NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the Application of the ASSOCIATION OF FLIGHT ATTENDANTS alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of DELTA AIR LINES, INC.	30 NMB No. 18 CASE NO. R-6838 FINDINGS UPON INVESTIGATION December 12, 2002

This determination resolves election interference allegations filed by the Association of Flight Attendants (AFA or Organization). For the reasons below, the National Mediation Board (Board) finds that the laboratory conditions required for a fair election attached August 29, 2000. The Board further finds that the laboratory conditions were not tainted.

PROCEDURAL BACKGROUND

On August 29, 2001, AFA filed an application with the Board pursuant to the Railway Labor Act (RLA or Act), as amended, 45 U.S.C. § 152, Ninth, (Section 2, Ninth) alleging a representation dispute involving Flight Attendants of Delta Air Lines, Inc. (Delta or Carrier). At the time the application was received, these employees were unrepresented.

The Board assigned Benetta M. Mansfield[1] and Mary L. Johnson to investigate. On September 6, 2001, AFA filed a Motion for Board Determination of Carrier Interference. In its Motion, AFA argued that "extraordinary circumstances" warranted a pre-election interference investigation, and requested a "Laker" ballot.[2] On September 10, 2001, the Board found a dispute existed and authorized an election. Due to the terrorist attacks of September 11, 2001, the Board granted Delta an extension until September 26, 2001, to file its response to AFA's interference allegations. On September 26, 2001, Delta filed an Opposition to AFA's Motion.

AFA filed a Response to Delta's Opposition to AFA's September 6, 2001 Motion on October 5, 2001. Delta filed its "Second Response" to AFA's Motion on October 17, 2001.

After reviewing the submissions from AFA and Delta, on October 26, 2001, the Board issued a letter to the participants stating that AFA's allegations did not "merit additional pre-balloting investigation," but did "establish a prima facie case." Therefore, further investigation of interference allegations was deferred until after the election. Because it found a prima facie case, the Board ordered Delta to post a "Notice to Flight Attendants," which was also mailed to employees' homes. Due to the disruption of postal service caused by anthrax in the mail, the Board also invited the participants to present their positions on the method of balloting at an oral presentation. The Board sent a follow-up letter on October 30, 2001.

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[1] On March 6, 2002, Benetta M. Mansfield advised the parties that she would no longer be an investigator on this case in light of her appointment as NMB Chief of Staff.

[2] A "Laker" ballot provides a "Yes/No" option on the question of union representation. A majority of votes cast determines the outcome.

The presentation on method of balloting took place on October 31, 2001, before the Board Members. On November 5, 2001, the Board issued procedures for the mail ballot election using the Board's standard ballot. Ballots were mailed December 7, 2001, from Chicago, IL. Ballots were returned to a United States post office box in Chicago exclusively designated for the election. Due to the continuing Washington, DC mail problems, the Board departed from its usual practice of accepting only mailed duplicate ballot requests, and permitted facsimile requests. Further, the Board sent a special Notice to all employees in the craft or class explaining the balloting procedures. The ballot count took place at 11 a.m. EST, on February 1, 2002.

The results of the count were as follows: of 19,033 eligible voters, 5,520 cast valid votes for AFA, and 89 for other representatives. This was less than the majority required for Board certification. On February 4, 2002, the Board dismissed AFA's application. That same date, the Investigators issued a letter advising the participants that the investigation into AFA's interference allegations would continue. AFA submitted a Supplemental Motion on February 12, 2002. On February 19, 2002, the Investigators established the deadline for Delta's response as March 4, 2002.

On February 28, 2002, the Investigators established a schedule and process for on-site investigation.

AFA filed a reply to Delta's March 4, 2002 submission on March 21, 2002.

Several Board representatives conducted on-site interviews with representatives of Delta management, randomly-selected employees, and AFA witnesses from April 8, 2002 through May 6, 2002. These interviews were conducted in Atlanta, GA; Cincinnati, OH; Dallas/Ft. Worth, TX; Los Angeles, CA; New York, NY; and Salt Lake City, UT. In addition, Board representatives conducted telephone interviews with AFA witnesses from March

20, 2002, through May 28, 2002. The total number of witnesses was 214.

ISSUES

1. When did the laboratory conditions the Board requires for a fair election take effect?

2. Were the laboratory conditions tainted?

CONTENTIONS

AFA

AFA argues that the Board should consider the Carrier's actions since 1995 as evidence that the laboratory conditions were tainted.

AFA asserts that Delta "conducted an unprecedented, comprehensive and unlawful campaign to interfere with, coerce, and unduly influence its flight attendants' choice of representative in violation of the [RLA]. . . ." According to the Organization, by January 1995, Delta was aware of AFA's organizing activity and commenced its anti-union campaign, which included the following:

1. **Establishment of the Delta Flight Attendant Advisory Forum (Forum)**. AFA refers to the Forum as a "company-created and dominated employee committee . . . which meets . . . to discuss . . . pay, rules and working conditions, and . . . has been used to confer benefits. . . .";

2. **Support for the "Freedom Force."** The Organization states that the Freedom Force is an anti-AFA group which "has . . . been granted enhanced access by Delta to . . . crew lounges and other areas . . . while denying or

interfering with AFA's ability to communicate with flight attendants in the same areas";

3. **Conferral of benefits;**

4. **Harassment, interrogation, and surveillance of AFA supporters;**

5. **Pervasive and relentless anti-AFA communication that overwhelmed the flight attendants' freedom of choice; and**

6. **Misrepresentation of Board procedures.**

According to AFA, after the Organization filed its August 29, 2001 application, Delta continued to interfere with employee free choice. In addition to the contentions outlined above, AFA asserts that the Carrier:

1. **Informed flight attendants that those on voluntary furlough were ineligible to vote, which is a misstatement of the Board's policy on furloughees' eligibility.** The Organization asserts that as the result of this misinformation, "over 3,000 flight attendants on voluntary furlough believed they could not participate in the . . . election, and likely did not return ballots."

2. **Sent anti-AFA videos to employees' homes, and played videos continuously in crew lounges.**

3. **Encouraged flight attendants to rip up their ballots.**

4. **Used the September 11 tragedy as a reason to vote against AFA.**

5. **Established an anti-AFA website, www.4freedomforce.com.**

6. **Increased its one-on-one harassment of AFA supporters.**

AFA argues that a re-run election using a Laker ballot is necessary to counteract the "omnipresent climate of fear and intimidation created by Delta."

DELTA

Laboratory Conditions

The Carrier argues that the Board cannot consider pre-application conduct "unless such conduct has a direct impact on laboratory conditions" during the election period. According to Delta, AFA could have availed itself of the rights afforded employees through the federal courts, under 45 U.S.C. § 152, Third and Fourth, (Section 2, Third and Fourth) but failed to do so. The Carrier asserts further that it "has been in a state of perpetual union organizing" since 1992. Therefore, Delta argues that to require laboratory conditions from the moment the Carrier was aware of AFA's campaign is "unworkable." For example, pinpointing such an early laboratory period would freeze wages, benefits, and working conditions in this case for seven years. The Carrier also argues that AFA engaged in one of the most "visible" and "vocal" campaigns in history, calling into question the Organization's contentions regarding fear and intimidation.

Campaign Communications

Delta asserts that its campaign communications were well within its "constitutionally protected rights." According to the Carrier, Delta's communications were in response to AFA's, and were also an attempt to correct misinformation. Delta cites Board determinations as well as court decisions for its proposition that

a carrier may, through communications, campaign against a union.

Delta Forum

The Carrier argues that the NMB does not find formation and use of employee committees such as the Forum to be interference absent other evidence. According to Delta, the Forum was initiated in 1995, six years before AFA filed its application. The Carrier asserts that the Forum was an attempt to address workplace concerns which arose from the financial crisis of the early 1990's.

Further, Delta maintains that the purpose of the Forum was communication, and that the Carrier repeatedly stated that the Forum was neither a union nor a collective bargaining process.

