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 AIRLINES, INC.	35 NMB No. 70 CASE NO. R-7148 FINDINGS UPON INVESTIGATION September 30, 2008

This determination addresses election interference allegations filed by the Association of Flight Attendants – CWA, AFL-CIO (AFA) involving Flight Attendants employed by Delta Air Lines (Delta or Carrier). For the reasons below, the National Mediation Board (NMB or Board) finds that AFA has not stated a *prima facie* case of election interference. Accordingly, the Board finds no basis for further investigation.

PROCEDURAL BACKGROUND

On February 14, 2008, AFA filed an application with the Board pursuant to the Railway Labor Act[1] (RLA) 45 U.S.C. § 152, Ninth (Section 2, Ninth), alleging a representation dispute involving the Flight Attendant employees of Delta. At the time the application was received, these employees were unrepresented.

The Board assigned Norman L. Graber and Sarah H. Halpin to investigate. On March 24, 2008, the Board found that a dispute existed and

[1] 45 U.S.C. § 151, *et seq.*

authorized an internet and telephone electronic voting (TEV) election. On April 3, 2008, the Board sent a notice to Delta and AFA that the tally date would be changed from June 3, 2008 to May 28, 2008. Voting instructions were mailed on April 23, 2008.

On May 7, 2008, Maria-Kate Dowling was assigned to investigate this case with Investigator Halpin. On May 28, 2008, the tally was conducted. The results of the tally were as follows: of 13,380 voters, 5,306 cast valid votes for representation. This was less than the majority required for Board certification. On May 29, 2008, the Board dismissed AFA's application. *Delta Air Lines*, 35 NMB 180 (2008).

On June 6, 2008, AFA filed a "Supplemental Motion for Board Determination of Carrier Interference."[2] On June 20, 2008, Delta submitted its response.

ISSUE

Whether AFA has stated a *prima facie* case of election interference?

CONTENTIONS

AFA

First, AFA asserts that Delta conducted a pervasive and comprehensive anti-AFA communications campaign that was intended to overwhelm flight attendants' ability to choose a representative freely. Second, AFA asserts that Delta harassed, interrogated, and surveilled flight attendants who supported AFA's organizing campaign, and interfered with AFA supporters' ability to communicate with their colleagues about unionization. Third, AFA asserts that Delta illegally conferred benefits—in the form of a three percent raise and an early retirement program—on its flight attendants during AFA's organizing campaign. Finally, AFA alleges that the Board's change of the election date, failure to send ballots to certain flight attendants, sending of opened or misdirected ballots to flight attendants, and failure to remove a deceased flight attendant from the List of Potential Eligible Voters (List) prejudiced AFA.

DELTA

In response, Delta asserts that it did not taint the laboratory conditions and, in fact, Delta's efforts were only in response to AFA's voluminous pro-

[2] This motion "supplemented" interference charges AFA had filed during the election period.

union communications to Delta employees. According to Delta, all the information the Carrier sent to flight attendants was factually correct and disseminated to inform flight attendants of their rights in the upcoming election. Delta also asserts that AFA cites only a few isolated occurrences of harassment in a workforce of over 13,000, that many of the incidents were based on hearsay or involved a manager who later relented, and that these occurrences do not amount to a comprehensive campaign to influence voter choice. The three percent pay raise and early retirement programs, according to Delta, applied to all employees and were pre-planned for legitimate business reasons. Finally, Delta contends that the Board did not err in changing the election date or in leaving a flight attendant on the list whose death was reported in an uncorroborated and untimely fashion to the Board. With regard to the ballots, Delta notes that AFA cites only a few incidents of opened or not-received ballots, and that this small number would not have been material to the outcome of the election.

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 as defined in 45 U.S.C. § 181.

II.

AFA is a labor organization and/or representative as provided by 45 U.S.C. § 151, Sixth.

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 . . . .

