

NATIONAL MEDIATION BOARD
WASHINGTON, D.C.

In The Matter of the)
)

REPRESENTATION OF EMPLOYEES)

Case No. R- 7254

of)

DELTA AIR LINES, INC.,)
_____)

**THE ASSOCIATION OF FLIGHT ATTENDANTS' REPLY
MEMORANDUM IN SUPPORT OF MOTION FOR A BOARD
DETERMINATION OF CARRIER INTERFERENCE**

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INTRODUCTION

The Association of Flight Attendants-CWA, AFL-CIO (“AFA-CWA” or “AFA” or “the Union”) files this Reply Memorandum In Support of Motion for a Board Determination of Carrier Interference. AFA believes that in reviewing the parties’ initial submissions in this matter the Board will find very little dispute over AFA’s factual allegations. Similarly, few points of law are in dispute because the NMB’s interference case law is well developed and its standards long settled. As we explain in greater detail, Delta has not raised any response to some of AFA’s allegations. Even when Delta has responded, however, the Carrier generally concedes the essential facts, but argues that its actions were nonetheless justified either by the supposed failings of the Board, alleged conduct by AFA, or its own views on the requirements of the Railway Labor Act, which we show are mistaken. Left without much to say in defense of its actions, Delta transparently attempts to divert the Board’s attention to AFA’s conduct, regardless of the fact that its complaints are obviously untimely and irrelevant to the Board’s assessment of carrier interference. In any event, Delta’s allegations are devoid of merit. AFA conducted its campaign consistent with the Union’s proud history and the outstanding character and professionalism of AFA members and leaders at every level of the organization.

Given that AFA’s prima facie showing remains undisturbed, we submit that the Board should now proceed with a full investigation.

ARGUMENT

I. DELTA'S ELECTION INTERFERENCE ALLEGATIONS AGAINST AFA ARE UNTIMELY.

In its response to AFA's election interference charges, Delta for the first time makes allegations of election interference against the Union. These allegations are untimely and properly disregarded by the Board for that reason alone. Although Delta devotes a considerable portion of its response to ill-founded complaints regarding AFA's conduct, which we address below, the Carrier requests "corrective action" based solely on its allegations regarding AFA's polling of Flight Attendants (apparently conceding that Delta's other complaints even on their face do not constitute actionable interference). Delta Resp. at 24-27. Delta seeks two remedies from the Board: (1) dismissal of AFA's interference charges; and (2) extension of the Board's dismissal bar to no less than two years. *Id.* at 24.

As Delta is no doubt aware through its experienced RLA counsel, the NMB's Representation Manual gives a party seven business days after the vote tally to submit allegations of election interference. NMB Representation Manual, § 17.0. The NMB only accepts late-filed allegations under "extraordinary circumstances." *LSG Lufthansa Servs., Inc.*, 25 NMB 405 (1998). Here, however, Delta has not offered any justification for its belated filing, much less shown extraordinary circumstances that might excuse the Carrier's tardiness. In analogous circumstances, the NMB has disregarded untimely interference claims. *See Northwest Airlines, Inc.*, 26 NMB 269, 273 n.1 (1999) (interference allegations submitted as part of response to another party's interference

claims not considered by the Board because untimely). The Board should do likewise in this case.

II. DELTA DOES NOT DISPUTE MANY OF AFA'S KEY FACTUAL ALLEGATIONS AND INSTEAD MISREPRESENTS AFA'S PRIMA FACIE BURDEN.

As an initial matter, Delta has left un rebutted many of the AFA's factual allegations. For example, Delta does not dispute that:

- Votes cast on workplace computers were done with the reasonable belief that Delta could monitor employee computer use.
- Votes were cast in the open around supervisors and co-workers and amidst a barrage of Carrier campaign speech.
- Delta sent nearly daily emails concerning the election that Flight Attendants were required to read.
- The Carrier engaged in a systematic campaign to call every Flight Attendant on their personal telephones.
- Delta prevented AFA supporters from communicating with Flight Attendants in the lobbies of layover hotels.
- Delta took it upon itself to communicate election rules and procedures to the electorate in the place of the NMB, which the Company viewed as having done an inadequate job of voter education.
- Delta granted a pay increase expressly limited to non-union Flight Attendants.

This un rebutted evidence alone is sufficient basis for the Board to find a prima facie case and proceed with an investigation.

Instead of directly meeting the AFA's case, the Carrier repeatedly chastises AFA for allegedly failing to prove that the laboratory conditions were tainted by the Company's conduct. *See, e.g.*, Delta Resp. at 32 ("AFA has submitted no substantial evidence that Flight Attendants believed they were required to vote."); *Id.* at 36 ("AFA

also fails to offer any evidence as to how many – if any – Flight Attendants . . . thought Delta, rather than the NMB, was running the election.”). In so arguing, Delta misconstrues the Board’s well-settled standard for interference charges.