The Freedom Force

According to Delta, the Freedom Force is comprised of employees opposed to AFA. The Carrier asserts that there is no evidence to support AFA's contention that the Freedom Force is a tool of Delta management. Further, when a flight attendant involved in the Freedom Force used Delta e-mail for Freedom Force purposes, Delta issued a notice that such use of Carrier e-mail was not permitted.

Wage and Benefit Improvements

According to Delta, pay increases from 1996 to 2000 were part of the Carrier's "historical pattern of periodically improving its employees' pay to keep them at or near the top of the industry." Further, the increases in flight attendant per diem were directly correlated with increases to pilot per diem. Delta cites NMB precedent in support of its assertion that pre-planned increases or those justified by business consideration do not constitute interference.

Harassment and Interrogation

Delta asserts that even if all AFA's assertions about harassment of AFA activists and supporters were true, it does not rise to a level of coercion. At most, the Carrier contends that one-on-one discussions between Delta supervisors and flight attendants over a six-year period in a craft or class of approximately19,000 flight attendants are isolated conduct, and not part of a systematic management effort. Delta further argues that if the Board examines AFA's allegations of harassment for the year 2001, there is no evidence of "direct interference, or of threats or discipline of union supporters." The Carrier also notes that even AFA campaign literature acknowledges the Organization's access to crew lounges.

Supervisor Surveillance

Delta asserts that the "most common complaint" from AFA's declarants was that "supervisors were 'conspicuously' present in the crew lounges . . . while AFA supporters were engaged in union organization." The Carrier argues that these "complaints" are "mere speculation or conclusion, with no supporting facts . . . of intimidation or coercion." Delta states that it is routine for flight attendant supervisors to be in crew lounges.

Access and Organizing Activity

Delta also asserts that AFA's contentions that its supporters were unfairly denied access to crew lounges for organizing activity is not supported by the evidence. The Carrier contends that it applied its policy on solicitation activity during non-work times and in non-work areas in a even-handed manner. According to Delta, the only instances of "even alleged retaliation" for organizing activity involved solicitation on work time and in work areas.

In response to AFA's allegations regarding activity after the Organization filed its application, Delta asserts:

1. Its communications regarding economic issues such as downsizing post-September 11 were in response to terrorist attacks and not to AFA's campaign. Videos sent to employees did not exploit the tragedy to discourage employees from voting for AFA;

2. Delta's communications during the election period were within its First Amendment rights; including statements that its employees do not need a union;

3. Delta inadvertently misstated that employees on voluntary furlough were ineligible in a November 17 communication, but issued a correction immediately and repeatedly; and

4. AFA interfered with employees' free choice.

FINDINGS OF LAW

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

I.

Delta is a common carrier by air as defined in 45 U.S.C. § 181.

II.

AFA is a labor organization and/or representative as provided by 45 U.S.C. § 152, Ninth.

III.

45 U.S.C. § 152, Third, provides in part: "Representatives . . . shall be designated . . . without interference, influence, or coercion . . . ."

IV.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions, "the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." This section also provides as follows:

> No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . .

DISCUSSION AND FINDINGS

I.

Background of Organizing Campaign

According to a declaration from David Borer, AFA's General Counsel, the Organization's campaign on Delta began in 1992 or 1993. AFA began circulating authorization cards and distributing union literature in 1993. Borer states that in 1994, "Delta management's anti-union campaign started to build." By 1995, AFA's campaign was very visible. Borer asserts that Delta created the Forum in 1995 "to suppress pro-union sentiment."

Delta states that union activity began in response to pay-cuts and furloughs in the early 1990's. The Carrier also asserts that in addition to AFA's organizing activity, the Transport Workers Union (TWU) tried to organize flight attendants from 1996-2000 and also tried to organize Mechanics and Related Employees. The Aircraft Mechanics Fraternal Association has also tried to organize Mechanics and Related Employees, and the International Brotherhood of Teamsters (IBT) began organizing Fleet Service Employees in 2001.

II.

Laboratory Conditions

Generally, the Board holds that laboratory conditions must be maintained from the date the carrier becomes aware of the organizing drive. *Mercy Air Serv., Inc.*, 29 NMB 55 (2001); *Express Airlines I*, 28 NMB 431 (2001); *American Airlines*, 26 NMB 412 (1999); *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998); *Key Airlines*, 16 NMB 296 (1989).

AFA urges the Board to consider evidence dating back to the mid-1990's. According to the Organization, from the time Delta became aware of AFA's organizing activities, the Carrier responded in a manner which tainted the laboratory conditions. Therefore, AFA argues that the Board should find interference based upon: the creation of the Forum; the Carrier's anti-union campaign; pay and benefit increases; misrepresentations concerning authorization cards; mandatory meetings; support for the Freedom Force; and harassment and surveillance. In support of its position, AFA submitted over 200 declarations and incident reports from flight attendants. Many of the incidents occurred in 1998, 1999, and early 2000, as did the vast majority of the incidents recounted by AFA witnesses to the Board's Investigators.

Delta asserts that the Board should consider only events which occurred after August 29, 2001, the date AFA filed its application. In support of this position, the Carrier cites *Delta Air*

Lines, 27 NMB 484 (2000). In *Delta, above*, there had been continuous organizing activity. In addition, the Organization in that case, TWU, did not provide evidence as to when the Carrier had specific knowledge of any "significant increase" in organizing activity. In light of those circumstances, the Board held that laboratory conditions attached the date TWU filed its application.

After careful consideration of the participants' arguments, the Board rejects both positions. Quite simply, a requirement that a carrier make no changes in working conditions where there is continuous organizing for several years is not feasible. Adoption of the standard suggested by AFA would impair a carrier's ability to function and as a consequence, unfairly penalize employees (e.g., no pay increases or benefit improvements for a several year period). On the other hand, the standard advocated by Delta would provide carriers with a virtually unrestricted opportunity to influence employees' free choice in the months while organizing is taking place. Worse yet, unfettered carrier activity during prime organizing activity could unduly influence employees even in their choice of whether to sign authorization cards.

Generally, in the absence of extraordinary circumstances, the Board will not consider evidence of occurrences prior to one year before the application was filed. In this case, there is record evidence that AFA increased its organizing activity in the spring of 1999 with its "STEP-UP" (Standing Together Equals Power) campaign. This campaign resulted in an increase in collection of authorization cards. An April 2000 Carrier document acknowledges this increase in organizing activity and indicates management anticipated AFA might file its application in the Spring of 2000. Nevertheless, the Board notes, as Delta argued, that AFA could have sought the judicial relief available under Section Third and Fourth, but failed to do so. In the context of the circumstances of this case, the Board finds that the

laboratory conditions commenced one year prior to the date AFA filed its application, August 29, 2000.[3]

III.

Carrier Conduct

During election campaigns, a carrier must act in a manner that does not influence, interfere with, or coerce the employees' selection of a collective bargaining representative. *Metroflight, Inc.*, 13 NMB 284 (1986). When considering whether employees' freedom of choice of a collective bargaining representative has been impaired, the Board examines the totality of the circumstances as established through its investigation. *Mercy Air Serv., above*; *US Airways,* 26 NMB 323 (1999); *Petroleum Helicopters, above*; *Evergreen Int'l Airlines*, 20 NMB 675 (1993); *America West Airlines, Inc.*, 17 NMB 79 (1990). As the United States Supreme Court stated in *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. and Steamship Clerks,* 281 U.S. 548, 568 (1930):

> The meaning of the word "influence" [in Section 2, Ninth] may be gathered from the context. . . . The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. "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."

[3] Even if the Board considered the pre-August 29, 2000, evidence, the Board's determination as to how to proceed with the investigation would not be affected.

IV.

Surveillance

A.

