NATIONAL MEDIATION BOARD OVERSIGHT OF ELECTIONS FOR UNION REPRESENTATION

(110–173)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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September 23, 2008

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Subcommittee on Aviation Staff

SUBJECT: Hearing on "National Mediation Board Oversight of Elections for Union Representation"

PURPOSE OF HEARING

The Full Committee will meet on Wednesday, September 24 at 2:00 p.m. in room 2167 Rayburn House Office Building to receive testimony regarding the National Mediation Board's ("NMB") oversight of elections for union representation.

BACKGROUND

The National Mediation Board was established in 1934 by an act of Congress as an independent Federal agency charged with overseeing labor-management relations in the aviation and rail industries. The NMB administers the specific terms of the Railway Labor Act ("RLA") governing the representation of workers and mediation and arbitration of collective bargaining and other disputes.

The purposes of the RLA, as set out in statute, are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; and (5) to provide for the prompt and orderly settlement of all disputes growing

out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."[1]

The NMB is composed of three Board Members, one of whom serves as the Chairman, who are appointed by the President and confirmed by the Senate for three-year terms. The current Board Members are: Read Van de Water (Chairman), Elizabeth Dougherty, and Harry Hoglander.

National Mediation Board Representation Procedures

The RLA affirms the rights of workers in the rail and aviation industries to elect to be represented by a labor organization and to bargain collectively. The NMB investigates and resolves representation disputes in the air and rail industries. Employees of these industries are under different rules than workers in other private industries, who are covered by the National Labor Relations Act ("NLRA") and settle their disputes and arbitrate their grievances before the National Labor Relations Board ("NLRB").

The NMB has specific rules and procedures for awarding representation rights under the RLA. These rules, established and published by the NMB, are set forth in the Board's Representation Manual. These rules are not codified regulations and serve more as general procedural guidance.[2]

A union seeking to represent workers at a rail or air carrier must first collect cards signed by employees stating that they want to be represented by the organization. Each employee must sign and submit his or her own card. A union must collect valid cards from a majority (50 percent plus one) of employees in a craft or class at a carrier in order for the NMB to call for an election, if those workers are already represented by another union. If that craft or class at the carrier is unrepresented at the time of the card collection, the union must produce cards from 35 percent of employees and submit them to the NMB as part of an application for representation by the union.

Upon receipt of an application for representation, the NMB begins an "investigation" to determine the employees in a given craft or class eligible to vote in the election. The carrier submits a list of all employees who have an "employee-employer relationship" as of the last day of the last payroll before the application for representation was received.[3] This becomes the list of voters eligible to vote in the election ("eligibility list").

The development of an exact list of eligible employees is an important part of the process, because an RLA election, as administered by NMB rules, is only valid if a majority (50 percent plus one) of eligible employees participates in the election and votes in favor of representation. Every employee on the eligibility list is counted as a "no" vote (against representation) unless he or she submits a ballot voting "yes". Therefore, if a majority of employees do not vote, it is not possible

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[1] 45 U.S.C. 151a

[2] National Mediation Board, Representation Manual (Sept. 14, 2007). The cover of the Manual states: "This Manual provides general procedural guidance to the National Mediation Board's staff with respect to the processing of representation cases before the NMB. The provisions of this Manual are neither obligatory upon the Members of the Board nor do they constitute the exclusive procedure for the NMB's investigation of representation matters pursuant to the Railway Labor Act."

[3] The NMB Representation Manual contains further details on the eligibility list determination process and the ability for a union to challenge names on the list. See http://www.nmb.gov/representation/representation-manual.pdf

for a union to "win" the election, even if all employees voting choose representation. This differs from the rules applicable to workers governed by the NLRA, where a majority of the votes received determines the outcome of the election. However, this has been the policy of the NMB since its inception in 1934.

If a union receives 50 percent plus one of the vote in favor of representation, the election is certified by the NMB. If a majority of eligible workers does not vote in favor, the NMB dismisses the application for representation.

A union may request the NMB to investigate if it believes there has been interference by the carrier in an election. Section 2, Fourth, of the RLA prohibits carrier interference and states that: "No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, ...or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization..." A carrier may also ask the NMB to investigate if it believes there has been interference with employees' right to choose or not choose representation on the part of a union in an election.

According to NMB's Representation Manual, the Board will only investigate allegations of interference after the outcome of the election has been determined, except in extraordinary circumstances. In an investigation, the NMB looks to see if the alleged interference caused "laboratory conditions" to be tainted. Laboratory conditions are the hypothetical conditions that would exist in a representation election without the interference. A request for an investigation must provide sufficient evidence with supported documentation that laboratory conditions were tainted.[4]

Association of Flight Attendants-CWA Campaign at Delta Airlines

The Association of Flight Attendants-CWA ("AFA-CWA") is a labor union representing over 55,000 flight attendants at 20 airlines. AFA-CWA has attempted two organizing campaigns at Delta Airlines. In 2001, AFA[5] filed for representation of flight attendants, but the election was not certified because less than 50 percent of Delta flight attendants participated in the election. Immediately after the election, AFA filed a motion for a determination of interference by Delta management with the NMB, based on allegations that during the voting period Delta engaged in an "anti-union campaign". The NMB investigated but ultimately the Board concluded that it could not find that "the level of carrier activity rises to a level requiring further investigation of employee choice of representative". The ruling noted, however, that "there were isolated incidents of inappropriate conduct on the part of certain supervisors" and stated that "the Board is troubled by the number of reported incidents of 'surveillance'".[6] Member Hoglander filed a dissent in the case and in his statement indicated his support for a re-run of the election.

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[4] Allegations must state a prima facie case that laboratory conditions were tainted and be supported by substantive evidence. See NMB Representation Manual, 17.0

[5] The union in 2001 was the Association of Flight Attendants, prior to its merger with the Communication Workers of America (CWA).

[6] National Mediation Board, 30 NMB No. 18, Case No. R-6838

On February 14, 2008, AFA-CWA again applied for representation of flight attendants at Delta Airlines with cards from over 50 percent of eligible voters. On April 1, 2008, AFA-CWA requested that the election be held using a simple yes/no ballot, which would be a departure from the usual process requiring a majority of eligible employees to vote in favor of representation. On April 15, 2008, NMB denied this request. Balloting for the election was conducted between April 23 and May 28, 2008. AFA-CWA received 5,253 votes in favor of representation from among 13,380 eligible voters (39 percent).

On June 6, 2008, AFA-CWA filed a motion for a determination of interference by Delta management with the NMB, based on the arguments outlined below. On June 20, 2008, Delta Airlines filed a response to AFA-CWA's motion, countering the union's claims. The case is still pending, and NMB has yet to issue a determination on the interference allegations. At this stage of the process, NMB is not being asked to make a final determination on whether there was unlawful interference. NMB must first issue a decision whether or not to conduct an investigation to establish a record of what actually occurred. NMB rules require that the request for an investigation must make a prima facie case of interference provide sufficient evidence with supported documentation. If the Board decides to conduct an investigation, on the basis of the factual record, NMB then determines whether there is unlawful interference.

In its motion, AFA-CWA asserted that Delta interfered with its employees' designation of a representative in violation of the Railway Labor Act by: conducting a "pervasive and comprehensive anti-AFA communications campaign that was intended to overwhelm the flight attendants' ability to choose a representative freely"; harassing, interrogating, and placing employees who supported the campaign under surveillance; and conferring benefits on flight attendants during the election. AFA also questioned a three percent pay increase Delta announced for all employees, including flight attendants, during the balloting period on May 2, 2008.

Delta, in its response, filed sworn affidavits denying these allegations and cited that a carrier has a constitutional right to communicate with its employees about its views on representation; that AFA does not have sufficient evidence to show interference or coercion by Delta; and that no AFA supporters were subjected to discipline or one-on-one interrogation by Delta. In its response, Delta also asserted that it has repeatedly voiced its commitment to free choice and that it gave AFA-CWA access to crew lounges throughout the election period.

The motion filed by AFA-CWA for a determination of interference addresses issues regarding the NMB's process and the degree of discretion NMB may exercise in applying its rules on representation elections. The first set of issues relates to the development of the list of employees eligible to vote in the election. NMB ruled to allow Delta to include flight attendants who have been furloughed for less than five years to remain on the eligibility list. This is consistent with NMB's past rulings and its guidance under Section 9.204 of the Representation Manual, which states that furloughed employees are eligible to vote if they retain an employee-employer relationship and have a reasonable expectation of returning to work. AFA-CWA challenged the NMB's decision to allow these 931 furloughed flight attendants to remain on the list, because Delta hired new flight attendants at other locations while retaining flight attendants on furlough elsewhere.

NMB also permitted flight attendants who were current Delta employees at the time of the election, but elected to leave the company and retain some benefits, by participating in an "early out" program to remain on the eligibility list. There were 821 flight attendants who chose this

option, but were allowed to remain on the list as current Delta employees even though they would be leaving employment with the company in the very near future. Finally, the day before the election, Delta informed the NMB that a flight attendant on the list was deceased, and notified the NMB. The Board ruled that since the request was received less then the seven calendar days required for removing a name and without required documentation, the individual would remain on the list.

The NMB also changed the date of the end of the election. On March 24, 2008, the NMB issued a notice establishing that an election among Delta flight attendants would take place and that the voting period would run from April 23 to June 3, 2008. Approximately one week later, on April 3, 2008, the NMB announced that the voting period would end and the ballot count would be completed on May 28, 2008. According to the NMB, typical air carrier elections last for three to five weeks. The length of the Delta election was five weeks.

WITNESSES

The Honorable Read C. Van de Water
Chairman
National Mediation Board

Accompanied by:
The Honorable Elizabeth Dougherty
Member of the Board
National Mediation Board

The Honorable Harry R. Hoglander
Member of the Board
National Mediation Board

Ms. Patricia A. Friend
International President
Association of Flight Attendants-CWA, AFL-CIO

HEARING ON NATIONAL MEDIATION BOARD OVERSIGHT OF ELECTIONS FOR UNION REPRESENTATION

Wednesday, September 24, 2008,

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The Committee met, pursuant to call, at 2:18 p.m., in Room 2167, Rayburn House Office Building, the Honorable James L. Oberstar [Chairman of the Committee] presiding.

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will come to order. Apologies for the delays because of the votes.

We are here to evaluate the rules and procedures of the National Mediation Board on its oversight of elections for union representation.

There are a number of important issues we are going to take into consideration today, and all of them have significant implications for the rights of aviation workers to bargain collectively.

The National Mediation Board is this year as old as I am. I will let you all figure out how old that is.

[Laughter.]

Mr. OBERSTAR. It was established as an independent agency to oversee labor and management relations in the aftermath of the Wagner Act and the Railway Labor Act of 1926. Its role is to govern the statutes covering workers and mediation and arbitration of collective bargaining and other issues of that nature in the rail and, later, the aviation sectors.

That very clear purpose is established in the Act, to forbid any limitation on freedom of association among employees or any denial as condition of employment or otherwise of the right of employees to join a labor organization and to maintain labor-management relations to avoid interruption to commerce or the operation of a carrier.

Over time, there has been a body of regulation established to implement the law, and the NMB has set a high bar for workers to win the representation of a union.

In a Mediation Board election, a majority of workers in a given craft or class who are eligible to vote in an election must participate in that election.

Every employee eligible to vote starts off the election as a presumed vote against representation. Those who do not vote are counted as votes against the union. If a majority of all eligible vot-

ers do not vote, employees do not vote, it is not possible for a union to win the election.

That is a very different standard than we have for public elections. Even if all those voted, if you had 100 percent of those voting choose representation but they are not a majority of all the eligible employees, then they lose.

Now that process differs from the rules applicable to workers governed by the National Labor Relations Act, where a simple majority of votes cast, like general elections that Mr. Petri and I and other Members of this Committee have to go through, establishes the outcome of the election.

That is a very high bar for a union to organize workers in the context of the Railway Labor Act. Given that high bar, we have to be very vigilant to ensure that elections are conducted with a clear set of rules to ensure that workers are not turned against a union by misrepresentation or coercive practices by management, that the rules are uniformly applied and that they are fairly and effectively enforced.

The testimony we will hear today from the Association of Flight Attendants and Pat Friend, who is their President, will set forth a number of issues in the recent campaign of AFA to organize flight attendants at Delta Airlines, and those issues raise a number of questions about existing NMB rules that govern representation elections.

These include decisions by the NMB to allow over 1,700 furloughed flight attendants, as well as those who intend to retire shortly after the election, to remain eligible to vote in the election. NMB standard is that any worker with an existing "employee-employer relationship" at the time the union files for representation election is eligible to vote.

Now I just have a question about how strongly those workers, especially those who are taking themselves out of the active work site, are motivated to vote on issues that affect worker-company relationships. If they remain eligible but do not vote, their failure to vote counts as a vote against the union. The deck is, in a certain way, stacked against organization.

As I went through the files in preparation for this, I found that a determination of the NMB that a deceased flight attendant should not be removed from the eligibility list because the request to remove that person was not made in a timely fashion. I thought that only happened in Chicago or New Jersey where the dead could vote.

I will probably hear from all my friends in Chicago about this. Too bad Mr. Lipinski isn't here.

[Laughter.]

Mr. OBERSTAR. Well, because deceased flight attendant, Janette Wood, was not removed from the list, she voted no in that election. It defies logic.

There are other actions by the Board that raise questions about whether there is any requirement that the NMB adhere strictly to its rules.

AFA, last year, filed for a representation election at Compass Airlines, a subsidiary of well-known local airline in Minnesota, Northwest. The Board pushed back the cutoff date for the election

by three months, citing extraordinary circumstances. You can't just shift the rules around for when an election occurs.

The circumstances the Board cited were that Compass planned to increase their hiring over the next several years. So the delay in the election allowed additional flight attendants, soon to be hired, to be added to the eligibility list because of the employer-employee relationship.

Last month, the Board attempted to revise its rules in a way that may have made it harder for workers to retain their union membership in the event of a merger.

Well, that further highlights the ability of the Board to alter the playing field in these representation elections through these seemingly small, but in reality very important, procedural changes. Subsequent to raising this issue by the union and others, the Board decided to drop that proposal.

The testimony we are going to hear today raises questions about the attitude among the leadership of Delta against unionization and the implications for flight attendants at Northwest who are currently represented by AFA and their status, should they become, God forbid, employees of a new Delta if approved by—I hope it doesn't happen—the Department of Justice.

Now I am not saying anything I haven't said before. I am opposed to that merger. I think it is a terrible thing. It would be the worst thing that has happened since deregulation. But that is a separate matter not subject to this hearing.

So it is appropriate for the Committee to undertake careful scrutiny of election tactics as they are managed by the NMB and to assure that there is fairness, equity and consistency.

Mr. Petri had to leave for another event. Does Mr. Coble wish to be recognized at this time?

Mr. COBLE. Very briefly, Mr. Chairman.

I would just like unanimous consent to have Mr. Petri's statement entered into the record.

Mr. OBERSTAR. By unanimous consent, it will be included.

Mr. Nadler? No questions.

Mr. Bishop? Mr. Michaud?

Do any Members wish to be recognized at this point?

Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair, and I am very thankful to you for holding this hearing in regard to this issue.

I travel twice a week—most of the Members do—and I am very concerned about some of the issues that flight attendants have brought to my attention as I am flying back from the East Coast to the West Coast and sometimes into Texas and other areas.

To me, it has always been an opportunity to be able to ask important questions about how they feel, whether it is their job, their representation, their hours because I come from the working class, and I want to ensure that whoever is out there protecting us in the air or helping protect us are well taken care of.

And I am finding, of course, that there was a great bit of concern by some of the individuals that I spoke to in regard to this merger and how it was going to affect many of their colleagues, maybe not necessarily them.

This National Mediation Board, you have to be careful. I don't know whether you travel a lot or whether you get a chance to talk to these individuals, but my suggestion is please do. You will get an earful.

They get harassed. Whether intentionally or not intentionally, I am not quite sure because I am not there, but this intimidation has to stop. We don't take it from a lot of other folks in many of our areas. We certainly shouldn't take it from their bosses.

Management should be helpful because that will make employees happier. They will be able to get better work results out of them.

I have been and I am a small business owner, and I hear all this, well, it is going to affect some business.

On the contrary, it helps create better working relations and, by the same token, they treat us better in the air. Maybe you would call it self-serving, if you will.

But I certainly thank the witnesses, and I look forward to the testimony.

And, I thank you, Mr. Chair. I yield back.

Mr. OBERSTAR. I thank the gentlewoman.

Ms. Richardson?

Ms. RICHARDSON. Nothing at this time, thank you, Mr. Chairman.

Mr. OBERSTAR. We will begin with the Chair of the National Mediation Board, Read Van de Water, who has had an extensive distinguished career at the Department of Transportation and now at the Board and then previously with Northwest Airlines.

Welcome to the hearing. Thank you very much for being here.

Ms. Dougherty, thank you very much for participating.

TESTIMONY OF THE HONORABLE READ C. VAN DE WATER, CHAIRMAN, NATIONAL MEDIATION BOARD, ACCOMPANIED BY THE HONORABLE ELIZABETH DOUGHERTY, MEMBER OF THE BOARD, NATIONAL MEDIATION BOARD; THE HONORABLE HARRY R. HOGLANDER, MEMBER OF THE BOARD, NATIONAL MEDIATION BOARD; AND PATRICIA A. FRIEND, INTERNATIONAL PRESIDENT, ASSOCIATION OF FLIGHT ATTENDANTS-CWA, AFL-CIO

Ms. VAN DE WATER. Thank you, Mr. Oberstar and Members of the Committee.

On behalf of the National Mediation Board, I am pleased to offer a brief oral statement today and ask your permission, Mr. Oberstar, to submit a written statement for the record.

Mr. OBERSTAR. Without objection, so ordered.

Ms. VAN DE WATER. Thank you.

I am joined today by my two colleagues, Harry Hoglander and Liz Dougherty. Mr. Hoglander has been with the NMB since August of 2002 and has twice served a one-year term as Chairman. Ms. Dougherty joined the NMB in December of 2006 and served immediately as the Agency's Chairman for six months.

As is probably apparent, the chairmanship of the NMB is a rotating position among the three members. I became Chairman this past July 1st, replacing Mr. Hoglander, and Ms. Dougherty is slated to resume the chairmanship on July 1st, 2009.

The National Media Board is a neutral Agency with a variety of statutory duties. Although a very small Agency, we have an exceptionally strong and talented professional staff from a variety of labor and management backgrounds.

Although we view our mediation, arbitration and other duties arising from the Railway Labor Act as very important, we will focus the testimony today on the issue of representation, reflecting the direction we have received from the Committee.

The Railway Labor Act was originally passed in 1926 and covered railroads. Amendments in 1934 created the National Mediation Board and gave the Board jurisdiction over representation issues. Airlines were added in 1936.

The Act has been amended only a few times since then. In the mid-1990s, an extensive review of the RLA by a joint labor-management committee called the Dunlop Commission, conducted at the request of the Secretaries of Labor and Transportation in the Clinton Administration, ultimately recommended that no statutory changes be made to the Railway Labor Act.

As you probably know, both the railroad and airline industries are highly unionized, 84 percent for rail and over 60 percent for airlines, well above the national average of under 8 percent for other private industries that operate under the NLRA.

One of the Agency's key functions is resolving representation disputes. This is a brief description of what occurs in such a situation:

An application is filed with the NMB alleging the existence of a representation dispute among a craft or class on a particular carrier. The application must be accompanied by a showing of interest. The showing of interest is 35 percent if employees are not represented or 50 percent plus 1 if they are represented by another union.

The NMB dockets the application, assigns an investigator, notifies the carrier and asks the carrier for a list of eligible voters and signature samples.

The NMB next authorizes an election if certain conditions have been met.

Participants may file challenges and objections to the list of voters which must be supported by substantive evidence. The investigator will rule on eligibility issues.

Ballots and voting instructions are mailed out. Elections usually occur within 21 days. Voting is now conducted by telephone and internet electronic methods.

We used to conduct our voting by mail. We added telephone voting in 2002 and internet voting in 2007. In the five years that we have had telephone and internet voting, our voting participation has gone up substantially.

After the tally, the Board either certifies the Union or dismisses the application depending on the result of the election.

The National Media Board employs the laboratory conditions test to ensure a fair election environment. This protects employees' rights to choose or not choose representation by a particular union.

Either the union or the carrier may file allegations of election interference up to seven business days after an election. All allegations must be supported by substantive evidence.

The Agency preliminary investigates all such allegations. If the investigation supports a prima facie case that laboratory conditions were tainted, the Agency will launch a further onsite investigation.

Moving to merger situations, the Agency also investigates the representation consequences that result from the merger of two carriers. In doing so, the Agency first determines if a single transportation system does exist.

We use a two-part test. It examines, first, whether the two carriers are held out to the public as a single transportation system and, secondly, whether there is substantial integration of key functions.

For example, the Agency ruled in both 2006 and 2008, at the request of different unions at different times, that the merger of U.S. Airways and America West constituted a single transportation system. As a consequence of that merger, the Agency extended certifications in some cases, recognized a unique joint council at the request of two previously opposing unions that would have faced each other in an election and, finally, authorized an election just a few months ago in early 2008 regarding representation of the pilots, an election that resulted in an extraordinary 95 percent voter participation by the pilots on the merged U.S. Airways.

The NMB is committed to employee choice in representation matters. We allow voluntary recognition, and we also extend certifications without elections when a union and carrier come to an agreement and can support that agreement with majority support from their employees.

A recent example of that policy is the NetJet decisions in July, 2008, which we explained in detail in our written testimony but would be happy to take questions on.

I hope this overview gives you an opportunity to further understand the policies and procedures of the National Mediation Board. My colleagues look forward to your questions and comments.

Mr. OBERSTAR. Thank you very much for your very crisp and crisply delivered testimony.

So, Ms. Dougherty and Mr. Hoglander, you have no supplementary statements. Fine.

Ms. Friend.

Ms. FRIEND. Thank you, Chairman Oberstar, and thank you to Congressman Costello for holding this hearing this week during a very constrained congressional calendar that probably just got more crowded than it was when you scheduled the hearing.

We believe that today's hearing is historic because in our memory this is the first hearing ever to be held on the policies and practices of the National Mediation Board.

Congress enacted the NLRA and the Railway Labor Act with an intent to protect workers and to promote the national policy declared by Congress to encourage unionization and collective bargaining, but decades of undermining by corporate interests and a lack of strong enforcement of those rights and sometimes outright hostility from the National Labor Relations Board and the NMB have led to an erosion of those rights.

Representation elections, as you have noted, conducted by the NMB pursuant to the RLA are unlike any other election in the free world in that winning requires a majority of all eligible voters must

cast a ballot. But nothing in the RLA requires these voting rules that are practiced today, particularly when a comparison of the language is made with the NLRA where elections are decided by a simple majority of votes cast.

These NMB rules have made it almost impossible for workers to form a union. In addition, the NMB routinely turns a blind eye toward aggressive anti-union behavior by employers.

A recent and revealing example of this would be the NMB's practices and decisions during the two representation elections of the Delta flight attendants.

In 2001, AFA-CWA filed for a representation election at Delta with support from over 50 percent of the flight attendants. During the voting period, Delta management engaged in an intense anti-union campaign. At the end of the election period, less than 50 percent of the Delta flight attendants participated, so the union was not certified even though over 98 percent voted for AFA.

Immediately after that election, we filed interference charges against Delta management. The NMB eventually ruled that the Board was troubled by Delta's conduct during the election but that a remedy was not necessary. Board Member Harry Hoglander filed a very rare dissent in that case.

Then, in early 2008, AFA again filed for representation election at Delta, again with support from well over 50 percent of the flight attendants, and again Delta management engaged in an unprecedented campaign of voter suppression. In the end, Delta management was successful, and less than 50 percent of the individuals listed on the eligibility list participated in the election even though 99 percent voted for AFA.

Included on the list of eligible voters that was submitted by Delta were flight attendants whose employer-employee relationship was tenuous at best, as you have noted.

Then on March the 18th, shortly after we filed, Delta management announced an early-out incentive package for flight attendants. Since these individuals would be leaving employment with Delta in the immediate future, they clearly had no stake in the outcome of the representation election, yet their names were allowed to remain on the eligible voter list.

In another act which disenfranchised more Delta flight attendants, the NMB, after announcing the dates for the election and the voting period, abruptly and arbitrarily and without consultation with anyone changed the election dates, shortening the voting period by one week for an 8,000 group class working for an airline with an extensive international route structure.

But in a final insult to democracy, Delta correctly reported a deceased flight attendant on the eligibility list. The NMB was notified in less than the seven calendar days that they require for removing a name. So the NMB ruled that death is not an extraordinary circumstance, and the flight attendant remained on the eligibility list.

Incredibly, now almost five months have passed since the election and since AFA filed, again, interference charges against Delta management, and the NMB has yet to respond or, to our knowledge, conduct an exhaustive investigation of our charges of interference.

But the most recent example of overreach by this NMB was its attempt to change its representation manual in airline merger situations. Those proposed changes, coming as Delta and Northwest prepare to merge and throwing the future of the collective bargaining rights of tens of thousands of Northwest employees into doubt, were suspicious at best.

I want to offer my thanks to the many Members of Congress who weighed in with the NMB to express their opposition and outrage at the proposals. Fortunately, the NMB withdrew the proposed changes after they received overwhelmingly negative comments.

Lastly, I would like to raise the issue of the possible conflict of interest that exists with the current Chair of the NMB. Chair Van de Water is a former employee of Northwest Airlines. Her failure to recuse herself from decisions involving her former employer, Northwest Airlines, has raised serious concerns.

These actions on behalf of Delta by the NMB jeopardizes over 60 years of collective bargaining for our Northwest Airlines flight attendants. Should Delta management succeed, with assistance from the NMB, in eliminating a flight attendant union, the Northwest Airlines collective bargaining agreement will be eliminated in the most undemocratic way imaginable.