In order to trigger an investigation, a party need only assert a “prima facie case that laboratory conditions were tainted.” NMB Representation Manual, § 17.0. A party satisfies this burden when “the allegations and evidence, if true, might reasonably taint the laboratory conditions.” *Fox River Valley Railroad*, 20 NMB 251, 259 (1993); *Express One Int’l*, 25 NMB 420, 426 (1998). Accordingly, the Union is not required at this stage to prove election interference. Only after an investigation has been conducted does the Board determine whether employer interference has, in fact, tainted the laboratory conditions.

Similarly, Delta tries to confuse the proper focus of the NMB’s prima facie interference inquiry. The Company attempts to devalue AFA allegations by comparing their number to the overall size of the electorate. *See, e.g.*, Delta Resp. at 4, 5. The salient comparison, however, is between the number and scope of the allegations of misconduct and the determinative number of votes, here only 165. AFA has documented specific examples of election interference which involved Flight Attendants numbering well in excess of the vote margin. In fact, much of Delta’s misconduct affected all or large numbers of Flight Attendants, including: home phone calls about the election; election pop-ups on work computers; and impermissible pay practices. Furthermore, AFA submissions not only address specific instances of interference, but also point to the

general Flight Attendant experience. All this must be assessed in light of the slim margin deciding the election, not the size of the entire voter pool.

III. DELTA CONCEDES THAT IT UNDERTOOK THE “BURDEN” TO “EDUCATE” THE ELECTORATE REGARDING BOARD PROCEDURES, HOWEVER, AFA HAS SHOWN THAT DELTA’S VOTER EDUCATION MATERIALS WERE INACCURATE AND MISLEADING.

Delta claims that it alone “carried the burden” to explain election procedures because the NMB “did not have the resources to engage in voter education efforts.” Delta Resp. at 34. The Carrier further asserts that the NMB inadequately educated Flight Attendants concerning the change in voting procedure. Delta Resp. at 32 n.41. However, Delta does not claim that it raised its concerns with the Board prior to the election or otherwise urged the Board to undertake additional voter education efforts. Delta also criticizes AFA for failing to publicize the election rules. Delta Resp. at 34. Purportedly due to the failure of the NMB and AFA to act, Delta made voter education a priority in its election campaign. Delta Resp. at 32.

Having undertaken the “burden” of communicating election procedures and rules instead of relying upon the Board, Delta also assumed the obligation to provide complete and accurate information. *Zantop Int’l Airlines*, 6 NMB 834, 835 (1979); *Era Aviation*, 27 NMB 321, 340 (2000). Misstatements and misleading information, even if unintentional, constitute material interference and necessitate remedial action. *Aeromexico*, 28 NMB 309, 338 (2001); *Allegheny Airlines*, 4 NMB 7, 11 (1962). Here, Delta repeatedly misrepresented Board rules and procedures in an effort to create three

misperceptions among voters: (1) that voting was mandatory; (2) that it was futile to cast a write-in vote; and (3) that there are procedural bars to decertifying a union.

Despite protests to the contrary in its response, Delta undoubtedly created the impression that voting was mandatory. The Carrier now represents its message as “you must vote in order for your view to be counted” and argues that this message was necessitated by the voting rule change. Delta Resp. at 32. In fact, the Carrier repeatedly advised employees that “YOU MUST VOTE to be counted” emphasizing only the language of command, and in other communications simply told employees “VOTE” in the imperative. This often repeated language was coupled with CEO Richard Anderson’s statement, undisputed by Delta, that “Every single person at Delta needs to cast a vote -- I can’t say that often enough.” SOF ¶ 3. Contrary to the picture Delta now tries to present to the Board, these messages instructing Flight Attendants that they must vote were not tied to the change in Board procedures. Delta only offered explanation of the change in NMB voting procedures in a few of its numerous publications. These other statements, however, cannot cure the taint of Delta’s far more numerous misleading slogans. In the past, the Board has only excused isolated misrepresentations, and even then only when the Carrier has “promptly and repeatedly corrected” the misstatements. *Delta*, 30 NMB 102, 128-29 (2002). Here, Delta made no effort at correction, and instead continued to repeat statements plainly intended to convey that voting was mandatory.

Although Delta now claims that its imperatives were mere “encouragement” to vote (Delta Resp. at 32), this characterization cannot be reconciled with the Company’s actual statements. When an employer tells its employees that “[e]very single person . . .

needs to cast a vote,” it is not mere encouragement. To the contrary, such statements constitute a management directive. It is difficult to conceive of a more patent violation of the fundamental principle laid down by the Board in its recent rulemaking that employees should be free to determine whether or not to participate in an NMB-sponsored election.

