

NATIONAL MEDIATION BOARD  
WASHINGTON, D.C.

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In The Matter of the ) )  
 ) )  
REPRESENTATION OF EMPLOYEES ) Case No. R- 7254  
 ) )  
 of ) )  
 ) )  
DELTA AIR LINES, INC., ) )  
\_\_\_\_\_) )

**THE ASSOCIATION OF FLIGHT ATTENDANTS' SUPPLEMENTAL  
MOTION FOR BOARD DETERMINATION OF CARRIER INTERFERENCE**  
**[CORRECTED]**

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## INTRODUCTION

The Association of Flight Attendants-CWA, AFL-CIO (“AFA-CWA” or “AFA” or “the Union”), files this Supplemental Motion for Board Determination of Carrier Interference with the National Mediation Board (“NMB” or “the Board”) seeking an investigation into the conduct of Delta Air Lines, Inc. (“Delta” or “ Company”) during the representation election for the 20,000 Delta Flight Attendants.

As established by the Declarations of dozens of Delta Flight Attendants, as well as the voluminous campaign material produced by Delta, AFA has stated “a *prima facie* case that the laboratory conditions were tainted.” NMB Representation Manual, § 17.0. A re-run election and additional safeguards must be ordered to remedy Delta’s violations of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Faced with the reality that only those Flight Attendants who actually vote now determine the issue of representation, Delta embarked on a months-long effort to blot out the ability of Delta Flight Attendants to make their decision in an atmosphere free of coercion, influence and interference. It usurped the power and authority of the National Mediation Board by rewriting the Board’s voting instructions and misrepresenting key elements of its procedures. Delta even instructed those who supported unionization, but not AFA, to vote “No” to make unionization more “likely” to occur.

Most insidious, was Delta’s decision to establish and control on-site voting. It transformed the In-flight departments and crew lounges at every domicile into polling

places and converted its computers and its intranet network (“DeltaNet”), into voting machines. Remarkably, Delta made known to employees in no less than three policy statements that it has the capability to track their use of its computers and DeltaNet, and reserves the right to do so. Put simply and irrefutably, Delta destroyed the privacy of the voting, the secrecy of the ballot box and any possibility of a free and fair election.

Delta also coerced and intimidated Flight Attendants through a relentless campaign that seeped into every facet of the Flight Attendant workplace and regularly reached into Flight Attendants’ homes. Flight Attendants arriving at the employee parking lot were faced with banners on the shuttle bus reminding them to vote. Once in In-flight, the crew lounges were blanketed with huge posters and signs, anti-AFA DVDs playing continuously, and literature all instructing them how to vote “NO” and constant admonitions that they “MUST VOTE.” And when they logged on to the Company computer for work, a pop-up screen confronted them that said “Decision 2010” with links to Delta-produced videos urging a vote against AFA. Added to these communications were Delta’s almost daily “Decision 2010” E-newsletters, Richard Anderson’s 78-minute “NEXUS” webcast, and weekly conference calls in which Anderson promised Flight Attendants raises if AFA was voted down. In the span of five weeks Delta sent 11 different mailers to Flight Attendants’ homes. The last two weeks of this oppressive campaign were capped off with supervisor telephone calls to Flight Attendants’ homes urging them to vote; an act that directly undermined the confidentiality and integrity of

the voting process as Delta gave Flight Attendants the impression that it knew whether they had voted.

Delta systematically transformed this representation election from a question of “free choice” to a mandatory directive to vote “NO” against AFA. Indeed, Delta exerted so much control over the election and so overwhelmed the atmosphere that one Flight Attendant thought the election was a “company sanctioned event.” (Decl. 89, ¶ 4).

Ultimately, the National Mediation Board must consider the effect of Delta’s misconduct in its totality – from the usurpation of the Board’s authority, to misrepresenting its procedures, to depriving Flight Attendants of the hallmarks of a fair vote – privacy, security and freedom from employer influence. Judging all of Delta’s actions as a whole, there can be no doubt as to the relief required – a re-run election should be conducted with all appropriate protective measures.

## **STATEMENT OF FACTS**

### **A. DELTA'S CAMPAIGN AGAINST AFA**

1. Immediately following the National Mediation Board's finding on August 18, 2010, that Delta and Northwest were a single carrier, Delta used every available means of communication to make it absolutely clear that it wanted Flight Attendants to vote against AFA. In the month preceding the election and through the voting period, Delta escalated these communications into a barrage of materials that explicitly conveyed this message. It sent emails almost every day, mailed pamphlets every week, hung banners, posted signs, distributed leaflets and broadcast videos wherever Flight Attendants congregated, called Flight Attendants at home, and devoted the most prominent pages of DeltaNet to the campaign. As shown below, Delta exploited every opportunity and devoted every conceivable space to inculcating Flight Attendants with the belief that it was not in their interest to support AFA and they must vote "No."

#### **DeltaNet**

2. The DeltaNet Employee Portal ("DeltaNet") is the carrier's intranet computer system. It "provides secure access to information and business-related processes for Delta employees, retirees and other select individuals." (Exh. 3, p. 2). DeltaNet is to be "used for business purposes only." (Exh. 3, p. 3). It provides the most current information on Delta work policies, benefit or rule changes, and other relevant workplace information. (Decl. 107, ¶ 2). Delta also posts information that pertains to the

schedules of specific Flight Attendants and Flight Attendant crews. (*Id.*) To log on to DeltaNet, Flight Attendants must enter their employee number and a password of their own choosing. (*Id.*) Flight Attendants before each trip must log onto DeltaNet to read their company email, policy updates, travel information, insurance notices and all other Delta announcements. (Decl. 107, ¶ 6). As discussed in greater detail below, Delta's official policy is that it may monitor all employee activity on DeltaNet.

3. Prior to and during the election period when a Flight Attendant logged on to DeltaNet, whether in a crew lounge or other location, the first page that popped up included a box in the center of the screen labeled "Decision 2010." (Decls. 1, p. 2; 8, p. 2; 11, p. 3; 19, p. 2; 24, p. 2; 67, p. 2; 88, p. 2; 89, p. 2; 90, p. 9; 107, ¶ 16; 19, p. 1; 123, p. 2; 140). The text within the box stated: "Whether you are casting a YES OR NO vote you MUST VOTE to be counted. Click here for more information." (Decl. 107, ¶ 16; Exh. 3, p. 1).

4. The page also contained links to anti-AFA videos, "Right From Richard" statements from Delta's Chief Executive Officer Richard Anderson ("Anderson"), and a direct link to the NMB's homepage with the hyperlink to BallotPoint. Other links on the Decision 2010 page included an animated video explaining that the United States Supreme Court gives Delta the right to express its opposition to AFA. A video of the Decision 2010 page is attached hereto as Exhibit 9.

5. On the same page, three connected boxes were also shown. The first box contained the following text: “STEP 1 Visit your divisional Decision 2010 page or talk to your leaders to get the facts.” (Decl. 107, ¶ 18). The text of the second box was: “STEP 2 The NMB will mail voting instructions to your home.” (*Id.*) The third box contained the following text: “STEP 3 Go to nmb.gov to cast your vote. The rules have changed – vote to be counted.” (*Id.*) By the end of the voting period, the entire login page was devoted to voting. (Decl. 89, ¶ 15).

### **Email Messages**

6. Delta creates an email account for each Flight Attendant to which it sends work-related information. (Decl. 107, ¶ 15). The only way Flight Attendants can access this account and retrieve the emails is by logging on to DeltaNet. (*Id.*)

7. Delta requires Flight Attendants to review their email messages before each trip. (Decl. 107, ¶ 6). Almost every day during the voting period Delta sent a “Decision 2010” email to the Flight Attendants. The emails included the following statements:

REMEMBER: TO BE COUNTED, YOU MUST VOTE (Exh. 2, p. 10).

IF YOU DON'T WANT AFA ... “NO” IS YOUR PICK  
WHETHER YOU DIAL OR CLICK (Exh. 2, pp. 44, 49).

VOTING FOR A UNION OR PERSON OTHER THAN AFA  
COULD ACTUALLY HELP AFA WIN. (Exh. 2, p. 2).

REMEMBER . . . IF YOU DON'T WANT AFA BUT YOU WANT  
TO CONSIDER UNIONIZATION, THE BEST OPTION IS TO

CAST A “NO” VOTE IN THE UPCOMING ELECTION. (Exh. 2, p. 2).

AT DELTA, FLIGHT ATTENDANTS HAVE RECEIVED PAY INCREASES IN 2007, 2008, 2009, 2010 (effective October 1) WITHOUT PAYING FOR A UNION CONTRACT. (Exh. 2, p. 39).

When it comes time to vote . . . make your choice based on proven facts, not promises that haven’t been delivered. (Exh. 2, p. 3).

NO CONTRACT REQUIRED – WE MAKE IMPROVEMENTS WHEN IMPROVEMENTS NEED TO BE MADE NOT BECAUSE A CONTRACT IS UP FOR NEGOTIATIONS. (Exh. 2, p. 10).

THE AFA SAYS IT CAN NEGOTIATE AN INDUSTRY-LEADING CONTRACT – IF SO WHY HAVEN’T THEY DONE IT ALREADY AT OTHER AIRLINES. (Exh. 2, p. 14).

You can’t be “PRO-DELTA AND PRO-AFA” (Exh. 2, p. 17).

### **Mailings To Flight Attendants**

8. In the weeks before the election, Delta sent 11 different mailers to the homes of every Flight Attendant. (Decl. 139). In those mailers the Company urged Flight Attendants to vote against AFA and to preserve their “direct relationship” with management. In addition, several of these communications contained Delta’s own voting instructions and explanations as to the effect of a Flight Attendant’s vote. (See Exh. 5, pp. 2, 11-13, 15-21, 45, 58). The content of these mailings included the following slogans, “TO BE COUNTED YOU MUST VOTE,” “IF YOU DON’T WANT AFA . . . NO IS YOUR PICK WHETHER YOU DIAL OR CLICK” and “REMEMBER . . . if you

don't want AFA, but you want to consider unionization, the best option is to cast a 'NO' vote in the upcoming election." (Exh. 5, pp. 2, 12, 45).

### **Videos**

9. Delta produced a 78-minute webcast on September 23, 2010, that it turned into a DVD and mailed to all Flight Attendants' homes. (Exh. 8). It featured Delta CEO Richard Anderson, Senior Vice President – In Flight Service, Joanne Smith, and several other Delta management personnel. During the webcast, the AFA election was discussed and Anderson made clear his belief that Delta Flight Attendants cannot be “pro-Delta and pro-AFA.” In addition, Anderson claimed that AFA's criticizing him was not a “Christian way to behave.” (Decls. 61, p. 6; 71, p. 2). Delta also produced a “DECISION 2010” video that was played almost continuously in the In-flight crew lounges at high volume. (Exh. 7; Decls. 40, p. 2; 43, p. 8; 70, ¶¶ 4-5; 71, p. 18; 97, p. 4; 110, p. 2; 118, ¶ 3).

### **Banners, Posters And Literature**

10. Flight Attendants, who use the company parking lots, must take a crew bus to the airport terminal. On these vehicles Delta hung Decision 2010 banners. (Decls. 10, p. 2; 39, p. 2; 64, p. 2; 106, ¶ 14; 141). The same kind of posters and banners were also hung in the In-flight departments and crew lounges, as well as in the hallways leading to these areas. (Decls. 2, ¶ 8; 24, p. 2; 39, p. 2; 43, p. 6; 58, p. 2; 61, p. 4; 64, p. 2; 67, p. 2;

71, p. 6; 88, p. 2; 89, ¶ 5; 90, p. 7; 106, ¶ 15; 118, ¶ 3; 130, p. 4). Delta inundated these areas at every base with an overwhelming amount of campaign material. (*Id.*; Exh. 1).

When arriving at work at MSP flight attendant lounge and In-flight area, there were signs all over telling people to vote. “Decision 2010” was the mantra along with “Our Track Record Speaks for Itself.” There were signs hanging from the ceiling, upright signs next to our check in phones, large displays with Delta’s “Facts” available at every turn, everywhere you looked you were reminded to vote and that you were better off without a union at Delta.

(Decl. 2, ¶ 8). In addition, Delta placed five-foot high metal racks in the In-flight areas which it filled with approximately 5 different election-related leaflets.

11. Some of the most common messages that appeared on Delta’s banners and posters were: “VOTE,” “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,” “GET THE FACTS BEFORE YOU VOTE,” “OUR TRACK RECORD SPEAKS FOR ITSELF” or “TOP REASONS” to vote against AFA. (Exhs. 1 & 10).

### **Supervisor Conduct**

12. As shown below, Delta deployed its corps of supervisors to spread its anti-AFA message to Flight Attendants in groups and individually. These interactions were not limited to the workplace but extended to the homes of employees.

- Formerly unseen supervisors regularly circulated through the crew lounges engaging Flight Attendants in discussions about the election. (Decl. 118).