We hope that Congress will send a clear message that the NMB can no longer be a party to corporate America's efforts to usurp the stated policy and precedent of Congress to encourage unionization and collective bargaining.

In closing, Mr. Chairman, I would point you to the NMB's web site where their 2005 through 2010 strategic plan includes a mission statement that contains 3 principal statutory goals. The second goal warrants mention today. It reads: To ensure employee rights of self-organization without interference when representation disputes exist.

Two of the board members who authored this plan no longer serve on the Board, but Board Member Harry Hoglander was one of the authors.

This Board, Mr. Chairman, has ignored its adopted strategic plan, and it is time to return the practices of this Board to its stated mission.

Thank you and I will be happy to answer any questions.

Mr. OBERSTAR. Thank you very much, Ms. Friend. Of course, as with all witnesses, your entire statement will be included in the record.

Chair Van de Water, I am puzzled by this requirement for a majority of all eligible employees. I would like to go back.

The Railway Labor Act language provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employee shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

But it doesn't say anything about requiring the majority of all eligible employees to vote. How did that practice come to be?

Ms. VAN DE WATER. Mr. Oberstar, it has always been that way with the Railway Labor Act, going back over 70 years.

Mr. OBERSTAR. How did that come? It had to be by regulatory inference. There is no statutory requirement for it.

Ms. VAN DE WATER. No. It became case law and practice at the National Mediation Board, and it was examined by the Dunlop Commission, and no recommendations were discussed.

Mr. OBERSTAR. Do you remember when the first time that decision was made? Do you have any idea when?

Ms. VAN DE WATER. In 1935.

Mr. OBERSTAR. In 1935.

Ms. VAN DE WATER. Yes, sir.

Mr. OBERSTAR. It goes back that far?

Ms. VAN DE WATER. Yes, sir.

Mr. COBLE. It is almost as old as you are.

Mr. OBERSTAR. No. The Act is as old as I am, not the regulation. It is one year younger.

[Laughter.]

Ms. VAN DE WATER. Further, Mr. Oberstar, we don't have any process in place for decertification like the NLRA provides for. So, in interest of promoting harmonious and stable relationships for interstate commerce, that is the way the Act has been interpreted over time for both rail and air.

Mr. OBERSTAR. Well, how is it justifiable to include in the eligible list those who have retired and are no longer active employees of the company?

Ms. VAN DE WATER. We include people who are on furlough which is very common, as you know, in the airline industry. We don't include people who have been furloughed forever. In a recent United Machinists election we had earlier this year, we did remove people who had been furloughed for a very extended period of time.

But if you maintain an employee-employer relationship or a hope of returning and you stay on the list to be furloughed, you do have the right to vote.

Mr. OBERSTAR. Even though others have been hired in the meantime and the reality is that they are not going to be called back.

Ms. VAN DE WATER. We don't set up the details of the employer-employee relationship. If Delta, for example, in this case, had people furloughed from one particular base but hired at a different base, that would be between the carrier and their employees. That is not an NMB decision.

Mr. OBERSTAR. So this standard could vary from carrier to carrier, from case to case.

Ms. VAN DE WATER. It could, depending on the situation, how long someone has been furloughed and what their expectation might be and what has been reasonable and practiced in the industry.

Mr. OBERSTAR. There is a curious term of art in the NMB proceedings called laboratory conditions. How did that come to be and what does it mean?

Ms. VAN DE WATER. Laboratory conditions looks at the totality of the circumstances in a particular case and whether the whole situation results to be tainted.

Mr. OBERSTAR. What is meant by laboratory?

Ms. VAN DE WATER. Laboratory would be the conditions that are ideal for a free and fair election and for free employee choice.

Mr. OBERSTAR. Okay. It is a term of art apparently been in practice for many, many years.

Ms. VAN DE WATER. It is, and sometimes the Agency has ruled that the laboratory conditions have been tainted and has ordered remedial actions, and sometimes it has ruled they have not been tainted.

Mr. OBERSTAR. And there is a body of practice in NMB proceeding that makes it clear to all what laboratory conditions means?

Ms. VAN DE WATER. There are a variety of cases that go back for quite a period of time. There have been quite a few just in the time I have been at the NMB.

Mr. OBERSTAR. You say in your statement that laboratory conditions are necessary conditions to protect employees' right to choose representation without coercion. How do you make that determination?

Ms. VAN DE WATER. It depends a lot on what the employer does and what the carrier does. We do not prohibit innocent and standard communications between employers and employees. That is actually a court decision upheld in the D.C. Court of Appeals that the NMB lost on that issue.

We ask that the employer not coerce or influence the employees. They can offer them information. They can communicate with them. They can't say things like if you vote for that union, we are going to fire you or if you vote for that union, you are going to fly the worst flights for the next year or that you will lose your health care benefits.

That is the kinds of things we look for. We want business as usual to continue during the election period.

Mr. OBERSTAR. What about circumstances in which an employer has its personnel standing at the voting place?

Ms. VAN DE WATER. We don't actually have a voting place. Our voting is done by telephone and by the internet. So someone could do it at their house.

I doubt many people vote at work. It wouldn't really be set up for that in an airline.

Mr. OBERSTAR. There are information tables at the work place.

Ms. VAN DE WATER. There are information tables, yes, if the union chooses to set one up or the carrier does.

We don't dictate the rules of how unions or employers set up information in the work place. We just ask that the employees not be unduly coerced or influenced.

Mr. OBERSTAR. Is it appropriate for an employer to refuse employees to set up an information place or table on the work site to talk and provide information about the union?

Ms. VAN DE WATER. I think generally employers allow employees to set up as long as it doesn't interfere with the normal course of business.

Again, it depends on the circumstances. It is hard to say across the board. We look at the details and the facts before coming to a decision.

Mr. OBERSTAR. Are there cases in which, under your watch, the Board has found that employer or employee activities have violated the laboratory conditions test?

Ms. VAN DE WATER. Absolutely. We had one just a few months ago with Great Lakes Aviation where we had some what we consid-

ered contamination of the cards by an employee trying to overthrow their union. We chose not to accept that, and the union is still in place and negotiating with the employer.

Mr. OBERSTAR. Mr. Hoglander, in 2002, the Board ruled that it did not find interference on the part of Delta in the 2001 flight attendant election.

I reviewed your dissent in the ruling, in which you said: "In my view, Delta's actions, viewed in the totality of the circumstances, tainted laboratory conditions required for an election ... I would order a rerun election in this case."

What did you mean by the totality of circumstances?

Mr. HOGLANDER. Well, in that particular case, that is the 2002 election that was being contested, I had strong feelings.

As you may or may not know, I worked in the airline industry as an airline pilot for 28 years. I was a union official, and I had some pretty close experience with organizing drives.

It seemed to me at the time that we handled both cases, both the railroads and the airlines, and what I think requires particular attention is the fact that I think I focused if that is the paragraph. I don't recall exactly what my words are, but I think I was focusing on supervisory interference, people standing around and trying to influence the vote.

I found there are two parts to that test in my mind. Things are different on the airline business where, say, an isolated incident that would occur in a shop—we will say in Nashville—where there is perhaps some tainting of the situation. It isn't the same as when we are dealing with operating crew members.

Operating crew members, in my experience as a pilot, when you are in Delta's largest domicile, in Atlanta, where literally hundreds of people come through the crew lounge area within an hour or two. If there is an incident that is witnessed there within an hour or two, these flight attendants, pilots and others who see this are on their way to New York, Salt Lake, Cincinnati, and it isn't an isolated instance any longer.

It is not like that shop in Nashville where what happens in Nashville seems to stay in Nashville. Also, I think I found fault with that.

I also, having 28 years of bouncing around crew lounges, it was rather stunning to me to see that there would be 6 or 7 supervisors around to observe. I never saw many supervisors in my years there. I mean they came through now and then, but generally there wasn't that.

In that particular portion that I felt had influenced those conditions, those were the circumstances that I used as a guide.

Mr. OBERSTAR. That is helpful. Thank you very much.

Ms. Friend, what was the situation that allowed a deceased flight attendant to be counted as eligible and a voter, as an employee?

The Board apparently said you didn't file a question about her death to remove the person from the list in time?

Ms. FRIEND. Right.

Mr. OBERSTAR. Has that happened before?

Ms. FRIEND. Not to my knowledge with a deceased employee, but the Board does have a rule that except in what they call extraordinary circumstances, within the last seven days of the closing of

the count date, they won't take anyone off the list who is identified as being perhaps not properly on it.

In this situation, it was actually the management of Delta that identified within that last seven-day period that, in fact, there was a flight attendant on the eligibility list who is deceased.

The Board ruled, and they said that they would not remove the deceased flight attendant because it didn't qualify in their opinion as an extraordinary circumstance. So that individual was counted in the total eligible and counted against the measurement of reaching the 50 percent plus 1 arbitrary threshold.

Mr. OBERSTAR. That one probably didn't make a difference.

Ms. FRIEND. In this instance, no, it didn't. It did not make a difference. It is merely an example of, I think, arbitrary nature of decisions that are made, that are not made in favor of assisting the workers to form a union but rather are made in favor of preventing them from reaching the arbitrary 50 percent plus 1 threshold.

Mr. OBERSTAR. Thank you. I will have other questions later.

Mr. KUHL. I will yield to Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. Thank you for calling the hearing.

Good to have you all with us.

Chairman Van de Water, let me put this question to you. I think you responded to Chairman Oberstar's question. The NMB's election rules were not developed by the current Board members, is that correct?

Ms. VAN DE WATER. No, sir. I am not quite as old as Mr. Oberstar.

Mr. COBLE. I forgot I implied that.

Have the same rules been applied without controversy in prior mergers where the work groups have been represented by different unions prior to the merger, A, and is there any reason that the rules should be applied differently where one group has been represented by a union and another group, non-union?

Ms. VAN DE WATER. No. What we have done in mergers in the past when employees have been represented on both sides of the carrier, is that the first part of your question? It depends on the size of the employee class.

If one group of employees on one carrier is quite a bit larger than the other and the smaller group can't come up with a showing of interest, which would be 35 percent, then we would generally extend the certification to the entire craft or class.

If one set of employees is represented and the other set of employees is not represented, then it would depend on the sizes of the class. If the represented employees are smaller than the unrepresented employees, we would not extend the certification to cover the entire craft or class.

If they came up with a showing of interest, we would certainly call an election. They would need a 35 percent showing of interest if the employees were not represented by the same union on each side.

But, for example, in the U.S. Airways and America West merger where ALPA was the union on both sides, if another union had come in to challenge them, they would have needed a showing of interest of 50 percent plus 1 to call an election.

So it just depends on the circumstances of the employee groups and whether they are represented by the same union on each side or different unions.

Mr. COBLE. Well, let me put a more narrowly defined question to you, Madam Chairman. Since the Northwest unions represent approximately 35 percent of the employees in the merger, is there any precedent to support the Northwest unions extending their certification to the Delta employees without an election?

Ms. VAN DE WATER. No, sir, none whatsoever.

If they came up with enough of a showing of interest, we could call an election, and then they would have that opportunity to try to extend the certification if they had the support from the majority of the employees of the new combined craft or class.

Mr. COBLE. I thank you.

Thank you all for being with us.

I yield back, Mr. Chairman.

Mr. OBERSTAR. Thank you, Mr. Coble.

Mr. Nadler.

Mr. NADLER. Thank you, Chairman.

Madam Chairman, you said the policy of requiring a majority of everyone to certify a union was longstanding. Do you think it works out fairly?

Can you think of any other election where that is the case?

Ms. VAN DE WATER. I think it does work out fairly if you look at the numbers of represented employees. Again, employees that are represented under the National Labor Relations Act are represented at about 8 percent nationwide. Employees, airline employees under the RLA are represented at 60 percent.

Mr. NADLER. But what do you say about an election in which 98 percent of those who vote, vote one way, and the election is called the other way? That is not what we normally would think of as a fair count.

Ms. VAN DE WATER. Well, that may be the case when fewer than half of the employees vote.

Mr. NADLER. Well, which is the case in most of our congressional elections and most elections in this Country with the exception of the presidency.

Ms. VAN DE WATER. We also have ways that we count votes that actually substantially aid the unions, sir. For example, if we have an election with two unions on the ballot and one union gets 25 percent of the votes and one union gets 20 percent of the votes, we still certify the 25 percent union because we count for all votes for representation as a vote for the winner. That is also different than most elections.

Mr. NADLER. That may be, but I still see as fundamentally unfair that one side gets the burden of everybody who didn't vote because you never get 100 percent turnout. If you mandated 100 percent turnout and marched people to the polls with a fine or something else, then it would say 50 percent or more, but otherwise I can't think of any democratic theory that would justify that kind of system.

Ms. VAN DE WATER. That may be, but it does work under our system. Generally, that is not a problem. For instance, the U.S. Airways pilots, they had 95 participation.

Mr. NADLER. Ms. Friend, do you think it is a problem?

Ms. FRIEND. I do think it is a problem.

In the instance that, with all due respect to the Chair, the instance that she is talking about, there are two unions on the ballot. So you have two organizations that are trying to generate votes, and you don't have a management that is campaigning and that is running a voter suppression campaign, saying, don't vote, since they know that we have this threshold to meet.

I think the fact that we have a higher percentage in the airline industry of unionization than exists in the private sector under the NLRA has nothing to do with the election process under the RLA. I think it has to do with tradition, quite frankly.

Mr. NADLER. Let me ask the Chairman again. Aside from hoary, antiquity and tradition, can you think of any reason to justify this rather unusual, as far as I know, unique system?

Ms. VAN DE WATER. Yes, sir. We are dealing with essential transportation systems that are treated uniquely under the RLA. One of the purposes of the RLA is to prevent disruptions of interstate commerce, and where a union does not represent, truly represent a majority of support that is difficult to do.

Mr. NADLER. But you would normally measure a majority as the majority of those who show up to vote. I have never heard of an election system like this.

So my question is can you think of any reason why you think this is a superior way to measure a majority as opposed to every other election in the world except in the Soviet Union?

Ms. VAN DE WATER. It seems to work well for representation under the RLA, sir. We are so highly represented.

Mr. NADLER. Excuse me. That is a judgment call. I am asking you as a matter of democratic theory.

Whether it works well or not is a complete judgment call. You say yes, she says no, and there is no basis to decide between that.

Why would it be disadvantageous to go to a more normal system?

Ms. VAN DE WATER. Well, we are a little bit different than the NLRA in the sense that we have no decertification.

Mr. NADLER. I am not talking about the NLRA.

Ms. VAN DE WATER. But that is how the NLRA does it.

Mr. NADLER. Yes, but it is also how everybody else in the world does it. That is why I said why.

Give me a reason why it is disadvantageous to go to a normal—I say normal in the sense of every other election I am aware of—system.

Ms. VAN DE WATER. All I can say to you, sir, is in my almost five years at the NMB it has generally worked very well. People who have looked at it, including labor and management, have recommended not to change it.

Mr. NADLER. Mr. Hoglander, could you comment on the same question?

Mr. HOGLANDER. Well, not being a professorial student of the RLA, but it seemed to me that when this Act was first passed the prime focus of the individuals, both the union and management, who were the authors of it was preventing the disruption of an essential piece of industry in this Country. That was in 1926 where there was certainly a whole different aspect of what constituted the

transportation system, and particularly the airlines weren't included for another 8 years anyway.

It is also my observation that for many, many decades the organization process was one that was left to the unions, and indeed where it says that they shall not interfere, referring to the management, they didn't interfere. It seemed to me from what I have read until at least in the forties or early fifties, that was the case where a union was an organization which was run that way and management or the carrier in that case didn't interfere to a great deal.

There were several cases that I think brought about by First Amendment rights, that management and the carriers then interceded in their obvious thoughts on whether their employees should be organized or not.

Having said all of that, I think that things might have changed since then.

We had a hearing in 1985 on a petition from the Brotherhood of Teamsters to address this yes/no vote, it is called colloquially, to address that sort of situation. The Board then in 1987, I think it was, rendered a decision that they weren't going to change that.

My own view is that an examination of this probably. Since both the airline industry and the rail industry have changed dramatically since that time, my feeling might be that we should at least consider, upon petition, a public hearing on such a matter to make a judgment in the future.

Mr. NADLER. Thank you. I have only one more question of the Chair.

You say in your testimony that under longstanding Board policy, the Board will extend an organization's certification to cover unrepresented employees in the merged craft or class only when the numbers of represented and unrepresented are not comparable.

Last month, the Board issued a proposal to extend the union's certification only where the union's membership is "more than a substantial majority" of the merged group.

What was the rationale for this change in policy and what is the significant of it and under the proposed policy how would you define a substantial majority?

Ms. VAN DE WATER. Well, it is no longer a proposed policy, sir. We did withdraw it. We thought it was clearer to say substantial majority than not comparable, but clearly no one agreed with us. So, since our proposals engendered more confusion than clarity, we did withdraw them.

Mr. NADLER. Okay. Thank you. I yield back.

Mr. OBERSTAR. I thank the gentleman.

Mr. Platts.

Mr. PLATTS. Mr. Chairman, no questions.

Mr. OBERSTAR. Mr. Kuhl.

Mr. KUHL. Chairman Van de Water, my colleague has raised a couple of issues, and maybe it is only in New York we are not accustomed to these types of elections, but I would like to follow up just a little bit.

You said this has basically, if I heard you correctly, been a standard policy of requiring all eligible people to be notified of a vote and in fact requiring 50 percent plus 1 to have a successful vote for organization. Is that correct?

Ms. VAN DE WATER. That is correct.

Mr. KUHL. Also, I think I heard you talking about reviewing contact between employers and employees and what was allowable and what wasn't as far as content. Is there any requirement as to how many or limit as to how many times an employer can contact an employee relative to an upcoming election?

Ms. VAN DE WATER. I think it is not a quantity issue as much as it is a quality issue. We would look at the content of the communications. Were they one-on-one, closed door meetings that could be used to influence or intimidate somebody or were they standard employer communications like a newsletter that goes out once a month, for example?

We don't have a hard set of facts that say, you have to do A, B, C and D and you can't do this. We have to look at the totality of the circumstances and the facts of each case.

Mr. KUHL. How much advance notice of an election are the ballots sent out?

Ms. VAN DE WATER. We generally send them out 21 days before a tally. For a larger group or class or extraordinary circumstances, we might do a little bit longer voting period.

Mr. KUHL. What would be a normally acceptable contact number between employer and employee? Once? Twice? Ten times?

Ms. VAN DE WATER. I can't give you a number, sir, because it depends on what would the normal course of business would have been there. Employers have contact with their employees depending on their industry, on and off, I would suppose, all the time. It would depend on what kind of contacts or how unusual were they or how coercive were they.

Mr. KUHL. Now is a part of this contact process, upcoming elections, are there lists provided of the employee, of the eligible employees to the union?

Ms. VAN DE WATER. We have a list, a list of voters. We get a list from the carrier of the employees that they have in the proper craft or class, for example, the pilots or the mechanics or the flight attendants or whatever the craft and class would be.

Then the union takes a look at that. The carrier and the union exchange what we call challenges and objections.

One person might say, hey, this is really a management person. They shouldn't be allowed to vote. I want to strike that person.

Or, this person has moved on to another carrier. They are not here anymore.

Or, this person might have started off as a mechanic but now works in a different craft or class. So they shouldn't be allowed to vote in that election.

So our in-house investigators will rule on eligibility determinations.

Mr. KUHL. Okay. Now do both sides have the list?

Ms. VAN DE WATER. Oh, yes, sir.

Mr. KUHL. With addresses so that they can communicate, the union can communicate with workers who are not members of the union like in this particular merger where you had a union and a non-union shop?

Ms. VAN DE WATER. We do not give address lists. We just give lists of voters.

Mr. KUHL. You give lists with names. You give them virtually no contact availability then. So if a union wanted to say, these are the benefits of the merger that would be provided to you, should you vote for an organization, they could not ever get that information to the individuals.

Ms. VAN DE WATER. We don't provide home addresses to them. They have other ways of contacting the employees and seem to have a pretty good on the ground system of contacting the employees.

Mr. KUHL. What might they be? I am not familiar with those. I am just curious as to what they might be.

Ms. VAN DE WATER. Email; personal communications; I, myself, look at some of the blogs that get put up online during an election and see what people are saying about it.

Mr. KUHL. Okay. Well, in my district, not everybody has a computer. So I don't know how effective a blog would be. Maybe that is just New York. I am sure in Mr. Nadler's district, they all have computers, but mine is a little different.

[Laughter.]

Mr. KUHL. I am just trying to understand the fairness and the equality issues of people who might want to join and getting the information that they would otherwise not be provided, and I am just curious as to why isn't that information given out.

I mean I understand enough about, I think, employer-employee relationships that an employer who is opposing unionization or organization is not going to allow union members to go about their employees at work and conduct sessions individually with them as to what the benefits would be of voting yes.

Ms. VAN DE WATER. Actually, I think in employee lounges, particularly for airlines, there is quite a bit of that kind of communication. I know in some of the recent cases the unions have set up tables with information. They can wear usually your union pin if they want to and can discuss it freely with other flight attendants or pilots or whatever the group might be.

Mr. KUHL. But that is the only access that you are aware of that they have?

Ms. VAN DE WATER. I don't know what other access they have.

Mr. KUHL. Okay. Also, relative to the actual election process itself, I still don't think I have heard the answer. Why was it 50 percent of eligible voters plus one? Why was that determination?

Ms. VAN DE WATER. The Act calls for a majority of the craft or class voting in favor of the union or supporting the union, and a majority, of course, is 50 percent plus 1.

Mr. KUHL. So that is what it says. I am, again, from New York. I am not aware of any other election that is held that way.

Do you think that is fair?

Ms. VAN DE WATER. I think it has resulted in an extremely high level of unionization among the railroad and airline industries, significantly higher than the rest of the private sector.

Mr. KUHL. I appreciate your observation. The question is whether you think it is fair.

Ms. VAN DE WATER. I think it has worked very well.

Mr. KUHL. In other words, you are not going to answer that question.

Ms. VAN DE WATER. I think it is fair.

Mr. KUHL. Ms. Friend, let me ask you the question. Do you think it is fair?

I will start there and work back.

Ms. FRIEND. Well, no, of course I don't think it is fair.

On the question of addresses, we refer to it—another one of those terms of art—as an excelsior list.

Up until 1977, the union did get an address list. Then there was a dispute on American Airlines, as I understand it, and American persuaded the Board at that time to change the policy. And so, since 1977, we do not get the address lists, but we used to.

Mr. KUHL. I assume that you would prefer to get the lists?

Ms. FRIEND. Absolutely. I mean it is a painstaking, very, very inexact effort to collect mailing addresses to attempt to communicate. It is even more difficult, of course, since the tragic events of 2001.

I always tell people if you want to organize flight attendants, first you have to find them, and they are behind security. If you don't have access behind security and even our flight attendant organizers who can get behind security can't get into the actual crew lounges.

Our experience in Atlanta, attempting to stand in the concourse, uniformed other airline flight attendants to talk to the Delta flight attendants, Delta management called the airport police to have them removed. So it really is a battle.

Meantime, Delta management mails to every flight attendant's home a DVD with the CEO explaining to them how if they vote for the union it is going to destroy years and years of this family culture that has been developed at Delta, and they will no longer have an open door policy with their supervisor, and the world as they know it will come to an end.

That gets mailed to every flight attendant, every Delta flight attendant. We don't have the same access.

Mr. KUHL. So you feel disadvantaged from that standpoint.

Ms. FRIEND. Extremely disadvantaged.

Mr. KUHL. I understand in today's world there certainly is a feeling of confidentiality, and some people obviously wouldn't want their home addresses. I assume that you wouldn't have any problem if a list were run by the employees and it said, if you don't want to be contacted by a union, check here, and then being excluded from that list.

Ms. FRIEND. Exactly right. I mean there are any number of ways.

We protect our list as well. If there is an organization that we believe has valuable information for some of our members, then we have them send that information to our mail house, and our mail house does the mailing for them. They can do that.

Every airline that I am aware of, what we refer to as the crew room or the report to work area has a company-provided mail file for company mail. We would be happy to have access to that for union literature.

Within AFA, we don't do house calls. We don't go knocking on people's doors because the second problem with finding flight attendants to organize is they don't live where they work. They commute from all over the world, literally.

We are not looking for their home addresses so that we can go and bang on their front door. We just want to be able to communicate with them.

Mr. KUHL. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. We will have another round of questions, but I appreciate the gentleman's line of questioning. It is logical to continue.

Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman. I thank you for holding this hearing, and I thank the witnesses for their testimony.

I want to stay on this issue of the ability of organizers to communicate with the workforce that they hope to organize.

My understanding is that in industries covered by the NLRA, that this so-called excelsior list is routinely provided to union organizers. Is that your understanding as well, Madam Chair?

Ms. VAN DE WATER. I am not that familiar with the NLRA, sir.

Mr. BISHOP. It is the case that in the NLRA those industries routinely provide home address of all employees.

My question is this: Since the threshold that the NMB has for organization is so high, 50 percent plus 1 of all those eligible to vote as opposed to those actually voting, which is the NLRA threshold, wouldn't it be just a gesture of fairness to help the organizers have at least some means of communicating with the potential workforce by giving them the home addresses?

Anyone, please.

Ms. DOUGHERTY. As Ms. Friend noted, we did used to give the list of addresses to the labor organizations, and there was a case in 1977 where the labor organization involved sold the list to another labor organization. After that time period, the Board determined that the privacy interests of the employees involved weighed in favor of not providing the address list to the labor organizations.

There have been cases where labor organizations have requested address lists because of extraordinary circumstances making it very difficult to communicate with the flight attendants, for example, very, very large groups on furlough. And, in those cases, where it is warranted the Board has provided address lists, and that is certainly still an available avenue for a labor organization to pursue, to request an address list in a case where there are excessive communications challenges.

But barring those, the Board has for over 30 years determined that the privacy rights of the employees weigh in favor of not providing the address lists.