Delta also incorrectly communicated to Flight Attendants that the election was between only two options: AFA and no-union. This false message was even built into the Company’s most pervasive campaign slogan: “If You Don’t Want AFA...NO is your pick whether you dial or click.” SOF ¶ 22. Under Board procedures, however, voters have the important option to write-in a union representative other than the organization appearing by name on the ballot. Despite Delta’s posturing, such votes are not inherently futile. There are multiple cases where a write-in representative has received sufficient votes to be certified. *See Int’l Total Servs.*, 16 NMB 231, 233 (1989); *Zantop Int’l Airlines*, 9 NMB 70, 77 (1981). In this case, Delta had no objective basis to predict that there could not be a ground swell of support that would carry a write-in representative to victory.

In the same vein, there was no factual basis for Delta’s repeated assertion that the “best option” for supporters of a union other than AFA was to vote no. SOF ¶¶ 7, 8, 22. As conceded in its Response, Delta communicated to Flight Attendants that write-in votes for unions other than the AFA could lead directly to the AFA being selected as the bargaining representative. According to Delta, it “truthfully and accurately told its employees that most write-in votes are likely to be counted as votes for representation that could help AFA win the election.” Delta Resp. at 38. But this statement is neither

truthful nor accurate. As the Board well understands, votes for a union other than AFA would not have helped AFA win the election. Such a vote could only “help” AFA by leading to a run-off election between AFA and a write-in union. In fact, if only 165 voters had cast a write-in vote instead of voting no, there would have been a run-off between the AFA and the second place union. Despite Delta’s claims to clairvoyance, no one could predict the results of such a run-off election. The “best option” for write-in supporters, therefore, would have been to attempt to force a run-off election, in which their desired choice of representative would appear on the ballot and have a full opportunity to make its case to the entire Flight Attendant group. Delta plainly interfered with employees’ free choice by misrepresenting the NMB’s write-in option.

Lastly, Delta misrepresented the ability of employees to return to non-union status if AFA was elected as their representative. As explained fully in our initial submission, Delta implied that procedural barriers had prevented the decertification of unions representing large crafts or classes in the past. SOF ¶ 24. The Carrier compounded this deception by asserting that the recent change in board procedures somehow made decertification more difficult than in the past, when in fact there has been no change in that regard. SOF ¶ 25. Delta’s misrepresentation of the implications of electing a representative constitutes interference. *USAir*, 17 NMB 377, 421 (1990); *Era Aviation*, 27 NMB at 338.

As a final note, Delta’s misrepresentations of election procedures are all the more offensive because some of these statements were communicated without clearly identifying Delta’s role in producing them. Delta strangely argues that neutral headings

on its voting materials, such as “Your Vote Matters” and “Decision 2010,” sufficiently identified to Flight Attendants that these materials came from the Carrier. Delta Resp. at 35; *see* AFA Exh. 5, pp. 6, 34, 37; AFA Exh. 1, pp. 1, 4, 21, 26, 33. In fact, these slogans were likely to suggest an air of neutrality and obscure Delta’s role in the production. Additionally, the sheer volume of Delta’s misleading “voter education” material simply overwhelmed the NMB’s official communications. This is *prima facie* interference.

IV. ALL VOTES CAST ON DELTA’S WORKPLACE COMPUTERS ARE TAINTED BY VOTERS’ UNDERSTANDING THAT THE COMPANY COULD MONITOR ALL EMPLOYEE ACTIVITY ON ITS COMPUTER SYSTEMS.

As explained fully in our initial submission, every vote cast on a workplace computer was done with the taint of election interference. Initial Submission, at 58-60. Delta does not contest AFA’s assertion that the crew lounges and In-flight departments where voting took place were inundated with campaign speech and lacked minimal voter privacy. SOF ¶¶ 26-28. Most damning, Delta concedes that Flight Attendants were on notice that their use of workplace computers could be monitored by Delta. Delta Resp. at 28 (“Like nearly all employers, Delta reserves the right to monitor or investigate possible misuse of its systems or equipment.”). According to its written policies, however, Delta does not limit its right to monitor computer usage to cases of suspected misuse. Instead, the Company “reserves the right to access or monitor, without notice, any access to the Internet or intranet using company workstations, including review of individual files maintained by users regardless of media.” SOF ¶¶ 31-32. Delta’s assertion that it is the common practice of employers to monitor the computer use of employees hardly

improves the Company's case. To the contrary, insofar as workers now generally understand that workplace computer usage is not private, this further supports AFA's contention that Flight Attendants voted on Company computers with the understanding that their voting could be monitored by Delta. Furthermore, Flight Attendants were not only using company computers, but had identified themselves by logging in. Delta stresses that some of its computer programs can be accessed without signing into DeltaNet specifically. Delta Resp. at 30. This is irrelevant. In order to access the internet on a Delta computer, employees must identify themselves by logging onto DeltaNet. Rook Suppl. Dec. ¶¶ 2-4.