The Board has held that surveillance is a per se violation. *American Trans Air*, 28 NMB 163 (2000); *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998); *Arkansas and Missouri R.R. Co.*, 25 NMB 36 (1997); *Sky Valet d/b/a Commercial Aviation Servs. of Boston, Inc., (Sky Valet)* 23 NMB 276 (1996); *Egyptair*, 19 NMB 166 (1992); *Key Airlines*, 16 NMB 296 (1989). In addition, as the Board first stated in *Laker Airways, Ltd.*, 8 NMB 236 (1981), the appearance or impression of surveillance is a sufficient basis for a finding of interference. The cases where the Board found the Carrier interfered by surveillance, there were other egregious carrier actions, such as ballot collection in *Laker*, *above*. In *Sky Valet, above*, a management official informed employees she knew who signed authorization cards and that those individuals would be discharged. Employees actually *were* discharged for signing authorization cards. *See Sky Valet, above.*

In other cases, where Organizations asserted that the laboratory conditions were tainted due to increased supervisory presence, the Board has found insufficient evidence of interference. *Aeromexico,* 28 NMB 309 (2001); *American Trans Air*, *above*; *American Airlines*, 26 NMB 412 (1999); *Federal Express Corp.*, 20 NMB 7 (1992).

B.

AFA asserts that "surveillance of AFA supporters by Delta . . . supervisors and other management personnel" was an "integral part" of the Carrier's campaign. According to the Organization, it was common "for an inordinate number of Delta supervisors to suddenly appear" whenever AFA activists set up information tables in the crew lounges or distributed union literature. In support of this assertion, AFA provided declarations and incident reports regarding multiple such occasions. The

most common allegation is that supervisors would congregate in the crew lounges whenever AFA activists were in crew lounges. The supervisors allegedly engaged other flight attendants in conversation; held parties or served snacks (cake, popcorn, ice cream); and repeatedly walked through or lingered during union organizing activity. Several flight attendants stated that the supervisors "stared" at them.

C.

Delta responds by asserting that it is routine for supervisors to be present in the crew lounges. According to Alison Johnson, General Manager-Employee Relations:

> The flight attendant workforce is an absentee group in that they come to work shortly before their sign-in times, go through a briefing on their assignment, then head for the aircraft. This limits the opportunities for supervisors to interact with them. Consequently, Delta's supervisors frequently spend time in the . . . lounges interacting with flight attendants. Special events in flight attendant lounges to thank flight attendants for their efforts, introduce new service procedures, or any number of other reasons which result in supervisors being in the lounge interacting with flight attendants have been a long-standing Delta tradition.

Delta denies that supervisors engaged in surveillance. The Carrier argues that many of the incidents cited by AFA occurred before the election period and that "virtually all of these complaints consist of mere speculation" or, at most, were "isolated incidents."

Further, the Carrier asserts that it provided training to its managers and supervisors. According to Walter Brill, Vice President and Associate General Counsel:

> The training provides them clear guidance and written instructions, on (1) NMB election procedures; (2) employee rights to choose or reject union representation; and, (3) the need to avoid any statements or actions which might interfere with employee free choice . . . . The acronym "T-I-P-S", which stands for the proposition that managers may not "Threaten-Interrogate-Promise or Spy". . . is explained.

D.

Several supervisors testified that when Sharon Wibben, Vice-President, In-Flight Service, assumed her responsibilities in 1999, she emphasized that supervisors must show "visible leadership." In addition, the investigation established that In-Flight Managers' and supervisors' offices are in close proximity to the crew lounges, in some instances even overlooking the lounges.

In Aeromexico, *above* at 335, the Board found that the evidence surrounding the Organization's allegation of "surveillance, based on a heightened presence of management officials in hallways and break-rooms, is contradictory and speculative."

In the context of the totality of the circumstances in this case, there is insufficient basis to find that Delta increased the presence of supervisors in the crew lounges in order to engage in surveillance or create the impression of surveillance. Although a large number of witnesses testified that supervisory presence increased before and during the election, Delta managers and supervisors testified credibly that they were there for other purposes. It is this Board's experience that it is not unusual for carrier management to increase their presence in flight attendant (or pilot) crew lounges during particular time periods to ensure compliance with carrier policies. In addition, the Board finds no nexus between alleged surveillance and any pattern of egregious activity, such as discharge (*see, Sky Valet,* 23 NMB 276 (1996))

or ballot collection (*see, Egyptair,* 19 NMB 166 (1992); *Laker,* 8 NMB 236 (1981)). Further, the craft or class at issue here is comprised of approximately 19,000 employees. On smaller carriers, even the appearance of increased supervisory presence during the laboratory period may lead to a Board finding of interference. The Board's finding that Delta did not taint the laboratory conditions in this regard is limited to the facts and circumstances of this case, and should not be construed as a license to carriers to engage in surveillance, or any other conduct which interferes with employee free choice. As always, the Board will continue to closely scrutinize allegations of surveillance, or the impression of surveillance, and take whatever appropriate action it deems necessary should it find substantial credible evidence in support of these allegations.

V.

The Freedom Force

A.

AFA asserts that an anti-union group of employees known as "The Freedom Force" was company sponsored and that this group was provided greater access to the workforce than AFA. According to the Organization, the Freedom Force used e-mail for anti-union purposes and Delta supervisors distributed Freedom Force materials in crew lounges. AFA describes the Freedom Force literature as "virulent." AFA also contends that whereas Delta supervisors removed unattended AFA campaign material from crew lounges and other areas, unattended Freedom Force materials remained undisturbed. Finally, the Organization also alleges that the Freedom Force web-site was supplanted by a new anti-AFA website www.deltaafa.org. AFA "surmise(s) that Delta and/or one of its union-busting consultants has funded and maintained the website."

The Organization argues that the Carrier's support for the Freedom Force violates Section 2, Fourth. AFA cites *Virgin Atlantic Airways*, 24 NMB 575 (1997); *Southwest Airlines, Inc.*, 21

NMB 332 (1994); and *USAir*, 17 NMB 377 (1990). *Virgin Atlantic* and *Southwest* involved applications from in-house unions where there were already incumbent representatives. In *Virgin Atlantic, above*, the Board found interference, based in part, on Carrier requirement or encouragement of employees to attend the applicant's organizing meetings. At one of these meetings, authorization cards were solicited. The Board dismissed the application.

In *Southwest, above*, the Board found that the Carrier "aggressively" interjected itself into "an incipient representation dispute." The Board held that "[t]he inescapable effect of the Carrier's actions was to align itself with [the applicant] and against [the incumbent]." As in *Virgin Atlantic, above*, the Board found the collection of authorization cards was tainted by the Carrier's actions, and dismissed the application.

The Organization provided a "confidential" Delta document dated April 15, 2000, entitled "Positive Employee Relations Plan and Strategy" describing In-Flight Services "on-going effort to assist in union avoidance." This document describes the Freedom Force, a part of "Grass Root Efforts," as follows:

- Flight attendants from all ranges of seniority.
- Representation seen in almost every base.
- Created their own website to address concerns and receive feedback.
- Created a personalized union avoidance campaign entitled "Proud to be union free!"
- Have their own communication process outside of Delta.
- Have their own networking capabilities.
- Speaking out against union supporters and stopping rumors.

- Produce a monthly newsletter.

- Branded the Pro-Delta lapel pin and baggage tag to represent "Proud to be union free!"

In the next section of the document, "Seven Week Campaign Calendar," the Freedom Force is mentioned several times. In week 1, it is suggested, "Coordinate with the Freedom Force on ways to be more aggressive and affective [sic]." For week 2, "Provide continued support and assistance where legally possible to the Freedom Force." In week 3, "Evaluate and educate Freedom Force with facts and information key to reaching large numbers of flight attendants." Week 4, "Help Freedom Force learn effective use of Guarantee Sheet." Week 5, "*Flood system with Freedom Force Material*" (emphasis supplied). Week 6, "Continue to distribute Freedom Force Material and the Guarantee forms," and Week 7, "Provide any support necessary to the Freedom Force."

B.

