does not establish widespread discrimination in the application of the Advocacy Policy.

Further, the evidence regarding an uneven application of the Advocacy Policy to AFA "visibility" tables and anti-AFA advocacy tables is insufficient to establish a wide-spread disparate treatment of the two groups by Delta. Although there appear to have been some instances where anti-AFA propaganda was allowed in circumstances that contravened the advocacy policy, this was a *de minimis* violation of the Advocacy Policy.

With regard to Narita, it is clear that Delta responded to reports of AFA organizing activity in the layover hotel by increasing and maintaining a management presence in the lobby. It is also clear that Delta attempted to apply its Advocacy Policy to the public areas of the hotel in order to limit the activities of the AFA advocates. Their efforts however had no real effect. AFA continued to pursue its organizing activities in the lobby throughout the campaign. While some employees either reported feeling surveilled by the presence of management or speculated that other Delta flight attendants were

intimidated by the presence of Delta managers, the AFA advocates were conducting their activity in a public place, the lobby of a hotel. The Delta managers were present but not unduly obtrusive. One of the AFA advocates stated, "I also told the Delta people that they could do exactly what we were doing and I was fine with that."

Similar allegations were made by AFA about Delta's activities in the Amsterdam layover hotel. As was the case in Narita, the AFA campaign activities continued despite the management presence. Further, AFA alleged that Delta induced hotel management in both Narita and Amsterdam to evict the AFA advocates from the lobby. These allegations were not proved during the investigation. In Amsterdam, it appears that the AFA advocates were asked to leave the lobby by the hotel's security staff but their activities continued in another part of the hotel. As in Narita, it appears that the hotel staff's actions were not in response to specific instructions from Delta. While the Board does not condone the Amsterdam hotel's response to the concerns expressed by Delta management, it is insufficient to establish carrier interference. *Delta Airlines*, 35 NMB 271, 293 (2008) (finding that carrier must have perpetrated incident to establish interference).

What the investigation established was that both AFA and Delta continued to campaign either in the lobbies of the layover hotels or in rented rooms just off the lobbies. Given Delta's explanation for its apparently increased managerial presence at these hotels, there is neither sufficient evidence to find that Delta was engaging in surveillance of employee campaign activity in public spaces away from the place of employment, nor is there evidence that their presence was intended to create an impression of surveillance. Moreover, the managerial presence in these circumstances cannot reasonably be said to establish an impression of surveillance.

## VIII.

### **Withholding/Promise of Wage Increases**

AFA contends that Delta influenced the outcome of the election by making receipt of wage increases contingent upon being or becoming non-union. Delta contends that AFA misconstrues Delta's previously promised increases to pre-merger Delta employees as punishment for pre-merger Northwest employees' union status. Delta states that it adheres to its obligation to honor the Northwest contract until all representation issues have been addressed and resolved.

On February 4, 2010, in a memorandum from Richard Anderson, Chief Executive Officer, Delta announced a wage increase for “U.S.-based front line non-contract employees” effective October 1, 2010. The memorandum continued:

In addition to honoring the commitment made to Delta people three years ago, we have also continued to honor the packages of pay, benefits and work rules provided for in the contracts still in place in workgroups where representation has not yet been resolved. When representation is resolved, we plan to begin the process of fully aligning the pay, benefits and work rules of employees in those groups.

On September 16, 2010, Delta conducted a conference call for flight attendants hosted by Joanne Smith and broadcast from the E Concourse crew lounge in Atlanta. Richard Anderson was one of the guests on the conference call and during the question and answer period, a flight attendant from Seattle referred to the upcoming election and asked,

if it doesn't come out the way I would like it, are we going to be brought to the Delta pay scale immediately and its work rules immediately? Or how is that going to work if we do not have our union contract?

Joanne Smith answered,

So if the vote is in favor of a direct relationship and no AFA, we have said that our intention would be to harmonize and bring folks a common set of work rules and pay and benefits so we can fly together as soon as possible. We have not been able to tell you exactly what that means, but you can look at what we've done in previous work groups that have settled representation. For example, in the maintenance organization the mechanics . . . . [t]he Northwest mechanics were brought up to Delta pay increases within the first pay period.

So while we can't commit to what we're going to do with Flight Attendants, it's our intention to do it as soon as possible.

Richard Anderson also replied:

If we tell you directly it'll be interference and the union will say that we influenced the vote, . . . So let me just tell you what we did with the mechanics, the meteorologists, the dispatchers, what we're getting ready to do with the simulator technicians who voted . . . the IAM off the property.

In each of those instances, I think that we did it within the very next pay period. Literally with the mechanics, the work rules flipped over and they all got pretty big raises pretty quickly. But we can't give you an opinion directly with respect to the AFA or they will file an interference charge against us.