Having conceded that its own policies announce the Company's power to monitor all workplace computer use, Delta repeatedly asserts that it did not actually do so in this case. Delta Resp. at 27. This is not dispositive. Even if Delta did not engage in any actual monitoring, every vote cast on a workplace computer was tainted, at the least, by the impression of surveillance. Votes on workplace computers were cast after employees had identified themselves and with the reasonable belief that the employer could monitor anything Flight Attendants did on those computers. As AFA argued in its opening brief, and Delta declines to address in its response, Flight Attendants were left with the choice either to decline Delta's invitation to vote on its computers, which would create the impression that they had something to hide, or to vote at work with the reasonable belief that the Company could determine whether and even how they voted. In addition, Delta set up a situation where Flight Attendants could reasonably believe that they could demonstrate their vote to Delta and therefore prove loyalty to the Company. So, although

Delta mocks AFA's arguments as premised on the "risk" of monitoring alone, the risk of monitoring in itself gives rise to election interference because it gives the impression of surveillance, which the Board has always found to taint the election process. *Delta Air Lines, Inc.*, 30 NMB at 115; *Pinnacle Airlines*, 30 NMB 186, 223 (2003); *Laker Airways, Ltd.*, 8 NMB 236, 250 (1981).

AFA has also presented substantial evidence that a significant number of Flight Attendants did vote on workplace computers and Delta readily concedes that it permitted Flight Attendants to do so. Delta Resp. at 36. In fact, Delta permitted Flight Attendants to access the NMB and BallotPoint websites, although it routinely prevents access to other non-work related websites. Rook Suppl. Decl. ¶¶ 2-4. Furthermore, the Union has submitted substantial evidence that Delta actively encouraged voting on workplace computers by inundating these areas with "voting instructions," some of which were even posted on the computers. SOF ¶ 13. Similarly, after logging onto DeltaNet, employees were directed to the NMB website to vote. See SOF ¶ 19. Delta itself essentially concedes that workplace voting was widespread by characterizing it as an important option in the "modern day work environment." Delta Resp. at 29. Therefore, AFA has made a prima facie case that voting on Delta computers tainted the laboratory conditions, indeed destroyed them.

Despite Delta misconstruing it as such, AFA's challenge is not an attack on the NMB procedures. The concerns raised above were not addressed in the past when the NMB has commented on the security of its internet voting procedures. See RE: Internet Voting Comment Period, 34 NMB 200 (2007); Policy on Use of Hyperlinks to its Voting

Website, 37 NMB 65 (2009). Instead, the NMB has focused on the measures taken to prevent a party from infiltrating the Agency's website or servers to monitor or change ballots. When employees vote on company computers, such security is irrelevant because the carrier can monitor voting without having to access the NMB servers. In short, the present issue is not one that the NMB has previously addressed. Nor does it call into question the integrity of the NMB's systems, but rather the lack of privacy or an expectation of privacy in Delta's computer system.¹

V. DELTA WITHHELD AND PROMISED PAY INCREASES IN ORDER TO INFLUENCE THE OUTCOME OF THE ELECTION.

As with AFA's other election interference charges, Delta for the most part does not deal with the evidence and arguments put forth by AFA regarding the withholding and promising of pay increases. No example of this is more striking than Delta's attempt to simply ignore what Richard Anderson and Joanne Smith actually told Flight Attendants regarding wage increases and claim instead that they did not link the rejection of unionization to the receipt of nearly immediate wage increases. Delta Resp. at 45. However, the record is clear.

During a September 16, 2010 conference call with Flight Attendants, a Flight Attendant specifically asked Anderson and Smith what would happen to wages and work

¹ Contrary to Delta's assertions, AFA does not suggest that it would be permissible to encourage voting on union-controlled computers in an analogous setting where voters were informed that their computer usage could be monitored. However, to the extent that Delta tries to argue that voting also occurred here on AFA-controlled computers, the exhibits submitted by Delta simply do not support that the Union engaged in such conduct, and in fact did not. Delta Resp. at 36.

rules if AFA lost the election and the CBA ceased to apply.² In responding, Smith made clear that her response was based upon AFA losing the election. (Exh. 2, p. 25) (“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.”) She also cited the example of the Northwest mechanics indicating that they became non-union following the merger and emphasized the speed with which Delta acted to give pay raises to them once they were non-union.

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 who early on settled [no Union] and have a direct relationship.*** The Northwest mechanics were brought up to Delta pay increases within the first pay period. (Exh. 2, p. 25) (emphasis added).

Richard Anderson then chimed in with statements similar to Smith.

I’ll be really direct, if we tell you directly it’ll be inference [*sic*] and the union will say that we influenced the vote, so I mean I can say that because I have legal training. 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 out the - or 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. (Exh. 2, p. 25) (emphasis added).