Mr. BISHOP. I understand that decision. It just seems to me that there is a concerted effort, and I understand what you are going to say, Madam Chair, which is that the high proportion of the industry is organized. But there appears to be a concerted effort here to thwart efforts to organize.

The 50 percent plus 1 just strikes me as impossible to justify. I mean if we conducted elections in this Congress that way, if we conducted elections in this Country that way, there would be outrage across the Country.

We are now compounding it by saying to management, of course, you have the names and address of those who work for you and oh, by the way, communicate with them.

But we say to the potential organizers, sorry, we can't provide you equal footing in terms of reaching your workforce.

It seems to me in this industry where the workforce is very spread out all over the Country and, in some cases, all over the world at least for part of the time. I mean they are not reporting to a central plant every morning where the union could set up a table and get information to workers.

It just seems to me to be just so profoundly unfair. I understand that you had a circumstance in which a union abused a right that they were given, but that is forming policy by exception as opposed to policy by the rule.

This just strikes me, as I say, as so profoundly unfair, and I would welcome your comment.

Ms. VAN DE WATER. But the majority of elections, sir, do result in certification, and I could get you a chart. We do have one, and we could submit it for the record if you like, that shows every year the number of elections we had and the percentages that result in certification. It is generally a majority every year.

Ms. DOUGHERTY. And I would just like to add, if I could, an observation about the requirement that a majority of eligible voters vote.

That may be an unusual voting process, but the Railway Labor Act is an unusual statute. If you will just bear with me, there are a couple things that I would like to point out about the Railway Labor Act, one of which has been already noted.

The primary, the first listed purpose of the Railway Labor Act is to avoid any interruption to commerce or to the operation of any carrier engaged therein.

The Board has for over 70 years determined, and it stated specifically in 1950 and then again in 1987, that that duty is better carried out by having this method of election. There are a couple of reasons for that.

One is that, as you know, labor organizations, when they negotiate a collective bargaining agreement, are required to take a tentative agreement back to membership to be voted on.

The Board stated in 1950 and again reiterated in 1987 a labor organization that truly enjoys the true majority support of all the membership is going to have an easier time having that tentative agreement ratified. The consequences of having an agreement fail ratification could be more of concern under the Railway Labor Act.

And, another point that my colleague has raised before also is that the Railway Labor Act does not provide for a decertification process which is provided under the National Labor Relations Act.

Mr. BISHOP. Thank you.

My time has expired, Mr. Chairman.

Mr. OBERSTAR. I thank the gentleman.

Ms. Fallin, we have three votes. I think we can get through another 10 minutes of questioning. Ms. Fallin.

Ms. FALLIN. Thank you, Mr. Chairman. I just have a couple of quick questions.

Were the proposed clarifications to the NMB's representation manual, specifically proposed in the Section 19.701, designed to change the NMB's practices or was it to be consistent with how the NMB has historically addressed the representation issues arising out of mergers in the airline industry?

Ms. VAN DE WATER. It was meant to be consistent and further clarify our existing policies. It was not meant to change our policies.

Ms. FALLIN. It wasn't meant to change your policy, okay.

So was Section 19.701 preventing a union from representing the post-merger work group or does it simply follow the past practices and the historical ways that things have been done?

Ms. VAN DE WATER. It was not intended to prevent representation of employees, and it was intended to reflect our past practice.

Ms. FALLIN. So would that section be consistent with the Railway Labor Act requirement that a majority of the employees in a craft or class have the right to determine if they want to be represented?

Ms. VAN DE WATER. That is my interpretation, yes, ma'am.

Ms. FALLIN. Okay. Were the NMB's election rules developed by the current Board members recently or have you had them for a long time and you have been just been following historical practices?

Ms. VAN DE WATER. We have had merger guidelines for over 30 years, and we put out clarifications to our representation manual periodically. We put out a clarification in 2007 about internet voting. We put out some merger clarifications in 2005, and there have been other cases in the past 30 years where we have had clarifications.

Ms. FALLIN. Do you believe the rules are clear?

Ms. VAN DE WATER. I thought they were.

Ms. FALLIN. All right. So is it clear then, do you believe it is clear to the attendants that in voting a non-vote is a no vote?

Ms. VAN DE WATER. Oh, I think that is very clear.

Ms. FALLIN. Okay.

Ms. VAN DE WATER. And we spell it out in the voting instructions that are sent.

Ms. FALLIN. Okay. Is it clear that the RLA says that a majority must want representation to be represented?

Ms. VAN DE WATER. Yes, ma'am.

Ms. FALLIN. And that majority would be 50 plus 1?

Ms. VAN DE WATER. Yes, ma'am.

Ms. FALLIN. You had, how much was the percentage?

Ms. VAN DE WATER. For which election?

Ms. FALLIN. For the one that we are talking about right now, it was 39 percent?

Ms. VAN DE WATER. Yes, ma'am, for the Delta AFA election.

Ms. FALLIN. So not 50.1?

Ms. VAN DE WATER. No, it was not 50.1

Ms. FALLIN. Okay. All right. Thank you, Mr. Chairman.

Mr. OBERSTAR. We will take one more Member, and that will be Mrs. Napolitano. Then we will recess for the series of three votes and resume within ten minutes after the last vote.

Mrs. NAPOLITANO. Thank you, Mr. Chair. I will try to be very brief.

Mr. OBERSTAR. I am sorry, Mrs. Napolitano. I misspoke. Mr. Michaud is next in line.

Mr. MICHAUD. Thank you, Mr. Chairman.

A quick question for Madam Chairman. AFA had requested that you remove someone who had passed away from the list, and NMB said no because it did not come within the seven days prior to the election, because it wasn't an extraordinary circumstance.

If that is not an extraordinary circumstance, what do you consider is an extraordinary circumstance?

Ms. VAN DE WATER. Actually, sir, Delta asked to have the flight attendant removed, but they did not provide us with any documentation that the person had actually died. Generally, the unions don't want us to accept carrier last minute changes to the voting list without some kind of substantive evidence to back it up.

That vote was not determinative. If it had been, we would have treated it differently. If we had not counted that vote, they would have only been short 1,384 votes, not 1,385.

Mr. MICHAUD. So what is an extraordinary circumstance, though, in your opinion?

Ms. VAN DE WATER. Well, we might get last minute additions or subtractions from a list that were not anticipated by anybody and to keep those people from voting would be unfair. So that might be considered an extraordinarily circumstance.

Generally, our rulings are designed to help employee choice as much as possible.

Mr. MICHAUD. Speaking about fairness, we heard a lot about the unions not being able to get the addresses, names and addresses. However, the employers can mail to the employees with whatever propaganda they want to mail. Don't you think it would be fair? Could you restrict the employers from mailing as well?

Ms. VAN DE WATER. I don't think we have the ability to restrict employers from communicating with their employees. But the unions do have the names, sir, just not the home addresses.

Mr. MICHAUD. If you did have the ability, as it relates to unionizing, to restrict employers from mailing propaganda as it relates to whether they form a union or not, would you support that?

Ms. VAN DE WATER. I would have to consider it with the Board. We would take it under advisement and ask for public comment on it like we do with any changes.

Mr. MICHAUD. Okay. Why did you keep changing the date when you look at, actually, the Delta voting? It is my understanding that you set a date, and then after AFA had sent out the notification you changed the date.

Ms. VAN DE WATER. We shortened the date by one week. So it was still five weeks. That is two weeks longer than our usual three-week voting period. We thought that was all the time we needed to address the challenges and objections which is generally why we have a long voting period, because we get so many challenges and objections.

Mr. MICHAUD. Why did you send that out after AFA sent a notification of what the dates were? If that is not interference, I don't know what is. So why was it after they sent out the notification?

Ms. VAN DE WATER. It wasn't intended to be after. I don't believe I even knew they had sent anything out.

We sent something around to be posted, and our voting instructions had not gone out. The voting instructions clearly articulated the date to all the employees getting them.

Mr. MICHAUD. We heard earlier about the situation dealing with yourself, where you did not recuse yourself from decision-making. Do you feel that you should recuse yourself from any decisions involving Delta, Northwest or Compass because of your relationship?

Ms. VAN DE WATER. Absolutely not. I was hired by Northwest Airlines 17 years ago. It has been a while. I was not an officer. I was not a senior level employee.

I have since then had a long career in aviation including a term under Secretary Mineta, whom I consider to be an outstanding Secretary, and I notice his picture is right behind me there.

I have had a long career in aviation. I have never been accused of having any conflict of interest. I might note for the record that my colleagues also have some extensive experience in the aviation industry, and they have never been asked to recuse themselves on any issue involving their past employers.

Mr. MICHAUD. Is your job full-time?

Ms. VAN DE WATER. Yes, sir. All the Board serves full-time.

Mr. MICHAUD. Okay. And your office is in D.C.?

Ms. VAN DE WATER. It is on K Street, 1301 K Street.

Mr. MICHAUD. K Street.

Ms. VAN DE WATER. Yes.

Mr. MICHAUD. How many days last year have you actually worked out of your office?

Ms. VAN DE WATER. I work out of my office some days. I telecommute some days. I consider that I work five days a week.

Mr. MICHAUD. I would be interested in how many days you physically worked out of your office, if you can provide that to the Committee as well.

Ms. VAN DE WATER. I really don't have a count, sir. I come in and go and work some at a home office as well, something that is very supported by OPM, telecommuting for Federal employees, and we have a telecommuting policy for our entire Agency.

Mr. MICHAUD. Getting back to my previous questions about the change in the date, which I feel probably was changed to interfere, how do you find interference? What is your definition of interference?

Ms. VAN DE WATER. Are you talking about carrier interference, sir?

Mr. MICHAUD. Any type of interference.

Ms. VAN DE WATER. Carrier interference is determined by the totality of the circumstances.

Mr. MICHAUD. When you look at the interference of an election, what would you consider interference of an election? Do you think the Board changing the date would be interference?

What is your overall definition of interference? What would be considered interference?

Ms. VAN DE WATER. It would be considered interference if perhaps the Board had not mailed out ballot instructions in a timely manner and a large percentage of people didn't get their ballots perhaps or that there was a problem with the U.S. Mail, anything that impinged on employee free choice.

Five weeks voting period generally does not impinge on employee free choice. That is a pretty long voting period, but it was a large group as well.

Mr. MICHAUD. Okay. Once again, Mr. Chairman, I want to thank you. I know my time is running out. I want to thank you very much for having this hearing, and I look forward to working with this because I think it is definitely something we have to deal with because I think there is a lot of interference.

I am concerned about the way the Board has been operating and would like to get into further details on the Board operation overall and also individually, particularly when you look at what is happening this week in Wall Street and what appears to have been greed that has caused a lot of the concerns today on Wall Street.

I appreciate this very much, and I look forward to working with you, Mr. Chairman, as we move forward in this whole issue of unionization as it relates to the airline industry.

Mr. OBERSTAR. I thank the gentleman.

There are other Members who have questions. We will recess for the three votes and reconvene within ten minutes after the last vote.

The Committee stands in recess.

[Recess.]

Mr. OBERSTAR. The Committee will resume its sitting following the series of votes.

We have a number of Members yet who wish to pose questions, and we will continue with Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman. I appreciate this hearing in regard to this particular issue.

I do have a couple of questions to the Chairwoman.

I am not sure who mentioned it. In 1977, the list was provided up to that time, and then apparently there was some sale of that from one union to another. And so, AA requested—American Airlines I am assuming—that you no longer mail the list. Now this is an airline asking.

If labor asked you to be able to put it back into use, would you do it just the way you did comply with AA's request, providing there were several provisos and understand that now things have changed?

Seventy-seven, that is, what, thirty-one years ago. Things have changed. Now there is a privacy issue, that you would be able to have them sign that you would not sell not, the way it is right now with the banks. Would that be feasible?

Ms. VAN DE WATER. I think it is certainly feasible. What we would probably do if the Union asked us to change our interpretation of the rules is to do what we did when we put out the representation manual proposals, to try to get input from all the participants who come before our Agency and put something out for public comment, possibly have a hearing.

I don't know. I mean we wouldn't just announce one day, this is what we are going to do. If we are going to change our policies, we would certainly give people a chance to comment on it and give us the value of their input.

Mrs. NAPOLITANO. Did you use those same steps with the AA request?

Ms. VAN DE WATER. I wasn't on the Board then. I can ask our general counsel.

She wasn't on the Board then either. I really don't know what happened in that case.

Mrs. NAPOLITANO. I would like that in writing, please, a reply.

Ms. VAN DE WATER. We would be happy to do that for the record.

Mrs. NAPOLITANO. Then I would ask labor if they would go ahead and provide that request from you with a copy to this Committee and then what the results would be.

Ms. VAN DE WATER. We would be happy to provide that.

Mrs. NAPOLITANO. If you do one, you should be able to do the other. That is my analogy.

There is a question in my mind on the definition of furlough. What does it mean, first of all?

What is the definition you use for furlough to say, okay, this person should remain on the list, this person should not?

Ms. VAN DE WATER. May Ms. Dougherty answer that question for you?

Mrs. NAPOLITANO. Sure, anyone.

Ms. DOUGHERTY. We generally look to what the policy agreed upon between the airline and the union as to the rights of recall are in determining what the length of furlough is or whether or not a furloughee would be eligible to vote because they have to have a valid right of recall and a reasonable expectation of returning to employment in order to be eligible to vote.

Mrs. NAPOLITANO. That is determined by what, in writing, by each airline, by the Board?

Ms. DOUGHERTY. Each airline has a different policy on what the recall rights are, and that policy would determine whether the employees had a right to return to work.

Mrs. NAPOLITANO. Okay. How often do you clean your list?

Ms. DOUGHERTY. Pardon me?

Mrs. NAPOLITANO. Scrubbing the list, cleaning it out for people who are dead or no longer employed?

Ms. DOUGHERTY. The eligibility list? There is an opportunity when the list is first provided for challenges and objections to the list, for both sides to challenge or object to the eligibility of people on the list.

Then there is also what is called an opportunity for status changes near the end of the voting period. So, for example, if someone was employed at a carrier on the cutoff date but had left the employ of the carrier by the end of the voting period, that would be a status change. We would be notified of that, and we would take the person off the list.

Mrs. NAPOLITANO. And you are notified by the airline?

Ms. DOUGHERTY. Or the union.

Mrs. NAPOLITANO. I am wondering if the list is updated before or after you have elections.

Ms. DOUGHERTY. It is updated both before and during. We listen to both sides for challenges and objections and then status changes. So we look at it twice.

Ms. VAN DE WATER. But we try to have the list finalized before the tally, if that is what you are asking.

Mrs. NAPOLITANO. Yes, because then if you are sending to an address no longer valid, then you know you are not going to get somebody sending in a vote. So that is an automatic no vote because they are not participating.

Ms. VAN DE WATER. If somebody, for instance, leaves the employment of the carrier during the term. They were on the cutoff list when we got the cutoff list and then they left the employ of the carrier, for example, that person would no longer be on the list.

But we at the NMB wouldn't know that. We would have to be notified of that either by the carrier or by the union.

Ms. DOUGHERTY. My colleague may have just said this, but if a ballot was returned to us with an incorrect address, we would take that person off the eligibility list.

Mrs. NAPOLITANO. Given now that we have the internet and all the wonderful new technology, how hard would it be to be able to clean and scrub those files and be able to share that information with labor to ensure that those are valid? You say that you do that already?

Ms. VAN DE WATER. Are you talking about the furlough list or the list of eligible voters?

Mrs. NAPOLITANO. Eligible voters.

Ms. VAN DE WATER. We actually rely on the carrier and the union to challenge the eligibility list, and that is a process that generally does take place in every election.

Mrs. NAPOLITANO. And you do that prior to the election and during the election?

Ms. VAN DE WATER. We do it, yes. We try to have all that done before the tally, but we do do some of it while the votes are out because it is usually a three weeks or so voting period. So, during that three-week period, we might still be working on the list, and that is done just to make the process move as smoothly as possible.

Mrs. NAPOLITANO. Ms. Friend, would there be any ability for you to be able to know their list, from looking at their list, whether or not that is a valid employee or not?

Ms. FRIEND. We will just use Delta, for example. When we get the list that the company provides to the NMB as a list of eligible voters, we give that.

We share that list with our Delta flight attendant activists, the ones that are working to form a union. They have to rely on word of mouth, what they know about.

For example, we would give it to an activist from Salt Lake City and say, do you recognize anybody on this list that you know of that has retired or has quit? That is the very unscientific way that we have to try to make sure that everybody is eligible.

On the question of furlough, the reason that we believe that the furloughed Delta flight attendants should not have remained on the list is because, while the company claimed that they were furloughed and they had some sort of indeterminate right to return to work, they were hiring hundreds, over a thousand, new hires.

Nowhere in the industry is an airline allowed to hire new employees while they have workers that have been furloughed as a result of a reduction in force and not been offered their job back.

Mrs. NAPOLITANO. Aren't those called scabs?

Ms. FRIEND. No. There is no strike.

It is just that they furloughed these people. These are people that were furloughed in the wake of the events of 2001, where we had furloughs all across, all across the industry, and right of recall varying number of years.

Five years is about average. These flight attendants had been furloughed way beyond, and the company was hiring new people to fill their staffing needs. Yet, these people were allegedly on a recall list of some sort.

Mrs. NAPOLITANO. Okay.

Mr. HOGLANDER. If I might, just to add there for a point of clarification, many of the furlough lists, at least in organized companies, it is determined by the collective bargaining agreement of who is eligible and who isn't and how they are eligible and in what order they are recalled.

In this particular instance, I think we are talking about the NMB will recognize either the collective bargaining agreement or the company's policies. So that is just in order to keep that.

Some other minor sophistications of what happens when you are on furlough: If you are a pilot or flight attendant that goes to work in the same class or craft for another airline, you automatically come off that list, additionally.

Mrs. NAPOLITANO. I am sorry. Thanks for the indulgence, Mr. Chair.

Ms. Van de Water, isn't this kind of inhibiting the association of the employees to be able to talk to each other?

Ms. VAN DE WATER. I am not sure I understand that question, ma'am.

Mrs. NAPOLITANO. The purpose of the RLA is to avoid interruption of commerce or operations, et cetera. Freedom of association by employees or any denial as a condition of employment or otherwise, that is kind of a nebulous way of putting it.

But this to me sounds like they are struggling to try to get their employees to try to participate, and you are saying, no, you can't have that list because back 30-some odd years ago something happened, without the opportunity for them to come back and say, okay, we will abide by rules set by you, so this does not happen again.

Ms. VAN DE WATER. Well, they do get the list of names.

Mrs. NAPOLITANO. But not addresses.

Ms. VAN DE WATER. Not addresses, that is correct.

Mrs. NAPOLITANO. Well, that is what I am referring to. How are they going to communicate with these individuals?

Ms. VAN DE WATER. They seem to do a pretty good job of it.

Mrs. NAPOLITANO. Now that is sidestepping it a little bit, I think, and I think you are hearing that they are.

Thank you for the indulgence, Mr. Chair.

Mr. OBERSTAR. Mr. Westmoreland.

Mr. WESTMORELAND. Thank you, Mr. Chairman.

Could I ask the Board to give your professional backgrounds before becoming on the Board right now?

Ms. VAN DE WATER. Of course, yes, sir. I graduated from law school from Georgetown Law School. I worked on Capitol Hill during the time I was at law school at night.

I also worked for Northwest Airlines as a Director of Government Affairs. After that, I worked for the Business Roundtable for a couple of years, primarily handling trade issues.

I ran a home-based consulting business for about six months before I was nominated to go to the Department of Transportation. I served as Secretary of Aviation and International Affairs from 2001 to 2003. I left that and six months later was confirmed to the Board.

Mr. WESTMORELAND. Thank you.

Ms. Dougherty.

Ms. DOUGHERTY. Thank you. I graduated from undergraduate school at Duke University and law school at the University of Virginia.

I worked in New York City and in Washington, D.C. at law firms as a Labor and Employment Attorney, and then I worked for the Bush Administration as a Labor and Transportation Policy Advisor, and I have been on the Board for almost two years.

Mr. WESTMORELAND. Mr. Hoglander.

Mr. HOGLANDER. I was initially in the Air Force. I started out that way, and then I went to Florida State University, graduated from that, went back in the Air Force and was in and out of the Air Force and the National Guard for a total of about 30 years.

In the meantime, I joined up with TWA as a pilot, spent 30 years with them also, and I was a representative of the TWA pilots, the Master Chairman, and also Vice President for the Air Line Pilots Association.

When I left the airline, I worked for Congressman John Tierney for seven years and did his labor work, both in the district and down here, in the home district—both in the District of Columbia and here on the Hill.

Then I have been on the Board for six years.

Mr. WESTMORELAND. Thank you. Mr. Chairman, it sounds like we have a pretty qualified Board out there.

Questions to the Board: Have the same election rules that we are talking about today been applied without controversy in the past for prior mergers or where the work groups have been both represented by different unions or union/non-union? Are these same rules applying today that have applied in the past?

Ms. VAN DE WATER. Yes, sir, they have.

We have had our merger guidelines. Is that what you are talking about? We have had them for about 30 years. They have been subject to some clarification along the way but no substantial changes.

Mr. WESTMORELAND. Would all of you agree those same rules have been applied?

Mr. HOGLANDER. Overall, they have. There have been a few exceptions along the way where there has been certain egregious conduct by one of the parties, and we have changed that to some degree. We haven't, but the Board.

Mr. WESTMORELAND. In talking about rules of conduct, I would like to ask Ms. Friend if I could, what was the ruling of the NMB issue during the election with regard to the AFA communication to the Delta employees?

Did the NMB rule that AFA had violated its own rules of conduct? Was that a decision that the Board made?

Ms. FRIEND. That is not my recollection.

My recollection is that we were asked to remove directions from our web site that directed the Delta flight attendants to the polling place, and we were asked to remove that from our web site because some of the Board members or Delta management—I am not sure which—believed that somehow we could get behind our web site and learn how many people actually clicked on the link that directed them to the polling place.

Then we would know how many people had voted, and we would know whether or not we had to increase our get out the vote activities. And so, they found that that was an inappropriate direction on our web site to the polling and asked us to remove it which we did.

Mr. WESTMORELAND. Ms. Friend, let me clarify this for the record. So did the NMB rule that the AFA had violated its rules of conduct?

Ms. FRIEND. No.

Mr. WESTMORELAND. May I ask the Board members their impression of was there any violations of the rules of conduct by the AFA?

Ms. VAN DE WATER. Yes, sir, yes.

The National Mediation Board had put out a notice in February. It was prompted by an earlier election in which a union had had a hyperlink to our web site. We did feel that a hyperlink had the possibility of violating somebody's confidentiality. We would have felt the same way if a carrier had done it.

No one should know who has voted or how they voted. Since under our rules, as we have discussed extensively, a vote means a vote yes, we thought that that was a way of tracking votes.

We asked everyone, carriers and unions, not to hyperlink to our web site. AFA did it, nonetheless. We asked them to remove it immediately, and they did.

Mr. WESTMORELAND. So your answer is yes.

Ms. VAN DE WATER. Yes.

Mr. WESTMORELAND. You did issue that the rules of conduct had been broken.

Ms. VAN DE WATER. Yes. We had asked all participants not to have hyperlinks.

Mr. WESTMORELAND. You might want to send them a refresher letter.

Mr. Chairman, with that, I will yield back the balance of my time.

Mr. OBERSTAR. You may have additional time.

Mr. WESTMORELAND. Oh, okay. Well, thank you very much.

Mr. OBERSTAR. We have few Members.

Mr. WESTMORELAND. There is not anybody else to ask questions. [Laughter.]

Mr. OBERSTAR. Well, no. We have two more on our side, but the gentleman may have another minute.

Mr. WESTMORELAND. Well, has the NMB in the past ruled that it is permissible to accurately explain how the voting process works and to urge employees to support either the company's or the union's position?

Ms. VAN DE WATER. The company may have standard communications with its employees, absolutely. They cannot have coercive communications with their employees.

Mr. WESTMORELAND. So this isn't you all's first rodeo of doing this?

Ms. VAN DE WATER. Yes, sir, we have had these kinds of allegations, and we have resolved them in different ways many times.

Mr. WESTMORELAND. How many of these hearings have you ever been called to testify at as a result of a merger where there may be two different unions or a union and a non-union company?

Ms. VAN DE WATER. This is the first hearing I have been called to in my time at the National Mediation Board.

Mr. WESTMORELAND. How long has that been?

Ms. VAN DE WATER. It will be five years in December.

Mr. WESTMORELAND. Have there been mergers that you are aware of that have taken place between union and non-union companies and companies that may have two different unions?

Ms. VAN DE WATER. Yes, sir. Certainly, the U.S. Airways and America West was a very large aviation merger.

Mr. WESTMORELAND. So this is a little out of normal of what you all have typically done in these types of transactions?

Ms. VAN DE WATER. We are happy to come up whenever we are called, sir.

Mr. WESTMORELAND. I understand. Thank you for your service.

Ms. VAN DE WATER. Thank you.

Mr. OBERSTAR. I just want to observe for the gentleman that there have been other issues raised in the previous 12 years before our majority in Congress, and there were never any hearings permitted. So this will not be the first. This will not be the last, I will say.

Ms. Hirono.

Ms. HIRONO. Thank you, Mr. Chairman.

Ms. Friend, in the discussion relating to the rationale regarding the majority participation rule, the Madam Chair has mentioned several times that under the RLA there is no decertification process, and the implication being that somehow this extraordinary participation rule is justified because there is no decertification process.

Isn't there a process that is akin to decertification because I cannot imagine that once a union is certified that they are certified forever and ever? So there must be, I would think, some kind of a decertification process, correct?

Ms. FRIEND. There is.

Ms. HIRONO. Could you briefly describe that?

Ms. FRIEND. Correct, there is a process to either replace the union or it could get rid of the union.

In fact, the flight attendants that joined AFA two years ago at Northwest Airlines have actually used the process a number of times. They were members of the AFA predecessor union up until 1976 where they triggered an election. Under the RLA, they triggered a dispute and left our union and joined the Teamsters.