Delta does not deny that the April 2000 document is a Carrier document. In addition, the Carrier asserts that the document clearly indicates that the Freedom Force "have their own communication process outside of Delta" and "have their own networking capabilities."

The Carrier also cites declarations from Walter Brill and Alison Johnson. Brill asserts that Delta provided training to managers and supervisors which included the "need . . . to manage the workforce and apply company rules in the same manner as they would in the absence of a union organizing effort . . . ." Johnson states that Delta issued the additional guidance:

> (1) that individuals who oppose the union have a constitutionally protected right to communicate their views and support the company . . . . (2) that the exercise of such rights must be entirely voluntary . . . and (3) that individuals who oppose the union .

> . . must be subject to the same rules and guidelines regarding solicitation and advocacy . . . as apply to individuals who support unionization.

Delta also provided evidence that in response to use of company e-mail by a Freedom Force activist, the Carrier issued a reminder about restrictions on such use. Further, in November 2001, Delta issued a warning to flight attendants after the Freedom Force altered an AFA document and posted it on their website. The "Notice" from Walter Brill stated: "Delta believes it is important that all expressions of viewpoints be done in a respectful manner and that it is inappropriate for anyone to alter another person's document or message."

C.

The record does not establish that Delta officially sponsored or funded the Freedom Force or the www.delta.org web-site. Although several employee witnesses testified that unattended AFA literature seldom remained in the lounges while Freedom Force material was left undisturbed, Carrier witnesses and other randomly-selected employees testified that there was no disparate treatment. While the Board is disturbed by the April 2000 Carrier document there is insufficient substantive evidence that the Carrier's conduct relating to the Freedom Force tainted the laboratory conditions.

VI.

Delta Forum

A.

The Board has held that the mere existence of employee committees is not evidence of interference. *American Airlines*, 26 NMB 412 (1999); *US Airways*, 24 NMB 354 (1997); *Continental Airlines/Continental Express*, 21 NMB 229 (1994). In *US Airways*, *above*, the Board found that, viewed in the "totality of the circumstances" the Carrier's use of employee committees to expand benefits or make other material changes tainted the laboratory conditions. *See also Horizon Airlines*, 24 NMB 458 (1997).

AFA alleges that the Carrier created the Forum in 1996 in response to union activity and that the Forum was presented as an alternative to unionization. The Organization asserts that Delta publicized the Forum's accomplishments in enhancing flight attendant working conditions. In addition, AFA contends that in August 2000, the Forum process was "refined" for the purpose of completing a pay and benefits survey. AFA also asserts that Delta promoted the Forum process as an alternative to the collective bargaining process. In support of this contention, AFA cites comments allegedly made by Delta's Vice President and Associate General Counsel, Walter Brill, in January 1999.

In response, Delta asserts that its establishment of the Forum, in June 1995, was well outside the "critical period" the Board should consider. In addition, the Carrier states that there was a compelling business reason for creating the Forum, i.e., "to improve employee relations and morale after the . . . cuts in pay and vacation and workforce reductions" from 1992-1994. Delta argues that the Forum is used as a communications vehicle between flight attendants and management.

The Carrier also asserts that management suspended Forum activities during the election period to avoid violating the laboratory conditions, and therefore, did not address the Forum survey during that period. According to Delta, the Carrier made changes to employee working conditions after September 11, 2001, without using the Forum process.

B.

The Forum is divided into two levels, Base Forums and the System Forum. There is a Base Forum at each of the 15 flight attendant domiciles. Employees at each base elect Forum representatives from their seniority groups. Each Base Forum has official representatives. The System Forum consists of one representative per 1,000 flight attendants, with each Base Forum having at least one Representative. The System Forum also has officers. Article V. 1 of Forum by-laws provides that the role of the Base Forum representative is to "obtain valid and actionable Flight Attendant input on customer service and Flight Attendant issues, as well as resolving local issues and acting as a communication vehicle between local Flight Attendants and In-Flight Service Leadership." Article V. 2 provides that the role of the System Forum representative is to "identify and analyze customer service and flight attendant issues impacting the system, resulting in recommendations for changes and improvements." Article V. 2 (c) provides that management will "partner with the Base Forum and System Forum to provide resources and guidance and to assist on ensuring . . . Forum proposals/recommendations support departmental and corporate requirements and strategic plans." Delta controls the method of nominations and procedures for identification of flight attendant concerns for presentation to management. Forum representatives are compensated for time spent on their Forum duties and attendance at Forum meetings.

Several senior employee witnesses testified that there were predecessor groups similar to the Forum dating back at least to the late 1980's, such as "FAST." The committee process was not used in the early 1990's, during the airlines's economic problems.

C.

Despite AFA's assertions, the record establishes that Delta did not hold out the Forum as an alternative to union representation. Nor did the Carrier equate the Forum process with collective bargaining. The Carrier submitted a declaration from Walter Brill which credibly refutes AFA's allegations in this regard. According to Brill,

> [t]o further involve its employees in process and work environment improvements . . . Delta implemented employee forums in the major work groups beginning with the Flight Attendant Forum in June 1995. The success . . . of the Flight Attendant Forum led to the creation of additional employee forums in Technical Operations . . . Air Cargo . . . Airport Customer Service . . . and Reservation Sales . . . . *Delta has been careful from the outset to emphasize that each Forum is intended to be a vehicle to enhance communications and the flow of information between employees and management, but that management retained the final authority on all issues.*

Emphasis supplied.

Brill states further:

> It has consistently been Delta's position in creating and dealing with the employee Forums that Delta will not engage in collective bargaining or enter into contracts with the Forums. While Delta gathers employee input through the Forums, Delta alone makes the decisions after consideration of those views and all other factors. . . .

Brill admits, as AFA asserts, that he stated "if the Forum is on the other side of Management in negotiating a contract, you are risking the Forum's future." According to Brill, this statement "is a legally required statement, because it would not be appropriate for Delta to convert the Forum from a vehicle for communication and dialog into a bargaining agent." Brill denies the following statement attributed to him by AFA:

> [B]ecause a contract with a union would only threaten Delta's financial stability and strength, the Forum is the only financially sound way for the flight attendants to protect their superior pay and benefits. And if AFA is certified, a contract with AFA will mean the termination of the Forum.

During the Board's field investigation, managers, randomly selected employees, Forum representatives, and AFA witnesses were asked several questions about the role of the Flight Attendant Forum. The most common characterization of the Forum was "a vehicle for communication between management and employees."

The vast majority of employee witnesses, including those supplied by AFA and Forum representatives, stated that they did not consider the Forum an alternative to a union because the Forum has no power, but is merely a tool to advise management of employee issues. Several witnesses stated that the Forum does not accomplish anything meaningful for employees. In addition, Forum representatives at both the Base and System levels informed the Board investigators that the Forum focused on minor issues, such as food carts on airplanes. Forum officials further informed investigators that it was always their understanding that compensation issues were not within the scope of the Forum process and that management would not discuss those issues.

D.

Both AFA and Delta cite the Board's "five-factor test" to determine if employee committees interfere with employee

"freedom of choice." This "test" was applied in only two Board determinations - *US Airways*, 24 NMB 354 (1997) and *Horizon Airlines*, 24 NMB 458 (1997). After the Carrier successfully challenged, on First Amendment grounds, two of the five factors in *US Airways v. National Mediation Board*, 177 F.3d 985 (D.C. Cir. 1999), the Board issued a new determination. *US Airways*, 26 NMB 323 (1999). In that determination, the Board stated it was not relying on "any of the five initial guidelines, but instead, on Carrier conduct during the critical period." The Board found that using its employee committee process, the Carrier made improvements in significant working conditions after the Organization filed its application. Further, the Carrier created new task forces to study other changes in employee policies. The Board found these actions interfered with employee free choice. The Board specifically stated that it did not rely on Carrier speech in making its finding. The Board noted that it does not "regulate or otherwise impede the Carrier's ability to communicate its constitutionally protected views on unionization to its employees."