² The transcript of the conference call reads: “Ron Harris: Good. I have a couple of questions. First of all, is there going to be more extension out of Seattle, with international flying? And also, there was a vote coming up November 3, and ***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?***” (Exh. 2, p. 25) (emphasis added).

Although Anderson made passing reference to the dispatchers (who remain unionized), the focus of the exchange was what would happen if AFA lost the election and the treatment of other groups who had become non-union.³

Of course, Anderson's statement that he could not tell Flight Attendants "directly" what Delta would do post-election in terms of wage increases plainly conveyed that he and Smith were telling Flight Attendants indirectly what Delta would do, *i.e.* rapidly grant them a pay increase. And, at no point, either directly or indirectly did either Anderson or Smith convey that pay increases would follow regardless of the outcome of the election, as Delta now claims was its intended meaning. Delta Resp. at 41 n.53. Instead, Anderson and Smith repeatedly cited the examples of groups who had gone non-union. In the end, their message was unmistakable: if AFA was voted down, PMNW Flight Attendants would quickly receive a substantial pay increase.

Beyond its attempt to evade the plain statements of its highest management, Delta also offers an internally inconsistent legal justification of its conduct related to pay increases. On the one hand, Delta asserts that the pre-merger AFA-NWA contract prevented it from extending pay increases to PMNW flight attendants pre-election (a

³ Although Delta suggests in its response that it told Flight Attendants that pay and benefits would be aligned as for other groups including the pilots who continued to be union-represented, the Carrier does not cite a single instance where it used the pilots as an example of the treatment that would be afforded to Flight Attendants post-election. In any event, the pilots do not provide an example of Delta aligning pay and work rules for employees only after representation has been resolved. To the contrary, the Delta and NWA pilot groups consummated a joint collective bargaining agreement to align pay and work rules *before* ALPA filed a single carrier application to become recognized by the Board as the representative for the combined craft or class, thus resolving representation. *Delta Air Lines, Inc. and Northwest Airlines, Inc.*, 36 NMB 36 (2009) (finding a single carrier with respect to pilots).

view of the contract that AFA does not share).⁴ On the other hand, Delta claims that post-election the Company intended to align pay and work rules regardless of whether AFA prevailed or not. But the fact remains that the pre-merger contract would still apply post-election if AFA won and would still prohibit the Carrier from making any contractual changes to PMNW Flight Attendant pays absent an agreement between AFA and Delta to amend the contract. *See Ass'n of Flight Attendants v. USAir*, 24 F.3d 1432 (D.C. Cir. 1994) (following NMB certification of AFA as representative for merged workforce, pre-merger CBA remained in place, absent parties' agreement to the contrary).⁵ Therefore, if AFA prevailed the status of the contract remained the same and Delta's assertion that the alignment of pay and work rules could only occur following the resolution of representation is nonsensical.

In addition, although Delta argues that the pre-merger contract prohibited it from granting pay increases, the Carrier does not cite any contract language in support of that claim. AFA does not believe that a wage increase would violate its agreement, which the Union views as setting a floor, not a ceiling. In any event, Delta never asked the Union

⁴ AFA finds Delta's new-found reliance on the contract ironic, to say the least. In fact, from the very outset of the merger, in communications to AFA Delta consistently took the position that it was not legally obligated to abide by the terms of the AFA-NWA agreement, but instead had merely chosen to follow the contract's provisions on an interim basis in the interests of an orderly transition during the merger. Now that it no longer suits the Carrier's purposes, Delta appears to have abandoned that frivolous legal position.

⁵ Delta relies on the *AFA v. USAir* case to contend that its refusal to provide pay increases to PMNW Flight Attendants does not constitute election interference, but that case did not address the issue of interference or infringement of RLA Sections 2, Third and Fourth.

for its view on the contract. Delta also complains that PMNW Flight Attendants would have enjoyed a windfall in light of superior benefits under their contract if granted the same pay increase as afforded PMDL Flight Attendants. Delta Resp. at 42 n. 55. But Delta does not even try to explain, nor can it, why the Company did not propose a pay increase for PMNW Flight Attendants calibrated to account for their greater benefits. Delta's failure to pursue the reasonable options available to it under the circumstances confirms that the Company intended to and did use the pay increases to influence the election.⁶

Shamelessly, Delta has continued to use the pay increases to taint the laboratory conditions in the post-election period. Delta has told PMNW Flight Attendants that it still will not grant the pay increases due to the fact that AFA has filed interference charges. See AFA letter to Delta, dated Dec. 14, 2010 (previously submitted to the Board). Ironically, Delta now refuses to grant the pay increases despite the fact that it has disavowed the AFA-NWA contract, the supposed impediment to granting the increases in the first place. Delta contends that the preservation of laboratory conditions post-election requires that it continue to withhold pay increases, but the Carrier rejected AFA's offer to waive any future claim that granting the increases now constitutes interference. Given AFA's offer, plainly Delta's real intent is to have PMNW Flight Attendants blame AFA

⁶ Delta also asserts that AFA's arguments regarding the withholding of pay increases were raised by the IAM with regard to the Simulator Technicians' election and previously rejected by the Board. This is incorrect. Although the IAM made a similar argument, the Board did not address the issue in its decision. *Delta Air Lines Inc.*, 37 NMB 281, 283, 308-09 (2010). Nor was there any reason to address the issue there because the Board found that the timing of the announcement of pay increases in that case provided sufficient basis to overturn the election and order a re-run.

for the fact that they have not received post-election increases as promised and thereby taint any re-run election.