Then about 25 years later, they were dissatisfied with that union, and they triggered another representational dispute with

the National Mediation Board, had an election and joined an independent union.

And then about three years after that, that didn't work out. So they triggered another election, another representational dispute, and joined AFA.

So it is a process that is available and it is, as the Northwest flight attendants have demonstrated, not that difficult to use. It simply involves triggering another election which could result in them either changing unions or going non-union, not certifying a union.

Ms. HIRONO. Thank you.

Madam Chair, regarding the majority participation rule, I realize that this is a decades long interpretation and years and decades of precedence. So is it likely that NMB will change this interpretation anytime soon?

Ms. VAN DE WATER. We would certainly consider it if we were asked. I can't say we would just categorically say, no, we are not interested in anyone's opinion, because we would not.

Ms. HIRONO. On the other hand, based on listening to your testimony, I draw the conclusion that your belief is that this is a good rule, and I get no impression at all that you would be open to changing it. But if so, that is great.

On the other hand, this is a Board interpretation of a statute, and it is Congress that drafts the statute. So if we don't agree with your interpretation of the statute, certainly Congress could provide clarifying language to the statute itself so that we would put in a majority of those voting kind of a clarification, right?

Ms. VAN DE WATER. Congress can certainly address any statute, yes, ma'am.

Ms. HIRONO. Okay. Thank you.

Then going on to the ability of the unions to get the addresses of the employees, is this by rule or is this by practice of the Board? Is this by some of court ruling that you no longer provide the addresses?

Ms. VAN DE WATER. It is not by a court ruling, no, but it is by long-term practice of the Board.

Ms. HIRONO. So, again, the Board could revisit this, recognizing you could place various kinds of limitations on the use by the unions of the addresses of the employees.

Ms. VAN DE WATER. The Board can certainly look at that.

Ms. HIRONO. If we were to ask you to do that, would you do that?

Ms. VAN DE WATER. We would certainly take that under advisement.

Ms. HIRONO. On the other hand, we could also do that by statute.

Ms. VAN DE WATER. Yes, ma'am, you could.

Ms. HIRONO. Thank you, Mr. Chairman.

Mr. OBERSTAR. Our next is Ms. Edwards, the newest Member of the Committee.

Ms. EDWARDS. Thank you, Mr. Chairman, and thanks for holding this hearing.

My question is to the Chairwoman. If the employer can contact every employee by mail, would it be your view that it would also be fair then for the union to be able to contact every employee by mail?

Ms. VAN DE WATER. I don't know that that is necessarily required for election fairness, but obviously we have heard to the contrary from many members today.

Ms. EDWARDS. Let me just ask this. Don't you think it would be less onerous, even by practice, if you simply provided a certain set of prohibitions on the use of the employees' addresses to be able to provide that level playing field for both the union and the employer?

Ms. VAN DE WATER. Oh, I am sure we could put conditions on any use that unions would agree to. Yes, I think we could do that.

Ms. EDWARDS. And, obviously, it has been pointed out we could do that also by clarifying statute.

Ms. VAN DE WATER. Yes, ma'am.

Ms. EDWARDS. Thank you.

I have some questions about your representation manual. Is your representation manual a guideline? Are they rules and regulations?

Ms. VAN DE WATER. They are guidelines for people who practice before the Agency. They are not binding on the Board, but they are meant to provide helpful information to participants and to our own staff.

Ms. EDWARDS. If I read about a proposed change to your representation manual that would then require union card check, in your view, would that make it actually more difficult for the union to actually organize workers in furtherance of your mandate?

Ms. VAN DE WATER. I am not sure which proposal you are referring to.

If you are referring to the statement that we don't accept card checks to extend certifications, that reflects existing law. We do accept card checks to call an election and have a showing of interest.

Ms. EDWARDS. I guess I am trying to get a sense, though. Wouldn't it be in greater furtherance to your mandate that you simply allow the union without card check per se to simply organize the workers?

Ms. VAN DE WATER. They can show us a showing of interest of at least 35 percent if the employees are unrepresented to call an election to reflect employee choice. Cards are used for that purpose as well.

Ms. EDWARDS. Thank you.

Then I want to get back to the eligibility considerations because as I sat here and listened I dare say that, save those of us from Wisconsin and Minnesota, none of us would be seated if we required a 50 plus 1 eligibility rule. And so I am curious.

I understand the history, but I am curious as to why you wouldn't simply go back to the drawing board and do what we do with every other election and make it a majority or those who vote.

Ms. VAN DE WATER. Well, the Railway Labor Act does call for a majority of the employees in the craft or class to support a union or not support a union. So that is the rule we do follow.

Ms. EDWARDS. But, again, it is your interpretation of that rule.

Ms. VAN DE WATER. Well, actually, I believe the Act itself calls for the majority. Yes, it does.

Ms. EDWARDS. Ms. Friend, back the eligibility again and the eligibility list, if a dead person on the list is not an extraordinary cir-

cumstance, can you describe to me what an extraordinary circumstance would be?

Ms. FRIEND. I am sorry. Are you asking me?

Ms. EDWARDS. Well, Ms. Friend or Madam Chair.

Ms. FRIEND. I believe that a deceased person on the list is an extraordinary circumstance. It was the Board that ruled that it wasn't.

Ms. EDWARDS. And the Chairwoman?

Ms. VAN DE WATER. If we had evidence for the person's death before the tally, that would have made a difference. No one presented us with evidence.

If Delta had come forward and said, we think these 20 people are dead, and they were AFA activists, we would probably be hearing a different story from the union.

Ms. EDWARDS. Even within that seven-day period?

Ms. VAN DE WATER. Yes. We have to have some kind of substantive evidence. We can't just say, oh, okay, thanks for telling us.

Ms. EDWARDS. Ms. Friend, in that circumstance, was there any substantive evidence that the person was dead?

Ms. FRIEND. The deceased person was reported by Delta management. I don't know whether or not the Board asked them for any evidence, but surely management did have the evidence if the person was deceased because they have certain death benefits that they would have had to pay out. So, had they been asked to provide it, I am certain that it would have been provided.

Ms. VAN DE WATER. But it was not determinative in the election?

Ms. EDWARDS. I don't know that that really matters. The question is the process and what the rules are and whether they are being followed, not whether it is dispositive in the election.

Ms. VAN DE WATER. We actually did follow the rules. The rules are you can't bring in anything within seven days unless you have some substantive evidence to back it up.

Ms. EDWARDS. Thank you.

Barring your ruling, you would agree that a deceased person on a list is a pretty extraordinary circumstance.

Ms. VAN DE WATER. That is a very extraordinary circumstance if we have evidence they are dead.

Ms. EDWARDS. Then I would like to get back. Going back to the employees' representation, if the carrier's employees are trying to organize and aren't currently represented by any union, is there anyone besides the carriers who review the eligibility list?

Ms. VAN DE WATER. Yes, ma'am. The eligibility list is first given to us by the carrier, but at that point both the union and carrier file challenges and objections to the list. That is a process that can go on for a little while as they each review the other's filings.

For instance, the union can say, no, we think these 20 people should be included or these 20 people should be removed for whatever reason. Perhaps they are management. Perhaps they have changed crafts or classes or they don't work at the carrier anymore. I mean it is an ongoing process.

Then the carrier responds.

Ms. EDWARDS. I wasn't clear about this. How long does it take you? What is the average length of time that it takes the Board to investigate interference?

Ms. VAN DE WATER. That completely depends on the circumstances of the case and how large the craft or class is and how extensive the allegations are and for us to review the facts. It is not something we want to rush.

Ms. EDWARDS. But you don't have some general sense of how long it takes to investigate allegations?

Ms. VAN DE WATER. Most of our cases are resolved within 90 days, start to finish. We do handle quite a large number of very small cases as well that are much easier, obviously, to investigate.

Ms. EDWARDS. How do you define undue interference?

Ms. VAN DE WATER. It is influencing or having coercive action by the carrier against the employees primarily, but we look at the totality of the circumstances and the evidence in each case.

Ms. EDWARDS. Are those standards set forth in your representation manual or some place in your rules?

Ms. VAN DE WATER. It is set forth in our representation manual as well as extensively in the case law of the Agency.

Ms. EDWARDS. But your representation manual is not dispositive.

Ms. VAN DE WATER. No, it is not, and actually my counsel tells me it is more in the case law.

Ms. EDWARDS. Thank you. No further questions.

Mr. OBERSTAR. I thank the gentlewoman.

The gentleman from Georgia.

Mr. WESTMORELAND. Thank you, Mr. Chairman.

Since we were kind of talking about card check, and I would like to hear from each one of you on the panel, do you believe that American workers should have the same rights or circumstances as Mexican workers about how to go about organizing?

Ms. VAN DE WATER. Do I get to start with that, sir?

I have to say I don't know much about the rights in Mexico. I do know more about the rights in the United States. I would hope that our rights would exceed that, those of the employees in Mexico, but I really don't know.

Mr. WESTMORELAND. Well, there was a letter written to the Mexican government in 2001 by then, I guess, Ranking Member Mr. Miller of the Education and Workforce Committee, asking the Mexican government to have secret ballots for choosing as to whether to organize a union.

Then this year, we had a bill that passed through the House that would say that the secret ballot would be a method that would not or could not be used, and some other method could be used in organizing a union.

So I was just wondering, and I guess I should have explained that a little bit. Don't you feel like that our workers, that we should want for our workers the same thing that some of the Majority Party wanted for the Mexican workers in organizing their unions?

Ms. VAN DE WATER. I think we would want as many protections for our workers as possible, but that is my own personal opinion and not an opinion of the Agency.

Mr. WESTMORELAND. Thank you.

Ms. Dougherty?

Ms. DOUGHERTY. I would agree. I would agree that our workers should have the best protections possible.

Mr. HOGLANDER. We actually do make exceptions to that when we have the agreement of both the——

Mr. WESTMORELAND. Just a simple yes or no is fine, Mr. Hoglander.

Mr. HOGLANDER. Do I agree that our workers should have?

Mr. WESTMORELAND. The same rights, the same abilities as the Mexican government or that our Members of Congress want the Mexican workers to have? Shouldn't they want the same thing for our workers?

Mr. HOGLANDER. I think we should those as goals?

Mr. WESTMORELAND. Thank you.

Ms. Friend?

Ms. FRIEND. I have to respectfully disagree with your characterization of the Employee Free Choice Act because it does contain a provision that allows for a secret ballot. It gives the employees a choice.

What we are looking for here for our workers is an opportunity to make a decision without undue coercion from the management.

Mr. WESTMORELAND. So you don't think that. Do you think we need to continue to insist with other governments that they use a secret ballot when we insist that ours don't?

Ms. FRIEND. If that were the position we were taking, then I would agree, but that is not the position.

Mr. WESTMORELAND. I didn't say you, personally. I am talking about other members of this body.

Ms. FRIEND. Well, I can only speak for myself, not for the other members of the body.

Mr. WESTMORELAND. Well, Ms. Friend, now that we are talking about it, is this the first time that AFA has raised any concerns regarding the majority participation rule?

Ms. FRIEND. No. It has been a concern of ours for a long time. This is the first in my memory where there has been a congressional hearing that focuses on the representation rules of the National Mediation Board. So it is the first time we had an opportunity to raise it.

Mr. WESTMORELAND. Okay. This has not been raised in any of the previous mergers?

Ms. FRIEND. It has been since the last eighties. It has been over 20 years since our union was involved in a merger that required an election.

The most recent mergers have been between airlines where we represent the workers on both sides. So it has not been an issue for us.

Mr. WESTMORELAND. When was the AFA-CWA certified to represent the Northwest flight attendants?

Ms. FRIEND. July, something or another, 2006.

Mr. WESTMORELAND. How many unions have been certified to represent the Northwest flight attendants in the last 10 years? Do you know the answer to that?

Ms. FRIEND. I just went through the history with Congresswoman Hirono. I am not sure of the exact dates. In the last 10 years, they are probably the second union. They left the Teamsters and went to an independent union, PFAA, and then they left PFAA and came to AFA-CWA.

Mr. WESTMORELAND. So you are the third union in 10 years.

Ms. FRIEND. Yes, that would be correct.

Mr. WESTMORELAND. By what percentage was the AFA-CWA certified to represent the Northwest Airlines flight attendants?

Ms. FRIEND. There were two unions on the ballot, AFA-CWA and PFAA, and I believe the spread between the two unions was about 1,000 votes. I am not recalling the exact numbers. But, obviously, the combined votes for both unions exceeded 50 percent plus 1 or no one would have been certified.

Mr. WESTMORELAND. But you don't know what percentage your union was?

Ms. FRIEND. I don't remember the numbers. My recollection is we had about 1,000 more votes than the independent union.

Mr. WESTMORELAND. See, that's a difference, Mr. Chairman, in a politician. You always remember what you won or lost by, don't you?

Mr. OBERSTAR. Oh, yes. Oh, yes.

I think Ms. Van de Water has a number.

Ms. VAN DE WATER. I do have a number, sir. The AFA received just under 48 percent of the vote. They were a couple hundred votes short of having 50 percent. But when combined with the PFAA votes, they were able to exceed 50 percent.

Mr. WESTMORELAND. Thank you.

Mr. Chairman, I will yield back the balance.

Mr. OBERSTAR. I thank the gentleman.

Ms. Van de Water, this document is the rulebook, the National Mediation Board Representation Manual, but it is not codified in Federal Regulation. It is not part of the Code of Federal Regulations, is that correct?

Ms. VAN DE WATER. That is correct.

Mr. OBERSTAR. Why is that the case?

Ms. VAN DE WATER. I am going to have to refer to my counsel on that, sir.

It was originally designed as internal guidance, and then we use it for participants before the Agency.

Mr. OBERSTAR. I wonder. As I began digging into this, all the facts and the details of the issues that we have been exploring, I said, get the Code of Federal Regulations, so I can understand how the Board is proceeding. I got this document instead.

It occurs to me that this manual is subject to change as the Board decides to change it, is that correct?

Ms. VAN DE WATER. It is subject to change by the Board, yes, sir.

We don't just change it willy-nilly. We do try to put it out for public comment if we are going to make changes.

Mr. OBERSTAR. I am not saying that you change it willy-nilly. I am just saying it is subject to change by the Board.

Ms. VAN DE WATER. It is.

Mr. OBERSTAR. Without going through a public notification procedure as you go through the notice of proposed rulemakings, the procedure that is required under the Federal Register.

Ms. VAN DE WATER. Yes. It is not. We do not follow that procedure. That is correct.

Mr. OBERSTAR. That is historical for 74 years.

Ms. VAN DE WATER. Yes, sir. I don't think we have had the representation manual that long.

Mr. OBERSTAR. On page 24, I tried to figure out now how you do these votes. In 13.304-2, it says: Void Votes. The following votes are void and will not be counted.

It goes though a list, and then it says: Votes indicating no desire for representation such as write-ins indicating no or no union.

So does that mean that if you vote no, that vote is not counted?

Ms. VAN DE WATER. Yes, it does mean that. You can write in a no vote.

Mr. OBERSTAR. A no vote is not a valid vote. The only valid vote is yes.

Ms. VAN DE WATER. Well, we also accept quite a few answers for yes. If you go in and vote for Mickey Mouse, we probably won't accept that because that is not a valid vote. But if you go in and vote for John Smith who happens to work at the carrier and just happens not to be part of the union trying to certify or just some person who works there, we would probably count that as yes.

We show great latitude to the union to count as many votes as possible as yes.

Mr. OBERSTAR. That is a very curious kind of voting system, don't you think?

Ms. VAN DE WATER. It is curious.

Mr. OBERSTAR. When there are ballot issues, referenda in States, as our State has had several times and California is notorious for ballot referenda, there is a box for yes and a box for no. But there is no such box for the Board.

Ms. VAN DE WATER. Yes, sir.

Mr. OBERSTAR. The Board has reviewed a number of representation elections and has then taken this procedure of notifying workers that the best way to vote no is to tear up your ballot or just not vote.

Ms. VAN DE WATER. We don't instruct voters to tear up their ballots, sir. We tell them how to vote.

Mr. OBERSTAR. I am sorry. Not you, but carriers have done that.

I am sorry. I didn't mean to say the Board. The carriers have said that. That was a slip of tongue.

Ms. VAN DE WATER. I can't comment on the pending Delta-AFA.

Mr. OBERSTAR. Not this pending, in the past, that has happened because I went back and looked through records and found that carriers, at various times, have said, just tear up your ballot.

Ms. VAN DE WATER. Carriers can communicate and tell employees if they don't want to vote or if they don't want the union, then they shouldn't vote.

Mr. OBERSTAR. Well, what is done in that situation, well, before I go to that question, who determines eligibility lists if there is no union in place?

Ms. VAN DE WATER. The carriers.

Mr. OBERSTAR. If we are starting ab initio in a representation issue, then who determines?

Ms. VAN DE WATER. Well, the union how is applying for representation. So if a union has come to us with a showing of interest of 35 percent of the cards for a class or craft that is unrepresented, then the carrier still has to provide the list of people, and the union

still gets a chance to look at it and make changes or make recommendations on how to add or subtract people from the list.

Just because they are not already in place doesn't mean that they don't get to look at the list.

Mr. OBERSTAR. Who determines the eligibility, though, in that case?

Ms. VAN DE WATER. We ask the carrier for an eligibility list, and then we provide it to the union to look at as well, but the carrier has to give us the original list. We don't keep those kinds of lists.

Mr. OBERSTAR. Then does the Board validate that list to determine that they are all living people?

Ms. VAN DE WATER. We go through the challenges and objections. We don't personally track down the people.

We do check the signature cards that come in. The carrier also has to provide us with a list of employee signatures. We check that out.

Then we have the parties file and, as I said, that can go on for quite a while because they respond to each other's filings as to who the valid voters are or are not.

Mr. OBERSTAR. Ms. Friend, have you gone through this type of situation where you have started?

I am really trying to understand how this Board operates. It is the most curious of agencies.

Have you gone through this practice now where you have started? There isn't a union in place. Members want to have a union. Now you get a list. How do you validate?

You heard what Chair Van de Water said.

Ms. FRIEND. I have gone through it numerous times, and it is a very inexact science.

And, it is very time consuming because it requires having as many as possible of our flight attendant activists on the carrier, the flight attendant group that is trying to form a union, look at the list and, using just their own personal information and personal contact, tell us is there anybody on this list that is now a supervisor in management or that you know has left or has retired or has quit or is deceased.

We only rely on what those activists that work for that airline know about these individuals. That is the only way we have of confirming that the list has not been padded to a larger number.

Mr. OBERSTAR. So the issue in the current situation but also in previous situations is coercive communication. That is also referenced in the manual. What does the Board consider coercive communication?

Ms. VAN DE WATER. We have had multiple cases with coercive communication. It could mean something as dramatic as if you vote for the union, your pay gets cut in half tomorrow if the union is voted in or you are going to be fired or you are going to be demoted or that kind of communication, one on one, that is mean to intimidate is an example of some things we have seen in the past.

Having a mandatory meeting with every member of the craft or class and shutting everybody up in a room and giving them dire consequences would be tough for us to accept.

But standard communications between employers and employees or the employer exercising their free rights, freedom of speech, we would not consider coercive.

Again, it just depends on the facts of the case. It is as much quality as quantity, as I stated before. It is not that you can't talk to people. It is just you can't threaten them or be coercive.

Mr. OBERSTAR. Did you happen to see Ms. Friend's testimony before the hearing?

Ms. VAN DE WATER. Yes, I did.

Mr. OBERSTAR. She lists numbers of situations in the instant case, you may not feel capable or appropriate to comment on.

Ms. VAN DE WATER. Right.

Mr. OBERSTAR. But what caught my attention was Delta setting up information tables with banners in the crew lounge, with posters, imploring flight attendants to give a rip, don't click, don't dial.

In other words, rip up your ballot, don't use the internet, don't call in to vote. Is that an example of coercive communication?

Ms. VAN DE WATER. I can't comment on the instant case, sir, where that is under consideration by the Board at this point.

Mr. OBERSTAR. Do you consider it coercive communication, Mr. Hoglander or are you not commenting either?

Mr. HOGLANDER. Well, actually, I can't comment on that case either.

But I can comment on the 2002 case where conduct of that sort is what gave the Board at least the understanding that there was prima facie evidence of interference, and we did have an investigation.

We went into that, which involved not only those particular acts by the company, but also there was some other communications by groups called the Freedom Force and things of that nature.

The problem that the NMB also seems to have in these sorts of situations is that we don't have subpoena power. So when we send an investigator—an investigator is an attorney from our legal department who is in charge of that particular election—we don't have the ability to seek any or issue any subpoenas for that sort of testimony.

Mr. OBERSTAR. Sorry for the interruptions on this separate Committee matter.

What examples do you have, Ms. Friend, of coercive communication and interference?

Ms. FRIEND. Well, I feel perfectly comfortable commenting on the instant case. We actually, four months after filing, would be interested in one question, and that is are we ever going to get an answer on our interference charges?

The interference I think that stands out in my mind, I mean you have described the literally wallpapering the crew rooms and the check-in areas with these instructions about not voting.

But our activists were allowed to set up an information table to communicate with their fellow flight attendants, but the problem is every time a flight attendant would approach the table to talk with them about the union, three, four or five supervisors would suddenly show up and hang around the table at the same time. That is intimidation.

That drives the flight attendants because this is essentially their boss with the power to hire and fire them because they are employees at will. So the ability to communicate, really there is a barrier there that management throws up that we find definitely interfering with the flight attendants' free right.

Another thing that happened in this case is that just as we were starting to vote, a company announcement came out—and the vote was taking place into May—that on July 1st, all non-contract employees would get a 3 percent raise.

So, immediately the question the flight attendants ask themselves is: Well, if I vote for the union I am going to be a contract employee. So what happens to my 3 percent raise?

So it is very subtle, but it is definitely a deterrent. It is definitely saying: You want a 3 percent raise? Don't vote.

Mr. OBERSTAR. Well, since the Board can't comment on the situation at hand and will not do so, I can't refer this back to Ms. Van de Water.

Mr. Westmoreland.

Mr. WESTMORELAND. Yes, thank you, Mr. Chairman.

Ms. Friend, talking about the 3 percent, I am assuming that you are talking about what is going on now with the Delta/Northwest merger and the flight attendants?

Ms. FRIEND. I was talking about the most recent representational election that took place among just the Delta flight attendants completely unrelated to the merger.

Mr. WESTMORELAND. How many times has the AFA tried to organize the Delta flight attendants?

Ms. FRIEND. We have assisted the Delta flight attendants in their efforts to form a union twice.

Mr. WESTMORELAND. You may not know the results of those elections, but do you remember what percentage wanted to organize?

Ms. FRIEND. In the first election, it was around 38 percent. In this most recent one, it was 40 percent.

Mr. WESTMORELAND. Forty percent?

Ms. FRIEND. That actually participated, that actually cast a vote.

Mr. WESTMORELAND. Yes, ma'am. Do you know what the salary is or what the difference is in the wage and benefits of a Delta flight attendant and a Northwest flight attendant?

Ms. FRIEND. I can't. I can't give you actual numbers, but interesting enough, just this morning, we had a presentation from a labor economist on our industry overall. One of the pieces of information that he provided is a chart that really shows, starting in 2001, each of the carriers' flights attendants groups and taking us through the various bankruptcies.

Interesting enough, when we get to the very end, when we get to this year, the Delta flights attendants are lowest, below all of the other major carriers.

Mr. WESTMORELAND. So Delta flight attendants make less than any other flight attendant?

Ms. FRIEND. The unit labor costs for Delta flight attendants are lower than any other major carrier, network carrier in the U.S.

Mr. WESTMORELAND. Okay.

Ms. FRIEND. Unit costs include salary, benefits.

Mr. WESTMORELAND. And it is the lowest of all the carriers?

Ms. FRIEND. Yes.

Mr. WESTMORELAND. That is interesting.

Let me ask you this. The Chairman mentioned, which was very interesting to me, about the cards that you fill out, that they don't have a no box. So I guess the safest way to know, and not that anybody would and I am not suggesting that, but to keep anybody from maybe fraudulently filling out one of these cards, the best thing to do would be to tear them up, would it not?

Ms. FRIEND. That is not how. That is not how they vote. They don't vote with a paper ballot.

Mr. WESTMORELAND. What do they vote with?

Ms. FRIEND. They vote on an internet on the computer or by telephone. There is no paper ballot.

Mr. WESTMORELAND. Okay. So it is an electronic thing. So how would you tear one up and post it on a wall?

Ms. FRIEND. You tear up your voting instructions. In order to protect the secrecy of the ballot, the voting instructions and certainly Ms. Van de Water can speak to this as well, the voting instructions tell them the web site to go to or the phone number to dial. Then they have to have a PIN. They have to have a personal identification number in order to get in.

So if I get that in the mail and I tear it up, then I have no way to vote because I have destroyed my access.

I no longer know the web site. Somebody could tell me the web site, but I no longer have a personal identification number in order to cast my ballot.

Mr. WESTMORELAND. I am really confused because the Chairwoman was talking about a signature card that you compared signatures.

Ms. VAN DE WATER. That is actually a little bit separate. When a union comes in and presents us with a showing of interest to trigger a election, they have authorization cards, and those are actually real cards.

On those, it will say something along the lines of I authorized the AFA to seek an election with the National Mediation Board, and it will have identifying information on it. It will have the employee's name and their address, and they have to sign.

Then when we get the signature samples from the carrier, we do actually physically compare the signatures on the card to the signature we got on the list just to make sure the employee did sign it.

Mr. WESTMORELAND. Okay.

Ms. VAN DE WATER. But the actual vote itself, as Ms. Friend said, is done either on the phone or on the internet, and there are two separate identification numbers each employee gets that they have to enter at different stages in the process to make sure that integrity of the process is protected.

Mr. WESTMORELAND. Thank you.