- In the crew lounges, AFA was allowed to have a visibility table in a “non-work” area. However, supervisors hovered around this table or frequently passed by, which had the effect of intimidating people into staying away from the AFA table. (Decls. 71, p. 6; 86, ¶ 4; 89, ¶ 9).
- Throughout the voting period, at numerous bases, Delta managers wore Delta-supplied t-shirts embroidered with “Decision 2010” in the In-flight area. (Decls. 2; 49; 61; 72).
- In July 2010 during a mandatory Flight Attendant training class, the instructor had a “NO WAY AFA” pin on his backpack. (Decl. 9).
- On August 10, 2010, a Delta supervisor urged all Flight Attendants during a pre-flight briefing to get on a Delta-sponsored conference call to hear all the “true facts” about Delta and the election. (Decl. 109).
- On August 31, 2010, during a hectic turn in LaGuardia, a passenger took a Flight Attendant’s bag accidentally. The Flight Attendant sought help from the supervisors in the Detroit In-flight office, one of whom asked if the bag had an AFA tag on it. After the Flight Attendant confirmed that it did not have an AFA tag, the supervisors expressed approval and were very helpful. However, it was very clear this helpfulness was due to the fact the Flight Attendant was not (apparently) an AFA supporter. (Decl. 91, pp. 4, 5).
- On September 5, 2010, in the In-flight department in Detroit, a Delta manager asked a Flight Attendant about union dues and whether she had ever used union representation. (Decl. 74).
- On September 7, 2010, a Memphis-based Delta supervisor told Flight Attendants during a pre-flight briefing prior to an Amsterdam flight that they should “give Delta a chance,” and to “get the facts” before voting. (Decl. 14).
- On September 19, 2010, in the Cincinnati base crew lounge a Delta supervisor made an announcement stating that a “yes” vote is for representation, a “no” vote meant no representation, and that “not voting” would also be a vote for representation. (Decl. 127).

- On September 20, 2010, during a Flight Attendant safety briefing, a Delta supervisor spoke about how to vote in the representation election. (Decl. 130).
- On September 20, 2010, in the computer room at the JFK Flight Attendant lounge (a work area), a supervisor engaged several Flight Attendants in a discussion about upcoming raises, and made misleading claims about those raises. (Decl. 99).
- On October 11, 2010, a LaGuardia-based Delta supervisor spoke to Flight Attendants for approximately twenty-five minutes about how AFA “verbally attacked Richard Anderson at a town hall meeting at JFK” and made other anti-AFA comments. (Decl. 17).
- In the Atlanta flight crew lounge (concourse A), shortly before the ballot count on November 3, 2010, a Flight Attendant heard the following announcement over Delta’s PA system, “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!” (Decl. 120).
- At the Narita layover hotel, a Delta Manager engaged a Flight Attendant in a lengthy discussion about unionization. She then advised the Flight Attendant that he could vote “no,” but tell his friends he voted “yes.” (Decl. 125).<sup>1</sup>

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<sup>1</sup> In addition, AFA was told by sources within the Company that Delta brought back hundreds of involuntarily furloughed (“IVLs”) Flight Attendants for the duration of the voting period ostensibly to work on “catering issues.” However, the Union has strong reason to believe they were brought back and paid by Delta simply in an effort to persuade them to vote against representation. Now that the election is over, the IVLs have been sent home. The NMB should investigate Delta’s decision to bring them back during the election period and determine if the Company recalled these Flight Attendants to influence their votes and the votes of other Flight Attendants.

**Delta Supervisors' Telephone Calls To Flight Attendants'  
Homes And Cell Phones**

13. In the last two weeks of voting, Delta supervisors called Flight Attendants' homes or personal cell phones, to implore them to vote by November 3. This conduct convinced many Flight Attendants that Delta knew if, and how, they voted. Examples of these supervisor calls include the following;

- On a call to a Seattle-based Flight Attendant, a Delta supervisor told him that voting was mandatory. (Decl. 60).
- A Delta manager left a voice message on a Flight Attendant's telephone stating that even though the Flight Attendant was an AFA representative, the manager, without exception, had to call everyone to remind them to vote. (Decl. 41).
- In a call to a Flight Attendant, a Delta supervisor, after telling him that she was not calling to ask him if he had voted, told him that "not voting was not good" since a majority of votes would decide the outcome. He told her he had already voted. (Decl. 4).
- A Delta manager called a Flight Attendant at home and told her that voting was open until 2 p.m. on November 3, and that Delta wanted 100% Flight Attendant participation. (Decl. 12).
- A Salt Lake City supervisor/field service manager called a New York based Flight Attendant on October 21, 2010, and asked if the Flight Attendant had voted. Then she said, "We are just calling to see if you voted and how you voted." (Decl. 134).
- A Delta manager left a message on a Flight Attendant's cell phone reminding her to vote and to check out all "the facts" before voting. (Decl. 36).
- On October 19, 2010, Delta management called a Flight Attendant three times. In the first call the Flight Attendant told Delta that she was aware of the vote. The next call came one hour later, and the

third call shortly after that. In the last call when the Flight Attendant attempted to say that the Company's calls were inappropriate, the manager hung up. (Decl. 84).

- A Delta supervisor left a message on a Flight Attendant's telephone reminding him to vote and stating that the "company's future was at stake." (Decl. 96).
- On October 27, 2010, Delta left a message on a Flight Attendant's telephone asking if she had "made the right decision for [her] future with Delta Air Lines, did [she] need some help making [her] decision, and to feel free to call for help" at 404-714-9949, a number at Delta In-flight in Atlanta. (Decl. 47).
- On October 22, 2010, a Flight Attendant received a message reminding him to vote and leaving a toll free number for him to call for campaign information. (Decl. 52).
- A Flight Attendant informed a co-worker that a Delta manager had called her and wanted to know if she had any questions about voting. She told him she had already voted. He asked if she wanted to tell him how she voted, though she wasn't required to do so. The Flight Attendant told the manager that she had voted "yes" and asked why he was calling. He said he was "off-duty" and just helping out. (Decl. 55).

(See also Decl. 2; 3; 18; 24; 38; 42; 44; 45; 62; 63; 66; 68; 71; 72; 73; 81; 87; 95; 98; 101; 103; 104; 105; 111; 114; 118; 142; 143; 147).

### **Advocacy Policy**

14. On July 8, 2009, Delta promulgated an "Advocacy Policy." (Exh. 6, p. 1). In her cover memorandum explaining the policy, Joanne Smith, Senior Vice President – In-flight Services, explained that, "Delta's advocacy policy is designed to accommodate employees' rights to express their views, whether on union representation or other issues,

while also accommodating the rights of those who wish to be left alone.” (*Id.*) Smith also stated that “advocacy should never take place on board the aircraft, in a jetway, gatehouse or on the ramp. Work areas of our lounges – briefing rooms, quiet rooms, computer areas, training areas – are also not appropriate locations for these activities.” (Exh. 6, p. 2). The Advocacy Policy states that: “No one is allowed to use Delta materials, equipment or communications channels – such as computers, copiers, fax machines, telephones, voice mail, electronic mail, company mail and aircraft – to produce or distribute non-Delta sponsored materials.” (*Id.*) Regarding bulletin boards, the Advocacy Policy states that “items that advocate a position (such as political material, material for or against a social policy, material for or against a union) are not permitted on bulletin boards or on walls or other areas on Delta premises.” (*Id.*) Regarding “pins, buttons or other message-bearing items,” the Advocacy Policy states that:

- Other than Delta-sponsored programs or initiatives, no buttons or other items (including caps, shirts, jackets or any other clothing) that convey a message or advocate a position or cause may be worn or displayed in work areas or on work time.
- The single exception is a small lapel pin equivalent to a piece of jewelry and no larger than the Delta Service award pin.
- Buttons or other items (including caps, shirts, jackets or other clothing) that express support for or opposition to a union may be worn or displayed in non-work and non-operations areas and on non-working time.

15. As shown by the incidents set forth below, Delta applied this policy as a sword to deter and silence AFA supporters, while it overlooked violations by anti-AFA activists.

- While anti-AFA posters and other materials coated the walls of Flight Attendant crew lounges and other crew areas, Delta did not permit a single pro-AFA poster on these walls. (Decl. 77).
- In Atlanta, Delta did not permit AFA to set up its visibility tables near the front of the crew lounge where all Flight Attendants enter, even though in the past Delta has permitted employees to use this area for charity sales, breast cancer fundraising and hot dog sales.<sup>2</sup> (Decl. 89). Instead, Delta relegated AFA to the back of the crew lounge area which is under observation by security cameras.
- In Atlanta, whenever Flight Attendants congregated around the AFA table a Delta supervisor would approach and walk by the table. (Decl. 89).
- In Memphis, Delta had recently moved the Union bulletin board to the far back corner of the lounge, the corner that has the least amount of traffic. Prior to that, AFA's bulletin board had been visible from the computer area and most other areas of the lounge. (Decl. 45).
- In Boston and Minneapolis, AFA activists sought permission to conduct advocacy in equal size and location to that of Delta "Decision 2010" advocacy, but were denied. (Decls. 26 & 27).
- During October 2010, Delta limited access to the crew lounges to Delta employees with IDs. As a result Delta barred AFA Vice President Veda Shook from the JFK Flight Attendant lounge; yet representatives from Delta vendors spent hours in the lounge distributing samples. (Decl. 103).

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<sup>2</sup> "Visibility" is a term AFA used throughout the campaign to refer to organizing activity.

- AFA received multiple reports of anti-AFA materials left unattended, in violation of the Advocacy Policy's prohibition of leaving advocacy materials unattended. (Decls. 30; 41; 82; 97).
- Once voting began and Delta realized that AFA was inviting Flight Attendants to report their votes to AFA, Delta supervisors began citing a new provision of the Advocacy Policy which prohibits polling. (Decls. 53 & 106). In at least one case, managers pulled AFA activists into a closed door meeting and informed them that they were breaking the law by recording votes. This incident was so intimidating and upsetting to these activists that they were unable to perform any more AFA advocacy. (Decl. 14, ¶¶ 3-4).
- A Delta Flight Attendant notified a Delta Regional Manager that a New York City-based Flight Attendant was selling "Vote No" buttons to other Flight Attendants in violation of the Advocacy Policy because the buttons conveyed a message and were larger than the Delta Service Award pin. In an email dated September 22, 2010, the Regional Manager agreed that such pins could not be worn on the uniform. Yet Flight Attendants continued to wear such pins with no opposition from management. (Decl. 20).
- When Flight Attendants, who supported AFA, confronted another Flight Attendant about wearing a prohibited pin, the Flight Attendant responded by stating loudly enough for a nearby supervisor to hear, "I know I can't wear it, but I don't care." The supervisor failed to address the problem. The AFA supporters appealed to the Regional Director, who informed them that the rules had changed and that the "Vote No" pins were now permitted. However, she could not produce the "new" policy in writing. (Decl. 20; *see also* Decls. 28, 33; 91; 115; 128).
- In Los Angeles, Denise Corsello frequently observed Flight Attendants wearing "NOWAYAFA" pins and bag tags (on their lanyards). Once she asked a supervisor to have Flight Attendants remove their "Vote No" pins and bag tags. The supervisor responded, "I cannot police everybody." Corsello pointed out several pins in the general vicinity, but the supervisor did nothing; yet, Los Angeles supervisors were able to police the AFA visibility

table to ensure it was never left unmanned (as required by the Advocacy Policy). (Decl. 28).

### **System-wide Conference Calls**

16. During the election period, Anderson and Smith conducted several system-wide telephone conference calls during which Flight Attendants could call-in with their questions. (Exh. 2, pp. 21-38). Predictably, the AFA election was mentioned prominently on each call, usually in the context of how pay and work rules would be changed in the event the Flight Attendants rejected representation.

#### **B. DELTA'S COMMUNICATIONS RELATING TO THE NMB'S PROCEDURES FOR A REPRESENTATION ELECTION.**

17. On or about September 1, 2010, the NMB mailed voting instructions to the Delta Flight Attendants. The instructions explained the three ballot options under the Board's new rule,<sup>3</sup> and the scenarios that could result based on a majority of valid votes cast for or against representation. It provided, in part:

No employee is required to vote . . . The way to vote for representation is to select one of the "Yes" options. The way to vote for no representation is to select the "No" option.

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<sup>3</sup> The NMB issued its new election procedure in May 2010. In order to be certified a union would no longer have to garner votes from a majority of all eligible employees. Instead, if a labor organization received a majority of ballots cast it would become the representative of that craft or class. *See* Final Rule, NMB-C-6964, 75 Fed. Reg. 26062 (May 11, 2010).

The notice explained further that “If you select the option of ‘Yes. I vote for Any Other Organization or Individual’ and do not identify any organization or individual . . . your vote will be counted as a valid vote for representation.”

18. On September 22, 2010, the NMB sent AFA and Delta a copy of the Notice of Election and official “Telephone and Internet Voting Instructions” Sample sheet, which the Board directed Delta to post at locations “where other notices to employees are usually posted,” such that it would remain posted and “completely visible.” The Board’s instructions provided in part:

If you wish to vote for representation, select one of the choices below:

- **YES. I vote for Association of Flight Attendants**
- **YES. I vote for Any Other Organization or Individual.**

If you wish to vote against representation, select:

- **NO. I vote for no representative.**

Telephone voting was displayed on the left side of the instructions, and listed in five numbered steps, and internet voting was on the right and listed as eight steps.

19. For roughly one month prior to and during the thirty-five day voting period, Delta linked its anti-AFA campaign to a directive to Flight Attendants: “You Must Vote.” CEO Richard Anderson stated in his October 14, 2010 “Right from Richard” communication “Regardless of what your point of view is, everybody has to cast a vote.” (Exh. 2, p. 115). That message was posted on DeltaNet. The Company used similar imperative language in the following communications to employees:

- DeltaNet Decision 2010 screen displayed upon login “YOU MUST VOTE to be counted.” (Decl. 107, ¶ 16; Exh. 5, p. 1).
- “VOTE” printed across a six-foot-tall freestanding color display that Delta placed in Inflight areas across the system. (Exh. 1, p. 1; Exh. 10).
- “VOTE” printed across a horizontal eight-foot-long color banner hung in In-flight areas and crew lounges. (Exh. 2, p. 3; Exh. 10).
- “VOTE” printed on two-foot banners reading “OUR TRACK RECORD SPEAKS FOR ITSELF.” (Exh. 1, p. 35).
- “TO BE COUNTED YOU MUST VOTE”; “To make your vote count, you must cast a ballot”; “Remember: To be counted, you must vote!” (Exh. 5, pp. 43-45).
- “REMEMBER: TO BE COUNTED, YOU MUST VOTE.” (Exh. 5, pp. 34-37).
- “YOU MUST VOTE to be counted” (Exh. 5, p. 37).