Subsequently, in a message dated September 30, 2010, Richard Anderson again discussed the issue of wage increases, stating

Three years ago, Delta committed that it would return employees to industry standard pay by the end of 2010 . . . I'm proud to say that the pay increases that go into effect October 1 for U.S.-based non-contract employees, deliver on that promise. This is really reflective of Delta core values of honoring our commitments and sharing the company's success with all of you who make that success possible.

We continue to honor the pay, benefits and work rules for the pre-merger Northwest employees where union representation has not yet been resolved. Once we resolve representation in these groups, we'll begin the process of fully aligning the compensation packages in those groups. That process of alignment began earlier this week for our flight simulator technician group, who for a second time voted against IAM representation. So the pre-merger Northwest employees were given the pay increases, benefits and work rule improvements that Delta simulator techs enjoy. And just again, they don't have to pay dues anymore.

### **Discussion**

The Board has long held that changes in wages or benefits during the laboratory period which were not planned prior to an organizing drive or that were timed to affect the outcome of an election have tainted laboratory conditions. See *Petroleum Helicopters, Inc.*, 25 NMB 197, 232 (1998). Changes

in pay which 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, 64 (2004) (finding no interference where pay increase was preplanned and based on compensation review showing wages to be below market rate). See also *Continental Airlines, Inc./Continental Express, Inc.*, 27 NMB 463 (2000).

In this case, the Board has previously found that Delta has consistently communicated to its employees, since emerging from bankruptcy, that it would provide pay increases so as to bring employees to industry-wide standard by the end of 2010. *Delta Air Lines, Inc.*, 37 NMB 281, 308 (2010) (finding timing of announcement of pay raise, rather than the decision to give pay raise, constituted interference). Here, there is no allegation regarding the timing of the announcement. The only issue, therefore, is whether Delta’s accurate statements regarding how it normalized pay in other work groups following the resolution of representation is coercive. Based on the totality of the circumstances, the Board finds that Delta’s statements were not coercive. Delta simply stated how it had proceeded with other employee groups following the resolution of representations disputes following the Delta/Northwest merger either through NMB conducted representation elections (meteorologists, dispatchers, simulator technicians) or disclaimer (mechanics). It is also true that, in its communications to employees, Delta also did not miss an opportunity to emphasize that it was fulfilling its “commitment” to employees, but the Board cannot condemn a carrier for a truthful and factual statement of what occurred with other employee groups. Nor can the Board find interference because, as it was free to do, Delta chose not to pursue an alternative that AFA would have preferred, bargaining with AFA over whether a pay increase for pre-merger Northwest flight attendants could be implemented consistent with the contract or with the permission of AFA.

## IX.

### **Overwhelming and Pervasive Campaign**

Several of AFA’s allegations against Delta amount to a claim that Delta’s Decision 2010 campaign was overwhelming, pervasive, and intimidating to employees. AFA alleged that Delta caused voting to occur among a “barrage of carrier campaign speech,” that phone calls by Delta managers to flight attendants’ home and cell phone numbers injected an element of interference into the election process, and that Delta made its campaign materials mandatory reading by including them in emails and pop-ups on company computers. AFA equates these materials with mandatory briefings constituting

unlawful interference. In its brief, AFA equates company computers with voting booths and argues that partisan speech should not be permitted there.

Delta responded that the Decision 2010 campaign was a direct response to AFA's aggressive campaign for representation. Delta alleges that AFA began a campaign in 2008 that included massive amounts of direct mailings to flight attendants, electronic communications, telephone calls, rallies and campaign events, and a "whisper campaign" intended to spread rumors about Delta management. In addition, Delta argued that much of its materials were created to educate voters about the 2010 voting rule change at the NMB. Gordon reported that "when the NMB's voting rule changes became effective in July 2010, Delta's communications immediately started focusing on educating Delta employees with unresolved representation issues about the NMB's new voting rules." Gordon reported that Delta flight attendants had experienced two previous elections where Delta had communicated that the best way to vote against representation was to not vote at all. Delta's Decision 2010 materials told flight attendants that the opposite was now true. Gordon noted that Delta's message to flight attendants was "you must vote to be counted."

As part of its Decision 2010 Campaign, Delta filled the crew lounges with banners, information tables, and posters encouraging employees to vote and providing information about the election process. Some of the common headings on Delta's banners included "The Delta Difference," "If You Don't Want AFA, NO is your Pick whether you Dial or Click," "It's Easy to Get In: It's Hard to Go Back," and "Get the Facts Before you Vote."

In addition to signs and banners in the crew lounge, crew busses were covered in Decision 2010 signs that included reminders to vote. Managers wore shirts with the words "Decision 2010" while on duty. "Get out the Facts" stands were covered with literature about Delta benefits, often comparing these with benefits of AFA-represented flight attendants at other carriers.