Ms. Friend, are these pieces of paper with the web site and the PIN number sent to someone's personal address or is this given out at the work place?

Ms. FRIEND. They are mailed. The National Mediation Board actually conducts the election. So they, the National Mediation

Board, mails the voting instructions to the address provided by the carrier.

Ms. VAN DE WATER. To home addresses. We would never send them to people's places of business. That would not be a fair election.

Ms. FRIEND. They are sent to the address of record that the employee has provided. It may or may not be their home as we have learned. It may be their tax ID place.

Mr. WESTMORELAND. But I think the correct answer is it is being mailed to where the employee wants it mailed to, is that not true?

Ms. VAN DE WATER. Right. That is right.

Mr. WESTMORELAND. You mentioned unit cost for compensation, okay. I am not in the airline business, and I don't understand about the unit cost. I just want to make sure I understand this because I represent a lot of Delta employees.

Ms. FRIEND. Yes, you do.

Mr. WESTMORELAND. So I just want to make sure I understand that in total compensation, the Delta flight attendants are the least paid in the industry.

Ms. FRIEND. Yes. The unit cost is what it cost Delta Airlines to put one flight attendant on an airplane.

That is what it costs, and that cost includes their wages and all components of their wages, their hourly salary as well as any incentives for language qualification or any number of things. It includes the cost of providing their health care, the cost of providing their pension. It includes the employer share of social security, and it includes the employer cost to provide worker's compensation insurance.

All of those costs, and then you take the total labor cost for all the flight attendants on the payroll and divide it by the number of flight attendants you have on the payroll, and you get the cost to put one flight attendant on an airplane.

Mr. WESTMORELAND. But that is a unit cost.

Ms. FRIEND. That is a unit cost. And so that, using that measurement, using the same calculation, that measurement, Delta flight attendants ended up lower. They may actually have a higher hourly rate of pay, but they have a lower per diem cost or they have a lower language qualification cost.

Mr. WESTMORELAND. Okay. Let's say that Debbie is the Delta flight attendant and that Nora is the Northwest flight attendant, when they get their paycheck, who gets the most money?

Ms. FRIEND. It is hard to say. It depends on how many hours Nora flew that month and how many hours Debbie flew that month.

Mr. WESTMORELAND. Let's say they flew the same amount of hours.

Ms. FRIEND. All things being equal, Nora's paycheck will be larger.

Mr. WESTMORELAND. Okay. Thank you.

Mr. OBERSTAR. Thank you very much, Mr. Westmoreland. That was a very interesting line of questioning. We got to know Nora and Debbie, and that was very useful.

[Laughter.]

Mr. OBERSTAR. Ms. Friend, would it make a difference in the outcome of elections if members were allowed to vote no?

Ms. FRIEND. Absolutely. If it was a yes/no ballot, then those people who care one way or another, who very much passionately want to have a voice in their workplace through a union, would vote, and those who are adamant that they want no part of having or being part of a collective group, being part of a union, would vote no.

Those people that don't care wouldn't participate, just like they do in any other election, and so the people that care would actually make the decision.

I would like to, just for the record, point out that the language in the RLA and the language in the NLRA are virtually identical, that this is an interpretation, that the RLA says the majority of any craft or class of employee shall have the right to determine, and the NLRA says that representatives designated or selected by the majority of the employees in a unit.

The language is virtually indistinguishable. This is simply an interpretation.

Mr. OBERSTAR. But they are written for two different organizations.

Ms. FRIEND. Exactly.

Mr. OBERSTAR. The Railway Labor Act dealt with that before the National Labor Relations Act was passed.

Ms. FRIEND. Right.

Mr. OBERSTAR. And it dealt with all the 13 crafts in the railroad sector. So the language, craft or class of employees, deals with the realities of the railroad sector and was applied to aviation after aviation became a very commercial activity in the 1930s.

The National Labor Relations Act says a majority of employees in a unit. That is the shop floor in an auto workers plant. That is a shop floor at Diamond Tool and Horseshoe. That is the underground mine in the Mesabi Iron Range of northern Minnesota, and it is mine by mine or later they changed it to iron ore mining range-wide.

So those are very different, and I think that we ought to give this whole sector of law a very thorough review. This is the first in a series of hearings we will have that will be continued next year to understand how this whole process operates and to perhaps reevaluate the fairness and the equity of the process.

I wonder what difference would it make, Chair Van de Water, if the Board's manual were required to be published in the Federal Register.

Ms. VAN DE WATER. I think then we would be subject to certain comment periods and procedures and things like that.

Mr. OBERSTAR. I am sorry?

Ms. VAN DE WATER. I said, we would be subject to procedures that are set in law, administrative law procedures.

Mr. OBERSTAR. What difference, in your view, would it make if employees were allowed to vote no?

Ms. VAN DE WATER. I don't know what difference it would be. We would have to study that and look at some of what happens under the NLRA and see what happens when people vote no. It is just anything we have considered at the Agency.

Mr. OBERSTAR. Right. Well, give it some thought. We will be coming back to that.

Ms. VAN DE WATER. Yes, sir.

Mr. OBERSTAR. As for the interference issue, I am just always haunted by the memory of my father working in the underground mine in Minnesota.

After the 1932 election, the mining captain came to him at the 300 foot level in the Godfrey Underground and said: Say, Oberstar, you voted Democrat yesterday. You know you better think about how you voted or you may not have a job around here in the future.

I won't say what my father responded or how he responded, but he was angry, very angry, and I carry that anger with me. Because in those days you had to go and ask for a Democratic or Republican ballot. The mining company had poll watchers. The miners called them stool pigeons.

They also had spies in the library to see what books the miners were taking out because you might be taking subversive literature like how to organize a union. They had spies in the pool halls, and they spies, stool pigeons, in the barber shops.

The one in our town was a letter carrier. His name appeared on the list of U.S. Steel, paid $100 a month to report back to the company what the miners were saying in the barber shop, in the pool hall, what they were taking out in the libraries.

That is coercive. It has haunted my memory and shaped my existence, and we are going to do something to clarify and to end these coercive practices.

That will do for this hearing. We will have further in the future.

Ms. VAN DE WATER. Thank you, Mr. Chairman.

Mr. OBERSTAR. The Committee is adjourned.

[Whereupon, at 5:19 p.m., the Committee was adjourned.]

OPENING STATEMENT OF
THE HONORABLE RUSS CARNAHAN (MO-3)
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

Hearing on
National Medication Board's Oversight of Elections for Union Representation
Wednesday, September 24, 2008

#####

Thank you Chairman Oberstar and Ranking Member Mica for holding this important hearing on the National Medication Board's (NMB) oversight of elections for union representation.

I have strong reservationa about the National Mediation Board's rules and procedures for awarding representation rights under the Railway Labor Act (RLA). Specifically, I am concerned that RLA, as administered by NMB rules, is only valid if fifty percent plus one of eligible employees participates in the election and votes in favor of representation. I find it deeply troubling that the NMB counts every employee on the eligibility list a "no" vote unless they submit a ballot voting "yes." As a result of this procedure if a majority of employees do not vote, it is impossible for the employees to unionize even if all employees voting vote in favor of representation.

It is a fundamental right of all workers to join a union without the interference of their employer or the government agency that oversees the election process. For this reason I find the Association of Flight Attendants (AFA)-CWA's two most attempts to organize at Delta Airlines deeply troubling.

Specifically, in 2001 AFA-CWA filed for representation of Delta Airlines flight attendants. Leading up to and during the voting period Delta engaged in an intense anti-union campaign intimidating union supporters. At the end of the voting period, less than fifty percent of Delta flight attendants had participated in election, so the election was not certified, even though ninety-eight percent of the votes cast were in favor of representation. Not only am I disappointed that Delta took steps to intimidate their employees so they would not participate in the vote, I am disappointed the NMB denied the interference charges filed by AFA.

Finally, AFA-CWA again filed for a representation election earlier this year. In addition to Delta Airlines engaging in an aggressive voter suppression campaign several NMB decisions and rulings made it extremely hard to meet the established participation threshold among eligible voters. Specifically, NMB allowed Delta Airlines to include in their eligibility list names of furloughed flight attendants, some who had been furloughed since 2001 who clearly had no interest in voting for union representation. Increasing the number of people on the eligibility list made it more difficult to reach the magic number of fifty percent plus one. Additionally, it is truly troubling to me that after the NMB issued a notice establishing that an election among Delta flight attendants would take

place and set the voting period for the election one week later NMB issued a notice that voting would end one week earlier than first noticed. This was done without consultation of AFA-CWA and after efforts had been made by AFA-CWA to reach out to its supporters.

In closing, I want to thank our witnesses for joining us today and I look forward to hearing their testimony.

#####

Statement by Congressman Jerry F. Costello
Committee on Transportation and Infrastructure
Hearing on the National Mediation Board Oversight of Elections for Union Representation
September 24, 2008

- Thank you, Mr. Chairman for holding today's hearing on the National Mediation Board's (NMB) oversight of elections for union representation. I would like to welcome today's witnesses.

- As Chairman Oberstar stated, the NMB governs the representation of workers; the mediation; and the arbitration of collective bargaining and other concerns as prescribed in the Railway Labor Act.

- This hearing is extremely important and timely given the pending merger between Delta and Northwest Airlines and the rights of its members to collectively bargain.

- I understand that the flight attendants have had considerable problems in the election process and their experience raises many questions about NMB's process and the discretion with which NMB uses to interpret and apply its rules in representation elections.

- I am interested in hearing more from Pat Friend, President of the Association of Flight Attendants, on that issue.

- We must maintain fair treatment of our airline employees and ensure and maintain two fundamental principles: the rights of workers and the right to collectively bargain. I again welcome our witnesses and look forward to today's hearing as we discuss this important issue.

Elijah E. Cummings

Committee on Transportation and Infrastructure
Full Committee

Hearing on "National Mediation Board Oversight of Elections for Union Representatives"

September 24, 2008
2:00 p.m.
2167 Rayburn House Office Building

Opening Statement of Congressman Elijah E. Cummings

Mr. Chairman:

Thank you for calling this important hearing to examine the National Mediation Board's (NMB) oversight of elections for union representation. This hearing comes at a time when the critical need for oversight could not be clearer.

As I am speaking right now, the U.S. markets are in turmoil, and hardworking families across the country are nervous about their economic futures due to the terrible consequences of failed oversight of our economy.

In light of this uncertainty about our economic future, today's hearing becomes all the more important, as working men and women look for some kind of stability and protection.

Labor unions have played an important part in our nation's history by providing much needed protection to the men and women they represent.

They have engaged in long struggles to protect American workers from poor working conditions, while also ensuring that men and women are making the wages they have earned.

The Association of Flight Attendants-Communication Workers of America (AFA-CWA) currently provides these same protections to more than 55,000 flight attendants at twenty airlines.

The AFA-CWA has raised very serious allegations against Delta Airlines and the actions the company took in response to the AFA-CWA's recent effort to expand its representation to that company's employees.

According to AFA-CWA, Delta conducted a campaign intended to sway its employees against voting for representation by the union.

Specifically, the motion presented by the Union to the NMB alleges that Delta harassed and interrogated its employees, placed employees in support of the AFA-CWA campaign under surveillance, and conferred benefits on flight attendants during the elections—specifically through the announcement of a three percent raise for all employees during the balloting period.

I cannot help but ask myself why—seven business days after the start date of this election—Delta would make such a move. Did its financial condition improve so drastically during this period?

Even if there was no malicious intent behind this announcement, the company must have been concerned about the appearance of impropriety—particularly in light of the outcome of AFA-CWA's last attempt to organize Delta's flight attendants this past spring, following the NMB launched an investigation into the Union's claims of interference by Delta.

The NMB found in this previous case that "there were isolated incidents of inappropriate conduct" and that it was "troubled by the number of reported incidents of 'surveillance'" on the part of Delta.

One NMB Member even filed a dissent in the case, indicating his full support for a re-run of the election.

The circumstances surrounding the AFA-CWA and Delta bring to the surface larger questions about the NMB's oversight of elections.

I am particularly concerned about the agency's decisions to allow Delta to include nearly 2,000 employees who have been furloughed or who opted to leave the company and retain some benefits by participating in an "early out" list.

The agencies tasked with administering oversight of the industries and markets of our nation play an essential role in keeping our country moving effectively and efficiently forward.

It is critical that these agencies—including the NMB—exercise their authority in a fair and impartial manner.

I look forward to hearing the testimony today of all of our witnesses today to determine the effectiveness of the organization's oversight of elections for union representation in the airline and railroad industries.

Thank you and I yield back the remainder of my time.

1 Harry E. Mitchell

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
"National Mediation Board Oversight of Elections for Union Representation"
9/24/2008

Thank you, Mr. Chairman.

Today we will discuss the National Mediation Board's (NMB) oversight of elections for union representation.

The NMB was established by Congress to serve as an independent agency responsible for overseeing labor-management relations in the aviation and rail industries.

The NMB also monitors the implementation of the terms of the Railway Labor Act (RLA) which codify the procedures for representation of workers and mediation and arbitration of collective bargaining and other disputes.

I look forward to hearing more from our witnesses about the NMB's role in ensuring fair terms of employment.

At this time, I yield back.

STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR
FULL COMMITTEE HEARING ON
"NATIONAL MEDIATION BOARD OVERSIGHT OF ELECTIONS FOR UNION REPRESENTATION"
SEPTEMBER 24, 2008

Today, the Committee will evaluate the rules and procedures of the National Mediation Board (NMB) in its oversight of elections for union representation. There are several important issues that we will discuss today, with important implications for the rights of aviation workers to bargain collectively.

The National Mediation Board was established in 1934 as an independent Federal agency charged with overseeing labor-management relations in the aviation and rail industries. The NMB administers the specific terms of the Railway Labor Act ("RLA"), the Federal statute governing the representation of workers and mediation and arbitration of collective bargaining and other disputes in these industries.

When Congress passed the RLA in 1926, it set forth very clear purposes for the Act: "to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization", and to maintain smooth labor-management relations to avoid interruption to commerce or to the operation of a carrier.

In establishing the rules to implement this labor law, the NMB has set a high bar for workers to secure the representation of a union. In an NMB election, a majority of workers in a given craft or class eligible to vote in an election must participate in an election. Every employee eligible to vote starts off the election as a presumed vote against representation - those who do not vote are counted as votes against the union. If a majority of all eligible employees do not vote, it is not possible for a union to win the election, even if all employees voting choose representation.

This process differs from the rules applicable to workers governed by the National Labor Relations Act (NLRA), where a simple majority of the votes cast determines the outcome of the election.

Given the high bar set for a union to organize workers under the RLA, we must be especially vigilant to ensure that elections are conducted under a clear set of rules to ensure that workers are not turned against a union by misrepresentation or coercive practices by management, and that the rules for an election are uniformly applied and strictly enforced.

The testimony of Patricia Friend, President of the Association of Flight Attendants-CWA, will reveal a number of issues in the union's recent campaign to

organize flight attendants at Delta Airlines that raise questions about existing NMB rules governing representation elections.

These include decisions by the NMB to allow over 1,700 furloughed flight attendants and those who intend to retire shortly after the election from the carrier to remain eligible to vote in the election. The NMB standard is that any worker with an existing "employee-employer relationship" at the time the union files for a representation election is eligible to vote.

I question how strongly these workers, particularly those who have voluntarily removed themselves from active employment, are motivated to vote on issues affecting worker-company relations. If these workers remain eligible but do not vote in the election, their absence automatically counts as a vote against the union.

The NMB also determined that a deceased flight attendant should not be removed from the eligibility list because the request was not made in a timely manner and without the proper supporting documentation. Because deceased flight attendant Janette Wood was not removed from the list, she ended up voting "no" in the election.

Recent actions by the NMB also raise questions whether there is any requirement that NMB strictly adheres to its rules. Last year, when AFA filed for a representation

election at Compass Airlines, a small subsidiary of Northwest Airlines, the NMB pushed back the cut-off date for the election by nearly three months, citing extraordinary circumstances. The circumstances in this case were that Compass Airlines planned to ramp up hiring over the next several years. The delay in the date of the election allowed additional flight attendants to be added to the eligibility list.

Just last month, the Board attempted to revise its rules in a way that may have made it harder for workers to retain their union membership in the event of a merger. This further highlights the ability of the NMB to alter the playing field in representation elections through small procedural changes. I am pleased that the NMB has decided to drop this proposal in the face of strong opposition.

The testimony we will hear today also raises questions about the sentiment among the leadership of Delta Airlines against unionization, and the implications for flight attendants currently represented by AFA at Northwest Airlines who may soon become employees of a "new Delta" if the proposed merger is approved by the Department of Justice.

Workers must retain their right to choose representation through a union, without interference by a carrier, as has been set forth in the Railway Labor Act since 1934. Any

attempts to diminish this right, by administrative actions of the NMB, or by election tactics of anti-union companies, will face careful scrutiny by this Committee.

I thank each of the witnesses for taking the time to be with us today and I look forward to your testimony.

STATEMENT OF

REP. THOMAS E. PETRI, Ranking Member

COMMITTEE ON TRANSPORTATION &

INFRASTRUCTURE

HEARING ON

"National Mediation Board Oversight of

Election for Union Representation"

September 24, 2008, 2:00 PM

Today's hearing arises out of matters related to the Association of Flight Attendants-CWA's ("AFA-CWA") campaign to represent flight attendants at Delta Airlines ahead of the proposed merger of Delta Airlines and Northwest Airlines.

Since 2001, the AFA-CWA has tried to organize Delta's flight attendants twice. Neither attempt has been successful.

In 2001, the AFA-CWA union election was not certified because less than 50 percent of Delta flight attendants participated.

Immediately after the election, the AFA filed a motion for determination of interference by Delta management. The NMB ruled that while there were isolated incidences of inappropriate conduct by certain supervisors, the level of air carrier activity did not rise to a level requiring further investigation.

Unfortunately, this organizing campaign left hard feelings on both sides that still exist today.

More recently, in the Spring of 2008, AFA-CWA again sought to organize the Delta flight attendants. The election took place between April 23rd and May 28th. Only 39% of the Delta's flight attendants voted in favor of union representation. This was below the 50% plus one threshold needed in accordance with the National Mediation Board's (NMB) long-established guidance and again the attempt to organize Delta flight attendants was unsuccessful.

Following the election in April and May, the AFA-CWA filed a motion for a determination with the NMB alleging interference by Delta management. Delta responded to the allegations and the matter is still under review by the NMB. Therefore, the NMB is unable to comment on the matter at this hearing.

However, the AFA-CWA will provide testimony today on their allegations of interference, including their concerns related to processes and procedures unique to the Railway Labor Act and the current NMB's oversight of the election.

The Railway Labor Act (RLA) is different from the National Labor Relations Act (NRLA) because it recognizes the national scope of certain transportation services and the national disruption that can occur if there were to be a strike by a local unit within the national organization.

I believe that the proper forum for questioning, reviewing, and proposing changes to the RLA is in a rulemaking and public hearing setting.

It should be done in the light of day, where everyone is aware of what is being proposed and has the opportunity to review, study, and comment on the proposed changes. This is the only way to ensure fairness and avoid unintended consequences.

Labor unions assert that they want a fair, open and transparent process for holding organizing efforts and union elections. But at the same time, some are making an effort to significantly modify the long-accepted organizing and election processes, including that of voting by secret ballot.

In commenting on the Employee Free Choice Act (EFCA) in an August 8, 2008, article in the Wall Street Journal, George McGovern stated, "... I am sad to say it [the EFCA] runs counter to ideals that were once at the core of the labor movement. Instead of providing a voice for the unheard, EFCA risks silencing those who would speak."

Senator McGovern also points out, "Under EFCA, workers could lose the freedom to express their will in private, the right to make a decision without anyone peering over their shoulder, free from fear of reprisal."

I share the concerns raised by former Senator McGovern.

Aviation industry employees, including Delta flight attendants, must be able to make a choice for union representation or no union representation free of interference, coercion or undue influence by management or labor.

60% of airline employees are members of a union, which is an indication that airline employees are capable of deciding for or against union representation.

Absent a compelling case for altering established best practices, the processes and guidance long-applied by the NMB, including during the United/US Airways merger a few years ago, should not be altered in the middle of an election at Delta, and individual members of the NMB should not have their character questioned for applying processes and procedures that have been in place for decades.

With that, I look forward to hearing from the Members of the NMB, as well as the President of the AFA-CWA and thank you all for your participation in today's hearing.

Testimony Of

Patricia A. Friend
International President
Association of Flight Attendants-CWA, AFL-CIO

Before the

Committee on Transportation and Infrastructure

National Mediation Board Oversight of Elections for Union Representation

Washington DC

September 24, 2008

On behalf of the 55,000 women and men at 20 airlines represented by the Association of Flight Attendants – CWA (AFA-CWA), I want to thank you for holding this important hearing today. I especially want to thank Chairman Oberstar and Representative Costello for making the time for this hearing during a very busy and constrained Congressional calendar. Today's hearing is, in a way, historic in that in our memory this is the first hearing to be held on the policies and practices of the National Mediation Board (NMB) and its oversight of representation elections. In our opinion, this hearing is long overdue and now is the time for a spotlight to be focused on the NMB, especially this current NMB, when it comes to the fundamental and legal right of all workers to join a union without interference from either their employer or the government agency tasked with overseeing the election process

This hearing is especially timely and very much needed considering the pending merger between Northwest and Delta Airlines, and the future of the collective bargaining rights for the vast majority its employees. The outcome of this merger could result in the new Delta Air Lines becoming the largest domestic airline and arguably the world's largest carrier that is, with one exception, a non-union and anti-union airline. Delta management has made it clear through interaction with AFA flight attendant leaders from Northwest Airlines that they will do whatever it takes to prevent the flight attendants of the "New Delta" from having the protection a union and a collective bargaining agreement provides.

Meanwhile, the current NMB has shown that it is willing to turn a blind eye towards egregious union busting behavior by airline management, making union recognition more difficult in this merger and placing more roadblocks on the already tilted playing field against the Delta employees and their ability to form a union.

When Congress enacted the National Labor Relations Act (NLRA) and Railway Labor Act (RLA) these laws were originally designed and intended to protect workers and to promote the national policy declared by Congress to "encourage unionization and collective bargaining." Decades of undermining by corporate interests and the lack of strong enforcement of those rights and outright hostility from the National Labor Relations Board (NLRB) and the NMB have only led to an erosion of those rights even though the national labor policy created by Congress to encourage unionization and collective bargaining has not legitimately been changed. In addition to the unchecked and aggressive tactics carried out by certain corporate interests, barriers to the free choice of workers to vote for union representation include significant hurdles established by agency practice. In many ways these barriers are even more pronounced for workers covered under the RLA than workers covered by the National Labor Relations Act (NLRA).

First, the rules established by the NMB through its practices and procedures create a fundamental disadvantage for workers under its auspices in their attempts to unionize. The most blatant example is the NMB's majority participation rule. Under rules practiced by the NMB, for a representation election under the Railway Labor Act to

be valid, 50%+1 of all eligible voters must cast a ballot, or in other words, must participate in the election. For example, if 49.9% of workers cast a ballot in the election and the union secures 99% of those votes, the NMB rules that election is not certified and the union losses because .01% of additional voters did not cast a ballot. Another way to view it is that all eligible voters immediately start out as a "No" vote on the question of union representation. In order to be considered a "Yes" vote, an employee must cast a ballot. Anyone that does not participate in the election is, in the eyes of the NMB, voting against union representation. This is strikingly different than the rules established by the NLRB where a simple majority of those voting determines the outcome, and has led, for example, Delta management to openly encourage their flight attendants to tear up their ballot instructions and to not vote.

Representation elections conducted by the NMB pursuant to the RLA are unlike any other election in the free world in that winning requires that a majority of all **eligible** voters must cast a ballot. Every other election in every other context, including union representation elections under the NLRB, requires a simple majority of the votes **cast** to determine a winner. The clear effect of this rule is to reduce the number of elections, and particularly to reduce the chance of a union victory. As an example, had this rule not existed, AFA would have won both of the two previous elections at Delta with over 98% of the votes for AFA-CWA in the first election and over 99% in the second election.

Nothing in the RLA requires the voting rules that are practiced today, particularly when a comparison is made with the language of the NLRA, where elections are decided by a simple majority of the votes cast by those taking part in the election.

The RLA language on determining representation rights says this about majority status:

> "**Sec. 2 Fourth....**Employees shall have the right to organize and bargain collectively through representatives of their own choosing. *The majority of any craft or class of employees* shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. (Emphasis Added)."

The NLRA, by comparison, says this about majority status for purposes of representation rights:

> "**Sec 9....**Representatives designated or selected for the purposes of collective bargaining by *the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment..." (Emphasis Added).

The anomaly comes in the interpretation that has been given to the two laws. Under the RLA, "*...the majority of any craft or class of employees...*" has been interpreted by the NMB to require that a majority of the workers in a given craft or class

must cast a vote or the election is not certified. Under the NLRA, very similar language, "*the majority of the employees in a unit...*" has been interpreted to be satisfied by a simple majority of the votes cast in a representation election. Virtually identical statutory language, yet very different interpretations and applications. This interpretation and application results in far fewer election victories for workers under the RLA, even when the union receives virtually every vote cast by the workers.

Essentially, a worker under the RLA is presumed by the NMB to cast a "NO" vote if she or he does not participate, for whatever reason. This presumption flies directly in the face of the national labor policy set by Congress of ***fostering*** unionization and collective bargaining; and, it is not based on explicit statutory language that requires this interpretation, as we have seen by the comparison with the virtually identical language of the NLRA.

Another significant hurdle for workers covered by the RLA that is not present for workers under the NLRA is lack of access to a list of employees' names and addresses in a bargaining unit slated for a representation election. This so-called "Excelsior List" puts the union and the employer on equal footing in communicating with the workforce. This list is taken for granted in industries covered by the NLRA, but has been made taboo for RLA-covered workers because of actions by the NMB.