20. On the last day of the voting period, Delta employed its public address system in Atlanta to broadcast the following statement: “Thirty-two minutes left to vote! Everyone must vote! If you have not voted, bring me your VIN and PIN and I will vote for you.” (Decl. 120).

21. The Company published a set of voter instructions in its “Voter’s Guide,” “VOTING” campaign mailing, large-format color poster boards (which were displayed in all Inflight areas), and its “Voting Tips” card. (See Exhs. 5, pp. 6-30; Exh. 1, p. 41; Exh. 10). In each instance, the instructions were entitled “How to vote by Phone,” and “How to vote via internet.” (See Exhs. 1, pp. 27 & 33). The Company’s instructions resembled

those provided by the NMB, both visually and substantively, except in the voter selection step Delta inserted parenthetical commentary in red:

Yes. I vote for [AFA]. **(this is a vote for AFA)**

Yes. I vote for any other organization or individual (**'write-in' is likely to be considered either a vote for representation or a void vote, either of which could help AFA win**)

No. I vote for no representative  
**(you are voting to be union-free)**

These instructions in the “VOTING” campaign mailing, the large-print poster boards, and the Voter’s Guide, were accompanied by the message “If you don’t want AFA, NO is your pick whether you dial or click.” (See Exhs. 1, p. 45; Exh. 10). The “Voting Tips” card that appeared at crew lounge computer terminals did not have that message. This created the impression that the election was a Company-sanctioned event. (Decl. 89, ¶ 4).

22. With respect to the write-in option, the Company’s “Voter’s Guide” advised that the “best option” for those who want another union is to vote “No.” The guide states that such votes would “likely help” AFA win the election. As quoted above, Delta’s voter instructions contained the similar statement that the “write-in” option “could help AFA win.” (Exh. 5, p. 20). The “Voter’s Guide” and “VOTING” brochure referenced the possibility of a run-off election caused by write-in votes for another union where neither gets a majority of total votes cast, concluding that “AFA would be almost certain to win.” (*Id.*) It ends with the enlarged statement in bold type face

“REMEMBER...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.” (Exh. 5, p. 58). The same statement was made in emails from the company to Flight Attendants during the voting period. (Exh. 2, pp. 2, 44).

**C. DELTA’S REPRESENTATIONS REGARDING DECERTIFICATION.**

23. In its final rulemaking, the NMB addressed comments and explained its position on decertification. The Board explained its practice to accept authorization cards from any person, union or group, including those by applicants intending to extinguish certification. 75 Fed. Reg. 26078 (2010). Those procedures, the Board stated, “allow employees to rid themselves of representation.” Finding that the new ballot procedure “is not intertwined with decertification,” the Board kept its existing decertification procedures in place. *Id.*

24. Delta addressed the issue of union decertification in its campaign materials, making the following characteristic statements:

- “the NMB will not accept authorization cards that seek to return to non-union status.” (Exh. 5, p. 20).
- “history has shown it is virtually impossible for a large, widespread group like ours, once unionized, to become non-union under rules like these.” (Exh. 5, p. 20).

25. Delta tied the “virtual impossibility” of decertification directly to the Board’s recent rulemaking:

- “Going from union to non-union has always been difficult, but under the NMB’s new rules it’s next to impossible.” (IFS Issue 66 (June 11, 2010))

- “When the NMB changed the rules, it did not provide an equal process to go back to non-union status if you are unhappy with the union later.” (Exh. 5, p. 20).

- “the new rules make it easier for a union to get elected and extremely difficult to go back to non-union status” (Exh. 5, p. 62).

**D. DELTA’S TREATMENT OF ITS IN-FLIGHT AREAS AND CREW LOUNGES AS POLLING PLACES AND ITS COMPUTERS AS VOTING MACHINES.**

26. Delta maintains an In-flight office and crew lounge for Flight Attendants at each of the twelve airports where they are domiciled. The In-flight department consists of an open area with Delta Computer work stations, a Company bulletin board and separate offices for management personnel and Flight Attendant bidding. The crew lounge is either in a different area of the In-flight office or a separate room close to In-flight. The crew lounge consists of couches and chairs where Flight Attendants congregate particularly before their flights. The crew lounge also has computer work stations, as well as a bulletin board for the Flight Attendants’ use.

27. As is made clear by the evidence proffered below, immediately 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.*” (Exh. 5, p. 19 (emphasis added); *see also* Exh. 6, Delta’s Advocacy Policy, p. 3). Supervisors also recommended that Flight Attendants vote on DeltaNet rather than by telephone because they may mistakenly vote “yes” if they stay on the call too long before making their decision. (Decl. 85). In Atlanta, Delta’s biggest base, there are over 60 computer terminals in the domestic lounge alone. (Decl. 135).

28. Shawn Fivecoat, former AFA Local Council President in Memphis, describes how the Flight Attendant crew lounge was transformed during the election period – a transformation that occurred in Delta crew lounges throughout the system:

Beginning in October, the Memphis crew lounge became inundated with [anti-AFA] banners, free standing document holders, and posters hanging from ceilings and walls. The Memphis crew lounge is located below the concourse down two flights of stairs. When you reached the bottom of the stairs (outside the crew lounge) you immediately faced a free standing sign as well as extremely large bulletin boards containing information about our ongoing election. Until this election there had never been signage of any kind in the area outside of the crew lounge.

There was no part of the crew lounge that you could stand and not see materials from management about the election. There were signs positioned on the walls over the computer areas telling you that in order to vote and have no union you needed to choose Option #3. The sign also stated that by choosing Option #2 you were virtually voting for AFA.

The free standing material holders contained distorted and inaccurate information. There was no place for AFA to display our information in the crew lounge (in any crew lounge in the system) except for placing it on the Union Bulletin Board. Delta shipped the exact same displays, banners and bulletin boards to every base in the system.

Delta's Base Manager set up a temporary office during the election period outside of her permanent office which allowed her to watch Flight Attendants signing in for their flights and any activity around the bank of computers.

The day after the election all of the signage had been removed and the crew lounge returned to normal.<sup>4</sup>

(Decl. 45).

29. Other examples demonstrate the extent to which Delta commandeered the In-flight Department and crew lounges for election purposes.

- In Flight Attendant crew lounges Delta played continuously a DVD featuring Richard Anderson explaining the reasons Delta was opposed to union representation and specifically, AFA. (Decls. 46 and 70).
- In the Seattle In Flight area Delta played a video continuously in which it promoted its "culture" and claimed AFA was interfering with the direct relationship between the Company and its Flight Attendants. (Decl. 43).
- A Flight Attendant who was voting by telephone in the In Flight department was unable to hear the telephone prompts because the video that Delta was broadcasting on how to vote "NO" was so loud. (Decl. 40).

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<sup>4</sup> See also Decl. of J. Zvick (LaGuardia crew lounge).

**E. DELTA'S MONITORING OF FLIGHT ATTENDANTS' USE OF DELTANET AND THE COMPUTERS THAT IT HAD DESIGNATED AS VOTING MACHINES.**

30. In three different policies, the Company states that it can monitor a Flight Attendants' use of DeltaNet. First, the "Fine Print" page found on DeltaNet provides: "Delta may monitor activity on the DeltaNet Employee Portal." (Exh. 3). In addition, the same page contains the following notification,

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.

*(Id)*.

31. The Fine Print page also advises employees that, "To review the policy regarding corporate intranet use, please read HRP 1119.13." HRP 1119.13, which is incorporated into the GSE Standard Operating Procedures, states:

Delta reserves the right to access or monitor, without notice, any access to the Internet or intranets and any transmission made via the Internet or intranet using company workstations, including review of individual files maintained by users regardless of media.

On the same "Fine Print" page describing the use of DeltaNet, the notice, "Cookies must be enabled" appears. A "cookie" is defined as "a text file containing tracking information such as dates and times of Web site visits, deposited by a Web site onto a user's computer. The text file is accessed each time the Web site is visited by a specific user and updated with browsing and other information. The main purpose of cookies is

to identify users and possibly prepare a customized web site for them, including the personalization of advertising appearing on the web sites.”<sup>5</sup>

32. Finally, as stated in its Human Resources Practices Manual, which is distributed to all Flight Attendants, “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.” (Decl. 106, Exh. 3).

33. Delta’s own Managing Director – Information Technology has acknowledged that “there may be a record of what internet website(s) a user has accessed.” (Delta letter to NMB, dated Oct. 1, 2010). He also explained that “if a Flight Attendant used a Delta computer to link to the NMB website and from there went to the NMB’s voting website, it is not possible for Delta to monitor what the employee did when they accessed the NMB’s voting web-site.” What he leaves unsaid but clearly implies is that while Delta allegedly cannot ascertain how an individual voted, it does know if the employee went to BallotPoint, the NMB’s voting website. Since the only reason a Delta Flight Attendant links to BallotPoint is to vote, Delta can know with virtual certainty which of its employees have and have not cast their ballots. The only exception is the rare instance where an employee goes to BallotPoint with the intention of

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<sup>5</sup> The Sedona Glossary: for E-Discovery and Digital Information Management at 11 (Sherry B. Harris, ed., Sedona Conference 3d, 2010).

voting but in the one or two seconds it takes to reach this site changes his or her mind and decides not to vote.

34. AFA's concerns over Delta's promotion and monitoring of DeltaNet and its computers for voting in this election were heightened when the results of the official NMB ballot count were announced on November 3. According to the NMB's "Report of Election Results," out of 19,887 eligible employees, AFA received 8,778 votes via BallotPoint's internet/telephone system, whereby a voter clicks on No. 1 if "AFA" is their choice. Eight additional votes were cast by write-in, a separate process from clicking "1." In a remarkable coincidence, that number -- 8,778 -- matched exactly the number of "yes" votes AFA had confirmed through telephone calls to its supporters. In fact, at 1:45 p.m. EST on November 3, 2010, AFA received an email confirming one additional vote, which brought the number of confirmed "yes" votes to 8,778. (Decl. 86).

35. As established by the Declaration of William McGlashen, Assistant to AFA's International President Pat Friend, AFA used its telephone banks as well as a toll-free "self-reporting" telephone number to confirm "yes" votes for the Union. (Decl. 86). The Union attempted to contact its previously identified supporters by telephone and asked them if they voted, and how they voted. AFA did not attempt to contact any Flight Attendant who had been assessed as not supporting AFA.

36. The Flight Attendants reached would confirm that they voted "yes," or "no," or would decline to disclose how they voted. AFA began keeping a running tally of

how many Flight Attendants were reached and the percentages of yes/no/would not disclose votes beginning in mid-October 2010. As reflected in the series of emails sent by AFA's Delta AFA Campaign Coordinator, Gayle Meyer, beginning on October 22, a consistent 85-86% of those who were contacted, or self-reported, confirmed their "yes" votes to AFA in the days leading up to the November 3 election. (Decl. 86). In addition, AFA had previously identified 1,500 AFA supporters the Union did not contact, and did not self-report. If the 85% support level was applied to this group, AFA should have received an additional 1,275 votes, for a total of 10,053.

37. AFA's "catch-as-catch-can" phone banking system to confirm "yes" votes was a highly imperfect one. It is not disputed that at any given time at least one-third (33%) of any Flight Attendant group were traveling for work, and were hard to reach. As a result, a good percentage of known supporters were never contacted and never self-reported, thus skewing the accuracy of AFA's running tally. The fact that AFA's last tally immediately prior to the ballot count matched the number of voters who clicked "1" for AFA is too extraordinary to accept as mere coincidence. Instead, it should be treated as yet another indication that Delta not only had the capacity to monitor voting activity on DeltaNet and its computers, but actually engaged in this conduct.

**F. DELTA'S CONDUCT AT THE LAYOVER HOTELS IN NARITA AND AMSTERDAM.**

38. Delta management repeatedly tried to prevent AFA from engaging in any organizing activities at the layover hotels in Narita, Japan and Amsterdam, Holland.

Typically, between 165 to 200 Flight Attendants are staying at each of these hotels at any given time.<sup>6</sup> It was clear to AFA that Delta assigned managers from their homes bases for tours of duty in Amsterdam and Narita for the sole purpose of stifling AFA visibility at the layover hotels. (*See* Decls. 116 & 122).

39. An AFA activist observed one set of managers being replaced by a new set in late September. (Decl. 116, ¶ 6). Upon their arrival at the layover hotel in Narita, the new Delta managers from New York and Atlanta “immediately went to the Radisson front desk and tried to get the hotel to stop AFA from doing visibility.” (Decl. 116, ¶ 7). The AFA activist realized that these managers were confusing and upsetting the Japanese hotel staff, so he offered to discuss the matter directly with the Delta manager, who refused. (Decl. 116, ¶ 8-9). Another Radisson hotel manager told a Flight Attendant that “Delta never comes out and tells you what they want; they hint at it, but Delta had made it clear through such hints that it did not want AFA doing visibility at the hotel.” (Decl. 116).