VI. DELTA'S SYSTEMATIC CALLS TO FLIGHT ATTENDANTS' PERSONAL PHONE NUMBERS ENCOURAGING THEM TO VOTE WERE INHERENTLY COERCIVE AND NOT JUSTIFIED BY DELTA'S THIN PRETEXT.

Delta does not deny that managers systematically called Flight Attendants on their home and cell phone numbers regarding the election, but claims that this inherently coercive conduct was justified. However, Delta's justification for calling 20,000 Flight Attendants on their personal phone numbers is irrelevant, as well as unconvincing. Citing one first hand report of voter confusion (a person who purportedly thought that only PMNW Flight Attendants were eligible to vote), Delta management concluded that Flight Attendants were generally confused about the new voting rules. Delta Resp. at 51. Needless to say, among 20,000 Flight Attendants, no matter what lengths the Board might go to in terms of providing instruction, a few individuals will misunderstand. Despite no evidence of widespread confusion, Delta devoted the resources of its management team to a massive calling effort. Delta does not explain why it could not have communicated its message in another, less intrusive, manner such as mailings or emails, which Delta frequently sent throughout its campaign.

Instead, Delta "reminded" employees in an inherently coercive manner by calling them on their personal lines. Even those supervisors who strictly followed the Delta script engaged in an inherently coercive one-on-one conversation (and AFA has provided evidence that some did not stick to the script). SOF ¶ 13. As the Board has previously

held, contacting employees on their personal lines can be inherently coercive and constitute interference. *Laker Airways*, 8 NMB at 249. Normally, Delta Flight Attendants are only called on their personal phone numbers when they have violated a work rule or for another similarly important business reason. Rook Suppl. Dec., ¶ 5. Since Delta had already communicated that voting was mandatory, as well as its strong opposition to AFA, the phone calls implied that it was an important work duty to vote, particularly against AFA. In short, Delta's thin pretext cannot and does not justify such an inherently coercive communication.

VII. ACCORDING TO ITS OWN ACCOUNT, DELTA RESTRAINED UNION ACTIVITY IN NARITA AND AMSTERDAM LAYOVER HOTELS.

Delta concedes that absent its intervention, the Narita and Amsterdam layover hotels would not have removed AFA supporters from their lobbies. Delta Resp. at 21. Furthermore, Delta essentially admits that this interference could have had significant impact on the election result because these hotels are important points of contact with large numbers of Flight Attendants. Delta Resp. at 20. Although claiming that AFA supporters engaged in harassment of fellow Flight Attendants in the hotel lobbies, Delta fails to adduce a single example of a Flight Attendant complaining to hotel management about AFA's conduct. If the AFA supporters had in fact acted as alleged by Delta in the most public areas of these hotels, it is hardly plausible that the hotel management would have allowed such conduct to continue, especially if guests had complained.

Not content to permit any aggrieved Flight Attendants to address their complaints to hotel management, Delta took it upon itself to fly in managers from the other side of

the globe to intercede. Unsurprisingly, following Delta's inquiries regarding the hotels' policies, the hotels suddenly began to enforce policies which previously had not been invoked. Although claiming that the two hotels themselves had policies that prohibited the conduct engaged in by AFA, we note that Delta has not submitted to the Board copies of these policies. Unlike Delta, of course, AFA supporters wield no influence over the management at these layover hotels. There is no evidence that absent Delta's intervention AFA would have been barred from the hotel lobbies in Amsterdam and Narita. In short, Delta has essentially conceded that they prevented an important point of contact between AFA supporters and Flight Attendants.

VIII. DELTA'S ATTEMPT TO CLOAK ITS MISCONDUCT IN THE PROTECTION OF THE FIRST AMENDMENT IS UNAVAILING.

Throughout its brief, Delta ineffectually attempts to shield itself from charges of election interference with the First Amendment. *See, e.g.*, Delta Resp. at 3 (“A case of election interference cannot be premised on hostility to Delta's constitutional rights.”) As articulated by the Supreme Court, an employer's predications regarding the effects of unionization are only protected by the First Amendment when they do not contain promises of benefits or threats of reprisal, and they are based on “objective fact.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Additionally, an “employer's otherwise protected speech becomes unprotected because the employer *also* engages in conduct tending to coerce.” *US Airways, Inc. v. NMB*, 177 F.3d 985, 992 (D.C. Cir. 1999).