In contrast to the practice under the NLRA, which requires employers to furnish a list of employee home addresses to unions as a matter of course, the NMB does not

require employers to do so unless the NMB has first found the employer to have contaminated the 'laboratory conditions' necessary for a fair election. This is at odds with the fact that the NMB consistently has held that an employer has a far more limited role than unions in election campaigns. By allowing the employer to use the lists while not requiring home address lists to be furnished to the unions, the employer is essentially licensed to dominate the process and withhold vital information from the union. It is the union's burden to prove sufficient interest in an election by submitting cards to the NMB showing such interest. Once the union provides quantifiable and verifiable employee interest in joining a union, the NMB conducts a review of the union-submitted employee signed cards and does or does not declare an election. This threshold, if met by the union and approved by the NMB, should be sufficient for the union to gain access to an employer's list of those employees the union seeks to represent. However, NMB practice severely limits access to accurate employee address and other information lists. This is another example of an inherent disadvantage for unions during representation elections. It should be no surprise that when the union is furnished with the address list the employees are far more successful in their attempts to organize.

While these rules established by the NMB have made it difficult for workers to organize under the RLA, recent unprecedented actions and decisions made by this NMB have made an already difficult task even more challenging. And the NMB has turned a blind eye towards aggressive anti-union behavior by employers, allowing them to engage in activities that run contrary to the intent of the RLA as established by Congress. A

recent and revealing example of this would be the NMB's practices and decisions during the two representation elections of the Delta flight attendants in 2001 and 2008.

In 2001, AFA-CWA filed for a representation election at Delta with union authorization cards from over 50% of the flight attendants. Leading up to and during the voting period Delta engaged in an intense anti-union campaign that involved intimidation of union supporters and the establishment of a "pseudo, union like" group. At the end of the election period, less than 50% of the Delta flight attendants participated in the election, so the election was not certified, even though over 98% of those casting votes wanted a union and selected AFA as that union. Immediately after the election, AFA filed interference charges against Delta management with the NMB. After months of investigation, the NMB eventually ruled that the Board was "troubled" by Delta management's conduct during the election but that a remedy was not necessary. Board Member Harry Hoglander filed a very rare dissent in that case stating:

> "In my view, Delta's actions, viewed in the totality of the circumstances, tainted the laboratory conditions required for a fair election. I cannot comprehend how my colleagues could reach another conclusion on the evidence presented. I would order a re-run election in this case. That is our statutory obligation."

In early 2008, AFA filed again for a representation election of the Delta flight attendants with signed authorization cards from well over 50% of the flight attendants seeking union representation. Delta again engaged in an aggressive, unprecedented

campaign of voter suppression, mounting an intense campaign that encouraged all Delta flight attendants to destroy their voting instructions and related information that had been mailed to flight attendants from the NMB. The campaign, entitled "Give it a Rip. Don't Click. Don't Dial" was designed to take advantage of the NMB's voting rules and keep the participation of the Delta flight attendants in the campaign below the 50% + 1 threshold.

I have included our interference charges, filed with the NMB against Delta management, as a supplement to my testimony.

I have also provided extensive written testimony in several recent Congressional hearings, including today's hearing, on the unprecedented Delta anti-union campaign so I will not go into all the details of the campaign. In the end, Delta management was successful in that less than 50% of the individuals listed on the eligibility list participated in the election even though 99% of participating flight attendants voted for AFA.

Several decisions and rulings made by the NMB prior to the start of the voting period and during the voting period, which is established by the NMB, facilitated this inability to reach the established participation threshold among eligible voters. First, in an effort to prevent undue interference in this second election, and since Delta's anti-union behavior and intent was clear from previous elections and public statements, AFA requested that the NMB conduct the election using a simple Yes/No Ballot. Under this procedure, those Delta flight attendants wanting union representation would vote "Yes".

Those that did not want union representation would vote "No" and a majority of the votes cast would determine the outcome. The ability to choose such a balloting procedure is well within the NMB's discretion and has been used in the past. Instead, the NMB claimed that they were unable to change their established policy, even though they had just deviated from long-standing policy in a recent election involving the Compass Airlines flight attendants.

Illegal expansion of list: Keeping in mind that under NMB procedures, all voters start out as a "No" vote unless they proactively participate in the election, AFA-CWA wanted to make sure that the eligibility list of voters contained names of voters that were actually inclined to participate as bona fide members of the craft and class. Delta management on the other hand was determined to put as many names as possible on the eligibility list, especially with individuals who would not vote or had no interest in participating in the election. Inclusion of such voters would make it harder for those desiring union representation to reach the 50% + 1 participation threshold. In this election, the NMB allowed Delta to place a number of names on the eligibility list from those that clearly had no interest in voting in this representation election. This effort by Delta management increased the number that was required by the union supporters to reach the 50% + 1 participation rate.

Included on the list of eligible voters submitted by Delta management were furloughed flight attendants whose "employer-employee" relationship was tenuous at best and whose expectation of return to Delta as a flight attendant was highly unlikely.

Some of these individuals had been on a furlough since November of 2001, clearly not intending to return to employment with Delta as a flight attendant. Also making it clear that Delta itself did not intend for these furloughed flight attendants to return, the company began hiring new flight attendants, rather than calling furloughed flight attendants back to service. Clearly, with no intention of returning to Delta, the many furloughed flight attendants on the eligibility list would most certainly not participate in a union representation election. This NMB ruled to allow for their names to remain on the eligible voter list.

On March 18th, just one month after AFA filed for a representation election for the Delta flight attendants, Delta management announced an "early out" incentive package for employees, including flight attendants. If an employee met certain requirements, they would be entitled to leave the company and still retain some benefits. Eventually 821 flight attendants chose to take this "early out" program. Since these individuals would be leaving employment with the company in the immediate future, they did not have a clear stake in the outcome of the representation election and many most likely did not participate in the vote. The NMB allowed their names to remain on the eligible voter list during the election.

And, finally, through sleuthing by AFA-CWA union supporters at Delta (keeping in mind that they do not have access to their own seniority list) dozens of names were put on the eligibility list by Delta management of employees who had already terminated their employment with Delta. Only when challenged by AFA-CWA, did Delta admit that

several flight attendants on the list were no longer employees of Delta. The integrity of the voting process must be maintained and is in doubt when an employer can stack the list arbitrarily.

Unilateral change in the election dates: On March 24, 2008, the NMB issued a notice establishing that an election among the Delta flight attendants would take place and that the voting period would run from April 23rd until June 3rd. After AFA-CWA had notified all its supporters, publicized the dates via electronic communication and produced and mailed printed materials, the NMB announced on April 3rd that it was, without consultation with AFA-CWA, unilaterally changing the election dates. I have provided a copy of the Winter 2008 edition of *Flightlog*, AFA-CWA's newsletter that was mailed to all AFA-CWA members including over 11,700 Delta flight attendants which listed the original NMB voting dates. Instead of the voting period ending and ballot count to be completed on June 3rd, the NMB announced that the final day would now be May 28th. AFA-CWA protested the unilateral decision arguing:

> ...unlike many employee craft or classes in the airline industry, flight attendants do not report to discreet work locations during the regular business hours. Rather, the 13,000 Delta flight attendants are based at 13 regular domiciles, dozens of additional "satellite" locations, and the majority actually commute to the their domiciles from other cities. In other words, Delta flight attendants are literally dispersed around the world at any given time. As a result, AFA-CWA is forced to focus its limited resources on reaching as many of these dispersed flight

attendants as possible within the election period. Clearly, a longer time period gives AFA-CWA the ability to reach most of the potential voters, while a shortened one does not.

The Board's decision is even more disturbing when it is compared to the election period established for the 46 flight attendants eligible to vote at Compass Airlines. In that election, the voting information was mailed out on December 17, 2007, and the vote count was on January 29, 2008. In other words, the 46 Compass flight attendants serving a small, domestic regional airline had over six weeks to vote. Here, on the other hand, in an election for an employee group that is over 300 times larger, where there is an extensive international route structure, and where, unlike Compass, flight attendants are on furlough, the flight attendants have one week *less* in which to vote. Where is the rationale for this decision?

The NMB eventually sent a letter, reiterating without explanation or rationale that the election dates would remain April 23, 2008 – May 28, 2008.

Damaged NMB Ballot Envelopes: Soon after the NMB began mailing balloting information, AFA-CWA received word from Delta flight attendants that the envelopes containing their personalized balloting information were either damaged, opened, or stuck to another voter's balloting information. As a result, several voters made clear that they did not trust the integrity of the voting process and would not be casting ballots.

AFA-CWA believes that this defective mailing error on the part of the NMB led to some voters not participating in the election.

Requests for Duplicate Voting Information: When requesting duplicate balloting information because of inadvertently throwing the ballots away or loss of the information, the NMB requires that the request be received in writing even though the balloting process itself is electronic/telephonic. Several weeks into the balloting process, Delta flight attendants began to make requests for duplicate voting information. As the May 28 ballot count loomed closer, AFA-CWA received increased complaints from flight attendants who had mailed requests for duplicates, but were still waiting for a response from the NMB. As of May 27th, AFA-CWA had collected the names of 58 flight attendants who had requested duplicate voting information but had not yet received it from the NMB.

Deceased flight attendant on eligibility list: AFA-CWA discovered a deceased flight attendant on the eligibility list and requested that her name be removed. As the request was received by the NMB less then the seven calendar days they require for removing a name, and even though Delta had failed to timely notify the NMB of her death, the NMB ruled that death is not an "extraordinary circumstance" that would warrant removing her name from the eligibility list.

Another example of the NMB decisions that have created a difficult organizing environment and of the NMB's willingness to randomly apply and interpret their policies

in favor of management was amply demonstrated in the representation election of the Compass flight attendants. This case demonstrated the NMB's willingness to deviate from their past practice, policy and the Representation Manual. However, it was done to address the concerns of the employer in this case, and directly against the interests of the employees seeking union representation and a binding labor contract.

Upon its emergence from bankruptcy, Northwest Airlines established Compass Airlines as a wholly owned, subsidiary airline to handle some of its regional flying. AFA-CWA began an organizing campaign amongst the flight attendants and filed for a representation election on August 22nd, 2007, with almost 100% of the flight attendants signing cards for an election. The NMB Representation Manual states that in order to determine which employees are eligible to participate in the election, the cut-off date is the last day of the payroll period ending before the day the NMB received the application for an election.

Compass Airlines filed with the NMB to stop the election from taking place claiming it was a "start-up" airline and had ambitious growth plans over the next several years. Since they claimed that there would be more flight attendants hired in the months and years to come, holding an election now would not be "fair" Despite long-established rules otherwise.

A full four months after AFA-CWA petitioned for an election, the NMB finally set election dates. This delay in scheduling an election is unprecedented for

representation elections and only makes sense if one considers that the delay worked in Compass' favor. The NMB finally ruled that the election would go forward but that the cutoff for inclusion of employees eligible to participate in the election would be moved forward to November 1, 2007, over 2 months since the original filing for the election. This decision was a profound deviation from long standing NMB policy and their representation manual, the exact sort of deviation that they have claimed is not possible when the union has sought recourse. In its decision, the NMB forcefully defended its right to ignore its own well-established procedures for conducting a representation election. The NMB stated:

> Although the Board's Manual sets forth procedural guidelines for the investigation of eligibility issues including the cut-off date, **the provisions of the Manual are neither binding on the Board nor the exclusive procedures for the NMB's investigation of representation matters**. The courts have recognized that the Manual is "not a compilation of regularly promulgated rules and regulations having the force and effect of law." **Thus, the NMB has the discretion under the RLA to establish rules for...eligibility to vote in an election and to deviate from these rules in the face of unusual or extraordinary circumstances**. (Emphasis Added)

This NMB has made clear that an employee's death does not constitute an "extraordinary circumstance" to have them removed as a "No" vote during a representation election. And this NMB has stated that a history of aggressive anti-union

behavior by an employer does not constitute an "extraordinary circumstance" to help facilitate unionization and collective bargaining as intended by Congress. But the NMB has no problem considering it is an "extraordinary circumstance" when the employer announced that they have a business plan to grow and expand and will hope to have in the future more employees then currently on the payroll.

So, as AFA-CWA has learned firsthand in these cases, the rules and requirements of the NMB in organizing campaigns are difficult. But the practices and decisions of this NMB have often made it even more difficult and have often been in favor of the employer.

Given all of the obstacles mentioned in the Delta campaign, AFA-CWA took extreme measures and filed carrier interference charges during the 2008 representation election. The Board noted in early May, 2008 that, "..Because the Board does not find extraordinary circumstances that would require Board action at this time, any allegations regarding conduct during the election period will be addressed, if appropriate, at the end of the voting period consistent with the Board's usual practice."

Almost five months have passed and the NMB has still not bothered to notify AFA-CWA if the Board will even investigate the charges of interference. If its suits the Board, the majority of Board members will delay scheduling elections, change election timelines and delay responding to carrier interference charges. This type of arrogance should not be tolerated.

While all of these actions have received various levels of attention and outrage, the most recent example of overreach by this NMB was its recent attempt to change its Representation Manual in airline merger situations. The proposed changes, coming as Delta and Northwest prepare to merge and throwing the future of the collective bargaining rights of tens of thousands of employees into doubt were suspicious at best and raised many questions. I want to thank the many members of Congress that weighed in with the NMB to express their opposition, and indeed outrage, concerning these changes. Fortunately, the NMB has withdrawn those proposed changes after receiving overwhelmingly negative comments, but the question still remains as to why the NMB was attempting these changes at this time.

There were a number of problematic changes proposed, by the NMB; however, Section 19.701 was especially egregious. Section 19.701 sought to change the procedures the Board uses to expand union certification after a merger occurs.

Under current NMB rules, the Board uses a "comparability" standard to determine representation rights in the context of a merger. As this is understood, if a unionized group of workers from one carrier is larger and "not comparable" in size to the group of workers who perform the same work at the other carrier in a merger, the former group's union is automatically certified to represent the new combined employee group without an election.

Proposed section 19.701 stated that when a union represents a craft or class of workers at one carrier, but no representation exists at the other, the Board will exercise its discretion and extend certification only where there is "more than a substantial majority, as determined by the Board." Under this new language, the threshold for extending certification is 'more than a substantial majority' and the Board determines at their whim what this percentage is. This is an ambiguous standard that has never been used and would grant the NMB unprecedented discretion to extend or deny certification to unions involved in mergers.

Section 19.701 also states that authorization cards may not be used to extend union certification. Currently NMB policies allow a union to extend certification through authorization cards or voluntary recognition, if the carrier consents. The Board later attempted to clarify this language; however, the revision was ambiguous and failed to clearly articulate the NMB's *current* policy.

Finally, the Board ignored multiple requests to schedule a public hearing and extend the comment period to October 15th, 2008. The Board is charged with administering labor-management relations in a fair and balanced manner and ensuring that the right of workers to freely choose union representation is protected. However, the proposed rule would have made it harder for workers to retain and achieve collective bargaining rights. There was simply no policy justification for the Board to implement these changes and no valid reason to deny a public hearing and extension of the comment period.

One other policy of the NMB deserves greater investigation and research. The NMB current policy is that in order to cast a vote, the voter must do so via the internet or over the phone. Voters do not have an opportunity to participate using a paper ballot. Recently, AFA-CWA conducted an internal audit of our voting procedures to determine voter participation in our internal elections. Our internal investigation found a 15 percent gap in participation in those elections using only an internet and phone voting process versus those that relied on a paper ballot. Those that utilized the paper ballots that were mailed back had a 15 percent greater participation rate then those that used the internet and phone method. It deserves investigation to determine if using a purely internet and phone based system of voting results in a decrease of voter participation in the election, especially when the NMB elections are based entirely on turnout and voter participation.

Lastly, I would like to raise the possible conflict of interest that exists with the current Chair of the NMB, Read Van Der Water. Chair Van Der Water is a former employee of Northwest Airlines, having served as their lobbyist for a number of years. Having her serving on the board at a time that many of the decisions impact her former employer potentially raises a conflict of interest. I for one find it interesting that in the two cases that AFA-CWA has had decided before the board that raise the most serious issues, were those directly involving Northwest Airlines – the Delta representation election and Compass Airlines. I hope the members of this Committee will ask Ms. Van Der Water about any possible contact that she may have had with her former employer, with Delta, or surrogates for her former employer or for Delta.

As you can see, it is difficult for any union to organize workers in the current environment of anti-union hostility from employers, especially when doing so under the onerous requirements established by the NMB. However, the decisions and actions of the NMB in these two cited elections and others have made the difficult environment even more challenging give the appearance of sanctioning the anti-union animus of Delta Air Lines. Congress should keep a vigilant watch over this NMB and send a clear message that the NMB can no longer be a party in corporate America's efforts to usurp the stated policy and precedent of Congress to "encourage unionization and collective bargaining." Currently, Delta, the country's most anti-union airline, is poised to become the largest airline in this country and possibly the world.

The actions on behalf of Delta by the NMB jeopardizes over 60 years of collective bargaining history of the Northwest Airlines flight attendants. Should Delta management succeed, with the assistance of the NMB, in eliminating a flight attendant union, the Northwest Airlines collective bargaining agreement would no longer be in effect. It is important for you to send this message. We will have a difficult struggle fighting this corporate giant, and we hope that the NMB does not once again push the scales in the employers direction.

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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September 24, 2008

The National Mediation Board
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Good afternoon, Chairman Oberstar, Ranking Member Mica, and Members of the Committee.

The National Mediation Board is pleased to have this opportunity to testify and we note that all three of the Board's Members are here before the Committee. Our comments today will focus primarily on the issue of representation.

The NMB is a neutral agency with a three member bipartisan board. The NMB's statutory duties involve mediating disputes involving wages and working conditions in the railroad and airline industries, resolving representation disputes among railroad and airline employees, and administering the arbitration of railroad grievances. To carry out this mission, the Agency relies on its experienced and knowledgeable staff with a diverse background in railroad and airline labor relations. The NMB's staff comes from both labor and management backgrounds. Our mediators include former union presidents as well as corporate officers. These men and women have a combined 350 years of experience working in the air and rail industries and under the Railway Labor Act.

The Railway Labor Act was created by labor management consensus and passed without amendment by Congress in 1926. In the succeeding 80 years, the Act has only been modestly amended. After the addition of airlines in 1936, there have been few amendments. The Board and the Act have functioned successfully for over 70 years. Today, both the airline and railroad industries are highly unionized -- 60% of airline employees and 84% of railroad employees are union members.

One of the NMB's primary purposes under the RLA is the resolution of representation disputes. Section 2, Ninth of the RLA charges the NMB with the responsibility to conduct representation elections "in such a manner as shall insure the choice of representatives . . . without interference, influence or coercion exercised by the carrier." To fulfill this statutory mandate to conduct elections untainted by carrier interference, the Board applies the "laboratory conditions" standard to the elections it conducts. This standard focuses on protecting employees' right to choose or not choose representation free of coercion or influence, not on whether the carrier has violated the law:

> [The Board employs its laboratory conditions test] to provide an election environment in which eligible voters [are] able to make their decision regarding representation with sufficient insulation from interference, influence or coercion by the carrier. This factual conclusion does not constitute or imply any determination the carrier committed illegal acts, but rather, that the factual circumstances in these cases were materially detrimental to the employees' freedom of choice under Section 2, Ninth of the Act. *Evergreen International Airline,* 20 NMB 675, 714 (1993)

The Board also recognizes that its laboratory conditions standard does not and should not prohibit the normal relations and standard communications between employer and employee.

The Board permits the filing of allegations of election interference at any time during the pendency of a representation dispute until seven days following the election tally. While the NMB may, in extraordinary circumstances, investigate such allegations prior to the holding of the tally, the Board generally defers any investigation until the completion of the election. Further, the Board investigates interference allegations only if they state a prima facie case that laboratory conditions were tainted and are supported by substantive evidence.

As part of its jurisdiction over representation disputes, the Board also investigates the representation consequences that result from the merger of two carriers. In such cases, the NMB determines whether the entities in question constitute a "single transportation system" or "single carrier" for representation purposes. In *Trans World Airlines/Ozark Airlines,* 14 NMB 218 (1987), the Board articulated the single carrier test that it has since consistently applied in both the airline and railroad industries. To determine whether two or more entities constitute a single transportation system, the

NMB employs a two part test: (1) whether the two carriers are held out to the public as a single transportation system; and (2) whether there is substantial integration of operations, financial control, and labor and personnel functions. The test is applied on a case-by-case basis based on the facts existing at the time employees file the representation application as opposed to a speculative future system. With regard to the first part of the test, whether the carriers are held out to the public as a single carrier, the Board looks at the carrier intent, public perception and factors such as whether there is a combined schedule, how the carrier advertises its services, whether reservations systems are combined, whether signs, logos and other publicly visible indicia have changed to indicate only one carrier's existence and whether tickets are issued on one carrier's stock.

In assessing the second part of the test, whether there is substantial integration of operations, the NMB considers whether the two carriers have common or separate boards of directors, corporate officers, flight operations, maintenance departments, customer service departments, accounting functions, finance departments, marketing functions, and labor relations. The Board also looks to see whether the operations are integrated from a managerial and labor relations perspective. Although common ownership is a factor in the determination, it is not controlling.

Existing certifications remain in effect until an organization or individual files a single carrier application and the NMB rules on the representation consequences of its finding of a single transportation system. Thus, the certifications of the minority unions may remain in effect until the date of the NMB's determination that the minority union does not have a sufficient showing of interest to trigger an election. The Board's statutory authority to investigate representation issues in mergers arises when requested by an organization or individual.

Under longstanding Board policy, once the NMB determines that a single transportation system exists as a result of the merger, the Board will extend an organization's certification to cover unrepresented employees in the merged craft or class only when the numbers of represented and unrepresented are not comparable.

The Board has never extended an organization's certification to cover the unrepresented employees in the merged craft or class on the basis of an existing collective bargaining agreement or dues check off combined with authorization cards from the unrepresented employees. Under existing NMB policy, authorization cards are accepted to satisfy the showing of interest requirement for an election in the merged craft or class. For example, if an organization only represented 25% of the employees in the merged craft or class, the organization may submit additional authorization cards to establish the requisite 35% showing of interest to trigger an election.

The Board has long held that nothing in the RLA precludes voluntary recognition. The Board will certify an organization based on a voluntary recognition agreement where the investigation discloses evidence of majority support. A recent decision, *NetJets Aviation*, demonstrates the Board's flexibility and commitment to employee free choice. The International Brotherhood of Teamsters (IBT) had represented NetJets Aviation's (NetJets) Pilots since 1973. The Pilots decided they wanted to form their own internal union, the NetJets Association of Shared Aircraft Pilots (NJASAP). NetJets, the IBT, and the NJASAP all agreed to participate in a privately-conducted election to resolve the representational question among the Pilots. On June 30, 2008, an internal election was conducted using the NMB's election contractor BallotPoint Election Services. This was not, however, an authorized NMB election. NJASAP received 97.7 percent of the vote.

On July 10, 2008, NJASAP filed its application with the Board supported by the certified election results from BallotPoint certifying NJASAP as the collective bargaining representative for Pilots at NetJets. NJASAP also provided the Board with valid authorization cards from almost eighty percent of the NetJets Pilots. Both IBT and NetJets management submitted letters to the Board consenting to NJASAP's certification.

Based on the agreement of the parties and the evidence that NJASAP's support by the majority of Pilots at NetJets, the Board used its discretion under Section 2, Ninth to "utilize any . . . appropriate method of ascertaining the names of . . . duly designated and authorized representatives and certified NJASAP as the representative of the Pilots at NetJets on August 26, 2008. *NetJets Aviation*, 35 NMB 245 (2008).

We hope that this summary of our representation procedures is helpful to the Committee. All three Board Members are available to address any questions or comments you might have.

Submitted by:
Read C. Van de Water, Chairman
Elizabeth Dougherty, Member
Harry R. Hoglander, Member

NATIONAL MEDIATION BOARD
WASHINGTON, D.C.

In the Matter of the	)	
REPRESENTATION OF EMPLOYEES	)	**Case No. R- 7148**
of	)	
DELTA AIRLINES, INC.	)	

THE ASSOCIATION OF FLIGHT ATTENDANTS' SUPPLEMENTAL
MOTION FOR BOARD DETERMINATION OF CARRIER INTERFERENCE

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INTRODUCTION

On February 14, 2008, the Association of Flight Attendants, AFL-CIO ("AFA" or "the Union"), filed an application with the National Mediation Board ("NMB" or "the Board") seeking an investigation into a representation dispute among the approximately 13,000 flight attendants at Delta Airlines, Inc. ("Delta" or "the Company"). Soon after the election period began, however, AFA noticed a disturbing trend of Company conduct that tainted the "laboratory conditions" the NMB seeks to promote during the balloting period. As a result, on May 5, 2008, AFA filed a request with the Board seeking an investigation and urged the NMB to take corrective action against Delta to end its ubiquitous interference in violation of Section 2, Ninth of the Railway Labor Act, 45 U.S. §152, Ninth. On May 5, 2008, the Board responded by stating that it had determined that there did not exist "extraordinary circumstances that would require Board action at this time." *Delta Airlines,* 35 NMB 158, 160 (2008).

Because Delta's illegal conduct did not abate in the run-up to the May 28 election, AFA now files this Supplemental Motion for Board Determination of Carrier Interference. As discussed below, Delta's comprehensive campaign to coerce and interfere with the flight attendants' free choice of a representative warrants a finding of interference and a new election to remove taint of the Company's illegal conduct.

STATEMENT OF FACTS

1. Delta's Anti-AFA Communications Campaign

From the moment it heard that AFA had filed for an election before the NMB through the May 28, 2008 ballot count, Delta maintained a campaign of anti-AFA communication that saturated

the flight attendant workplace. Slick anti-Union propaganda sent to the flight attendant homes complemented the workplace videos, posters and supervisor presence in the flight attendant crew lounges that overwhelmed the Delta flight attendants' free choice of a representative.