40. Delta managers also attempted to draft hotel management into harassing AFA activists into ceasing visibility. For example, sometime between September 22 and October 5, an activist was in the hotel lobby wearing an apron that said “Ask me about AFA.” The apron held AFA materials which she was handing out. (Decl. 122, ¶ 6). Three hotel managers surrounded her and told her she was not allowed to wear her apron

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<sup>6</sup> A change of 165 votes from “NO” to “YES” for representation would have certified AFA as the exclusive bargaining representative of Delta Flight Attendants.

there. (Decl. 122, ¶ 7). She asked the hotel manager for the relevant policy, but he did not have it; he said his manager gave him these instructions. (Decl. 122, ¶ 9; Decl. 136). The activist told him that Delta gave that instruction to his manager. (Decl. 122, ¶ 10). He admitted that Delta management had told the hotel management not to allow AFA in the hotel lobby. (Decl. 122, ¶ 10). Meanwhile, a Delta supervisor spent forty minutes trying to persuade a Flight Attendant to vote “no” in the election and suggesting that she vote “no” but tell her friends she voted “yes.” (Decl. 122, ¶ 5).

41. A similar incident occurred near the end of the voting period. On October 26, that same activist was wearing an AFA t-shirt, and the apron in the hotel lobby. (Decl. 122, ¶¶ 13-14). An Atlanta-based female supervisor said, “We’ve allowed you to wear the t-shirts, but you need to remove that apron; you’re not allowed to give anything away or distribute materials.” (Decl. 122, ¶ 15). A male manager then immediately confronted the AFA supporter and tried to intimidate her physically, leaning into her personal space, rocking back and forth telling her repeatedly that she could not do this, and that it was a violation of the Advocacy Policy. (Decl. 122, ¶ 16). Another Flight Attendant in that vicinity, not engaged in visibility activities, reported feeling intimidated by this conduct. (Decl. 122, ¶ 16). Although ostensibly in Narita for Delta advocacy, the female supervisor performed impromptu uniform compliance checks in the hotel lobby, departing from usual procedure. (Decl. 122, ¶ 18; Decl. 131). Flight Attendants reported to AFA that the increased manager presence at the hotel was

intimidating, and that the managers' conduct was progressively more aggressive as the voting period continued. (Decl. 22, ¶ 20; Decl. 116, ¶¶ 14-15).

42. At the Amsterdam layover hotel, AFA had previously had full access to Flight Attendants crews arriving at the hotel. On many prior occasions, AFA had used the hotel lobby to distribute AFA literature, and to discuss such issues as contract ratification, and the Northwest-Delta merger in 2008. (Decl. 45). In addition, AFA activists had engaged in three days of informational campaigning in the lobby of the Amsterdam layover hotel just prior to the balloting period for this election. But Delta ended AFA's unfettered access to arriving Flight Attendant crews on September 30, 2010, when the NMB election period commenced. At that point, Delta dispatched supervisors from the United States to Amsterdam.

Shortly after the arrival of Delta supervisors, hotel security told the AFA-CWA members in the lobby that if they did not leave the lobby the hotel would call the police. They were directed to remove everything AFA from the lobby. They complied and then went outside of the hotel and sat on a park bench by the front door. Security again approached them and told them [they] were not allowed to discuss AFA in the common areas of the hotel or the police would be called. At one point one of the security guards told a Flight Attendant that they were not allowed to wear anything with AFA on it in the lobby area. Both management and AFA members were required to rent a meeting room in the back of the hotel with the hopes members would drop by. This drastic change in the way AFA members were treated coincided with the beginning of the election process.

Also, the International Brotherhood of Teamsters and the Professional Flight Attendants Association (previous unions) utilized the lobby of this hotel to communicate with members. (Decl. 45).

**G. DELTA’S CONDUCT REGARDING WAGE INCREASES.**

43. On February 4, 2010, Delta announced a wage increase for employees effective October 1, 2010. From the outset, Delta made clear that the wage increase would only be available to “non-contract employees.” (Exh. 11). Delta explained that union-represented employees would not share in the wage increase because the Company “continued to honor the packages of pay, benefits and work rules provided for the contracts still in place in workgroups where representation has not yet been resolved.” (*Id.*) However, PMNW employees who were no longer union represented would be eligible for the increases. (*Id.*) For PMDL Flight Attendants, the wage increase was 2% for those with 0-12 years of service and 5% for those with more than 12 years of service. (Decl. 86, ¶ 4).

44. On September 16, 2010, Delta conducted a conference call for Flight Attendants hosted by Joanne Smith, Senior Vice President – In-flight Services, and broadcast from the Atlanta Lounge in Concourse E – the International Lounge. One of Smith’s guests that day was Richard Anderson who came ready to answer Flight Attendant questions. During the call, the following colloquy regarding wage increase took place between Flight Attendant Ron Harris from Seattle and Smith and Anderson:

Joanne Smith: Hello, how are you doing?

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?

Joanne Smith: So let me, I'll turn it over to Richard for Seattle, but let me answer the question on pay and work rules. 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 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.*

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

Richard Anderson: 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 there – 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). A transcript of the conference call was subsequently posted on DeltaNet.

45. Richard Anderson again discussed wage increases in his "Right From Richard" message dated September 30, 2010, the transcript of which was posted on DeltaNet. In that communication, Anderson stated:

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 those 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 technical group, who for a second time voted against IAM representation. So the *pre-merger Northwest employees were given pay increases, benefits, and work rule improvements that Delta simulators techs enjoy. And just again, they don't have to pay dues anymore.*

(Exh. 2, p. 77) (emphasis added).

46. On October 1, 2010, the effective date of the wage increases for non-contract employees, and the day after NMB ballots were mailed to all Delta Flight Attendants, Richard Anderson again sent a letter to employees trumpeting the pay increase. The letter signed by "Richard" was posted on DeltaNet and popped up along with the Decision 2010 campaign page when Flight Attendants logged on to the company system. In the letter, titled "OCTOBER PAY INCREASES – FULFILLING OUR COMMITMENT TO INDUSTRY STANDARD PAY," Anderson states:

Pay increases effective today deliver on a commitment Delta made three years ago to reach industry standard pay at the top of the scale by the end of 2010 for our non-contract, US-based people. We also continue to honor the pay, benefits and work rules for pre-merger Northwest employees where union representation has not yet been resolved. When representation is finally resolved in these groups, we will begin the process of fully aligning the pay, benefits and work rules of employees in those groups. That process of alignment began earlier this week for our flight simulator technician group, *who recently voted against IAM representation.* \*\*\*\* Of course, base pay is just one part of the equation. We granted 15 percent of our stock to employees at the close of the merger, paid out approximately \$18 million in Shared Rewards and performance incentives this year and expect to pay about \$260 million in profit sharing on Valentine's Day. Sharing Delta's success – which you help created – is one

of our core values. The pay increase shows the uniqueness and success of the Delta family. In the toughest of economic times this industry faced - 2008, 2009 and 2010 – we kept our deals. And, when other major airlines were announcing involuntary furloughs, we kept our commitments to no involuntary furloughs of frontline employees.

(Exh. 2, p. 81) (emphasis added).

#### **H. OTHER REPRESENTATIONS REGARDING THE EFFECT OF UNIONIZATION ON EMPLOYEE BENEFITS.**

47. Examples of Delta promising Flight Attendant benefits and/or indicating that benefits will be taken away include:

On August 4, 2010, a Flight Attendant heard a JFK Delta supervisor tell a few junior Flight Attendants that if AFA is voted in, then the free van service “The Crew Runner” from Kew Gardens to JFK would be taken away. Many Flight Attendants rely on this service to get to work. [Free access to “The Crew Runner” is given in reverse-seniority order -- the most junior get on first.] (Decl. 103).

On September 13, 2010, a Flight Attendant heard a Delta supervisor reassure another Flight Attendant that her 80 hours of accrued sick time would be “banked” by Delta if the Northwest contract went away when AFA lost the election. (Decl. 29).

On September 20, 2010, Matthew Mann was on the telephone with Crew Scheduling trying to trade days around his schedule when Seattle Base Manager Janice Fawcett overheard his conversation and told him that he could not trade days because that is a “contractual restraint” and that “in a situation with more personal, one on one, relationship with management” she would be able to take care of those trading days since he “was such a good Flight Attendant with a good record.” (Decl. 71, p. 11).

On October 9, 2010, in the office of a Minneapolis-based supervisor, the supervisor spoke to Flight Attendants about the election claiming that the office was a designated advocacy area and such discussions were lawful. The Flight Attendants told her that they intended to vote “Yes.” She

responded, “If you vote “No,” you will receive an immediate \$400 a month pay increase.” (Decl. 137).

### **ARGUMENT**

“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 by the carrier.” *American Airlines*, 26 NMB 412, 445, 1999 (citing *Midway Airlines Corp.*, 26 NMB 41 (1998); *Metroflight, Inc.*, 13 NMB 284 (1986); *Key Airlines*, 13 NMB 153 (1986)). To carry out this function the Board has established election procedures and requirements that, if observed, guarantee a free and fair balloting of the affected craft or class. Here, the parties’ duty to act as the NMB and the RLA demand was magnified by the fact that this election would decide the representational fate of almost 20,000 Flight Attendants.

Unfortunately, the only consideration that Delta magnified was its intention to defeat AFA at all costs. During its campaign Delta jettisoned the NMB procedures and the employee protections that ensure the integrity of the vote. As shown below, it destroyed the requisite laboratory conditions through the following conduct:

- Delta established its own electoral rules and process, thereby usurping the Board’s exclusive authority to conduct the election.
- Delta reduced the four choices an employee has in a representation election – abstention, representation by AFA, representation by another union, or no representation – to just two. First, under its regime abstention was not an option; voting was mandatory – like any other job responsibility. Second, Delta misinformed Flight

Attendants that a “No” vote was clearly the “best option” for those who were considering a write-in candidate.

- Delta destroyed the privacy and secrecy of voting by converting In-flight departments and crew lounges into polling places and company computers and DeltaNet into voting machines.
- By being able to access and monitor the Flight Attendants’ use of those “voting machines,” Delta eliminated the security of the ballot box.
- Delta used every form of available media to repeat again and again its misrepresentations about Board’s procedures, its claims that voting is mandatory, and that this compulsory vote should be cast against representation.
- In the last two weeks of the election, Delta expanded the opportunities of supervisors to converse with Flight Attendants about the election from the work place to the privacy of their home telephones.
- Delta made its campaign literature mandatory reading for all Flight Attendants whenever they reported to work.
- Delta withheld a wage increase from the then-represented Flight Attendants while at the same time promising them that same increase if it remained “union-free.”

By these and other actions discussed below, Delta injected into this election a constant flow of interference, coercion and influence. The taint this conduct produced is so overwhelming that it necessitates a re-run election and other measures to attempt to cleanse the laboratory in which a second election should take place.

**I. DELTA MISREPRESENTED BOARD RULES AND PROCEDURES IN A MANNER CALCULATED TO SKEW THE ELECTION RESULTS AND GAVE THE IMPRESSION THAT THE COMPANY, NOT THE BOARD, WAS CONDUCTING THE ELECTION.**

The NMB has consistently held that when a carrier takes it upon itself to communicate the rules of a representation election, it must provide “accurate information concerning the method of voting and the consequences of voting.” *Zantop Int’l Airlines*, 6 NMB 834, 835 (1979); *Era Aviation*, 27 NMB 321, 340 (2000). Statements and actions by a carrier that are misleading to employees regarding the election process, the NMB, or the Board’s rules, procedures or policies, constitute material interference with an election. *US Airways*, 24 NMB 354, 392 (1997) (ordering a re-run where the carrier misled employees into thinking they had two representation choices -- company “roundtables” or the union). Likewise, a carrier’s inaccurate assertions regarding the RLA also taint laboratory conditions, requiring remedial action by the Board. *USAir*, 17 NMB 377, 421 (1990) (misstatements regarding union membership and the payment of dues). In either case, the misstatements by a carrier need not be intentional in order to constitute material interference that necessitates an election re-run, although in this case Delta’s misrepresentations were hardly accidental. *Aeromexico*, 28 NMB 309, 338 (2001) (warnings by carrier regarding consequences of union representation materially misrepresented the RLA, requiring election re-run).

Here, Delta violated these principles in a number of ways. First, the Company systematically created the misperception that voting was mandatory. Second, Delta

misrepresented the NMB's voting procedures. Third, Delta distorted the NMB's decertification process. And finally, Delta supplanted system-wide the NMB's exclusive role in conducting the election through the creation of on-site polling areas plastered with prejudicial voter-instruction materials. Through these actions, Delta violated its employees' rights under the RLA to organize free from the carrier's coercion and influence. These blatantly unlawful actions demand an election re-run and the other relief set forth below. *Era Aviation*, 27 NMB 321, 341 (2000).

**A. Delta Issued Company Directives That Flight Attendants MUST VOTE In Derogation Of The NMB's Voting Rules.**

In its most recent rulemaking, the Board rejected its former election procedure of assigning "no" votes to all nonparticipants. 75 Fed. Reg. 26062, 26073 (May 11, 2010). It found that the inaction of employees should not be considered equivalent to the conduct of those who actually cast ballots. *Id.* at 26078. Moreover, the NMB recognized that an individual could abstain for many reasons entirely unrelated to a desire not to be represented. *Id.* at 26073. Yet, under then-current procedures, employees who chose not to vote for other reasons -- e.g. apathy, religion -- were effectively deprived of their decision. The Board concluded that because its voting procedure "impose[d] a position on those who abstain," it created a form of compulsory voting that the Board would no longer sanction. *Id.* at 26073, 26076.