AFA argues that the Board should find that Delta's communications regarding improvements derived from the Forum process interfered with employee free choice. As stated in the Board's 1999 *US Airways* case, however, the "test" the Board uses in determining whether employee committees interfere with employee free choice focuses on carrier conduct, not carrier speech. Applying that standard to the facts in this case, the Board finds that Delta did not use the Forum to make changes in working conditions during the critical period.

VII.

Campaign Communications

A.

Board Policy

In *Mercy Air Serv., Inc.*, 29 NMB 55, 73 (2001), the Board cited its long-standing policy on carrier campaign communications:

> Carriers have a right to communicate with their employees during election campaigns, but this right is "not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election." In reviewing communications, the Board examines their content to see if they are coercive, contain material misrepresentations about the Board's processes or the Act, or combined with other Carrier actions, influence the employees in their choice of representative.

(Citations omitted.)

AFA urges the Board to find interference based on Delta's communications to employees in letters, videotapes, and Delta publications. According to the Organization, Delta used a "pervasive and relentless anti-AFA communication campaign." AFA also asserts that through publications such as "Plane Facts" and "Myth Blaster", the Carrier misled employees about AFA, particularly the union's finances and dues.

B.

Misrepresentation of Board Procedures

AFA's most serious allegation regarding Delta's campaign communications involves a statement in a Delta publication issued in November 2001, entitled "Inflight Insights." The Organization contends that Delta "deliberately mistate[d] Board procedures with respect to the voting eligibility of flight attendants who accepted a "voluntary furlough" after September 11, 2001.[4]

Specifically, the newsletter stated:

> Q. Will the Delta Recovery Program affect the union election in IFS?
>
> A. No, except that people in the 'class or craft' who voluntarily separate from the company (e.g., accept a voluntary furlough or Pension PLUS), will be removed from the list of eligible voters in their craft or class (as long as their exit date is on or before the day the ballots are due to be returned to the National Mediation Board).

AFA asserts that because of this "misinformation, it is quite possible that some 3,000 flight attendants . . . did not return their ballots . . . [and] . . . this fact alone is sufficient to overturn the . . . election."

[4] After September 11, 2001, Delta reduced its flight attendant workforce by approximately 4,000 positions. Approximately 3,000 of those accepted a "voluntary leave." Most of the employees who accepted the leave were off the property by November 1, 2001.

In response, the Carrier asserts that it did not deliberately misstate Board procedures. On November 29, 2001, the Carrier mailed a packet of information to flight attendants on voluntary leave (VLT). Included in the packet was a document entitled "VLT CONNECTION; News and Information for Flight Attendants on Voluntary Leave." The document contained "frequently asked questions," including the following:

> Q. When will AFA ballots be mailed?
>
> A. The National Mediation Board (NMB) will mail the ballots on December 7, 2001.
>
> Q. If I am on voluntary leave of absence, am I eligible to vote?
>
> A. Yes flight attendants on leaves of absence, including the voluntary leaves, are eligible to vote and will be sent a ballot by the National Mediation Board (NMB), the government agency running the election.

According to the Carrier, the same packet which contained this information also contained "Inflight Insights." The Carrier admits that the information in "Inflight Insights" was a mistake, and that the words "voluntary furlough" should have read "voluntary severance."

The Board's investigation established that the newsletter did not taint the laboratory conditions. Delta provided substantial evidence of the following:

- In a series of meetings held with employees on VLT prior to their leave, Delta managers informed flight attendants that they retained their eligibility to vote;

- Delta promptly and repeatedly corrected the misinformation. For example, the Carrier held conference calls with those on VLT. On November 30, 2001, the IFS home page issued a correction, and an e-mail also was

issued. That same date, the information was corrected via an In-flight service code-a-phone message. The code-a-phone message continued through December 4, 2001.

In addition, Delta managers at several stations testified to Board investigators that they personally called, or directed others to call, employees on VLT to inform them that the information in "Inflight Insights" was incorrect. The misinformation also was offset by the correct information on the "VLT Connection" which was included in the same packet. Finally, the employee witness testimony established that few, if any, employees on VLT believed they were ineligible to vote as the result of the Carrier's misstatement.

C.

Videotapes

Delta mailed videotapes to flight attendants at home during the election campaign. In addition, the Carrier played videotapes in the crew lounges on a continuous basis at certain stations.[5]

Two videotapes which AFA cites as evidence of interference were mailed to employees in November and December 2001. One was from Vice-President, In-flight Service, Sharon Wibben and the other from Delta CEO and Chairman, Leo Mullin.

In her video, Wibben discusses why flight attendants should reject AFA, and urges them to rip up their ballots as the safest way to vote "no", if that is how they wish to vote. Wibben also discusses the fact that Delta flight attendants are at the top of the industry in pay and benefits. She states that no union can guarantee anything because with a collective bargaining process the carrier has to agree. In addition, Wibben suggests that AFA wants to represent Delta's flight attendants for the dues income.

[5] As stated previously, the Board is considering only evidence dating from August 29, 2000.

During the video, Wibben makes more than one reference to how the Carrier has pulled together post-September 11.

Mullin also refers to September 11 on his video, "Holiday Message." Mullin, like Wibben, states that Delta opposes more unions. Mullin states that it is difficult to reverse the decision to be unionized, and urges flight attendants to rip up their ballots if they wish to vote no.

The Board's review of these videotapes establishes that neither Wibben nor Mullin misstated Board or RLA procedures. Nor were the tapes coercive. In addition, the investigation established that the vast majority of flight attendants never watched any of the videos sent to their homes, nor did they pay attention to the videos shown in the crew lounge. While Delta managers played campaign videos in the lounges, they did not attempt to make employees watch them. At certain stations where support for AFA was strong, negative employee reaction resulted in cessation of the video in the crew lounges.

D.

"Give a Rip" Campaign

The Board has repeatedly stated that accurately portraying the way an employee can vote no is not interference. *Express I Airlines,* 28 NMB 431 (2001); *Delta Air Lines, Inc.*, 27 NMB 484 (2000); *American Air Lines*, 26 NMB 412 (1999).

According to AFA, Delta created its "Give a Rip" campaign to ensure that flight attendants would not vote for AFA. The slogan appeared in Delta literature, on posters in crew lounges, and in flight attendant mail boxes. In addition, In-flight supervisors wore "Give a Rip" pins.

In *Delta*, *above*, the Board found no interference stemming from Carrier videotapes urging employees to vote no. In *American*, *above*, the Board did not find interference where the

carrier's newsletters stated "the best way to avoid a union is tear up a ballot."

The Board finds that Delta's "Give a Rip" campaign did not taint the laboratory conditions.

E.

Publications and Letters

The Board analyzes allegations of improper communications in the context of the "totality of the circumstances." *American, above*; *Midway Airlines Corp.*, 26 NMB 41 (1998).

AFA asserts that, through a variety of communications, Delta sent a message to flight attendants that they would be worse off with a union. According to the Organization, Delta characterized its anti-union statements as "factual." AFA cites in particular, a letter from Sharon Wibben and Vicki Escarra, Executive Vice President and Chief Marketing Officer, dated August 29, 2001, and a letter from Leo Mullin, on the same date.

In their letter, Wibben and Escarra state, in part:

> We believe without question that when the facts are on the table, you will choose to remain union-free and preserve our Delta difference - a culture unique in our industry, where leaders value and respect our people, and where our people in turn are committed to the common good of *all* who earn a living here.
>
> It is our responsibility as your leaders to keep you informed of the facts and to tell you the truth. We will do that at every point in the campaign, fully and completely. We would be remiss in that duty from the start if we did not clearly restate our belief that the AFA would be detrimental to Delta and Delta flight attendants. We believe the AFA would put our

partnership with you at risk, together with the security that our partnership has always meant to you and your families.

If you compare what we have done at Delta to what the AFA and other unions have done at other airlines, we clearly have it better. Contracts . . . at United Airlines and US Airways seem to have bred adversarial relationships . . . . Flight attendants at those airlines have lower wages and poorer benefits . . . .