Plainly, AFA does not challenge any employer speech that does not promise or threaten, is grounded in objective fact, and is unconnected to coercive conduct. Instead,

the Union has presented substantial evidence of well established forms of employer interference to which neither the NMB nor any court has ever granted First Amendment protection. As discussed above, the Carrier's statements regarding mandatory voting, decertification, and the futility of write-in votes were false and in no way grounded in fact. Any statements regarding pay constituted promises of benefits or were connected with coercive discriminatory pay practices and as such were not protected by the First Amendment. Similarly, the phone calls to Flight Attendants were inherently coercive and, therefore, any communications made during them were not protected by the First Amendment.

Delta argues with a straw man when asserting the Constitutional right of an employer to engage in unlimited legal speech regarding a representation election. Delta Resp. at 49. The Union has never discussed limits on the amount of legal speech. Instead, the AFA has explained that when the amount of impermissible employer speech and conduct is pervasive, as it was during this election, a re-run election and other further remedies are necessary. Initial Submission at 73-79.

IX. DELTA'S COMPLAINTS REGARDING AFA'S CONDUCT ARE IRRELEVANT AND ILL-FOUNDED.

Delta apparently believes that casting AFA in a bad light will somehow improve its case before the Board. But Delta does not cite a single case, and we are aware of none, where the NMB has found a union's conduct material to whether or not a carrier has engaged in interference. Thus, Delta devotes a large portion of its brief to entirely irrelevant accusations regarding AFA to no avail. Although AFA is reluctant to further

waste the Board's time with Delta's misguided and false accusations, we briefly address these matters.

Delta's primary complaint is that AFA engaged in polling. Delta Resp. at 11-19. The NMB, however, has repeatedly found union polling of the type conducted by AFA to be permissible. *Piedmont Airlines, Inc.*, 31 NMB 257, 284-285 (2004); *Delta Airlines*, 30 NMB at 144; *Federal Express Corp.*, 20 NMB 486, 534 (1993). Plainly aware of this Board's precedents, Delta seeks to rely instead on NLRB cases to argue that AFA's conduct is somehow faulty. But Delta misreads the NLRB case law, which does not involve circumstances analogous to this election. *See NLRB v. Gormac Custom Mfg., Inc.*, 190 F.3d 742, 747 (6th Cir. 1999) (union leaflet misrepresenting that certain employees intended to vote for union constituted "improper and deceptive" pre-election polling); *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364, 1372 (5th Cir. 1980) ("When considered in light of the acts and threats of violence [(e.g. slashing tires and anonymous bomb threat)], [union organizer's] oral polling of employees regarding their pro or anti-union sentiments may have been coercive."). Delta's chief issue with AFA's polling, aside from the fact that it occurred at all, appears to be the fact that AFA attempted to poll in a comprehensive and systematic fashion. Delta Resp. at 17-19. But the Board has never held that union polling is only permissible when it is incomplete or poorly done.

Delta's other complaints are even less worthy of attention. Delta asserts that AFA's campaign was "massive" and "unrelenting," but the volume of AFA messages cannot seriously be compared to the access to employees that Delta as the employer enjoyed through its computers, near daily company emails, calls to personal phone

numbers and multiple mailings to every single Flight Attendant. Delta's characterization of AFA's campaign messages as "fear and smear" is just silly. Delta Resp. at 9. Underneath the overwrought commentary, Delta relates that AFA made entirely unsurprising organizing arguments, such as pointing out that the Company would be free to change conditions of employment or outsource jobs in the absence of a contract. Delta even protests that AFA used paid union time to campaign, but that is purely a contractual matter. If Delta felt that such conduct had occurred, it should have filed a grievance instead of trying to raise the issue with the NMB. Delta also complains about conduct occurring *after* the election, to no apparent end other than to try to make AFA look bad.⁷ On top of all of this, Delta repeatedly makes allegations regarding conduct of "AFA supporters" without any evidence whatsoever that these individuals acted at the direction of the Union.⁸ In the end, Delta's baseless attempt to cast aspersions on AFA only serves to highlight that the Carrier has very little of substance to say in defense of its own conduct.

⁷ For example, Delta describes a rally on December 8, 2010 at AFA's headquarters in Washington, DC conducted by members of the group "No Way AFA," who were flown in by Delta as non-revenue positive space passengers. After the ralliers stopped chanting and picketing, AFA General Counsel Ed Gilmartin left the building for an appointment. As he passed the group, one individual shouted an epithet at him and he responded in kind, not speaking as a representative of AFA but rather as an individual who had been cursed at.