The Board's new election procedure was specifically intended to provide members of the craft or class with the opportunity to exercise their right to abstain from voting, and

thereby “acquiesce in the will of the voting majority. The choice is theirs.” *Id.* at 26078. If that choice cannot be relegated to the Board, then it certainly cannot be made by a carrier. Eliminating the prior form of compulsory voting, the Board found, was “essential to fulfilling its statutory mission to ascertain employee preference” and provide the Board with “a more accurate measure of employee sentiment.” *Id.* at 26073, 26076. Accordingly, the NMB’s official voting instructions state: “No employee is required to vote.” Statement of Facts ¶ 17 (“SOF”).

Here, however, Delta exercised its unique power and authority in the workplace to institute compulsory voting and negate the option of abstention now provided under the Board’s rules. In a DeltaNet broadcast linked to the “Decision 2010” interface, Delta’s CEO Richard Anderson issued a clear instruction to all employees: “Regardless of what your point of view is, everybody has to cast a vote.” SOF ¶ 19. This message was then reinforced by supervisors across the system, who engaged Flight Attendants one-on-one in In-flight areas and urged them to vote, even calling individuals at home with the same instruction. SOF ¶¶ 12, 13. In some instances, supervisors explicitly referred to voting as “mandatory.” SOF ¶ 13. Finally, shortly before the polls officially closed, Delta broadcast in one In-flight area and crew lounge a directive to Flight Attendants who had not yet voted to do so. SOF ¶ 12. Delta reinforced this message through the ubiquitous use of the imperative “VOTE” in its crew lounge banners, free-standing poster boards, and direct mailings. The word “VOTE” consistently appeared in disproportionate-sized

type and sometimes simply stood on its own without any accompanying text. *See* SOF ¶¶ 6, 8, 11, 19.

Delta also used its computer system to convey the same management directive. Such use of Delta's computer system, which is otherwise reserved for business purposes, in and of itself conveyed to Flight Attendants that voting was an official work function. DeltaNet is the intranet portal by which the Company propagates all work-related information to work groups and individual employees, including Company e-mail, policies, scheduling, and notices regarding employee benefits and other HR matters. SOF ¶ 2. Delta Flight Attendants are required to log in to DeltaNet at the start of each work day. *Id.* The Company policy applicable to the use of the In-flight computers is that "[i]nternet access is to be used for Delta business purposes only." *Id.* Delta likewise restricts use of company e-mail to "company business." *Id.* Accordingly, DeltaNet does not normally allow access to external web sites or internet-based e-mail. *Id.*

Nevertheless, upon logging in to DeltaNet after the voting period had begun, Flight Attendants were presented with a full-screen "Decision 2010" interface which advised that "YOU MUST VOTE to be counted." SOF ¶ 3. That remained the initial DeltaNet screen until the election polls closed. *Id.* The Company also sent daily e-mail reminders regarding the election to the Flight Attendants' Delta e-mail accounts accessed through DeltaNet, which included the "YOU MUST VOTE" message. SOF ¶ 7.

The message “YOU MUST VOTE” was an employer directive. Arbitral boards regularly uphold carrier discipline of employees for failing to comply with provisions that tell employees what they “must” do. *See, e.g.*, Public Law Board No. 6251, Award No. 14. Delta conveyed the unequivocal message that voting was a work obligation by way of the “YOU MUST VOTE” message delivered from the CEO, supervisors, and the employee computer interface and e-mail. In so doing, the Company’s actions countermanded the Board’s instruction that “No employee is required to vote.”

Worse yet, Delta’s directive to vote was accompanied by misleading instructions on how to vote. DeltaNet’s Decision 2010 screen listed three discrete “Steps” culminating with the casting of a ballot, which were represented as a continuum of official stages in the voting process. Step One was to “visit your divisional Decision 2010 page or talk to your [Delta] leaders to get the facts.” Step Two was receipt of the NMB’s mailing. Step Three was to “Go to [nmb.gov](http://nmb.gov) to cast your vote.” SOF ¶ 5. However, these are not the steps in the voting process established by the NMB. SOF ¶¶ 17, 18. The Board’s process certainly does not require subjection to carrier propaganda (“Step One”), and Delta tainted laboratory conditions by indicating that such a step was required. *Metroflight*, 13 NMB 284, 290 (1986).

The institution of compulsory voting in and of itself is impermissible, and antithetical to the basic principle that voting must be voluntary. Moreover, here, the directive to vote cannot be detached from Delta’s pervasive message to vote “No.” Not a

single Delta Flight Attendant could have been unaware that the Company wanted him or her to vote “No.” Thus, Delta was not only telling Flight Attendants erroneously that they must vote, but was also effectively telling them that they must vote “No.”

**B. Delta Interfered With The NMB’s Write-In Ballot Procedure.**

The dissemination of partial or otherwise misleading information about NMB voting procedures is direct evidence of material election interference. *Allegheny Airlines*, 4 NMB 7, 11 (1962). Here, Delta’s unlawful campaign for a “direct relationship” was accompanied by instructions about the NMB’s write-in option that were inaccurate, and which undoubtedly interfered with the election.

Delta instructed its employees to vote “No” in the upcoming election even if they supported a union other than AFA, rather than cast a write-in vote. SOF ¶¶ 7, 21, 22. The Company stated throughout its printed materials that if you supported another union, the “best option” would be to vote “No.” SOF ¶ 22. Delta’s “Voting Instructions” card mailed to eligible voters at home likewise warned that write-in votes “could help AFA” win the election. SOF ¶ 21. Similar statements appeared in nearly every piece of campaign literature Delta disseminated. SOF ¶¶ 7, 8, 21.

These instructions instilled the incorrect belief that there were only two possible outcomes in this election -- a win for AFA or a win for Delta -- and accordingly, that employees had only two voting options -- a “No” vote for a “direct relationship” with Delta, or a “Yes” vote for union representation by AFA. Indeed, removal of the write-in

option was built directly in to Delta's slogan: "If you don't want AFA, NO is your pick whether you dial or click." SOF ¶¶ 7, 8, 11, 21. Delta's unambiguous message was that write-in votes were futile.<sup>7</sup>

Thus, Delta interfered with the NMB's election procedures, which are premised upon the opportunity for run-off elections between unions:

[W]here a majority of employees indicate a preference for representation, the Board's duty is to determine which individual or organization is the ultimate employee choice through a run-off election. . . . [T]he aim of the Board is to more accurately ascertain the clear, uncoerced choice of a bargaining representative, if any, by the affected employees.

75 Fed. Reg. at 26082. The NMB has determined that providing the write-in option on the ballot furthers the Board's mission and better indicates employee sentiment: "Experience has shown that the write-in vote is an effective means for permitting employee freedom of choice, as in some cases write-in candidates have received sufficient votes to be certified by the Board." *Id.* (citing *Int'l Total Servs.*, 16 NMB 231, 233 (1989)); *see also Zantop Int'l Airlines*, 9 NMB 70, 77 (1981).

A carrier is not permitted to institute a voting process at odds with that approach. While a carrier is allowed to accurately explain to employees how to procedurally cast a

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<sup>7</sup> Where Delta materials offered a broader explanation of the write-in option, such as the Company's tri-fold "VOTE" mailer, information about the possibility of a run-off election was presented in the context of Delta's prominent instruction to vote "No" as the "best option" if you supported another union. SOF ¶ 8, 21. The rationale Delta indicated for that conclusion -- that "AFA would be almost certain to win" -- was without a legal or factual basis, and failed to explain that in a run-off election, the other representative would be on entirely equal footing with AFA no matter how many votes each one had received in the initial election. *Id.*

“No” ballot, it is prohibited from garnering “No” votes through deception. By choosing to take up the topic of write-in votes, and then providing misleading information intended to persuade voters to reject the write-in option, Delta improperly influenced employees and prevented employees supportive of representation from making an informed choice. This misinformation about NMB procedure constitutes material interference. *US Airways*, 24 NMB 354, 386, 388 (1997). In addition, Delta’s erroneous instructions undoubtedly could have changed the outcome of the election. Here, by causing only 164 Flight Attendants to switch from voting for a write-in to voting against representation, Delta would have succeeded in changing the outcome of this election, which otherwise would have resulted in a re-run if AFA’s vote count remained the same.

**C. Delta Misrepresented NMB Decertification Procedures.**

Delta further misled Flight Attendants regarding the NMB’s decertification process. Board precedent makes clear that misrepresentation of the availability of or process for decertifying a representative constitutes illegal carrier interference. *USAir*, 17 NMB at 421; *Era Aviation*, 27 NMB at 338.

In *USAir*, the carrier suggested to employees that there was no process for decertifying a union and that if the craft or class were to elect the union as their representative, they would “most likely” remain represented by that union for the duration of their employment at the carrier. *USAir*, 17 NMB at 390. Holding that such statements “tend to pressure employees in their choice of representative,” the Board

explained that while it “has no formal decertification procedure,” as the carrier had in effect claimed, “employees may change representatives, pursuant to the Board’s Rules.” *Id.* at 421. The carrier’s conclusory statement, made in isolation and without explanation, thus misled employees and, “coupled with a pervasive and sustained anti-union posture . . . had an adverse effect on employee free choice.” *Id.* at 427.

In *Era Aviation*, carrier management similarly suggested to its employees in letters and meetings that there was no process “to vote the union out.” *Era Aviation*, 27 NMB at 334–36. The Board found that these messages misinformed employees about the Board’s processes with respect to decertification. *Id.* at 341. Such statements, made in conjunction with those implicitly “link[ing] the rejection of union representation with benefits,” the Board ruled “contributed to the taint of laboratory conditions.” *Id.*

Statements by Delta similarly misrepresented Board processes relating to decertification. First, Delta advised employees that the “NMB will not accept authorization cards that seek to return to non-union status.” SOF ¶ 24. That statement is more than misleading -- it is genuinely false. In its recent final rulemaking, the Board reiterated its long-standing policy to accept authorization cards from an applicant “intended to terminate collective representation.” 75 Fed. Reg. at 26078 (citing *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983)). The Board’s procedures thereby “allow employees to rid themselves of a representative.” *Id.* Delta’s statements to the contrary constitute carrier interference.

Second, the “Decertification 101” section of Delta’s “Decision 2010 Voter’s Guide” stated: “History has shown it would be virtually impossible for Delta’s Flight Attendants to return to union-free status if the AFA is voted in.” SOF ¶ 24. In both the Voter’s Guide and a letter mailed to Flight Attendants’ homes, Delta advised that “[w]hen the NMB changed the rules, it did not provide an equal process to go back to non-union status if you are unhappy with the union later.” SOF ¶ 25.

Delta’s portrayal of Board procedure, with its warning of irreversible representation, is without legal foundation and significantly misinformed employees regarding the implications of their vote. Vaguely claiming to be drawn from “history,” the Company’s message instills the impression that there were in fact past instances where a craft or class desiring to oust their union failed for some reason other than insufficient support. *See* SOF ¶¶ 24, 25. This was accompanied by statements creating the distinct impression that decertification is more difficult under the Board’s new ballot procedure, when in fact it is precisely the same. 75 Fed. Reg. at 26078 (new ballot procedure “is not intertwined with decertification”). In conjunction, Delta’s statements conveyed the inaccurate notion that it was procedurally difficult for Flight Attendants to return to union-free status even if that were their true desire, without explaining that authorization by a majority of them would be sufficient to trigger a new election. The Company’s unsupported warnings could only have been intended to exert undue influence on eligible voters.

#### **D. Delta Commandeered NMB Authority Over The Election.**

Delta took control over every facet of the Flight Attendants' election, up to and including ballot collection, and supplanted the NMB's role in conducting the election. First, it made voting a work obligation through explicit directives from corporate management and supervisors, and official Company communications on DeltaNet, as described above. Coupled with its misleading information on Board procedure, as also described, Delta was able to institute voting procedures that deviated from those prescribed by the Board. The ultimate result was the appearance that Delta was running the election.

It is unlawful for carriers to hold themselves out as the entity conducting a representation election, or to distribute campaign materials with the appearance of official information provided by the Board. *LSG Lufthansa Servs., Inc.*, 27 NMB 18, 44 (1999). (carrier's delivery of official ballots to employees unlawfully influenced vote because it "left many employees with the impression that the election was being administered by the carrier"). Campaign materials may not, for example, include reproduced Board voting materials or portions of the Board's web site, as doing so could "mislead employees into believing that the material is an official statement of the NMB." *Delta*, 35 NMB 158, 159 (2008).

Here, Delta reproduced portions of the Board's official voter instructions and sample ballot and then embedded its misrepresentations and anti-AFA rhetoric therein.

SOF ¶¶ 8, 21 (reprinting sample ballot with parenthetical that write-in votes “could help AFA win”). For example, Delta’s freestanding poster boards displayed in In-flight areas and crew lounges, which bore no indication that they were campaign material from Delta, displayed the vote choices with parenthetical commentary advising against the write-in and displaying the slogan “If you don’t want AFA . . . ‘NO’ is your pick, whether you dial or click.” SOF ¶¶ 11, 22. The Company thereby gave its published materials the appearance of official authority. DeltaNet reinforced the apparent authoritativeness of these materials. Decision 2010 was made the initial interface for all Flight Attendants during the duration of the election, and likewise failed to indicate that the required “Steps” and requirement of voting were not those of the Board. *See* SOF ¶ 5. Overall, the sheer volume, physical appearance, and size of Delta’s voting instruction materials overwhelmed and supplanted the NMB’s official instructions, which appeared nondescript in comparison and were far less prominent. In addition, as discussed in greater detail below, Delta gave the appearance that it controlled the election by unilaterally instituting on-site polling in the work place.