The letter continues:

Delta already provides better pay and benefits, as well as more flexibility and job security, than the AFA has ever been able to negotiate . . . .

In his letter, Mullin states, in part, of the election:

The outcome of this process is of crucial importance . . . because we continue to believe unequivocally that further unionization would not be in the best interest of Delta employees or our company.

[D]elta respects the right of people to decide for themselves whether to have union representation, but we also adamantly support the right of Delta people to choose to remain union-free. Further unionization would impair our ability to work with our people directly and would negatively . . . meet our significant competitive and economic challenges. As we have seen throughout the airline industry in recent months, fractious labor negotiations can create agonizing challenges to customer service and serious uncertainty and upheaval for all employee groups.

AFA argues that these letters were coercive and cites *Mid Pacific Airlines*, 13 NMB 178 (1986) in support of this assertion. In *Mid Pacific, above*, the Carrier wrote a letter to employees asserting that organizing activity would jeopardize a potential merger and resulting financial relief. The letter tied the survival of the Carrier to cessation of organizing activity and promised wage and benefit increases in exchange for withdrawal of employee support for the union.

In contrast to carrier communications in *Mid Pacific*, *above*, the Board finds Delta's August 29, 2001 letters were not coercive. In addition, the Board's examination of Delta campaign publications, such as "Myth Blaster" and "Plane Facts," establishes that these materials also were not coercive nor did they contain material misrepresentations about the Board's processes or the RLA. Therefore, in the context of the "totality of the circumstances," the Board finds that Delta's campaign communications did not taint the laboratory conditions.

VIII.

Solicitation, Access, and Uniforms

A.

In *USAir*, 17 NMB 377 (1990), the Board found that the Carrier's policy against soliciting on company property was only applied to union campaign materials. The Board held this practice "interfered with employee free choice." The Board further held that the "carrier's policy prohibiting the dissemination of [union] campaign literature . . . combined with the pervasive and determined campaign against unionization . . . and the inaccurate and misleading statements . . . influenced the employees in derogation of their Railway Labor Act rights." *USAir*, *above* at 423. In *American Airlines*, 26 NMB 412 (1999), the Board found insufficient evidence of systematic, uneven or discriminatory enforcement of the carrier's rules on solicitation and access.

A September 30, 1999, Memorandum to all flight attendants describes the carrier's policy on "Vendors in Flight Attendant Lounges" as follows:

> In-Flight Service base lounges are for Delta company business, and also provide an area where flight attendants can rest and relax. We are committed to ensuring we maintain the integrity around the purpose of our lounges.
>
> Concurrent with this, we receive flight attendant requests to set up lounge displays for various causes or promotion of items. We have implemented a policy to best manage these requests. Any flight attendant who desires to set up a table display in a lounge must request permission of the local base manager not more than seven days out but at least twenty-four (24) hours in advance of the time they wish to set up the display.
>
> In keeping with our lounge purpose, requests will be approved provided:
>
> - there are no other Delta sponsored lounge events scheduled the same day of the request
> - the display does not interfere or interrupt other flight attendants completing company business or those resting
> - the vendor doesn't monopolize the limited, frequently congested space
>
> We want to honor these requests when possible and expect professionalism at all times. Local managers will ask that a flight attendant in a vendor capacity leave the lounge if unprofessionalism or disruption to others is evident.

> The systemwide implementation of this policy should reduce the confusion that currently exists regarding when vendors may set up displays in our lounges and will enable us to maintain the lounges as suitable places of business and rest areas.

Another Delta policy prohibits the use of company equipment for "advocacy purposes."

Delta's policies further provide:

> **BULLETIN BOARDS**
>
> - Company business bulletin boards are for official company notices only. . . .
>
> - Items which convey a message or advocate a position, such as political campaign material or material which advocate or oppose a union, and material which in the Company's judgment is likely to be offensive to others, are not permitted on bulletin boards.
>
> **SOLICITATION OR ADVOCACY ACTIVITIES**
>
> - Solicitation or advocacy activities *by non-Delta employees*, except for activities sponsored by Delta, are not permitted on Delta premises at any time.
>
> - Delta premises generally include the parking lot entrance roadways and surrounding areas. Any solicitation or distribution of literature by non-Delta employees must be done without blocking or otherwise interfering with ingress and egress to Delta property.
>
> - Solicitation or advocacy activities *by Delta employees* are permitted *only* in non-work

areas, such as break rooms, and only during an employee's non-working time.

- Parking lots are considered non-work areas, but solicitation activities are not permitted to interfere with traffic or to harass or offend employees.

- If an area such as a break room is used both for work and non-work purposes, solicitation or advocacy activities are permitted in that area only when it is not being used for work purposes. Solicitation or advocacy activities may never be undertaken in a manner that is likely to offend, harass or interfere with employees who do not wish to be subject to such solicitation.

- Non-offensive and non-inflammatory advocacy materials may be handed out in non-work areas at non-work times. This material may not be left unattended or placed at unattended positions.

PINS, BUTTONS OR OTHER MESSAGE BEARING ITEMS

- No buttons or other items bearing a message or advocating a position (including caps, shirts, jackets or any other clothing item) may be worn, carried or displayed in work areas or on an employee's work time, other than small lapel pins which are equivalent to a piece of jewelry and are no larger than the Delta service award pin.

- A single, non-offensive sticker no larger than 2 inches by 3 inches may be affixed to tool or lunch boxes.

B.

AFA alleges that Delta restricted its access to employees through uneven enforcement of the rules. AFA submitted declarations from individuals who assert they either were denied access to crew lounges, limited in their distribution of AFA campaign material, or disciplined for engaging in organizing.

The Carrier submitted declarations from 24 Delta Base Directors on this issue. All assert that "AFA supporters were given broad latitude" to engage in organizing activities. In Atlanta, there were four oral warnings issued for violations of the Carrier's solicitation policy from September 2000 through the end of the election period. There were no actions taken in Boston, Cincinnati, Chicago, Seattle/Portland, and Salt Lake City; an "estimate[d] three oral warnings, in Dallas/Fort Worth, ('not documented and, therefore, not included in the work record')", one in Fort Lauderdale/Miami, none in Houston/New Orleans, one formal oral warning at JFK, and "counseling" in Los Angeles, La Guardia, and Orlando (since 1994). All the Managers assert that requests for access to crew lounges were granted, if the requests complied with Carrier policy.

The Board's investigation established that Delta employees who supported AFA generally were provided tables for distribution of campaign literature. In addition, AFA activists were permitted to engage in organizing activity in crew lounges on non-work time. Most of the employee witnesses interviewed by the Board testified that they saw AFA activists in the crew lounges on numerous occasions and also saw AFA campaign literature in the crew lounges. In addition, several witnesses testified that they received AFA campaign literature at home and from AFA activists in public airport areas.

C.

Delta policy permits employees to wear one pin in addition to their service pin, and to affix a non-message bearing sticker to items such as tool boxes, lunch boxes, or baggage. Flight

Attendants must be in full compliance with the Carrier's uniform policy on duty. Off-duty employees are permitted to wear street clothes on company property, however, they are prohibited from appearing in partial uniform. For example, employees may not wear uniform skirts or slacks with a tee shirt. Off-duty flight attendants who wore AFA tee shirts with part of their uniforms were told to change. There were also incidents where individuals who were not in violation of the Carrier's uniform policy were instructed to remove pro-AFA tee shirt items, however, these incidents were sporadic and not systematic.

Further, although several AFA declarants and witnesses testified that they were instructed to remove certain pro-union paraphernalia, the investigation established that these incidents were isolated and non-systematic. Union supporters were not permitted to wear pins or display logos stating "vote AFA," but could wear or display items which simply stated "AFA."

D.

The record establishes that AFA was provided access to the workforce, and that in general, Delta management enforced its access, solicitation, and uniform policies in a relatively even-handed manner. The exception to this even-handedness involved the Freedom Force.