A. Delta's Anti-AFA DVD.

After the AFA election was announced, a Delta-produced anti-AFA DVD was mailed to every flight attendant's home. The DVD (attached hereto as Exhibit 1, "Exh."), titled "Important Information for Delta Flight Attendant!" was included in a slick package featuring smiling flight attendants and a personal message from Delta CEO Richard Anderson outlining the reasons why a vote for AFA would have the effect of "negatively changing a great relationship." Anderson goes on to reminisce about his days at unionized carrier Northwest by stating several blatant falsehoods:

> When I unilaterally gave pay raises and domestic partner benefits to flight attendants at Northwest, I received loud objections from the union because those benefits were paid directly because it was the right thing to do. The union often would criticize and vilify management in order to promote their own value. After all, they collect hundreds of dollars a year in union dues from each person, while Northwest flight attendants today have lower rates of pay than Delta flight attendants.

Perhaps Anderson's memory is clouded, or he knowingly made these untrue statements. In any event they are false. As established in the attached Declaration of Danny Campbell ("Campbell Decl." attached hereto as Exh. 4, p. 1), the former President of the Northwest flight attendants when they were represented by the Teamsters, Anderson *wasn't* CEO at Northwest when he "gave pay raises and domestic partner benefits to flight attendants." John Dasburg was CEO at the time of the pay raises, and further, Anderson never granted a pay raise to the Northwest flight attendants during his tenure as CEO. In fact, Anderson demanded pay cuts and benefit concessions beginning in 2002

and continuing with the successor Union to the Teamsters, the Professional Flight Attendants Association, through 2006. (Exh. 4, ¶ 4).

The DVD itself is a long testimonial to the reasons why Delta is superior to all other unionized carriers: "open-door" policy between employees and management; better pay and benefits (without specifics); how much former Union flight attendants prefer working at non-Union Delta (persons not identified); and the fact Unions cannot provide guarantees. Delta even managed to insert a reference to "9/11" when a flight attendant spoke about how Delta showed concern about its stranded flight crews on that day. The speaker (unidentified) contrasted Delta's concern for its flight attendants with the experience of the unionized crews at his hotel who were left to fend for themselves while air travel was grounded after the terrorist attacks. (Delta's show of "concern" may have been related to the fact that AFA had filed a petition for an NMB election for the Delta flight attendants on August 29, 2001, some two weeks before the attacks).

The DVD served no other purpose than to influence and coerce Delta flight attendants into voting against AFA representation. There is no "information" in the DVD that reflects neutrality on the part of Delta; rather the entire DVD is a strong exhortation to the Delta flight attendants that voting for collective bargaining representation will negatively impact their work life at the Company.

B. "GIVE A RIP - DON'T CLICK, DON'T DIAL"

Delta has also setup information tables and huge banners in the crew lounge with posters imploring flight attendants to "GIVE A RIP - DON'T CLICK, DON'T DIAL." In other words - don't vote. (Exh. 2). Through this slogan, Delta was imploring its flight attendants to destroy their voting instructions that contained the VIN and PIN numbers necessary to vote. In an updated version

of the old "destroy your ballot" mantra, the "GIVE A RIP - DON'T CLICK, DON'T DIAL," refrain is designed to persuade the flight attendants to immediately destroy their voting instruction before they even have an opportunity to think about voting. Delta attempted to transform the voting instruction themselves into objects of derision and anti-Delta sentiment.

This command was reinforced at every opportunity as Delta posted large posters with that slogan at every Delta flight attendants crew lounge across the system. As shown in Exh. 2, Delta's information tables contain multiple signs and leaflets next to a continuous running video of CEO Richard Anderson and other management officials imploring the flight attendants to reject unionization. Delta even distributed "shred it" pins that anti-AFA flight attendants wore aboard flights. (Exh. 18).

C. "I BELIEVE IN OUR DELTA"

Delta's primary vehicle for spreading its anti-AFA rhetoric has been the Company-produced newsletter titled "I BELIEVE IN OUR DELTA." The newsletter was posted on Delta's internal computer system that reaches every flight attendant who logs on to check his/her schedule, and was handed out in flight attendant crew lounges and airport concourses. Beginning in October, 2007, some four months before AFA even filed for an election, and continuing through and after the May 28 ballot count, this newsletter promoted a steady stream of anti-AFA diatribes designed to dissuade the Delta flight attendants from supporting the Union. (Exh. 3, pp. 1-68).

In the October 26, 2007 edition, Delta goes after the Union about its dues requirement, and warns flight attendants against signing an AFA authorization card. (Exh. 3, p. 1). The November 2, 2007 issue contains an essay from Joanne Smith, VP Inflight Services, who warns flight attendants

from engaging in any Union activity aboard the aircraft, and directs them to "notify your leader" if they observe such activity. (Exh. 3, p. 5). The November 16 issue urges flight attendants to leave "your options open" by allowing Delta, not the Union, to decide the seniority issue. (*Id.*, p. 12). Delta's obsession with AFA became so odious that Joanne Smith felt obliged to explain in the December 7 edition why the newsletter "has so much information on unions." (*Id.* p. 24). Smith acknowledges that Delta was focusing on unions because AFA had started calling Delta flight attendants at home and she felt "a sense of obligation to speak on the topic." (*Id.*)

After February 14, 2008, the date AFA filed its application for an election with the NMB, Delta's anti-AFA rhetoric completely dominated every subsequent issue of the newsletter. On February 22, the newsletter announced that Delta was initiating a "full-court press" in the flight attendant lounges and auxiliary bases:

> As we all know, there continue to be some questions, rumors, misinformation and the need for further clarification on various topics regarding union representation. So, with such an important decision in front of you, during the next several weeks, Joanne and I, along with other IFS leaders, will be spending more time in the bases and AFPs [auxiliary bases]. Please know it is ***our priority to be as available and accessible to you as possible*** in order to answer your questions, share our perspectives and make sure you have correct information. (Emphasis added)

(Exh. 3, p. 40).

The March 7 newsletter contained Smith's account of conversations with AFA supporters in the flight attendant lounge in which she told them that AFA cannot guarantee anything, particularly in light of the bankruptcy-issued contracts AFA was force to accept. (*Id.* p. 45). The "DON'T CLICK; DON'T DIAL" slogan made its first appearance in the March 20 edition, as Delta assured the flight attendants that "this is the surest way to vote no and prevent anyone else from obtaining the information and perhaps voting on your behalf." (Exh. 4, p. 47). Delta also added

bonus coverage to its regular newsletter, with special features like the one titled: "NEGOTIATION 101" - in which it reiterates that bargaining can leave flight attendants "better off, worse off, or leave you about the same." (*Id.*, p. 48). In the March 28 edition, Delta states that AFA "has demonstrated that its members have not been protected from pay cuts, job loss, pension termination and or any other changes affecting the airline industry." (*Id.*, p. 49).

In the April 4, 2008 edition, the Company criticizes AFA for attempting to remove furloughed flight attendants from the list in light of the length of their furlough, and contains a section titled: "Contradictions, Incomplete Information and Few Guarantees from AFA" and another titled: "How to Vote NO to AFA Representation." (*Id.*, p. 50).

The April 18, 2008 edition discusses seniority protection in the event of a merger with Northwest Airlines and promises that "Richard and Ed have said all along, we will protect our employees' seniority and our board-approved seniority protection policy has the backing of U.S. law." Delta then warns the flight attendants:

> Don't let the AFA mislead you into thinking that there is only one way to integrate a seniority list. Keeping your options open will allow you to have a voice in the process. As always, we strongly encourage you to do your research and get the facts.

(Exh. 3, p. 52).

Of course, the April 18 newsletter ends with a capitalized and bolded declaration that "THE ONLY SURE WAY TO VOTE NO IS TO NOT VOTE AT ALL." and instructs flight attendants to "rip up and throw away the VIN and PIN you receive from the NMB." (*Id.*). The Company intimates that AFA will engage in voter fraud when it states that ripping up your voting instructions "is the surest way to vote no and will prevent anyone else from obtaining information and perhaps voting on your behalf." (Exh. 3, p. 52). Of course, no such thing occurred during balloting and

Delta has provided no evidence to support this outlandish assertion.

On the first day of balloting, April 23, Delta put out another newsletter, this time signed by VP of Inflight, Joanne Smith, reasserting its promise to protect seniority by stating falsely:

> Last September, Delta's Board of Directors made a written commitment that we would not agree to a merger unless the merger agreement guaranteed a process for fair and equitable seniority integration for all frontline Delta people. In December, our policy was endorsed by the U.S. Congress.

(Exh. 3, p. 56).

In reality, Delta vigorously OPPOSED the enactment of the fair and equitable seniority integration legislation by Congress. And once again, Delta urges the flight attendants to "rip up and throw away the VIN and PIN you receive from the NMB." (*Id.*). Delta then reminds the flight attendants of its intent to saturate the flight attendant crew lounges with supervisors spouting anti-AFA rhetoric:

> During the next several weeks, we along with other IFS (Inflight Services) leaders, will continue to be available in the bases and AFPs to answer your questions, share our perspectives and make sure you have accurate information.

(Id.)

The April 25 newsletter, again mentions seniority integration protection for flight attendants and stated that, as of April 25, 215 flight attendants had decided to take the voluntary early out through the Company-sponsored "60-point retirement program" or the "early out program." (*Id.*, p. 64). The May 2 issue announced a 3% raise for all flight attendants and urged the flight attendants to read " the memo from Richard and Ed for more details." (*Id.*, p. 57). Following the election, the May 30 edition praised the flight attendants for rejecting AFA and preserving the "unique culture we have enjoyed." (Exh. 3, p. 66).

D. Delta Misstatements About Board Voting Procedure.

AFA also learned that new hires were being told by Delta management that they would be ineligible to vote. One Delta flight attendant flew with a new hire who reportedly said that Delta management told the new hires they could not vote until they had been employed for at least one (1) year. (Exh. 4, p. 11).

2. Delta's Harassment/Intimidation/Surveillance of AFA Supporters

Delta's most effective and insidious anti-AFA tactic was the overt and intimidating presence of Company supervisors and their supporters in the flight attendant crew lounges, airport concourses, and at times, on the aircraft with working flight attendants, where they interrogated flight attendants about their Union sympathies, harassed AFA supporters, and constantly surveilled the Union activists who had were attempting to discuss the AFA election with their colleagues. At a carrier where fear seems to be the most effective way to keep employees in line, Delta used the AFA election to "let loose the dogs of war" to show flight attendants that Delta would not allow a Union on its property. As shown below, AFA activists were constantly under the eye of Inflight supervisors who planted themselves and their anti-AFA rhetoric wherever Delta flight attendants gathered during the runup to the election:

- On April 24, a Delta supervisor asked 3 AFA activists to remove a small 8X10 sign that said "STEP UP" from their small AFA table in the break area, even though the Company had set up a large billboard that said: "GIVE A RIP TO YOUR UNION BALLOT." (Exh. 5, p. 3).

- On April 26, Delta flight attendants and AFA supporters Toni Weinfurtner and John Jablonski were in the Atlanta crew lounge for the GOTV campaign. A Delta flight attendant on special assignment was wearing a "BIG JUST SAY NO TO AFA" sign on his body. As they attempted to speak with their colleagues about the election he came up and told them how "gullible" they were, and when asked if he was management said in a loud voice "NO I AM A FLIGHT ATTENDANT." He then used the Delta PA system to invite flight attendants over to speak to him about AFA. (*Id.*, p. 2).
- AFA activist Jean Cinotto, who was prominent on AFA's webcasts, was threatened by Delta Supervisor Colleen Atherly for her "tone" in emails even though Cinotto was merely inquiring about a mistake with her vacation totals. (Exh. 10, pp. 5-12).
- AFA supporter Jacob Easter reported on April 28 that a Delta supervisor was wearing a flight attendant uniform, though his only duty was to monitor the concourse and speak to flight attendants about the election. Supervisors do not wear flight attendant uniforms unless they are actually working onboard a flight. (Exh. 7, p. 3).
- AFA supporters were being observed by a Delta supervisor who began shouting that AFA was "scum" when a flight attendant approached the AFA table to discuss the Union. (Exh. 5, pp. 6-8).
- On April 23, two Delta supervisors stood in front of the AFA table for the majority of the time AFA activists manned the table. An Inflight Field Manager Jackie Reilly was wearing a flight attendant uniform at the time. (*Id.*, p. 9).

- AFA learned that Delta flight attendant Marisela Hess was called at home and asked where she got her AFA pin, and was asked not to speak about the Union. (Exh. 5, p. 10).
- On April 28, Delta supervisors in Atlanta told AFA activists that they had to remove a yellow bag tag from the AFA table that said "Ask me about AFA." About 15 to 20 minutes later a supervisor came back and told them she was "mistaken" and that the bag tag was acceptable. But the flight attendants AFA wished to speak with had already left the area. (Exh. 10, pp. 1-3).
- Denise Corsello, an AFA activist was told to take down a "ProDelta -ProAFA" sign from AFA's designated area at the Los Angeles Airport from April 29-30. (Exh. 9, p. 1).
- On April 27, in the Salt Lake City airport flight attendant lounge, Delta supervisor Cory Lindquist told Delta flight attendant and AFA activist Jon Dewey that he could not distribute AFA materials in the lounge. Another flight attendant, Dianne Shelton told Lindquist that Dewey was within his rights to distribute the AFA material. Lindquist relented and said Dewey could hand the literature at the door to the lounge. (Exh. 11).
- On May 6, AFA activist John Jablonski noticed Candace Bruton, a Delta flight attendant wearing a "PRO-DELTA PRO-UNION FREE" t-shirt and "selling" bag tags that said "Just Say NO to AFA" though she was not collecting money. While other pro-AFA activists are approached and harassed by management, Burton was untouched by Delta supervisors while in the crew lounge. At one point Jablonski

overheard Delta supervisor Janet Payne say to Burton: "not to worry what is in your (her) budget that we (Delta) would take care of it." (Exh. 5, p. 11).

- AFA activists from Northwest Airlines were confronted by Delta supervisors and questioned about being on the E Concourse in Atlanta. (Exh. 6, p. 4; Exh. 8, pp. 4-8).
- While on the ground in Los Angeles, Delta supervisor Jim Terry approached several flight attendants to talk about how their seniority would be in jeopardy if they voted for a union. (Exh. 4, p. 10).
- Delta Manager David James verbally harassed AFA activist Toni Weinfurtner on May 8 at the Atlanta airport. James screamed at Weinfurtner for wearing her uniform and using her security credentials to talk to flight attendants on the E concourse. (Exh. 6, p. 4).
- On May 1, Delta supervisors Brian Olievera and Jim Terry told Denise Corsello to remove her AFA logo t-shirts from their AFA table because it resembled a poster. (Exh. 9, p. 3).
- On May 2, Delta flight attendant Denise Corsello was called by supervisor Kim Barasso and told that Delta has decided that no AFA posters were allowed to used system-wide. (*Id.*, p. 2).

John Cornelius, a flight attendant employed by Alaska Airlines, spent over year in Atlanta working on AFA's organizing campaign at Delta. The summary of his experience dealing with the constant harassment of Delta supervisors encapsulates the experience of most of the Delta flight attendants who worked to obtain AFA representation. (Exh. 8, pp. 11-12).

3. Delta's Conferral of Benefits During the Election Period

In a remarkable showing of "chutzpah" in the midst of balloting for AFA representation, on May 2, 2008, Delta announced a 3% raise for all flight attendants effective July 1, after voting would be completed. Delta also announced a voluntary early out program that resulted in 821, at last count, flight attendants choosing to leave the Company *after* the May 28 ballot count. Both benefits were conferred by Delta to dissuade voters from casting ballots for AFA representation.

A. The 3% Raise

In announcing this pre-election pay raise effective July 1, 2008, Delta CEO Richard Anderson CFO Ed Bastian wrote a memorandum explaining their reasoning for conferring such a raise at the same time Delta flight attendants were deciding whether to choose an exclusive bargaining representative:

> You'll recall ***earlier in the year we deferred a decision on these increases as we worked to reforecast the impact that record fuel prices would have on our business and to make sure we can afford any pay adjustment we make.*** We've done that now and our confidence in taking this step comes from the tremendous work you all are doing in those parts of our business we can control. In the first quarter, we achieved 101% of industry average unit revenues; we've established fuel hedges currently valued at more than $350 million; we remain on track to gain an additional $550 million in productivity this year and the list goes on. We also remain confident in the strength of our proposed merger with Northwest and the speed with which it will move forward. (Emphasis added).

(Exh. 12, p. 1).

Remarkably, on May 2, 208, the date of this announcement, a barrel of oil was trading at $110, a 10% increase from April 1, and is now trading at approximately $133 per barrel - an additional 24% increase from the date the pay raise was announced. (Exh. 13). Thus, Delta's

statement that the pay raise was given after Delta had "deferred a decision on these increases as we worked to reforecast the impact that record fuel prices would have on our business" is simply nonsensical. In other words, the Company deferred the pay raise when oil was trading as low as $87 per barrel in mid-January 2008, and instead, waited until it had risen to $110, an almost 26% increase, on May 2, to determine that fuel prices warranted a raise for the flight attendants effective July 1. One Delta flight attendant told an AFA activist that she had decided not to vote for AFA because of the 3% pay raise. (Exh. 14, p. 2).

B. The "60-Point Retirement Program" and "Early Out Program"

On March 18, 2008, just one month after AFA filed its election application, CEO Anderson and CFO Bastian distributed a memorandum to all Delta employees outlining a voluntary employee reduction plan for all non-pilot employees - the "60-Point Retirement Program" for those already eligible for retirement whose age and years of service add up to at least 60, with 10 years or more of service; and the "Early Out Program," which is open to "frontline employees" including flight attendants, with 10 or more years of service. (Exh. 15, p. 2). The 60-Point program provides for severance pay based on years of service, lifetime travel passes, medical, dental and vision benefits, and life insurance. The Early Out provides reduced severance pay, health benefits, and passes. (*Id.*)

According to Delta's "Rollout and Communication Plan" for these voluntary reduction programs, April 14 was the date flight attendants could begin enrolling for the program, with May 12, the date enrollment closes. (*Id.*, p. 5). The enrollment date was subsequently expanded until "a minute before midnight on May 15." (*Id.*, p. 17). Once flight attendants enrolled, they had until "0800ET on May 28," the date of the AFA ballot count, to designate their "preferred exit dates."

(Id.) As of May 19, Delta reported that 821 flight attendants had elected to participate in the voluntary leave programs. *(Id.)* Although these 821 flight attendants had effectively severed their ties to Delta by May 19, they were not removed from the Eligibility List for the May 28 ballot count.

4. The Board's Balloting Procedures

From AFA's February 14 application, through the May 28 ballot count, the NMB's election procedures were arbitrary and flawed. As a result, many Delta flight attendants were denied an opportunity to vote for representation.

A. Unilateral Change in the Election Date

On March 24, 2008, the Board issued a notice establishing that an election among the Delta flight attendants shall take place and that voting period will begin on April 23 and conclude on June 3, 2008. After AFA notified its supporters about the June 3 ballot, count, the Board, without consultation with the parties, decided, unilaterally, on April 3, to change the date of the ballot count from June 3 to May 28. AFA protested the Board's unilateral decision arguing:

> . . . unlike many employee craft or classes in the airline industry, flight attendants do not report to discrete work locations during regular business hours. Rather, the 13,000 Delta flight attendants are based at 13 different regular domiciles, dozens of additional "satellite" locations, and the majority actually commute to their domiciles from other cities. In other words, Delta flight attendants are literally dispersed around the world at any given time. As a result, AFA is forced to focus its limited resources on reaching as many of these dispersed flight attendants as possible within the election period. Clearly, a longer time period gives AFA the ability to reach most of the potential voters, while a shortened one does not.

> The Board's decision is even more disturbing when it is compared to the election period established for the 46 flight attendants eligible to vote in the *Compass Airlines, Inc,* 35 NMB 82 (2008). In that election, the voting information was mailed out on December 17, 2007, and the vote count was on January 29, 2008. In other words, the 46 Compass flight attendants had over six (6) weeks to vote. Here, on the other hand, in an election for an employee group that is over 300 times larger, the flight attendants have one week *less* in which to vote. Where is the rationale for this decision?

After Delta filed a response to AFA's April 4 letter, the Board reiterated, without explanation or rationale, that the Delta ballot count "remains in the Board offices on May 28, 2008, at 2 p.m. ET." Delta flight attendants were thus denied an additional week of balloting.

B. Damaged Ballot Envelopes

Soon after the Board began mailing balloting information, the Union received word from several Delta flight attendants complaining that the envelopes containing the VIN/PIN balloting information were either damaged, opened, or stuck to another voter's balloting information. As a result, AFA was told by several voters that they did not trust the voting process and would not be casting their vote for representation.

One Delta flight attendant, Carol Landry, sent an email to AFA activist John Jablonski noting that her balloting information came in an envelope that was opened. She also stated that other flight attendants have complained about unsealed or tampered envelopes that has caused some voters to question the confidentiality of the balloting. (Exh. 5, p. 13). Another Delta flight attendant, Linda Sorenson, received her voting instructions with a hand-written note on the envelope that read: "This was stuck to my envolop. PLS FWD to this person!" (Exh. 7, pp. 4-6). Clearly, Sorenson's envelope had been stuck to another flight attendant's balloting instructions envelope. Vicki Bender

told another AFA activist, Brenda Uribe, that her instructions were tampered with. (Exh. 14, p. 3). Two other Delta flight attendants, Naney J. Noonan and Byron Haxton, reported that their balloting envelopes were open, and they were not voting. (Exh. 16, p. 2).

C. Requests for Duplicate Voting Information

Several weeks into the balloting process, Delta flight attendants began to make request for duplicate voting information. As the May 28 ballot count loomed closer, AFA received increased complaints from flight attendants who had mailed requests for duplicates, but were still waiting for a response from the NMB. (Exh. 7, p. 7; Exh. 17, p. 2). As of May 27, 2008, AFA had collected the names of 58 Delta flight attendants who had requested duplicate VIN/PINs but had not yet received them from the NMB. (Exh. 14, pp. 6-8).

D. Deceased Flight Attendant on Ballot

In a remarkable decision that only underscores a host of inexplicable decisions by the Board, a deceased flight attendant, Janette Wood, remained on the List, since, it the Board's view, notice of the status change was "provided less than seven calendar days before the count without supporting documentation, and offered n explanation for why this status change was untimely." In the Board's view, death is not an "extraordinary circumstance" that would warrant waiving the seven-day rule for submitting status changes. (NMB May 28, 2008, letter, p. 10).

ARGUMENT

I. DELTA AIRLINES HAS INTERFERED WITH ITS EMPLOYEES' DESIGNATION OF A REPRESENTATIVE IN VIOLATION OF SECTION 2, THIRD, 2, FOURTH, AND 2, NINTH OF THE RAILWAY LABOR ACT, 45 U.S.C. §§ 152, THIRD, FOURTH AND NINTH.

The Railway Labor Act gives employees the right to organize and select a representative without interference, influence or coercion. Section 2, Third, 2, Fourth, 45 U.S.C. § 152, Third, Fourth; *Texas & N.O.R.R. Co. v. Brotherhood of Ry. & S.S.Clerks*, 281 U.S. 548 (1930); *Laker Airways*, 8 NMB 236 (1981). Section 2, Fourth expressly provides that:

> it shall be unlawful for any carrier to interfere in *any way* with the organization of its employees or to use the funds of the carrier . . . to influence or coerce employees in an effort to induce them to join or *not to join or remain members of any labor organization.*

45 U.S.C. § 152, Fourth (Emphasis added).

The terms "interference, influence and coercion" were defined by the Supreme Court in *Texas & N.O.R.R.* Co., soon after the Act became law:

> 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law . . . 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." The phrase covers the abuse of relation or opportunity so as to corrupt or override the will . . . *Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme.*

281 U.S. at 553. (Emphasis added).

This prohibition against carrier involvement in its employees' choice of a representative is underscored in Section 2, General Purposes Clause. That section states that one of the purposes of the Act is to "provide for the complete independence of carriers and of employees in the matter of self-organization." 45 U.S.C. § 152, General Purposes Clause.

Under Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, the Board is charged with the duty of ensuring that employees in any craft or class are guaranteed the opportunity to designate a representative without carrier interference, influence or coercion. If allegations of carrier interference are made, the Board must investigate such claims. *Piedmont Airlines, Inc.*, 31 NMB 257 (2004); *America West Airlines, Inc.*, 30 NMB 310 (2003); *US Airways*, 24 NMB 354 (1997); *Metroflight, Inc.*, 13 NMB 284 (1986); *Key Airlines*, 13 NMB 153 (1986).

In its investigation, the Board must determine whether based on the "totality of the circumstances revealed" the laboratory conditions which it seeks to promote have been contaminated. *Mercy Air Services, Inc.*, 29 NMB 55 (2001); *Petroleum Helicopters, Inc.*, 25 NMB 197, 225 (1998); *Sky Valet, Inc.*, 23 NMB 276, 294 (1996); *America West Airlines, Inc.*, 17 NMB 79 (1990); *Atchinson, Topeka & Santa Fe Ry.*, 12 NMB 95 (1985); *Zantop Int'l Airlines*, 6 NMB 834 (1979). The laboratory conditions commence when the carrier becomes aware of the union organizing campaign. *United Airlines*, 27 NMB 417 (2000); *Era Aviation*, 27 NMB 321 (2000).

If interference is found, the Board may devise a remedy to remove the taint and provide the employees with a fair election. *AeroMexico*, 28 NMB 309 (2001); *LSG Lufthansa Services, Inc.*, 27 NMB 18 (1999); *Sky Valet Inc.*, 23 NMB at 295-96; *Metroflight, Inc.*, 13 NMB 284 (1986); *Rio Airways*, 11 NMB 75 (1983); *Mercury Serv.*, 9 NMB 312 (1982); *Laker Airways*, 8 NMB 236 (1981). The Board's authority includes the investigation of carrier interference allegations and the imposition of a remedy to remove the taint of the interference. *Virgin Atlantic Airways*, 24 NMB 575, 623 (1997); *Southwest Airlines, Inc.*, 21 NMB 332, 351 (1994); *Sea Airmotive, Inc.*, 11 NMB 87, 92 (1983)(issuing a *Laker* ballot to remedy carrier interference before the ballot count); *Transkentucky Transportation R.R., Inc.*, 8 NMB 495, 502(1981)(same).