⁸ Delta's reference to videos on a website called "AverageJoeInc.com" provides a prime example of its attempt to attribute to AFA the actions of individuals acting independent of the Union. Delta Resp. at 11-12. The website in question was operated by a Delta Flight Attendant, Scott Braxton, who was solely responsible for the site's content. AFA never assisted financially or in any other way with the site and Mr. Braxton never consulted with AFA regarding the content of the site.

X. AFA HAS REQUESTED APPROPRIATE RELIEF.

Delta takes issue with the forms of relief requested by AFA. Delta instead suggests that the Agency should simply conduct a re-run election under the same terms as the first election without taking any steps to remedy Delta's taint of the laboratory conditions and without safeguards to prevent the Carrier from interfering yet again. The Board, however, cannot risk recidivism on Delta's part.

Setting up another straw man, Delta misrepresents that AFA is seeking to change the form of the ballot. We are not. AFA instead has requested a change in the voting method, specifically use of the Board's long-standard mail ballot procedures. Delta tries to cast this request as an attack by AFA on the Board's internet and telephone voting procedures. But it is Delta itself that has undermined the integrity of those voting methods by establishing on-site voting on company-controlled computers in derogation of the expectation -- upon which the Board's current voting methods are premised -- that employees will vote in secrecy and privacy. AFA only seeks relief to restore the secrecy and privacy of voting, and a mail ballot will accomplish that result. Aside from asserting that the request for a mail ballot is somehow an "affront" to the Board, Delta's sole remaining objection is that this method of voting is less convenient for voters. However, any decrease in convenience would be minimal at most and is amply justified by the need to ensure that voting in a re-run is secret and occurs in private.

Delta also objects to AFA's alternative request for a re-run with safeguards against the use of Delta computer systems for voting and against voting in work areas. *Id.* Again, Delta argues that these measures would make voting less convenient, but again

any minimal loss of convenience is warranted under the circumstances. Delta also suggests that this alternative relief would be difficult to implement. But surely Delta, like other employers, is able to block specific websites from its computer servers, and could block access to the BallotPoint site. *See* Rook Suppl. Dec. ¶¶ 2-4. As for preventing voting in work areas, Delta argues that it lacks sufficient control of its workplace to effectuate such an order. Delta Resp. at 62 (the Company “has no way of enforcing” such a prohibition). We doubt that is the case. Plainly, Delta has the means to advise employees that voting in work areas is prohibited, just as the Carrier advised in this election that it was permitted. And just as Delta encouraged employees to vote in the workplace in the last election, the Company could take reasonable steps to prevent employees from doing so in a re-run.

As demonstrated in our opening brief, AFA is entitled to an Excelsior list under applicable Board precedent. Delta opposes AFA’s request by arguing that the Union had sufficient means to communicate with Flight Attendants. But the Carrier cannot seriously claim that AFA’s access was equivalent to its own when the Company (1) had a complete mailing list which it used to send nearly a dozen glossy flyers; (2) sent emails to all Flight Attendants on a near daily basis which they were required to read as a condition of employment; (3) flashed election-related pop-up messages every time employees signed on to work computers; and (4) made calls to all Flight Attendants on their personal phones. Delta’s suggestion that employees must be permitted to opt out of an Excelsior list in order to be able to protect their privacy must also be rejected. Delta Resp. at 64. The NLRB routinely provides an Excelsior list and makes no provision for opting out, so

Delta's argument for a privacy interest in home address information swims against a strong tide. In any event, if any real concern for privacy existed, that concern could be addressed through the use of a third party mailing house to handle AFA communications.

Finally, Delta asserts that requiring Delta to bear the costs of a re-run lies outside the Board's authority because it is "adjudicatory" or "punitive." Delta Resp. at 65. Although it is correct that the NMB "has no authority to adjudicate unfair labor practices," *America West Airlines, Inc. v. NMB*, 986 F.2d 1252, 1257 (9th Cir. 1992), the imposition of costs would not be tantamount to such a ruling. Here, the Agency has already devoted substantial resources to an election of unprecedented size. An order requiring that Delta defray the costs of a re-run would only serve to further the Board's investigatory function, and as such lies well within the NMB's broad remedial powers.

CONCLUSION

For all the foregoing reasons and those set forth in AFA's initial submission, the Board should find that a prima facie case of interference has been stated and proceed with a full investigation of this matter.

Respectfully submitted,

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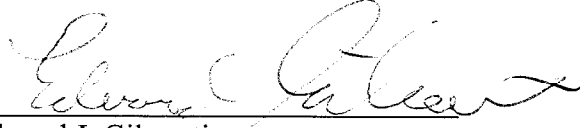
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of AFA's Reply Memorandum in Support of Motion for a Board Determination of Carrier Interference, with supporting declarations, was sent via e-mail on this 14th day of January, 2011, to the following:

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