STATEMENT OF FACTS

I. Delta Communications

A. DVD

In April 2008, Delta sent a DVD entitled "Important Information for Delta Flight Attendants" to each Delta flight attendant. The DVD was ten minutes long and contained footage of flight attendants and Delta executives discussing Delta's "unique culture" and expressing the view that Delta's flight attendants would retain a higher quality of employment if they did not select representation. Flight attendants and Delta officials asserted that "the surest way to vote no" to AFA representation was to not vote, and that the surest way to prevent someone else from using your voting information was to rip up and throw away your ballot.

On the DVD, Delta CEO Richard Anderson stated that "where he used to work" they "decided [their] flight attendants needed a raise" and the labor organization representing the flight attendants was upset when the flight attendants were granted that raise. On the inside cover of the DVD there is a written message from Anderson stating, in part:

> 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.

B. Newsletter

Delta's weekly newsletter, entitled "I Believe In Our Delta," was posted on Delta's internal computer system and available in crew lounges and airport concourses. The newsletter often had factual information regarding unionization, the Board, and the election process. The newsletters also stated Delta's belief that flight attendants could preserve Delta's benefits and culture by voting against representation. For example, the March 28, 2008 newsletter stated 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." The April 18, 2008 newsletter discussed the possibility of a future merger stating: "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." The April 18, 2008 newsletter also stated that Anderson and Delta CFO Ed Bastian "will protect our employees' seniority and our board-approved seniority protection policy has the backing of U.S. law." One newsletter stated that signing an authorization card indicated a flight attendant's support for AFA.

The newsletters also carried columns written by Delta officials responding to flight attendants' concerns about the election. In Joanne Smith's—Delta's Vice President of In Flight Services—November 2, 2007 column, she reminded flight attendants that they were not permitted to engage in union activity on board an aircraft and directed flight attendants to notify their supervisors if they observe such activity. On December 7, 2007, Smith stated that the newsletter had "so much information on unions" because AFA was calling Delta flight attendants at home and Smith felt "a sense of obligation to speak on the topic." On February 22, 2008, Sandy Gordon, Delta's Vice President of In Flight Service Operations and Training, wrote a column stating that "there continue to be some questions, rumors, misinformation and the need for further clarification on various topics regarding union representation." Therefore, Gordon stated that she and Smith would be available and accessible to flight attendants in order to answer any questions regarding representation.

Delta used the slogan "Give a Rip: Don't Click, Don't Dial" in the newsletters. When Delta used the slogan, the Carrier explained that tearing up the ballot was "the surest way to vote no and prevent anyone else from obtaining the information and perhaps voting on your behalf."

C. Other Communications

Delta set up information tables in crew lounges offering the Carrier's

weekly newsletter as well as other information on the election. Delta displayed red banners and signs stating: "Give a Rip: Don't Click, Don't Dial" explaining how to vote "no" to AFA representation and to ensure no one else voted on a flight attendant's behalf.

In support of its interference allegations, AFA submitted an e-mail from AFA Vice President Veda Shook to AFA Attorney Ed Gilmartin where Shook says she saw a flight attendant on a flight wearing a lapel pin that read "shred it."

AFA also submitted an email from Delta flight attendant Sherry Johnson to Northwest Airlines flight attendant and AFA organizer Danny Campbell stating that an unidentified newly hired flight attendant told an unidentified AFA organizer that she was told by management that she was ineligible to vote if she had been a flight attendant for less than one year.

II. Delta's Contact With Flight Attendants and Organizers

A. Two Incidents of Managers Posing as Flight Attendants

AFA alleges that on April 23, 2008, in the Atlanta flight attendant lounge, two Delta supervisors stood in front of the AFA table, one of them wearing a flight attendant uniform. AFA also submitted a declaration from a Northwest flight attendant who saw a Delta supervisor in a flight attendant uniform boarding a Delta flight. AFA does not allege that either supervisor was engaged in anti-union activity or interacting at all with AFA organizers, nor does AFA allege that either supervisor wore a flight attendant uniform in order to convince other flight attendants that they were not supervisors.