As discussed below, and supported by the Declarations of Delta flight attendants and other documents, the Company has engaged in a comprehensive campaign to coerce, influence and interfere with its flight attendants' free choice of a representative. Specifically, Delta has:

1. Conducted comprehensive and relentless anti-AFA communication including videos, and newsletters that has overwhelmed the flight attendants' free choice, and deliberately misrepresented NMB voting procedures;

2. Harassed AFA supporters through interrogation, surveillance and interference with the ability of AFA supporters to discuss unionization with the flight attendants;

3 Conferred benefits such as pay raises, and a voluntary "early-out" program after voting had commenced.

In addition, the Board tainted its own voting process by unilaterally moving the date of the ballot count, mailing out damaged voting information envelopes, failing to timely respond to requests for duplicate balloting information, and finally, by allowing a deceased flight attendant to remain on the Eligibility List.

Based upon this conduct, AFA requests that the Board find that the laboratory conditions necessary for a free and fair representation election under the RLA were tainted. *America West Airlines, Inc.*, 17 NMB 79 (1990). Accordingly, the Board should remedy Delta's interference through a special *Laker* election ballot.

A. Delta Conducted a Pervasive and Comprehensive Anti-AFA Communications Campaign That Was Intended to Overwhelm the Flight Attendants' Ability To Choose a Representative Freely.

Although the Board has upheld a carrier's First Amendment right to communicate to its employees, it has also consistently ruled that "[t]he privilege of free speech is not absolute. It must be evaluated in the context of the rights of others." *Express Airlines I, Inc.*, 28 NMB 431 (2001);

Federal Express, 20 NMB 7, 49 (1992); *US Airways*, 24 NMB 354, 391 (1997); *USAir*, 18 NMB 290 (1991); *EgyptAir*, 19 NMB 166 (1992); *America West Airlines, Inc.*, 17 NMB 226 (1990). *See also Texas & N.O.R.R.* Co. *v. S.S. Clerks,*, 288 U.S. 548 (1930). In applying this standard, one court has recognized that

> [t]he Constitution does not tolerate expression by an employer found to be specifically prohibited by an Act of Congress, an act which has been repeatedly tested and upheld, particularly when its statements infringe on the First Amendment rights of employees to associate free of employer disruption. *See NLRB v. Gissell Packing, Co.*, 395 U.S. 575, 617 (1969).

IAM v. Continental Airlines, 754 F.Supp. 892 (D.D.C. 1990).

Violations of Section 2, Ninth of the RLA have been found where, during a Board election, an employer held meetings and sent letters to employees that discredited the union and instructed them how to vote against the union, *Allegheny Airlines*, 4 NMB 7 (1962), and where an employer issued a letter implying that the carrier's financial future was contingent on the rejection of the union. *MidPacific Airlines*, 13 NMB 178 (1986). In *Allegheny*, the Board recognized the inherently coercive effect of a carrier's communication during an election campaign:

> It is clear that the employees would read the letter fully appreciative of the power and authority which [the] carrier exercised over them with respect to their day-to-day assignments and security of their jobs. It would be completely unrealistic to believe that under such circumstances employees would not be particularly susceptible to the arguments advanced by the carrier against union representation. *It was pure and simple pressure to interfere with a free choice of a representative.*

4 NMB at 14.

Accordingly, the Board's determination of "whether a carrier's campaign is overwhelming is not the number of campaign communications but the substance and impact of those communications." *US Airways*, 24 NMB at 391. In *Petroleum Helicopters*, the Board found with

respect to a carrier's communications:

> Under the circumstances of this case, PHI's barrage of meetings and communications suggesting that its clients, oil and gas companies, did not want to do business with a unionized company, that PHI would lose business and jobs, is a factor leading to the Board's finding that the carrier interfered with employees' free choice of [a] representative. . . . The one on one or small group meetings conducted by [company management] to discuss the organizing campaign served to reiterate the same messages communicated in the larger meetings and by the fact sheets.

25 NMB at 233.

As described below, Delta's communications with its flight attendants is designed as "pure and simple pressure to interfere with their choice of [AFA]" as their bargaining representative. *Allegheny*, 4 NMB at 14. As a result, "the overall effect of [Delta's anti-AFA campaign is] sufficient to overwhelm the [flight attendants'] ability to choose a representative freely." *US Airways*, 24 NMB at 391.

Days after the NMB mailed out election ballots on April 23, Delta mailed a slick anti-AFA DVD to all flight attendants that contained personal messages from the Company's top management giving their reasons why voting for representation would have the effect of "negatively changing a great relationship." (Exh. 1). CEO Richard Anderson (who, during the election period signed his correspondence simply as "Richard") wrongfully stated in the DVD that he was responsible for giving "pay raises and domestic partner benefits to flight attendants," at Northwest Airlines and that the Union nonetheless raised "loud objections." As shown by the Declaration of Danny Campbell, however, the former President of the Union representing Northwest flight attendants, in reality, John Dasburg was the CEO who gave those benefits. (Exh. 4, p. 1). And Anderson actually demanded wage and benefit cuts while he was in charge at Northwest. Predictably, the DVD also contains flight attendant testimonials on Delta's superiority to unionized carriers, and how Delta flight

attendants from those unionized carriers prefer the "culture" at non-union Delta.

This DVD was designed for the simple purpose of dissuading flight attendants from voting for AFA by showing that Anderson, not AFA, will give you raises, and that a unionized environment will destroy Delta's "open-door" policy for flight attendants. The promise of future raises, which was borne out by the Company's announcement of a 3% raise on May 2, as well as management's sudden show of concern for flight attendants was calculated to poison the notion of a Union on the property. Delta clearly was not "neutral" about the unionization of its flight attendants.

The anti-AFA message was reinforced in the crew lounges where a continuous loop of videotape/DVA was shown on small televisions featuring Inflight VP Joanne Smith and other management personnel giving reasons why AFA would not be good for flight attendants. On those tables featuring Smith's screen image were also huge posters imploring flight attendants to "GIVE A RIP -DON'T CLICK, DON'T DIAL," a reference to destroying the NMB balloting information mailed to every flight attendant's home. (Exh. 2). This new slogan was an updated version of the old carrier "destroy your ballot" mantra from the days of mail balloting. Now flight attendants are urged to destroy their VIN/PIN information so they can't vote by internet or by telephone. Delta's slogan gives the unmistakable message the even keeping the balloting information is dangerous; that somehow someone may take your VIN/PIN information about vote without your knowledge. Again, Delta is implying that the voting process is suspect and the confidentiality of the vote is not well-protected.

The anti-AFA message permeating the crew lounges was, in turn, reinforced through Delta's "I BELIEVE IN OUR DELTA" newsletter which was available online to all flight attendants. (Exh. 3, pp. 1-68). From October 2007 through the election, the newsletter maintained the anti-AFA

drumbeat Delta pushed throughout the election period. In fact, in December 7, 2007 edition, Smith was forced to defend to flight attendants why the newsletter was so focused on Unions. (Exh. 3, p. 24). After the NMB announced the election, all subsequent newsletters gave the standard Delta reasons for not voting for AFA representation: Unions cannot guarantee anything; AFA cannot protect its members from pay and benefit cuts; AFA cannot protect seniority in the event of a merger; and most insidious, Delta states in almost every newsletter after February 14, the date of AFA's application for an election, that ripping up the VIN/PIN information "is the surest way to vote no and will prevent anyone else from obtaining information and perhaps voting on your behalf." (Exh. 3, pp. 39-68). No such thing occurred during balloting and no evidence has ever been submitted supporting such a ridiculous allegation.

Of course, the 3% raise for all "non-contract" employees, which included the non-union Delta flight attendants, was first announced in the newsletter. Smith tells the flight attendants to "read the memo from Richard and Ed for more details." (Exh. 3, p. 57).

Finally, Delta misstated the Board's voting procedures by telling new hires they were ineligible to vote if they had been flight attendants for less than a year. *Aeromexico,*28 NMB 309 (2001)(misstating Board procedures constitutes interference); *Federal Express,* 20 NMB 7 (1992) (same). (Exh. 4, p. 11).

Given Delta's power and authority over flight attendant pay, benefits and work-rules "[i]t would be completely unrealistic to believe that under such circumstances [Delta flight attendants] would not be particularly susceptible to the arguments advanced by [Delta] against union representation." *Allegheny Airlines*, 4 NMB at 14. By threats to future benefit increases if AFA is voted in, and promises to protect seniority after the merger with Northwest Airlines, Delta's written

communication constituted "pure and simple pressure to interfere with [the Delta flight attendants free choice of a representative." Id. Accordingly, the overall effect of Delta's written communication to flight attendants "overwhelm[ed] the [flight attendants'] ability to choose a representative freely." *US Airways*, 24 NMB at 391.

B. Delta Harassed, Interrogated And Surveilled Flight Attendants Who Supported AFA's Organizing Campaign, And Interfered With Their Ability To Communicate With Their Colleagues About Unionization.

Carrier interrogation of employees over their union sympathies, and surveillance of their activities in support of an organizing campaign constitute interference with employee free choice. *Sky Valet d/b/a Commercial Aviation Services of Boston, Inc.*, 23 NMB 276 (1996); *Laker Airways*, 8 NMB 236 (1981). In addition, discipline and discharge of employees for their involvement in union activities violates the RLA. *Key Airlines, Inc.*, 16 NMB 296 (1989). Furthermore, carriers are prohibited from interfering with their employees' right to communicate about organizing at the workplace. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Adams v. Federal Express Corp.*,470 F.Supp. 1356, 1362-63 (W.D. 1979), *aff'd.* 654 D.2d 452 (6th Cir. 1981).

The most oppressive feature of Delta's anti-AFA campaign was the omnipresence of inflight supervisors in the flight attendant crew lounges and airport concourses where AFA activists attempted to speak to their colleagues about the issue of *their* collective bargaining representation. Everywhere flight attendants gathered, Delta management was present in full force. Supervisors appeared wearing anti-AFA t-shirts, and sat or stood close to any AFA information table that may appear in the crew lounge. AFA activists were ceaselessly harassed about the contents on their information table, or asked to remove the small AFA signs they had posted to alert their colleagues

that Union information was available. Where AFA did manage to setup an information table, Delta supervisors where usually not far away, which acted as a warning to any interested flight attendants that they were being watched - if they approached an AFA activist, Delta would take note. Delta flight attendants knew they were under surveillance if they spoke to AFA. (See Exhs. 4-10).

On other occasions, Delta supervisors became openly hostile to AFA supporters. One Delta supervisor screamed out that AFA was "scum" in the flight attendant lounge in Atlanta. (Exh. 5, pp. 6-8). Toni Weinfurtner was screamed at for wearing her uniform on the E concourse in Atlanta. (Exh. 6, p. 4). Other flight attendants were told to remove their pro-AFA bag tags, asked by supervisors where they got an AFA pin, or told not to speak to AFA supporters. (Exh. 10, pp. 1-3; Exh 9, p. 3; Exh. 8, p. 11). John Cornelius, an Alaska Airlines flight attendant who spent over a year in Atlanta working as an AFA activist to help the Delta flight attendants obtain representation, has provided a summary of his experiences dealing with Delta's constant harassment of AFA's activists: In pertinent part, Cornelius states:

> While working with Delta flight attendants attempting to engage their colleagues in the work space many workers told me of days when they would arrive and be told to move their table two inches, then the next day they would be required to move the table back to its original space. One scenario described to me was a situation where a flight attendant asked for assistance from a supervisor and the person was told by the supervisor that 'if they removed that pin (AFA pin), they could receive help.' I was consistently advised of supervisors walking into briefing rooms and talking about there being no need for a union. Additionally, supervisors handing out the Delta campaign buttons along with their anti union message. One day advocates for AFA would walk in and the rules would be changed another day ti would be something different. It was also commonplace for some of the activists to be 'called in for special meetings' these were intended to scare the worker.... Flight attendants would walk into work and while in briefings, their luggage tags would be cut off. Since no workers are allowed to travel with or bring scissors to work, it is not hard to figure out where they came form! In one instance a crew bag's zippers were coated in chewing gum. What disturbs me most about this is that Delta management knew of these many instances of tampering with a person's belonging and never

> addressed it. The impact on crew security in this case has many potential adverse repercussions. It is my opinion that this environment was even fostered by Delta management's complacency if not participation.

(Exh. 8, pp. 11-12).

Based upon the described conduct, it cannot be disputed that Delta deliberately set out to interfere with and intimidate flight attendants from communicating with their colleagues about the AFA election in violation of the RLA. *Laker Airways*, 8 NMB 236 (1981).

C. Delta Illegally Conferred Benefits On Its Flight Attendants During AFA's Organizing Campaign.

The conferral of benefits to influence the outcome of an organizing campaign violates the Act. *Union of Prof. Airmen v. Alaska Aeronautical Indus.*, 95 LRRM 2868 (D. Alaska 1977); *Adams v. Federal Express Corp.*, 470 F.Supp. 1356, 1370 (W.D. Tenn. 1979), *aff'd* 654 F.2d 452 (6th Cir. 1981); *Mercy Air Service, Inc.*, 29 NMB 55 (2001); *American Trans Air, Inc.*, 28 NMB 163 (2000); *Continental Airlines/Continental Express*, 27 NMB 463 (2000); *Petroleum Helicopters, Inc.*, 25 NMB at 228; *USAir*, 17 NMB 377 (1990); *Florida East Coast Ry.*, 17 NMB 177 (1990); *Mercury Serv.*, 9 NMB at 322; *Laker Airways*, 8 NMB at 251; *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). As the Board recognized in *Laker*, this principle is consistent with the well-settled precedents of the National Labor Relations Board ("NLRB") and the Supreme Court. *Laker Airways*, 8 NMB at 252.

As the Court stated in *NLRB v. Exchange Parts Co.*:

> . . . The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged . . . The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently

removed.

375 U.S. at 409. (cited in *Laker Airways*, 8 NMB at 252-53). Indeed, "it is the mere offer" [of increased benefits] which tends to undermine their [organizing] activity." *Union of Prof. Airmen*, 95 LRRM at 2871. And once a carrier is aware of a union organizing campaign, "[f]rom that date onward until the conclusion of the election, laboratory conditions must be maintained." *Key Airlines*, 16 NMB 296, 310 (1989). Accordingly, any conferral of benefits on employees seeking representation during this critical period raises the specter of carrier interference that is designed to undermine support for the union. *Id.*

In fact, the Board has made clear that changes in working conditions after an election is underway "may taint laboratory conditions, except if the changes were "planned before the laboratory conditions attached, or there is 'clear and convincing evidence of a compelling business justification.' " *Mercy Air Service,* 29 NMB at 73-74 (*citing Continental Airlines/Continental Express,* 27 NMB at 475).

Here, there can be no doubt that Delta's May 2 announcement of a 3% raise to all "non-contract" employees was intended to dissuade flight attendants from voting for AFA representation. By announcing a raise effective *after* the May 28 election, Delta was signaling its intent to reward the flight attendants for remaining "union-free." After all, the desire for AFA representation is based entirely on the concept that unionized Delta flight attendants will be able to negotiate a binding contract over their rates of pay, rules and working conditions. By promising the raise to "non-contract" employees only, then it follows, logically, that a vote for AFA will jeopardize the raise. The intent was unequivocal and effective. Indeed, the Company's stated rationale for granting a

raise effective on July 1 is simply ludicrous. Anderson wrote that the raise was being given now after Delta had "earlier in the year . . . deferred a decision on these increases as we worked to re-forecast the impact that record fuel prices would have on our business and to make sure we can afford any pay adjustment we make." (Exh. 12, p. 1). In other words, Anderson would have the flight attendants, and this Board, believe that the skyrocketing cost of fuel is the basis for announcing a pay *increase* to the flight attendants. In January 2008 ("earlier in the year"), a barrel of oil was trading at $87, as of May 1 it was trading at $110, a 26% price increase. (Exh. 13). As of this writing it is trading in the $123 range, with no sign of decreasing in the near future.

Moreover, even if Delta had granted the raise "earlier in the year" it would have still tainted the laboratory conditions since Delta admitted it was aware of AFA's organizing campaign in the December 7, 2007 edition of "I BELIEVE IN OUR DELTA." (Exh. 3, p. 24). Therefore, any raise announced after December 2007 was within the critical period during which the laboratory conditions must be maintained. Delta has hardly satisfied the Board's requirement that it show "clear and convincing evidence of a compelling business justification" for announcing a pay increase on May 2, just three weeks before the ballot count. To the contrary, Delta has shown by "clear and convincing evidence" that the pay raise announcement was motivated by anti-Union animus and was intended only to defeat AFA representation. *Mercy Air,* 29 NMB 55 (2001).

The same conclusion can be reached with regard to the two (2) voluntary "early out" programs Delta announced in March 2008. (Exh. 15, pp. 2-18). Again, the timing of the announcement as well as the time line flight attendants were compelled to follow if they wanted to participate, was calculated to suppress votes for AFA representation. Flight attendants could enroll n the early out programs between April 14 and May 15. Once flight attendants enrolled, they had

until "0800ET on May 28," the date of the AFA ballot count, to designate their "preferred exit dates." (*Id.*, p. 17). As a result, flight attendants who knew they were leaving Delta beginning in June 2008 were nonetheless eligible to vote. It takes little imagination to conclude that it was highly unlikely that many of the 821 who elected to leave through these programs retained any interest in bothering to cast ballots for AFA since they were, in a real sense, already psychologically "gone." Delta thus achieved a dual purpose through these two early-out programs: it reduce the number of frontline employees and undermined support for AFA among flight attendants who were leaving the Company within a month of the ballot count.

The 3% pay raise, announced in the middle of the election period, as well as the two (2) early out programs had the deliberate effect of undermining support for AFA in violation of the Board's laboratory conditions. *Mercy Air Service,* 29 NMB at 74.

D. <u>The Board's Conduct During The Election Tainted The Laboratory Conditions.</u>

> It is well-established that the Board reruns entire elections when there is a post-election finding of interference, laboratory conditions have been tainted such that a fair and free election is no longer possible, or if there is a substantial error in the election process.

United Airlines, 27 NMB 221, 227 (2000)(inaccurate eligibility list and confusion over eligibility issues warranted new election); *Delta Airlines,* 27 NMB 484, 505 (2000)(Board mailing error and carrier interference tainted laboratory conditions); *Air Tran Airlines*, 26 NMB 226 (1999)(mailing error required re-run election); *Trans World Airlines*, 8 NMB 298, 299 (1981)("clearly inadequate" eligibility list as well as numerous additions and deletions of names undermined the balloting process).

In the *United Airlines* decision, the Board found no carrier interference, but found that the inadequacy of the eligibility list submitted by the carrier tainted the laboratory conditions and compelled the Board to hold a re-run election:

> The Board received numerous inquiries from United employees indicating confusion in the balloting process, and the eligibility of voters in this case. The Board finds that the events following submission of the original list, including the addition of 500 eligible voters, and the Board's subsequent decision to impound the ballots, has caused widespread voter confusion and uncertainty in ths election. The Board has considered the alternatives, including an extension of the voting period to permit only the additional 500 eligible employees to vote. The Board has determined that this alternative would further confuse the situation. The Board concludes that these circumstances require a re-run election for all voters on the List of Eligible Voters.

United, 27 NMB at 227.

A similar conclusion was reached in *Trans World Airlines,* where the Board found that the carrier had submitted a "clearly inadequate" list of potential voters, then "did nothing to allay the parties' problems" during the balloting period. 8 NMB at 299. As the Board stated:

> The adequacy of the list was at issue from the start. Events following release of the list to the parties on December 31, 1980, did nothing to ally the parties problems. On January 21, 1981, TWA notified the Board that 116 names on its original list were those of employees in a job classification which was not part of the craft or class. During the period prior to March 10, 1981, some 59 names were deleted from the list and 47 names were added to the list as a result of the parties' challenges. In addition, the parties assert that they are unable to locate 555 individuals because they do not have enough information. A further claim was made that certain allegedly eligible voters were not included on the list.

Id.

Here, the Board make several inexplicable decisions that adversely affected the Delta flight attendants ability to freely choose a representative under the RLA. First, after announcing on March 24 that the voting period would commence on April 23 and conclude at 2 p.m. on June 3, 2008, the Board, without consultation with the parties, reduced the voting period by six (6) days when it

moved the ballot count to May 28. This notice was issued after AFA had spent thousands of dollars notifying its supporters of the June 3 election date. (Exh. 19). This unilateral voting change undoubtedly confused many Delta flight attendants and likely caused many voters to either not vote in a timely manner, or to make an untimely request for duplicate balloting information. In any event, a reduction in the balloting clearly suppressed the number of votes cast for AFA representation, which raises serious questions about the Board's motives.

In addition, when the balloting information was finally mailed, AFA began hearing complaints from voters who received balloting information in opened or tampered envelopes. One flight attendant received a ballot envelope that had been stuck to a another voter's envelope, and luckily had her information forwarded. (Exh. 7, pp. 4-6). Who knows how many other flight attendants received voting instructions that were stuck to other ones? AFA was told by several Delta flight attendants that they would not vote because the damaged or stuck envelopes had destroyed their trust in the integrity of the balloting process. (Exh. 16, p. 2).

AFA also heard from dozens of Delta flight attendants who had not received their duplicate balloting instructions. Though many flight attendants may have failed to timely file a duplicate request, AFA has compiled a list of about 58 flight attendants who had not received their duplicate ballot information by May 28 even though they had made timely requests. (Exh. 14, pp. 6-8).

Finally, in an almost humorous flourish that only underscores the Board's arbitrary conduct during this entire election, Janette Wood, who tragically died in January 2008, nonetheless remained on the List as an eligible voter. Invoking its "seven-day rule," the Board deigned to keep Ms. Wood on the List since Delta had not provided any "extraordinary circumstances" to warrant waiving that rule. The Board cannot, and did not, explain what purpose is served by including a deceased person

on the List, since no such rationale exists.

Accordingly, the Board's arbitrary decision to reduce the duration of the balloting period, the mailing of damaged or opened balloting envelopes, its failure to timely respond to duplicate balloting requests, and its inclusion of a deceased individual on the List all support a finding that a re-run election is warranted. *United,* 27 NMB at 227.

II. THE BOARD SHOULD REMEDY DELTA'S EGREGIOUS INTERFERENCE BY CONDUCTING A RE-RUN ELECTION FOR THE DELTA FLIGHT ATTENDANTS IN ACCORDANCE WITH *LAKER* PROCEDURES.

As the foregoing demonstrates, Delta has engaged in a comprehensive campaign to intimidate and coerce its employees with the sole purpose of defeating their free choice of a representative. Indeed, the breadth and severity of the carrier's coercive actions have tainted the sterile conditions the Board must maintain to ensure a free and fair election. Quite simply, Delta has taken calculated risks to engage in illegal conduct. As the Board noted in *Laker*, it has broad remedial authority to restore the free democratic processes protected by the Act, once it finds that carrier interference has tainted the election. 8 NMB at 257. Here too, the carrier has "waged . . . a deliberate campaign designed to override employee free exercise of the right guaranteed by the Act. Extraordinary remedies are required to overcome" these violations. *Id.* at 253.

Moreover, the Board's remedial authority has been invoked in situations, such as this one, where the carrier has committed pervasive interference. *Virgin Atlantic Airways,* 24 NMB 575, 623 (1997); *Southwest Airlines, Inc.,* 21 NMB 332, 351 (1994); *Sea Airmotive, Inc.,* 11 NMB 87, 92 (1983).

> Finally, to vitiate the clear violations of the law by TTI and to insure that there will be an election free of interference, influence, or coercion, and to mitigate any lasting impact of the illegal discharges, the desires of the majority of those actually casting valid ballots will determine the outcome of the elections, whether or not a majority of those eligible participate in the elections.

8 NMB at 502.

Here, too, the Board must act to "mitigate any lasting impact" of Delta's all-consuming campaign to interference and coerce flight attendants in their effort to obtain representation. Without a strong remedy, therefore, the lasting impact of the taint caused by Delta will remain. *Virgin Atlantic Airways,* 24 NMB 575, 620 (1997)("Because the carrier's actions tainted a significant percentage of VAASA's authorization cards, the Board finds that the organization has failed to support its application with the required number of authorizations . . ."); *Southwest Airlines,* 21 NMB 332, 349 (1994)("The inescapable effect of the Carrier's actions was to align itself with CARE and against the IAM&AW. In taking this pro-CARE role, the Carrier's actions taint the laboratory conditions necessary for the Board to fulfill its statutory obligations.").

Furthermore, the Company's conferral of benefits, interrogation and surveillance of flight attendants sympathetic to AFA, and its interference with their ability to discuss representation issues with their colleagues, has created a workplace environment that is hostile and coercive toward unionization. And the Company's pervasive and sustained anti-AFA communication has simply "blotted out" the flight attendants' ability to think freely about choosing a representative. *Federal Express,* 20 NMB at 51. Given this record, a *Laker* ballot is the appropriate remedy for the Board to employ to guarantee a fair and free flight attendant election at Delta.

CONCLUSION

For all of the above reasons, the NMB should find that Delta Airlines has interfered with the rights of its employees in violation of the Act. Accordingly, the Board should conduct a re-run election using the *Laker* procedures, in which the employees vote "Yes" or "No" as to representation by AFA, with results to be determined by the majority of those actually casting ballots. Furthermore, the Board should order Delta to provide AFA a list of the home addresses of all Delta flight attendants.

Date: June 6, 2008

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 was sent via hand-delivery and first-class mail, postage prepaid, on this 6th day of June, 2008, to the following:

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