IX.

Harassment, Interrogation, and Discipline

A.

Interrogation of employees regarding their representation choice is per se evidence of interference. *LSG Lufthansa*, 27 NMB 18 (1999); *Sky Valet*, 23 NMB 276 (1996); *Mercury Servs., Inc.*, 9 NMB 312 (1982); *Laker Airways*, 8 NMB 236 (1981). Discipline and discharge for union activities also violates the RLA. *Key Airlines, Inc.*, 16 NMB 296 (1989).

AFA submitted declarations from several flight attendants who assert they were either disciplined, harassed, or interrogated due to their organizing activity. According to the Organization, Delta engaged in a "pattern of interrogation . . . as a means to intimidate and coerce flight attendants." AFA asserts that most of the "discussions," initiated by supervisors, occurred in the crew lounges or airport concourses.

AFA also provided declarations from employees who maintain they were harassed for union activities, as well as from those who state they were disciplined.

According to Delta, there were only "a handful of one-on-one conversations over a seven-year period." The Carrier argues that the Board does not find interference based upon isolated incidents, and cites *American Airlines*, 26 NMB 412 (1999), and *Northwest Airlines, Inc.*, 26 NMB 269 (1999).

B.

Both the evidence submitted by the participants and the Board's witness interviews establish that certain supervisors initiated discussions with flight attendants regarding

unionization.[6] The Board finds credible assertions from various supervisors that they initiated discussions with flight attendants in the context of long-term working relationships or even friendships. In addition, there is credible evidence that at certain stations AFA activists who were in compliance with either Carrier rules or airport regulations were harassed by Delta supervisors. There were a few incidents in which Delta supervisors contacted airport authorities or police to complain that AFA was soliciting on airport property. In most of these instances, the activists had valid permits. The supervisors assert that flight attendant complaints about AFA activity led to these incidents.

Finally, the record establishes that most of the incidents of discipline or threats of discipline were related to Carrier rules violations, and viewed in the "totality of the circumstances," do not establish interference.

In sum, the Board finds that while there is evidence of supervisor-initiated discussion about the union and harassment of union supporters at certain stations, the incidents were not part of a systematic carrier effort.

X.

Pay and Benefit Increases

Generally, the Board finds changes in pay or benefits which were pre-planned or where there is "clear and convincing evidence of a compelling business justification" do not taint laboratory conditions. *Delta Air Lines*, 27 NMB 484 (2000); *Air Logistics, L.L.C.*, 27 NMB 385 (2000); *American Airlines, Inc.*, 26 NMB 412 (1999).

[6] There were several allegations of incidents in Florida.

On August 3, 2001, Delta announced an increase in flight attendant per diem effective September 1, 2001, and enhanced deadheading effective November 1, 2001. In addition to a pay increase in 1996 (which restored the five percent pay-cut Delta employees suffered in 1993), there were pay increases in 1997, 1999, and 2000. According to Delta, pay increases were general increases consistent with the Carrier's historical pattern. Further, the record establishes that flight attendant per diem rates have been at parity with pilot per diem since 1997. Since the pilots' per diem increased in 2001, the same increase was applied to the flight attendants' per diem.

Although AFA asserts that in August 2001, flight attendants were promised a raise in January 2002, the evidence indicates that only a "pay review" was scheduled for January - February 2002.

The change in the Carrier's deadheading policy allows flight attendants to deadhead to their homes, rather than to their base, "subject to certain limitations." This enhancement, in and of itself, is an insufficient basis for a finding of interference.

XI.

Other AFA Allegations

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

XII.

Union Interference

A.

The Board frequently has stated that the same analysis of whether the laboratory conditions have been tainted applies to union interference and carrier interference. The carrier, however, has unique power and authority in the workplace. In this context, similar facts when applied to a carrier or a union could lead to different conclusions about whether the laboratory conditions have been tainted. *United Air Lines, Inc.*, 22 NMB 288, 318 (1995); *Air Wisconsin*, 16 NMB 235, 239-40. *See also America West Airlines*, 26 NMB 195, 207 (1999). When applying this principle in cases involving allegations of union interference, the Board has found that certain campaign activity, including ballot collection, engaged in by an organization, rather than a carrier, is not coercive because it does "not produce the same effect on employees." *United*, *above* at 318, *citing Federal Express Corp.*, 20 NMB 659, 665 (1993); *America West, above* at 209.

In *United Airlines, above* at 319, the Board noted the RLA's legislative history, particularly the statement of John B. Eastman, Director of Transportation, before the Senate Committee on Interstate Commerce on the 1934 amendments to the Railway Labor Act:

> When employees are dealing with employees, the situation is quite different from what it is when companies are dealing with employees. Companies have power over the means of livelihood of employees, and that is where the danger lies. Employees have no such power over each other. When it comes to the organization of employees, it is entirely appropriate and proper that argument and electioneering be allowed.

B.

Delta asserts that AFA interfered with the election by conducting an "aggressive" campaign, interrogating and polling employees, and most seriously, collecting ballots.

The investigation established that AFA did conduct an aggressive campaign, however, that does not constitute a basis for finding interference. On the issue of polling, the Board has stated:

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

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

While the record establishes that AFA conducted telephone polling, the Board finds that such activity did not taint the laboratory conditions.

C.

In *America West*, *above*, the Board considered ballot collection in a case where the organization had collected ten sealed ballots following the solicitation of ballots through meeting notices. The Board found that these activities did not affect the outcome of the election, and the conduct was not coercive. Therefore, the conduct did not provide a basis for refusing to certify the results of the election.

Delta alleges that AFA collected ballots in New York. The investigation established that AFA activists in New York invited supporters to a group ballot mail-in at the Post Office on December 14, 2001, one week after the ballots were mailed. There is no evidence of ballot collection, ballot copying, or transportation of ballots by union representatives to the post office. In the absence of evidence that AFA conducted a system-wide, systematic campaign of ballot collection, the Board finds that the Organization's actions in New York did not taint the laboratory conditions.

XIII.

Method of Continuing Investigation

In this case the Board does not find the level of carrier activity rises to a level requiring further investigation of employee choice of representative. While there were isolated incidents of inappropriate conduct on the part of certain supervisors there is no evidence of a systematic Carrier effort. Although the Board is troubled by the number of reported incidents of "surveillance," there is sufficient credible evidence that increased supervisory presence in the crew lounges was in the course of business, and not an attempt to intimidate employees. Similarly, although the Board is also troubled by the Carrier's relationship with the Freedom Force, there is insufficient evidence of Carrier conduct relating to the Freedom Force which tainted the laboratory conditions.

These findings are fully supported by the majority's consideration of the evidence established by the investigation, which was one of the most extensive in the Board's history. The majority reviewed all of the evidence collected by its Investigators, as well as several hundreds of pages of documents submitted by AFA and Delta, including multiple sworn statements. In addition, this determination is fully consistent with Board precedent. When the record in this case is viewed as a whole, the Board finds that the Carrier, through the totality of its conduct,

did not taint the laboratory conditions necessary for a fair election.

CONCLUSION

The Board finds that the laboratory conditions required for a fair election were not tainted. This conclusion is based on the totality of the circumstances. Therefore, as there is no further basis to proceed, the Board closes its file in this matter.

By direction of the NATIONAL MEDIATION BOARD

Benetta M. Mansfield

Benetta M. Mansfield
Chief of Staff

Harry Hoglander, dissenting,

In their decision today, the Board majority fails to explain that their decision is a significant departure from Board precedent. In an attempt to justify and accept conduct which unquestionably "tainted laboratory conditions," the Board majority states they are "troubled" and "disturbed" by Delta's conduct. The majority's decision now creates a gray area of legally allowable conduct: that which is "troubling," but does not constitute interference. I am at a loss to understand this tortured reasoning.