B. Six Incidents Where Organizers Were Asked to Remove Signs or Stop Distributing Literature

In support of its allegations of interference, AFA alleges six incidents where supervisors asked organizers to remove signs or stop distributing literature. In three of these six incidents, the supervisor involved, after checking with other supervisors or flight attendants, relented and allowed the organizers to continue their activities. In support of these incidents, AFA submitted a declaration from organizer John Jablonski stating that on April 24, 2008, in Delta's Atlanta flight attendant lounge, he and other AFA supporters were told by an in-flight supervisor to take down an AFA sign. The AFA supporters refused, and after checking with other management officials, the supervisor allowed the flight attendants to leave the sign up. Second, AFA submitted an email from flight attendant Jon Dewey to AFA organizer Marianne

Bicksler stating that on April 27, 2008, in the Salt Lake City lounge, a Delta field service manager told Dewey that he was not permitted to hand out AFA leaflets. After being corrected by another flight attendant, the supervisor allowed the leaflets to be distributed. Finally, AFA submitted an "Interference Incident Report" from Delta flight attendant Jean Marie Cinotto stating that on April 28, 2008, in the Atlanta flight attendant lounge, a Delta supervisor asked AFA supporters to remove an AFA bag tag. The AFA supporters refused. After checking with others, the supervisor said she was mistaken and that they could leave the tag where it was.

In support of the three alleged incidents where the supervisor did not relent and allow the organizing efforts to continue, AFA submitted three "Interference Incident Reports" filed with the organization by Delta flight attendant and AFA organizer Denise Corsello. The first report stated that on April 29 and 30, 2008, in Los Angeles, Delta supervisor Angela Patterson asked Corsello to remove a "Pro Delta Pro AFA" sign. In response, Delta submitted a declaration from Kimberly Barrasso, General Manager of In-Flight Services, stating that Corsello repeatedly sought to use large poster board signs in the crew lounge, and was consistently told by management to remove the signs because they violated Delta's advocacy policy. The second report stated that on May 1, 2008, in Los Angeles, Delta supervisors Brian Olievera and Jim Terry told Corsello to remove all AFA signs and logo t-shirts from the AFA table because they resembled posters. According to Delta, the supervisors involved in this incident were not available to respond at the time of filing. The third report alleged that on May 2, 2008, in Los Angeles, Barrasso telephoned Corsello and stated that Delta had decided that no pro-union posters could be used system wide and supervisors would now insist that flight attendants remove all AFA signs and t-shirts from lounges. According to Barrasso, she checked with Delta's Law Department and confirmed that large poster board signs were not permitted in the lounges, but that small signs were permitted, and then telephoned Corsello with this information.

C. <u>One Incident Where An Organizer Was Allegedly Threatened</u>

Between April 7, 2008, and April 24, 2008, Jean Marie Cinotto exchanged emails with various Delta supervisors requesting that the Carrier update her paid personal time (PPT) balance. The supervisors responded to Cinotto's concerns and her balances were updated on April 24, 2008. AFA alleges that on April 25, 2008, Delta Field Service Manager Colleen Atherley telephoned Cinotto to discuss the tone of Cinotto's previous emails. As evidence of the phone call, AFA submitted an April 25, 2008 email from Cinotto to Atherley. Cinotto's April 25 email is the only documentation of the alleged telephone call. Cinotto writes in her April 25 email to Atherley that Atherley

threatened and warned her about her tone. Cinotto also writes in her email that she believed Atherley had called her because Cinotto was "a very visible activist working for representation for our Flight Attendants" and that Atherley "appear[s] to be trying to interfere with our election by attempting to intimidate" Cinotto. Other than Cinotto's statement in her email, the record contains no evidence that Atherley threatened or warned Cinotto, or that the telephone call was in any way related to the AFA organizing campaign.