Delta also communicated its campaign to flight attendants through email and DeltaNet. Each flight attendant has an email account to receive work-related communications. During the voting period, Delta sent Decision 2010 emails to flight attendants. Some of the statements included in these emails included "Remember: to be Counted, You Must Vote," "When it comes time to vote . . . make your choice based on proven facts, not promises that haven't been delivered," "The AFA says it can negotiate an industry-leading contract-if so why haven't they done it already at other airlines."

Jay Frederick defined DeltaNet as “a collection of technology and content from multiple sources, arrayed together in what is known as a portal.” Flight attendants can access DeltaNet from any computer as long as it has internet access. Prior to and during the election period, Campaign 2010 messages were posted on DeltaNet. Pop-up screens were displayed on DeltaNet and included many of the same messages that were in the emails and on banners and signs. These pop-ups would remain on a computer screen for ten seconds if a flight attendant did not avoid it by clicking on the “close” button or clicking anywhere else on the computer screen. In addition, there was a countdown to the final day of the election period on Delta computers. Most flight attendants were able to quickly click out of the pop-up messages and most did not read the accompanying messages, finding them to be an annoyance while trying to check in for a flight. The countdown clock was constantly visible on the computer screen.

Delta’s campaign included phone calls to flight attendants reminding them to vote. Two weeks before the date of the tally, Delta executives, including Joanne Smith decided it was necessary to make reminder calls to all flight attendants. This decision was prompted by calls from flight attendants who had not received their voting materials or had other questions about the election process. Smith reported that Operational FSMs were directed to make one phone call to each flight attendant and leave a message if unable to reach them rather than continue to call. Because Operational FSMs made the phone calls, rather than Performance FSMs, Smith reported that flight attendants did not receive calls from their direct supervisors. Several flight attendants did, however, report that they received a call from a direct supervisor and one FSM reported that he made calls to flight attendants under his direct supervision and left his direct phone number for them to call back when leaving a message.

Managers making phone calls received training and a script they were told to follow. When leaving a message, managers were told to read from the following script:

I’m calling to make sure you know that the voting window for the flight attendant representation election here at Delta is open through 2:00pm November 3<sup>rd</sup>. I do not want to know if you voted, or how you voted, but simply calling (sic) to make sure you are aware we are nearing the end of the voting period and that you must vote in order for your vote to count. You will need your VIN and PIN to vote. If you don’t have your VIN or PIN you should request a duplicate copy from the NMB before October 27.

We hope there will be 100% participation so that this decision is made by the MAJORITY of ALL Delta flight attendants.

The script also included questions and answers. Flight attendants reported that, in most cases, there was little diversion from the script. There were isolated incidents of managers stating their opinion about the election when engaged by flight attendants. One manager told a flight attendant “you need to think about all the things that Delta has done for you” when considering how to vote. Although managers were told to only call once, some called several times when they did not reach a flight attendant. Most flight attendants, though, reported that they only received one call or message.

As part of its Decision 2010 campaign, Delta also sent materials to flight attendants’ home addresses. Many flight attendants described the massive and overwhelming amount of mail that they received from Delta during the election period. Many reported discarding all materials they received while others reported that they read everything in order to remain informed about issues related to the representation election. The mailings included many of the same messages already outlined above, as well as the Voting Guide and information about the NMB rule change.

### **Discussion**

A carrier’s overwhelming and pervasive campaign can contribute to a finding of interference. The Board’s evaluation of a carrier’s campaign considers “whether the speech in the context of the ‘totality of the circumstances’ impermissibly interferes with employee free choice.” *American Airlines*, 26 NMB 412, 448 (1999). The Board has found that a campaign was so pervasive as to interfere with employee free choice when, for example, the campaign communications includes the message: “PLEASE DESTROY YOUR BALLOT!” and where carrier officials told employees in private or small group meetings that the company would go bankrupt if the union won the election. *Petroleum Helicopters*, 25 NMB 197, 205, 221 (1998).

Without a doubt, Delta ran an aggressive campaign against union representation. As discussed above, however, Delta’s campaign communications did not include material misrepresentations of the Board’s procedures, threats of reprisals, or promises of benefits. There is a level of carrier campaign communications which can overwhelm an employee’s ability to determine how he or she will vote in a representation election without carrier interference or influence. That was not the case here. While many flight attendants were annoyed by the pop-ups, they also stated that they could be

closed easily or went away after a few seconds. Delta's campaign communications did not direct the flight attendants to vote "no" and they did not include threats of consequences to employees who voted in favor of representation. Delta's campaign materials, including messages on DeltaNet, mailings to flight attendants' homes, and banners displayed in crew lounges contained a non-coercive message urging employees to participate in the election.

## X.

### **AFA's Other Allegations**

AFA submitted evidence and argument regarding a variety of other allegations. The Board finds that many of these allegations are not supported by sufficient credible evidence. The other allegations, if true, do not constitute interference.