Delta’s systematic effort to marginalize the NMB’s role in the election process, while commingling employee work duties with voting rights, removed any semblance of a neutral government authority in charge. The natural outcome of the Company’s activities was the distinct impression among employees that the election was a “company-sanctioned event.” SOF ¶ 22.

### **E. Delta Unilaterally Established On-Site Polling Places.**

Delta usurped the authority of the NMB to determine how employees can vote when it unilaterally conducted on-site voting, contrary to established Board procedures. It treated each In-flight area and crew lounge as a polling place where Flight Attendants were encouraged to cast their ballots by logging on to company computers.

The NMB has rejected on-site elections as the preferred method for determining representation preference. Since voting is a personal act, the NMB has explained employees should be “free to vote in the privacy of their own homes, without being subject to pressure from carrier or union officials.” *Mercury*, 9 NMB 312, 320 (1982); *see also Petroleum Helicopters*, 25 NMB 197, 232 (1998) (“the Board reviewed its use of mail ballot elections specifically to permit employees to vote in the privacy of their homes”). Unlike the NLRB, the NMB, therefore, does not routinely hold representation elections at worksites. The NMB Representation Manual does not even contain a description of the procedures for conducting an on-site election. Instead, on-site elections have only been ordered as a rare remedy for interference in unusual circumstances. *See, e.g., Lufthansa*, 27 NMB at 18 (ordering an on-site election be held in Guam and Saipan in response to employer ballot collection). In accordance with its standard practice, the NMB did not order on-site voting in this election.

Nevertheless, Delta decided unilaterally to transform its crew lounges into polling places. Delta alerted Flight Attendants that they could vote in crew lounges on Delta

computers or phones in the Company's official appearing "Voters Guide." SOF ¶ 27. By plastering the same official looking banners and posters with the directive "VOTE" throughout every crew lounge, Delta conveyed a clear message to Flight Attendants that these areas were the appropriate place to vote. SOF ¶ 28. The Company additionally inundated these areas with "voting instructions" that described how a Flight Attendant could cast a ballot, including instruction cards posted on the computers. SOF ¶ 13. At the conclusion of the election, when polling places were no longer needed, all of this material was taken down and the crew lounges were converted back to their normal state. SOF ¶ 28.

In conjunction with the signage conveying that the crew lounges were polling places, Delta transformed every work computer into a voting machine. Each crew lounge contains banks of computers which Flight Attendants routinely use to check their e-mail as they are required to do before a trip begins. SOF ¶¶ 2, 26. After logging on to DeltaNet on a Company computer, Flight Attendants were confronted with "Decision 2010" pop-up screens that directed them through hyperlinks to the NMB website. SOF ¶ 3. Although Delta generally restricts internet access on these computers to Company systems and work related third-party websites, the Company allowed Flight Attendants to access the NMB and BallotPoint websites from work computers. SOF ¶ 4. To underscore the message, Delta displayed its "voting instructions" placards on the computers below the monitor and above the keyboard. SOF ¶ 10.

Thus, by unilaterally establishing a system-wide network of on-site polling places and designating its own computers as voting machines Delta supplanted the role of the Board, which alone may direct on-site voting, and violated Board procedure. Delta's adoption of on-site voting through its business computer system also reinforced the Company's message that voting was a mandatory work obligation.

**II. DELTA'S TRANSFORMED CREW LOUNGES, IN-FLIGHT DEPARTMENTS AND WORK COMPUTERS LACKED THE PROCEDURAL PROTECTIONS NECESSARY FOR A LEGITIMATE ON-SITE REPRESENTATION ELECTION AND INSTEAD CREATED A COERCIVE ATMOSPHERE.**

Although Delta should not have conducted on-site voting at all, the Company further interfered with the election by not guaranteeing a private, secret balloting process free from undue influence in its on-site polling. When the integrity of the vote has been compromised, the NMB has consistently set aside the results of the election. *See, e.g., Era Aviation*, 27 NMB at 321; *Lufthansa*, 27 NMB at 18; *Petroleum Helicopters*, 25 NMB at 197; *Arkansas & Missouri R.R.*, 25 NMB 36 (1997). The NMB, likewise, has held that creating the appearance of a lack of secrecy or privacy constitutes unlawful interference. For example, the Board has held that the collection of ballots even when sealed violates the integrity of the election. *America West*, 26 NMB 195, 208 (1999). Likewise, the Board ordered a re-run election when a carrier created a box to collect ballots, even though no ballots were actually collected. *Rio Airways*, 11 NMB 75 (1983). The NMB has also held that the appearance of surveillance has a chilling effect on union

activity and therefore constitutes a sufficient basis for a finding of interference, even when the carrier did not engage in actual surveillance. *Pinnacle Airlines*, 30 NMB 186, 223 (2003)

In this election, Delta destroyed the integrity of the voting process and secrecy of the ballot in a coordinated and systematic manner. Having assumed the electoral responsibility of the NMB, Delta failed to provide employees with the basic procedural protections that the NMB would provide in an on-site election and which are also found in NLRB procedures, the LMRDA, and local election laws. Specifically, Delta failed to ensure: a secret place to cast a ballot; a zone of privacy at the polling place free from partisan speech; freedom from supervisor monitoring; and a patently secure ballot box.

**A. Voting Did Not Take Place In The Privacy Of A Voting Booth.**

Telephones and computers in crew lounges and In-flight areas were located in open areas in full view of co-workers and supervisors. SOF ¶ 26. Some areas were even monitored by security cameras. If Delta were to properly transform such inappropriately busy, open and monitored areas into voting sites, it had to take the requisite precautions to create secure voting booths. It took none.

On-site elections always incorporate an area to vote in secret. In political elections, votes are always cast behind a curtain or other form of partition. The NLRB, when conducting worksite elections, requires that employees be able to vote in the “secrecy of a voting booth.” NLRB Statement of Procedures, § 101.19. DOL regulations

under the LMRDA state that part of guaranteeing a secret ballot is “providing voting booths, partitions, or other physical arrangements permitting privacy for the voter while he is marking his ballot.” 29 C.F.R. 452.97. This basic procedural protection stems from the recognition that voting in the open is inherently coercive and, therefore, some form of a voting booth is necessary to guarantee freedom of choice.

**B. Voting Occurred Amidst A Barrage Of Carrier Campaign Speech.**

In addition to a secret voting booth, all legitimate polling places include a private zone free of partisan speech in and immediately around the polling area. While a carrier does have a limited right to engage in speech, if a carrier unilaterally creates polling sites, employer speech must completely cease in and around those areas to ensure a private, personal vote free of carrier coercion. The NLRB has adopted the “*Milchem* Rule” under which “sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.” *Milchem Inc.*, 170 NLRB 362 (1968). The LMRDA, likewise, requires unions to prevent campaigning within the polling place and authorizes them to limit speech around the polling place. 29 C.F.R. § 452.111.

Further, the Supreme Court has held that the First Amendment is not violated when a state prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. *Burson v. Freeman*, 504 U.S. 191 (1992). The Court recognized that it was the practice of every state to impose such

restrictions. *Id.* at 206. The state’s compelling interest in preventing election fraud and voter intimidation was found so strong that even lacking empirical proof that the restriction was narrowly tailored, the prohibition still cleared the high hurdle of strict scrutiny. *Id.* at 211.

Here, the Company uniformly filled crew lounges throughout the system with the same banners, free standing document holders, posters, and DVDs demanding employees to “VOTE” and directly or by implication against AFA. In these crew lounges, there was no place where a Flight Attendant could stand and “not see materials from management about the election.” SOF ¶¶ 10, 28.

Delta even continued its rhetoric when employees logged on to the company computers which served as makeshift voting machines. After logging on, employees were confronted with a “Decision 2010” pop-up that commanded them to “VOTE.” SOF ¶ 3. This pop-up also contained links to anti-AFA propaganda, right next to the link to the NMB website. SOF ¶ 4. A legitimate election would prohibit such partisan speech within the voting booth.

Furthermore, Delta made sure that only its perspective would be communicated at the polling sites by limiting AFA access. In the In-flight areas, Delta did not permit AFA to post any signs or distribute any literature. In the crew lounges, Delta did not allow AFA to locate tables in prominent areas and union postings were limited to the Union Bulletin Board. SOF ¶¶ 15, 28. Thus, Delta improperly established on-site voting in

areas dominated by carrier campaign speech in derogation of fundamental voting safeguards.

**C. The Presence Of Supervisors During Voting Added A Further Element Of Coercion.**

The lack of private voting booths and a propaganda-free zone was compounded by the pervasive presence of supervisors in the crew lounges. The Board has stated that the increased presence of supervisors in work areas, even when not converted into polling places, can constitute interference by creating the impression of surveillance. *Federal Express Corp.*, 20 NMB 7, 22 (1992).

Here, by allowing voting in In-flight areas and crew lounges, Delta effectively brought the election to the supervisors. There is no effective difference between this and directing supervisors to monitor a polling place, which the NLRB has consistently held constitutes unlawful interference. *See, e.g., Electric Hose & Rubber Co.*, 262 NLRB 186 (1982) (holding that the presence of a supervisor 10 to 15 feet from the entrance of the voting area interfered with the election); *Smithfield Packing Co.*, 344 NLRB 1 (2004) (improper electioneering around polls when employer official entered voting area six times on day of election and remained there for 20 to 30 minutes each time). Unsurprisingly, there are reports of supervisors engaging in direct campaigning in the crew lounges and surveillance of AFA campaigning. *See* SOF ¶ 12. Additionally, even when employees did not have any direct interaction with supervisors, allowing voting in the presence of supervisors created the impression of surveillance, which is a sufficient

basis alone for a finding of interference. *Delta*, 30 NMB 102, 115 (2002); *Pinnacle*, 30 NMB at 223 (2003); *Laker Airways, Ltd.*, 8 NMB 236, 250 (1981).

**D. Voting Through DeltaNet Compromised Ballot Secrecy And Gave, At Minimum, The Impression Of Surveillance.**

Lastly, by transforming Company computers into voting machines, Delta engaged in modern-day ballot collection. The NMB has consistently held that collecting ballots, even if sealed and voluntarily furnished, constitutes unlawful surveillance and *per se* interference. *Era Aviation*, 27 NMB at 336; *Northwest Airlines*, 26 NMB 269, 295 (1999); *America West*, 26 NMB at 208; *United Airlines*, 22 NMB 288, 320 (1995); *Mercury*, 9 NMB at 321; *Laker Airways*, 8 NMB at 249.

Whether 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 that Delta could and would. In “The Fine Print” from the Delta Extranet policy, Delta warned: “Delta may monitor activity on the DeltaNet Employee Portal.” SOF ¶ 30. In its GSE Standard Operating Procedures, the Company warned: “Delta reserves the right to access or monitor, without notice, any access to the Internet or intranets and any transmission made via the Internet or intranet using company workstations, including review of individual files maintained by user regardless of media.” SOF ¶ 31. Similarly, in the Personnel Conduct Standards and Appearance Guidelines, the Company warned: “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.” SOF ¶ 32. Furthermore, in response to AFA concerns about voting on company computers Delta submitted to the NMB an affidavit from the Company’s Managing Director–Information Technology, in which he testifies that “there may be a record of what internet website(s) a user has accessed” available to the Company.<sup>8</sup> SOF ¶ 33.

This admitted ability to investigate computer usage is the same as the ability of a collector of sealed ballots to open the envelope. Even if Delta could prove it did not actually review employee use of computers to vote, this is irrelevant -- just as it is irrelevant whether the person who collects a mail ballot envelope actually looked at how the employee voted. In either case, the employer has interfered with the election by creating the impression of surveillance and the impression that the employee’s vote may not be secret.

Such a breach in the integrity of the ballot box or voting machine cannot be tolerated in a legitimate election. The NLRB, for example, requires that the ballot-box be secured in a manner that avoids even the appearance of the potential for a security breach and “where a situation ... casts a doubt or cloud over the integrity of the ballot box itself,

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<sup>8</sup> Other statements by Delta reinforced uncertainty over the secrecy of the ballot. In its “Voter’s Guide,” the Company asked the theoretical question, “How can we be sure the company responsible for tallying our votes can be trusted?” SOF ¶ 8. Delta’s answer was that “All votes are kept confidential until the independent company shares the election results with Delta, the Union and the NMB simultaneously on November 3rd.” The implication that Delta would ultimately know how each individual employee voted could have exerted undue influence on voters.

the practice has been, without hesitation, to set aside the election.” *Austill Waxed Paper Co.*, 169 NLRB 1109 (1968). Similarly, the LMRDA requires that unions adopt “adequate safeguards ensuring control of ballots both before and after the voting.” Labor Union Law and Regulation 264 (William W. Osborne ed., 2003) (citing *Donovan v. Graphic Arts Local 518*, 228 L.R.R.M. (BNA) 2092 (C.D. Ill 1984)). Likewise, the ballot boxes in political elections are never under the unilateral control of an interested party.

In addition, by encouraging voting on company computer systems, Delta challenged Flight Attendants to demonstrate their “faith” in the “Delta family” and implied that the Company would know who failed the challenge. The Board has held that encouraging voters to display their loyalty to the employer constitutes unlawful interference. *Era Aviation*, 27 NMB at 339; *Laker Airways*, 8 NMB at 249. Employees, ultimately, were left with the choice either 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.

### **III. DELTA INTERFERED WITH THE ELECTION BY BOTH WITHHOLDING AND PROMISING BENEFITS.**

In order to influence PMNW Flight Attendants to vote against union representation, Delta made receipt of wage increases contingent upon being or becoming non-union. Delta’s discrimination between union and non-union employees in terms of wage increases interfered with employee free choice in two ways. First, PMNW Flight

Attendants were punished for their union status when Delta denied to them an otherwise generally available benefit solely and explicitly based on their union status. Second, Delta improperly influenced these Flight Attendants through promises that they too would soon share in the wage increases if they became non-unionized.