D. Four Incidents Involving Harassment by Individuals Who Were Not Delta Management Officials

AFA submitted a declaration from Jablonski stating that on April 26, 2008, in the Atlanta flight attendant lounge, during an AFA "Get Out The Vote" drive, there was a Delta flight attendant wearing a sign that said "BIG JUST SAY NO TO AFA." According to Jablonski, the flight attendant told the AFA organizers that they were "gullible" and when asked if he was management he shouted, "No, I am a Flight Attendant." Jablonski also stated that on April 26, 2008, in the Atlanta flight attendant lounge, Kevin Chapas, who Delta has confirmed is a front line flight attendant, shouted that AFA was "scum." In its response, Delta stated that the Carrier is not responsible for the views expressed by individual flight attendants and that there is no evidence that AFA brought these incidents to the attention of management. Jablonski further stated that on May 5, 2008, in the Delta flight attendant lounge in Atlanta, Delta flight attendant Candi Bruton was wearing a home-made anti-AFA t-shirt and giving out anti-union bags and lapel pins while standing next to a supervisor. According to Jablonski, he heard an unnamed supervisor tell Bruton not to worry about "the cost" because Delta would take care of it. Jablonski did not hear to what "cost" the supervisor was referring, or hear any further discussion between Bruton and the supervisor. The supervisor involved, Janet Payne, stated that the "costs" to which she was referring were for a Delta marketing event, unrelated to the election. Jablonski also stated that Bruton sat near the AFA table while using her lap-top that had a large anti-AFA sign on it. Finally, AFA submitted an email from a hotel manager to an AFA organizer requesting that AFA not organize in his hotel because patrons had complained that they felt harassed. Again, Delta responded that it is not responsible for the actions of people who are not Delta management.

E. Five Incidents of Alleged Verbal Interference With Organizing Activities

AFA submitted a declaration from flight attendant and AFA organizer Toni Weinfurtner stating that on May 6, 2008, in Atlanta, she witnessed Delta supervisor Norma Hunger interrupting AFA organizer Danny Valdez while he

was writing down information for flight attendant Frank Cavalcanti. Delta submitted a statement from Hunger stating that Cavalcanti is a personal friend and she did speak to him, but did not interrupt his conversation with Valdez. Weinfurtner also stated that on May 8, 2008, in Atlanta's E Concourse, Delta management official David James interrupted her and "verbally harassed" her, but Weinfurtner does not specify what the "verbal harassment" entailed. On May 15, 2008, in Atlanta, according to Weinfurtner, an in-flight supervisor interrupted her conversation with another flight attendant. Delta submitted a declaration from the in-flight supervisor involved, Lawrence Tutt, stating that the interruption was work related and that he needed to inform the flight attendant to whom Weinfurtner was speaking that her trainer had arrived. AFA also submitted a declaration from John Cornelius, an Alaska Airlines flight attendant and AFA organizer, stating that Delta managers asked him and Weinfurtner whether they had a permit to be where they were when they were talking to Delta flight attendants in Atlanta, and that management officials chastised an AFA organizer for using her badge to gain access to secured areas in order to organize.

F. Other Allegations of Harassment

AFA submitted a lengthy letter from AFA organizer Cornelius to AFA attorney Ed Gilmartin detailing his "experience . . . in regard to the campaign to join AFA at Delta Airlines." Cornelius stated that while working on the campaign, he experienced being "routinely circled by Delta management in their vehicles" and photographed by management while organizing in the parking lot. He also stated that he was followed to his hotel and that "the tire of one of [his] rental cars [was] damaged in an obscure fashion that would lead one to believe that it was an intentional act." Cornelius reports incidents of harassment by unnamed supervisors told to him by unnamed flight attendants. The incidents have no further identifying details, such as dates, time periods, or stations. These incidents describe situations in which activists "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." Also, a supervisor once told a flight attendant that she would help the flight attendant if the flight attendant would remove her AFA button. According to Cornelius, supervisors would commonly state that Delta did not need a union and hand out pro-Delta materials. One flight attendant, according to Cornelius, asked management to "stop the anti-union workers" and was told "that she better watch it, that she was walking a fine line and she better be extra careful." In its response, Delta stated that AFA has provided insufficient information about these incidents in order to confirm or deny them.