The circumstances relative to this case prompted an unprecedented investigation. Numerous experienced Board Investigators conducted on-site interviews with representatives of Delta management, randomly selected employees, and AFA witnesses over a month long period. These interviews were conducted in five major Delta hub stations. The Investigators followed up these on-site interviews with at least a dozen or more telephone interviews. Moreover, the file in this case is

voluminous. I disagree emphatically with the majority's attempt to discount the findings of the Investigators.

It is my view that based on the evidence gathered by the Investigators, Delta interfered with the election and I would order a re-run election. Section 2, Fourth, of the Railway Labor Act is clear in its admonition:

> 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 . . . .

(Emphasis supplied.)

The majority view is that carriers are now permitted to interfere if their conduct is only "disturbing," "troubling," and "inappropriate." The statute does not contain such subjective standards; it is absolute in its clarity; carriers cannot interfere "in any way."[7]

In a document dated April 5, 2000, authored by Delta, the Carrier carefully coordinates its activities with those of The Freedom Force. Indeed, in a seven week "campaign calendar," the Carrier mentions The Freedom Force as follows: Week 1, "Coordinate with the Freedom Force on ways to be more aggressive and affective [sic]." Week 2, "Provide continued support and assistance where legally possible to the Freedom

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[7] I agree that truly isolated single incidents of conduct viewed in the totality of the circumstances does not taint laboratory conditions. Here, however, the majority admits to evidence of interference from "numerous" witnesses.

Force." Week 3, "Evaluate and educate Freedom Force with facts and information key to reaching large numbers of flight attendants." Week 4, "Help Freedom Force learn effective use of Guarantee Sheet." Week 5, "Flood system with Freedom Force Material." Week 6, "Continue to distribute Freedom Force Material and the Guarantee Forms." Week 7, "Provide any support necessary to the Freedom Force."

Witnesses associated with the Freedom Force refused to be interviewed by the Investigators. The NMB does not have the power to subpoena such witnesses in order to discover facts surrounding these allegations. Therefore, this refusal by witnesses to cooperate with the investigation hampered the Board's fact finding abilities. The silence of these witnesses resonates loudly with me. Based upon this refusal and other evidence, I would find that the Freedom Force and its virulent anti-union website was unofficially "sponsored" and supported by Delta.

There is record evidence, beyond the planning memorandum cited above, that the Carrier was not even-handed in its promotion of the Freedom Force's anti-union message. For example, several employee witnesses testified that while AFA literature was removed from the employee lounges, Freedom Force material was left undisturbed. This directly connected with the Week 5 and Week 6 agendas to "flood" the system with Freedom Force materials and to "continue to distribute" Freedom Force materials.

In *USAir*, 17 NMB 377, 423 (1990), the Board found that the Carrier's policies on access and solicitation, while "even-handed on its face," interfered with employee free choice because "virtually the only material not permitted on employee bulletin boards was pro-IBT material." The Board viewed this as interference, which combined with other factors such as a "pervasive and determined campaign against unionization over several months," influenced the employees in derogation of their RLA rights. I cannot ignore, especially in light of Delta's

professed plan, the uneven access it permitted to Freedom Force literature.

This is particularly true when viewed in the context of the totality of the circumstances. The record in this case is replete with evidence that Delta stepped up supervisory presence in the crew lounges during the campaign and particularly when employees were distributing pro-AFA literature. This evidence was provided by AFA witnesses, Forum witnesses, and randomly interviewed witnesses. Among the specific incidents recounted by witnesses were:

- At both New York City stations, supervisors were always in the lounge at the same time as AFA activists. The supervisors would mill around or sit at a large table near the AFA table. This resulted in flight attendants avoiding AFA activists.

- During the campaign at JFK, a witness noticed 2 to 3 supervisors in the crew lounge during the afternoons which is the busiest time, which was an increase.

- Between 2000 and the election, supervisors at JFK would appear in the lounge as soon as an AFA activist walked in. Often after the activists spoke with a flight attendant, a supervisor or a pair of supervisors would go up to the same flight attendant and begin a conversation.

- In the last two months before the election, a witness was followed by a Field Service manager at JFK around Concourse A. On three occasions supervisors tried to take pictures of campaigning, stating it was for "Flight Attendants' Appreciation Week."

- There was a supervisor in the JFK lounge who took pictures of activists handing out information right after the application was filed.

- In Atlanta, supervisors were always present when AFA was in the lounge. Whenever AFA had an event, it was followed by a bigger Delta event, which always included free food.

- In Atlanta, there was increased supervisory presence. When the campaign got "hot and heavy", there would be as many as eight supervisors in the lounge. When AFA set up a table in the lounge, the supervisors would come out, sit and eat their lunch, and take notes.

- In Atlanta, there were more supervisors in the lounge when AFA was around and there was a perceptible change in supervisory presence before, during, and after the election.

- In Atlanta, there was increased supervisory presence. For example, there was a table staffed by supervisors near the lounge door that flight attendants had to pass in order to enter the lounge. Supervisors were always in the lounge during "Step-Up," and always in the Food Court when flight attendants handed out AFA literature. . . . Supervisors always made sure AFA activists stayed in their corner of the lounge during "Step-Up Campaign."

- Another Atlanta witness stated that during the election, supervisors were always in the lounge handing out pizza, breakfast, and snacks. This flight attendant stated that in 22 years as a flight attendant, this had not happened. The behavior ceased after the election.

- In Los Angeles, supervisors routinely spent time in the lounge, but there was a significant increase in the number of supervisors in the lounge for the 6 to 8 weeks before the election. There was especially an increase when Delta began its "Rip it Up" campaign. The supervisors appeared to be watching the flight attendants.

For Delta's part, it does not deny supervisory presence in crew lounges. In fact, the Carrier states it is routine. I am unconvinced, especially in light of multiple witness statements

providing consistent, credible testimony of the markedly increased supervisory presence during the campaign. Nor was this conduct isolated; it occurred in major carrier stations: Atlanta, Boston, JFK, LaGuardia, and Los Angeles. Many witnesses expressed a fear of being watched. Witnesses also spoke of supervisors taking notes and photographs of activists and other flight attendants while activists were in the lounges.

The question is not whether Delta intended for its supervisors to actually engage in surveillance, that is immaterial. The evidence gathered leads to the conclusion that the increased supervisory presence had a coercive effect on employee free choice because the employees' fear of surveillance while speaking to AFA activists or taking AFA literature would be construed as support for the union. As the Board held in *Sky Valet,* 23 NMB 276, 303 (1996), the Carrier engaged in improper conduct when its officials began to convey to all employees in the craft or class the impression that they were under surveillance. *Cf. Federal Express,* 20 NMB 7, 47 (1992) (no finding of surveillance where randomly selected employees did not notice an increased presence of managers in the crew lounges during the pertinent period.) The surveillance by Delta supervisors during the union organizational period undermined the confidentiality of the voting process and tainted the laboratory conditions.

The majority's view that the increased presence of supervisors in crew lounges during the critical period was "in the course of business" demonstrates a woeful lack of understanding of crew lounge custom and usage. From my vast experience as a carrier employee, it is highly unusual for groups of supervisors to frequent crew lounges. Witnesses credibly stated that there were unprecedented increases in the number of supervisors in crew lounges during the critical period, especially when AFA supporters were present. This combined with such other flagrant action by supervisors such as photographing flight attendants, glaring at AFA supporters, and questioning those participating in organizing activities taints the laboratory conditions. Moreover, these incidents were not isolated. They happened in major hubs on numerous occasions.

The majority completely failed to understand the social interaction of communication among flight attendants during an organizing campaign and the chilling impact that the communication of the majority termed "isolated incidents" have on the election process. The reaction to an "isolated incident" is not confined to the narrow geographic boundaries of the occurrence. When an "isolated incident" is witnessed in an Atlanta crew lounge, it will spread to New York, Los Angeles, Boston, and Salt Lake City within a matter of hours as the flight attendants converse in other crew lounges, in layover hotels, and on the aircraft throughout the Delta system.

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.

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