“Just as the offer of benefits during an organizing campaign may constitute improper interference so may the denial of benefits.” *Key Airlines*, 16 NMB 296, 310 (1989) (Flight Attendants seeking to organize denied wage increase extended to other employees). The Board has recognized that the “impact” of such action is “to place the blame on the union for the denial of the pay increase” and “could naturally be expected to be seen as a penalty for showing union support.” *Id.* Moreover, courts applying the NLRA have found employer policies that discriminate solely on the basis of union membership “inherently destructive” of employee rights and *per se* unlawful. *Melville Confections, Inc. v. NLRB*, 327 F.2d 689, 691 (7th Cir. 1964) (unlawful to condition participation in profit-sharing plan upon lack of union representation); *see also Kroger Co. v. NLRB*, 401 F.2d 682 (6th Cir. 1968) (same). Similarly, a carrier violates the RLA by imposing “a facially discriminatory policy that penalize[s] employees . . . for no other reason than their decision to unionize.” *Atlas Air Inc. v. ALPA*, 232 F.3d 218, 225 (D.C. Cir. 2000) (carrier unlawfully withheld profit-sharing payment from pilots due to selection of union representation).

Thus, Delta plainly sought to punish PMNW Flight Attendants for their union status by adopting a facially discriminatory wage increase. This action also reinforced Delta's message that Flight Attendants should reject AFA representation based upon "Delta's track record of working together to make improvements to benefit our people and our operation when they need to be made, not just when a contract is up for negotiation." SOF ¶ 7. Delta will likely argue that it had no alternative to its discriminatory pay scheme in light of its prior commitment to increase pay for PMDL Flight Attendants and its decision "to honor the pay, benefits and work rules for pre-merger Northwest employees." SOF ¶ 45. Delta, however, had another alternative. The Company could have gone to AFA to discuss whether a pay increase for PMNW Flight Attendants could be implemented consistent with the CBA or with permission from the Union, but did not. Delta will also likely argue that pay is only one component of compensation and to award pay increases to PMNW Flight Attendants without adjusting other benefits would have conferred a windfall on those employees. However, if Delta's true concern were parity, then the wage increase could have been structured to take that concern into account, with lesser increases available to PMNW Flight Attendants in proportion to their richer benefits package. Instead of these approaches, Delta simply denied any increase to PMNW Flight Attendants plainly as a demonstration that unionization carried a penalty. In addition, PMDL Flight Attendants witnessing the

treatment of their unionized colleagues were also likely to draw the conclusion that they would continue to receive better treatment by remaining non-union.

Not content to merely wield a stick by denying benefits, Delta also used the promise of future pay increases of as much as 5% as a carrot to entice PMNW Flight Attendants to vote against union representation. “The offer of benefits to influence the outcome of an organizing campaign is a violation of the Railway Labor Act.” *Laker Airways*, 8 NMB at 251 (citing *Union of Professional Airmen v. Alaska Aeronautical Indus.*, 95 L.R.R.M. (BNA) 2868 (D. Alaska 1977)). The Board has consistently found interference when a carrier “promises to confer benefits in an effort to persuade employees” to reject union representation. *Petroleum Helicopters*, 25 NMB at 232.

Here, Delta conveyed to PMNW Flight Attendants that the pay increase denied to them on October 1, 2010 would quickly be made available to them if they became non-union. The recorded statements of Richard Anderson and Joanne Smith during a conference call on September 16, 2010 delivered this message loud and clear. SOF ¶ 44. In answer to a PMNW Flight Attendant’s question whether he would be brought up to the Delta pay scale immediately following the election, Ms. Smith explained that “if the vote is in favor of a direct relationship and no AFA,” Flight Attendants could “look to what [Delta had] done in previous work groups that settled representation.” *Id.* She specifically invoked the example of Northwest mechanics who “were brought up to the

Delta pay increases within the first pay period.”<sup>9</sup> *Id.* Mr. Anderson too referred the questioner to what had occurred with other employee groups, including the Simulator Technicians who “voted the IAM off the property,” and indicated that wages for these groups were increased “within the very next pay period.” *Id.* In particular, he noted that mechanics received “pretty big raises pretty quickly.” *Id.*

In two subsequent communications to employees concerning pay increases, Delta again cited the example of the Simulator Technicians. In his September 30, 2010 “Right From Richard” communication, Mr. Anderson emphasized that the Simulator Technicians “who for a second time voted against IAM representation . . . were given pay increases, benefits, and work rule improvements that Delta simulator techs enjoy. And just again, they don’t have to pay dues anymore.” SOF ¶ 45. The example of the Simulator Technicians was cited yet again in a letter from Anderson regarding pay increases that appeared as a pop-up on DeltaNet on October 1, 2010, the day after the NMB mailed out voting packages to Flight Attendants. SOF ¶ 46. Thus, the promise of a future wage increase if Flight Attendants became non-union was repeated and reinforced.

Apparently, as expressly stated by Mr. Anderson on September 16, he believed that he could not be held accountable for election interference if he only explained what

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<sup>9</sup> Northwest’s mechanics were represented by the Aircraft Mechanics Fraternal Association (“AMFA”). However, on February 25, 2009, AMFA requested that the NMB revoke its certification, and the request was granted. *Northwest Airlines*, 36 NMB 84 (2009). From that point on, PMNW mechanics were unrepresented.

Delta had done with other employees who had become non-union without “directly” indicating what the Company intended to do with PMNW Flight Attendants. He was mistaken in this belief. Any assessment of whether employer speech contains a promise of benefit ““must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the later that might be more readily dismissed by a more disinterested ear.”” *US Airways v. NMB*, 177 F.3d 985, 991 (D.C. Cir. 1999) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)); *see also Era Aviation*, 27 NMB at 344 (where “letter implicitly linked the rejection of union representation with benefits,” laboratory conditions were tainted). PMNW Flight Attendants could not fail to understand the intended implication of the comparison to other work groups that had become non-union and quickly thereafter received wage increases. Delta’s coy attempt to skirt an interference claim is unavailing.

Just as PMNW Flight Attendants understood that raises would quickly follow if they became non-union, so too they were made to understand that, as long as Delta had “to honor the pay, benefits and work rules for pre-merger Northwest employees,” they would not be included in wage increases. Moreover, in its campaign materials, Delta emphasized that negotiations under the RLA can take many years, suggesting that PMNW Flight Attendants could be left waiting for wage increases for a very long time if AFA prevailed. So the choice was clear, either become non-union and receive an

immediate pay increase or remain union and await the outcome of the next, presumably lengthy, round of negotiations.

Following the lead of Delta's highest management, lower level managers also communicated to Flight Attendants that other benefits would be granted or withheld based on the outcome of the election. These threats and promises included instances of telling Flight Attendants that a free van service to get to work would be taken away if AFA won, that they would receive a \$400 raise if they voted "no," that accrued sick leave would be credited by Delta if AFA lost, and that preferable trip trading arrangements would be available if Flight Attendants were not unionized. SOF ¶ 47. Thus, Delta engaged in improper coercion involving wages and benefits at every level of the organization.

**IV. BY MAKING CALLS TO FLIGHT ATTENDANTS' PRIVATE TELEPHONE NUMBERS, LIMITING THEIR ACCESS AND ABILITY TO CAMPAIGN, AND FORCING THEM TO READ COMPANY CAMPAIGN MATERIAL, DELTA FURTHER TAINTED THE LABORATORY CONDITIONS.**

**A. Delta Managers' Widespread Calls To Flight Attendants' Homes Interjected A Further Element Of Intimidation Into The Election Process.**

Delta's systematic calls to Flight Attendants on their home phones and cell phones encouraging them to vote constituted unlawful interference. The Board has consistently held that one-on-one discussions with supervisors about the election are inherently coercive. *See, e.g., Aeromexico*, 28 NMB 309, 335 (2001); *Key Airlines*, 13 NMB 153,

163 (1986); *Zantop Int'l Airlines, Inc.*, 6 NMB 834, 836 (1979); *Allegheny Airlines*, 4 NMB 7, 13 (1962). Likewise, supervisor calls to employees' homes interfere with the election by creating the appearance that the carrier is "keeping a close watch on the employees." *Laker Airways*, 8 NMB at 249 (holding that supervisor calls to employees homes inquiring whether they had received ballots constituted interference). Similarly, the NLRB considers interviews at employee homes equally coercive to those conducted in employer offices. *Peoria Plastic Co.*, 117 NLRB 545, 548 (1957).

Here, Delta's systematic calls to Flight Attendants at home to encourage them to vote, regardless of whether the supervisors encouraged employees to vote in a particular way, were inherently coercive. There are some reports, however, of supervisors engaging in partisan campaigning during these phone calls, which clearly constitutes interference of the worst kind. SOF ¶ 13. But even when the message to vote against AFA was not explicit, it was clear. Normally, supervisors only call Flight Attendants at home when they have violated a work rule or for another similarly important business reason. Furthermore, by calling during the last two weeks of the campaign, Delta created the impression that it was monitoring who had voted. 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 against AFA.

**B. Delta Interfered With The Flight Attendants' Right To A Free And Fair Election By Applying Its "Advocacy Policy" In A Manner That Discriminated Against AFA.**

If a carrier adopts a policy that prohibits employees from advocating for unionization at work, the policy must be applied equally to the expression of views against unionization and for other causes such as charitable giving. *See SkyWest Pilots ALPA Organizing Committee v. SkyWest Airlines*, No. C-07-2688 CRB, 2007 WL 1848678, at \*13 (N.D. Cal. June 27, 2007). Likewise, the Board has held that discriminatory enforcement of an advocacy policy can contribute to a finding of election interference sufficient to order a re-run election. *USAir*, 17 NMB 377, 423 (1990). Although Delta's Advocacy Policy on its face treats advocacy for unionization the same as advocacy for other causes, in practice, the Company applied the policy in a manner that discriminated against AFA.

Specifically, Delta repeatedly allowed Flight Attendants who were against unionization to wear "NO WAY AFA" paraphernalia although prohibiting the display of similar pro-AFA items. SOF ¶¶ 14, 15. Delta also consistently required AFA to set up its visibility tables in less prominent areas of the crew lounges than it had previously allotted for charities. SOF ¶ 15. Thus, by discriminatorily applying its Advocacy Policy, Delta violated its employees' right to campaign for unionization on Company premises and thereby interfered with the election.

**C. Delta Interfered With And Surveilled Flight Attendants Engaged In Union Activity At The Layover Hotels In Narita And Amsterdam.**

AFA set up visibility tables and campaigned in the lobbies of two hotels, one in Narita, Japan, and one in Amsterdam, Holland. Typically, 165-200 Flight Attendants nightly stay on layover at each hotel. SOF ¶ 38. Previous solicitation by AFA in these hotel lobbies resulted in no complaints from hotel management. SOF ¶ 42. Even immediately prior to the election period, AFA was allowed to use the lobbies to communicate with Flight Attendants. *Id.*

When the election began, however, Delta dispatched managers to these hotels to disrupt AFA's ability to communicate with employees. First, Delta supervisors harassed AFA supporters, monitored employees who spoke with AFA representatives, and discussed the election with Flight Attendants. SOF ¶¶ 40, 42. Second, Delta suggested to hotel management that they should remove AFA supporters from the lobbies. SOF ¶¶ 39, 41. Since Delta guarantees these hotels a large number of guests, management complied with this suggestion by dispatching security to stop AFA's efforts. *Id.* Despite years of precedent of freely communicating with members in these lobbies, AFA was removed from these visible areas and forced to rent meeting rooms in the back of the hotels.

Delta's actions constituted impermissible interference with and surveillance of union activity. Employer presence outside union meetings, even if silent, is inherently coercive and constitutes interference. *Pinnacle Airlines*, 30 NMB at 222. Additionally,

increasing supervisor presence, even at work, without a legitimate business reason creates the impression of surveillance and constitutes interference. *Delta*, 30 NMB at 117. Here, there was no legitimate business reason for sending managers across the globe to monitor employees off employer property during personal time. Tellingly, there had never before been any supervisor presence at these hotels. Furthermore, Delta did not silently observe AFA's campaign, but rather took action to disrupt AFA's efforts. Although Carriers have a limited right to regulate union activity on their own property, this right does not extend beyond carrier premises when employees are not working. *SkyWest Pilots ALPA Organizing Committee*, 2007 WL 1848678, at \*13 ("Employers may not prohibit employees from distributing union literature on non-work time and in non-work areas."). Delta's disruption of AFA's off-site organizing, directly and through deputized hotel management, therefore constituted impermissible interference with union activity and thereby the election.

**D. Delta Infected The Requisite Laboratory Conditions By Making The Reading Of Its Campaign Material Mandatory.**

Carriers are not permitted to hold mandatory meetings during the laboratory period to promote their message regarding the election. *Stillwater Central R.R., Inc.*, 33 NMB 100, 138 (2006). A carrier that conducts "daily mandatory briefings" regarding the election commits unlawful interference, regardless of the content of the briefings. *Delta Air Lines, Inc.*, 27 NMB 484, 507 (2000).

Here, Delta briefed Flight Attendants daily regarding the election via the mandatory DeltaNet interface and company e-mails. SOF ¶ 7. Flight Attendants are required to log on to DeltaNet at the beginning of each work day, and to read the e-mail messages they receive from the Company. SOF ¶ 2. Employees are permitted to use DeltaNet and company e-mail for Delta business purposes only. *Id.* When Flight Attendants logged on to DeltaNet during the voting period, the initial screen was Delta's "Decision 2010" interface. SOF ¶ 3.