## XI.

### **Allegations of Union Interference**

Delta also alleged that AFA's conduct interfered with the election. Delta asserts that AFA interfered with the election by interrogating and polling employees and by conducting an overly aggressive campaign. Delta also alleged that much of its own communications were in response to AFA's aggressive and widespread campaign.

As part of its campaign, flight attendants who supported AFA made calls to their coworkers. Some flight attendants told the Investigators that they were uncomfortable receiving phone calls from AFA advocates and wondered how AFA had gotten their phone numbers. Most flight attendants, however, reported that AFA advocates merely asked them whether they voted and if they had any questions. Some flight attendants acknowledged that they had requested information from AFA in previous elections.

AFA supporters also approached flight attendants in crew lounges and at layover hotels to discuss representation. They did record the responses. One flight attendant reported that she was called "young and naïve" after she told an AFA advocate that she did not support the union. Others reported that they felt comfortable disagreeing with AFA advocates and engaging them in arguments over whether a union was necessary. Some reported simply lying to AFA about how they planned to vote in order to not have to discuss the issue.

Flight attendants at pre-merger Delta hubs were more likely to report feeling uncomfortable by the presence of AFA activists in their crew lounges. Some reported that they felt AFA was interfering simply by having supporters at visibility tables in a crew lounge. For example, one Los Angeles-based flight attendant felt that AFA supporters should not have been permitted to sit at a table in front of the coffee maker. Like those pre-merger Northwest flight attendants who believed Delta should not campaign because a carrier has no role in an election among employees to choose a representative, many pre-merger Delta flight attendants felt that any advocacy by the AFA should have been impermissible.

Flight attendants also reported that there was much animosity among co-workers during the election period. There were numerous reports of bag tags being ripped off and flight attendants insulting each other. Some pre-merger Delta flight attendants reported feeling uncomfortable passing through the lounges in Minneapolis or Detroit during the election period. Likewise, pre-merger Northwest flight attendants reported the expressions and jokes used by pre-merger Delta flight attendants to insult them. There were isolated incidents of more extreme behaviors on both sides.

### **Discussion**

The Board frequently has stated that the same analysis of whether the laboratory conditions have been tainted applies to union interference and carrier interference. The carrier, however, has unique power and authority in the workplace. In this context, similar facts when applied to a carrier or a union could lead to different conclusions about whether the laboratory conditions have been tainted. *Delta Air Lines*, 30 NMB 102, 143 (2002); *United Air Lines, Inc.*, 22 NMB 288, 318 (1995); *Air Wisconsin*, 16 NMB 235, 239-40 (1989).

On the issue of polling, the Board has stated:

The Board views polling of employees during a representation election as one instance where the application of its standard to 'effectively identical factual situations involving alleged union vis-a-vis carrier interference may lead to different conclusion.' Whereas polling by a carrier is coercive precisely because of the substantial and material ability of the carrier to act against employees, the kind of polling evidenced here did not carry with it the same threat of imminent retaliation.

*Federal Express Corp.*, 20 NMB 486, 534 (1993).

AFA did not taint the laboratory conditions by asking flight attendants about their support for the union. The investigation established that AFA's polling was conducted by other flight attendants, was not coercive, and did not compromise the secrecy of the ballot.

While AFA did conduct an aggressive campaign, the Board finds that this is not a basis for finding interference. In *United Airlines, above* at 319, the Board noted the RLA's legislative history, particularly the statement of John B. Eastman, Director of Transportation, before the Senate Committee on Interstate Commerce on the 1934 amendments to the Railway Labor Act: "When it comes to the organization of employees, it is entirely appropriate and proper that argument and electioneering be allowed." It cannot be disputed that some individual flight attendants may have exceeded the norms of polite discourse or behavior. But this uncalled-for activity was not restricted to AFA supporters. Just as Delta is not responsible for the conduct of those flight attendants who opposed representation, AFA was not responsible for the conduct of flight attendants who supported representation.

**CONCLUSION**

Based upon the totality of circumstances, the Board finds that the conditions required for a fair election were not tainted.<sup>7</sup> Therefore, as there is no further basis to proceed, the Board closes its file on this matter.

By direction of the NATIONAL MEDIATION BOARD.



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<sup>7</sup> Member Hoglander notes that the totality of the circumstances in the instant case is distinguishable from *Delta Air Lines*, 30 NMB 102 (2002). In his view, the Board's investigation in 2002 revealed carrier support for an anti-union group of employees known as the "Freedom Force" and widespread evidence that Delta did not even-handedly apply its Advocacy Policy to the union and anti-union advocates. In 2002, the record established multiple incidents of supervisors and managers taking notes and photographs of AFA activists and other flight attendants while the activists were in the lounges. There were no such allegations or evidence in the present case.