In addition, Flight Attendants received e-mails from Delta regarding "Decision 2010" almost daily during the laboratory period. Again, Flight Attendants are required to read Company e-mails as a job function. The e-mails that Delta required Flight Attendants to read carried the core messages of its campaign against AFA, including:

- "REMEMBER: TO BE COUNTED, YOU MUST VOTE"
- "IF YOU DON'T WANT AFA . . . 'NO' IS YOUR PICK, WHETHER YOU DIAL OR CLICK"
- "VOTING FOR A UNION OR PERSON OTHER THAN AFA COULD ACTUALLY HELP AFA WIN."
- "REMEMBER . . . IF YOU DON'T WANT AFA BUT YOU WANT TO CONSIDER UNIONIZATION, THE BEST OPTION IS TO CAST A 'NO' VOTE IN THE UPCOMING ELECTION."
- "AT DELTA, FLIGHT ATTENDANTS HAVE RECEIVED PAY INCREASES IN 2007, 2008, 2009, 2010 (effective October 1) WITHOUT PAYING FOR A UNION CONTRACT"
- "You can't be 'PRO-DELTA AND PRO-AFA'"

SOF ¶ 7. By making Flight Attendants read these highly partisan statements, Delta removed the line between performing required job functions and participating voluntarily in a representation election. In erasing this distinction, Delta deprived the Flight Attendants of their right to cast a ballot freely and without coercion, and instead engaged in mandatory briefings which constitute unlawful carrier interference. *Delta Air Lines*, 27 NMB at 507.

**V. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE NMB SHOULD CONDUCT A RE-RUN ELECTION AND TAKE ALL OTHER NECESSARY MEASURES TO ENSURE THAT DELTA CANNOT INTERFERE WITH A SECOND ELECTION.**

As AFA has shown, Flight Attendants were inundated with a campaign of unprecedented size and scope that spanned over their entire day. SOF ¶¶ 8, 13. Away from work, Flight Attendants were repeatedly barraged with Delta campaign rhetoric. SOF ¶ 9. When opening the mail, an employee was likely to find one of Delta's glossy oversized mailers or a DVD of Richard Anderson's "Nexus" webcast. When answering the phone, an employee might hear the voice of a supervisor instructing them to vote. SOF ¶ 13. If staying at a layover hotel, Flight Attendants might have been accosted by a supervisor. SOF ¶ 41. This campaign increased when Flight Attendants arrived at work. In the parking lot, Flight Attendants were likely to see large partisan banners on the shuttle buses. In crew lounges and In-flight areas, the same anti-AFA message and VOTE directive was ubiquitous. SOF ¶¶ 9, 10. When logging onto company computers, employees were confronted with screens directing them to Delta campaign material.

SOF ¶ 13. When checking their work e-mail as required, Flight Attendants were likely to have received one of the almost daily e-newsletters regarding the election. SOF ¶ 7. Just as Delta's campaign was pervasive, so too were the various forms of election interference described above.

Many of Delta's acts of interference even standing alone would constitute a sufficient basis for requiring a re-run election. However, the Board additionally must examine the facts and circumstances of interference in totality to determine whether laboratory conditions have been tainted and employee free choice has been impaired, and what is the appropriate remedy. *See, e.g., American Airlines*, 26 NMB 412, 445 (1999); *America West*, 26 NMB 195, 206 (1999). Combined, Delta's campaign clearly constitutes the type of pervasive interference that the Board has held taints the laboratory conditions necessary to conduct a fair election and warrants the imposition of strong remedies. *See Federal Express Corp.*, 20 NMB 7, 24 (1992); *USAir*, 17 NMB 377 (1990).

The NMB possesses sole authority to determine the remedy for election interference. *See, e.g., LSG Lufthansa Servs. v. NMB*, 116 F. Supp. 2d 181, 190 (D.D.C. 2000) ("In conducting a re-run election, [the NMB] is authorized to conduct the election in any way it sees fit in order to prevent carrier interference."). In the past, the Board has employed a variety of different remedial measures. At one end of the spectrum, in response to carrier conduct that renders a re-run by secret ballot election inappropriate,

the NMB has certified a representative on the basis of authorization cards.<sup>10</sup> *SkyValet*, 23 NMB 276, 296-97 (1996). At the other end, at minimum, the Board will order a re-run election conducted under the same procedures as the initial election. In between, the Board has employed a variety of different ballot forms, different voting methods, notice requirements, and various combinations of all these remedies. As with any election, the procedures for a re-run are committed to the Board's sole discretion. *British Airways Board v. NMB*, 685 F.2d 52, 56 (2d Cir. 1982) ("If [the NMB] does conduct an election . . . how it accomplishes this mission is entirely its affair.").

The NMB's guiding principle is to select a remedy that will "purge the taint" of carrier interference and "ensure a fair election." *Key Airlines*, 16 NMB 296, 308 (1989). Thus, remedies are evaluated on a case-by-case basis. 75 Fed. Reg. at 26083 ("The Board has discretion to respond to allegations of election interference as it sees fit according to the unique facts before it."). The Board has not hesitated to adopt new remedies as unique circumstances warrant and as necessary to cure carrier interference. *See, e.g., Laker Airways*, 8 NMB 236 (1981).

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<sup>10</sup> Under the NLRA, the spectrum has been extended even further. Where election interference is so outrageous and pervasive that traditional remedies cannot erase the coercive effect on employees, rendering a fair election impossible, the NLRB has issued a bargaining order without requiring proof of majority union support. *See, e.g., Am. Directional Boring*, 353 NLRB No. 21, 2008 WL 4490058 (N.L.R.B. Sept. 30, 2008), *enforcement denied by* 188 L.R.R.M. (BNA) 3024 (8th Cir. 2010) (denying enforcement of order entered by two-member Board), *and supplemented by* 355 NLRB No. 172, 2010 WL 3446129 (N.L.R.B. Aug. 27, 2010) (re-ordering employer to bargain with the union).

Plainly, a re-run election is required in this case. As we have demonstrated, Delta has engaged in many of the most egregious forms of carrier interference, including: giving the appearance that the Company, not the Board, was conducting the election; telling employees that they were required to vote and otherwise misrepresenting election procedures; voting on DeltaNet and in crew lounges in a manner that compromised the secrecy of the ballot and coerced employees in the exercise of their choice; widespread instances of supervisor surveillance and intimidation; and withholding wage increases with the promise to grant increases later if the Union were defeated. These are not minor infractions, but rather conduct that strikes a fundamental blow to the fairness of the NMB election process. In addition, the election was extremely close with only 165 votes determining the result out of an eligible voter pool of 19,887 and 18,760 votes cast. There can be no doubt that the conduct documented here was sufficient to impact the outcome of an election decided by such a narrow margin.

In the past, the Board has applied different ballot forms as a type of remedy. AFA, however, does not believe that a change in ballot form would be appropriate under the circumstances of this case. First and foremost, Delta's misinformation regarding the ballot options on the Board's newly-adopted standard ballot has injected confusion in the voting process that will need to be dispelled in the re-run election. In our view, changing the ballot form will likely create more confusion, rather than cure the confusion Delta has already sown. In addition, a *Laker* ballot, which differs from the Board's standard ballot,

would not be appropriate in light of the nature of Delta's interference. The *Laker* ballot provides only two choices in the format: "Do you desire to be represented by [Union Name]?" with boxes marked "Yes" and "No" and with no space provided for write-ins. Given that one of the key forms of election interference at issue in this case is Delta's misrepresentation that voters desiring a representative other than AFA should vote no, the removal of the write-in option would tend to compound, not cure, Delta's misrepresentation. The *Key* ballot is also inappropriate under the circumstances of this case. The *Key* ballot presents voters with only a single option for casting a vote on the question "are you opposed to representation by [Union Name]?" with a single box to check and no write-ins. Unless a majority of eligible voters cast votes against the named representative, the union is certified. Here, however, because Delta has interfered with the first election by telling employees that they "MUST VOTE," the *Key* ballot would actually provide additional incentive for the carrier to repeat this misconduct.

Although a change in the ballot form is not a suitable remedy for the specific forms of interference committed by Delta, a change in the Board's voting procedures is necessary under the circumstances of this case and the re-run should be conducted by mail ballot. In past cases, the Board has changed the method of voting in order to insure a free and fair re-run and ameliorate the taint of carrier interference. *See, e.g., LSG Lufthansa Servs.*, 27 NMB 18 (1999) (ordering re-run conducted as on-site ballot box election); *Rio Airways*, 11 NMB 75 (1983) (same). A mail ballot will help to remove the

taint created by Delta's unilateral decision to conduct on-site voting in the workplace. It will encourage Flight Attendants to vote from the privacy of their own homes and negate the possibility that Delta might once again seek to establish a polling place where ballots are cast. In addition, Delta's encouragement of voting through DeltaNet created an atmosphere of surveillance and, at least, the impression that balloting is not secret. A mail ballot will reassure voters that the process is secret and that the Company cannot know whether they voted, much less how. Although AFA appreciates the efficiency and convenience afforded by the Board's electronic voting process, we submit that the specific forms of interference perpetrated in this case can be best remedied through a mail ballot election.

If the Board were to decline to order a mail ballot re-run, then alternatively the Board must order a series of election safeguards designed to achieve the same result. These safeguards are as follows: (1) order that voting through the DeltaNet system is prohibited; (2) order that no hyperlink or series of hyperlinks or other method of access to the BallotPoint web-site be permitted through DeltaNet or Delta-controlled computers; (3) order that voting is not permitted in Delta In-flight areas, crew lounges, or any other work area. Such safeguards are necessary to insure that Delta does not again conduct on-site voting using Company computer systems that voters have been told are subject to

monitoring.<sup>11</sup> In light of the difficulties which may arise in insuring compliance with these safeguards, however, AFA submits that a mail ballot election is the preferable remedy.

Regardless of the method of voting, the Board should issue an order prohibiting Delta supervisors from calling Flight Attendants at their personal telephone numbers to communicate regarding election matters. As explained above, a call from management to the home is inherently coercive and smacks of intimidation. As Delta has demonstrated, it possesses a wide variety of mediums to communicate its message to Flight Attendants. Therefore, prohibiting supervisors from using the particular medium of calls to Flight Attendants' personal phones will not impair Delta's ability to impart its views.

The Board should also adopt additional remedial measures to assist in removing the taint of Delta's election interference. The Board should require that Delta provide to AFA a list of all eligible voters to be used in the Union's campaign during the re-run election. The list should be provided within three business days of the Board's decision. In cases of egregious carrier interference, such as occurred here, the NMB has ordered such relief. *Washington Cent. R.R. Co.*, 20 NMB 191, 238 (1993); *USAir*, 17 NMB 377, 428 (1990). This remedy is particularly appropriate "where the list would restore the

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<sup>11</sup> Considering that the vote in this election lacked the security required of a secret ballot, the NMB should take every precaution to ensure that the confidentiality of the votes in the re-run election is as absolute as possible. Accordingly, if the re-run is conducted using telephone and internet voting, the Board should confirm that BallotPoint's operations are secure and capable of identifying and eliminating any virus that could compromise the voting process.

balance of communications or access in situations where employee freedom of choice was impaired by prior election interference.” *Wisconsin Central Ltd.*, 24 NMB 123, 125 (1996). That is precisely the situation here. Delta inundated employees with its campaign messages both in the workplace and at their homes, including repeated misrepresentations regarding election procedures. At the same time, Delta applied its “Advocacy Policy” unfairly and sought to marginalize AFA’s presence in crew lounges at every turn. Even worse, the watchful eyes of supervisors discouraged Flight Attendants from communicating with AFA even in the remote areas of the crew lounges to which the Union was relegated. On top of all this, Delta had AFA organizers removed from the lobbies of the busy layover hotels in Narita and Amsterdam, thus curtailing AFA’s message even beyond the workplace. As a result, the imbalance in communications could not have been more stark, nor more directly the product of carrier interference. This warrants provision of a mailing list as a remedy.

It is also standard for the Board in re-run elections to require that a special notice be mailed to all employees and posted in the workplace. In this case, however, the special notice should be mailed to all Flight Attendants prior to the commencement of the re-run election. *Petroleum Helicopters*, 25 NMB 197, 236 (1998). The notice should also be accompanied by a copy of the Board’s findings of election interference. *Id.* And both the notice and the Board’s decision should be posted in all work areas as of the date when the notice is mailed out and throughout the duration of the election process. In

addition, the special notice should be mailed again to all Flight Attendants in the packages containing voting materials. *Id.* Considering the gross misrepresentations of Board law and procedures engaged in by Delta, these additional safeguards are necessary to insure that eligible voters have accurate information regarding the re-run election and the reasons for it from the very earliest stage in the process.

Finally, the Board should require Delta to bear the costs of the agency's administration of the re-run election, including the cost of mailing the special notice and the Board decision, as well as the costs of mailing ballot materials and any other election costs. The size of this election is, we believe, without precedent for the agency, involving more employees in a single election than often have participated in all elections combined for an entire year. Given these circumstances, the public fisc should not have to bear the costs of a re-run election necessitated solely as a result of Delta's malfeasance. It lies well within the Board's plenary authority in election matters to impose such a remedy.

## **CONCLUSION**

For all the foregoing reasons, 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 Supplemental Motion for Board Determination of Carrier Interference [Corrected] was sent via email on this 24th day of November, 2010, to the following:

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