In his declaration, AFA activist Danny Campbell stated that in the Altanta crew lounge he witnessed two Delta supervisors attempting to distract two AFA activists and that the supervisors' presence intimidated flight attendants from approaching the AFA table. Campbell also stated that he witnessed a Delta base manager request that AFA activists move their table "2 inches" in the Atlanta flight attendant lounge. AFA also submitted an email from flight attendant Lisa Caretto to Campbell stating that Delta flight attendants Tricia Cowan and Tanya Pacheco told Caretto that in Los Angeles Delta supervisor Jim Terry discussed with them "how their seniority will be in jeopardy if they vote for a union" on an aircraft. Finally, AFA submitted a May 2, 2008 email from Jablonski to a flight attendant identified only as "Marisela" stating that he "got a phone call from [flight attendant] Cindi Striplin" that Marisela "had an incident with a Delta IFS supervisor calling [her] at home asking [her] who gave [her her] AFA pin . . as well as telling [her] not to discuss [AFA's] campaign." Jablonski stated that "[d]ocumenting this interference is critical as we go to the government to show how our election is not fair" and asked Marsiela to "please email [him] back with more details of this incident so [he] can document it and pass it on to the AFA legal in DC which is making our government aware of these travesties and mockeries of our rights." Jablonski received no reply.

III. Benefits Conferred During the Election Period

A. The Three Percent Pay Increase

Between September 14, 2005 and April 30, 2007, Delta formulated a restructured business plan as a result of the Carrier's Chapter 11 bankruptcy proceedings. The business plan called for periodic increases in wages in order to raise all Delta employees to industry standard wage levels. In March 2007, Delta sent a DVD to all employees informing them about the post-bankruptcy business plan. On the DVD, Michael Campbell, Delta's Executive Vice President for Human Resources, Labor, and Communications, announced that pay increases would begin on July 1, 2007, with an across-the-board four percent general increase at the top scale for non-contract employees. Thereafter, Campbell stated, pay would incrementally increase until pay reflects industry standards. Thus, subsequent steps were planned for 2008 and beyond.

On January 21, 2008, Delta CEO Anderson stated in his weekly message to employees that he was committed to general pay increases in 2008, beginning July 1, 2008. On February 8, 2008, Anderson stated in his weekly message to employees that an announcement regarding pay increases would be made the first week of March. On February 29, 2008, Anderson stated in his

weekly message to employees that the announcement regarding the size of the pay increase would be delayed, but reaffirmed that there would be general increases beginning July 1, 2008. On March 18, 2008, Delta announced that it was temporarily deferring the 2008 general pay increase announcement due to economic difficulties.

On May 3, 2008, in a memo from Anderson and CFO Bastian, Delta announced a three percent across-the-board pay increase for all U.S. non-contract employees. According to Campbell, this announcement was made only after Delta executives determined that the raise would be economically feasible.

AFA submitted a declaration from US Airways flight attendant and AFA organizer Joshua Freeze stating that Delta flight attendant Penny McLain reported to him that Delta flight attendant Wenche Poole decided not to vote for representation because of the pay increase.

B. The Voluntary Program

On March 18, 2008, in a memo from Anderson and Bastian, Delta announced that it would be offering two early-out/early retirement "voluntary programs" beginning in April in order to address the rising price of fuel and weakening U.S. economy. According to Campbell, Delta hoped it would be able to reduce at least 2,000 positions without involuntary furloughs through the voluntary programs. The voluntary programs were made available to all non-pilot employees who satisfied the eligibility requirements, approximately 39,000 employees. Delta informed any flight attendants who elected the voluntary programs that they would need to continue working until after the busy summer flight season. For flight attendants, no departure dates were available in June, 2008, and only a limited number were available in July, 2008, with most of the departures to be set in the fall.

According to AFA, approximately 821 flight attendants chose to participate in the voluntary programs. AFA alleges that these 821 flight attendants had no motivation to vote in the election, as they would soon be retired.

IV. Board Conduct

A. Tally Date

On March 24, 2008, the Board announced that the tally in this case would take place on June 3, 2008. On April 3, 2008, the Board changed the

tally date to May 28, 2008. At the time of the change, sample instructions or ballots had not been sent out.

B. Ballots

AFA names 64 flight attendants who allegedly did not receive ballots. The Board's records reveal that 40 of the named voters did not request duplicate ballots; 15 requested, and were sent, duplicate ballots; three were not on the list of potential eligible voters; one was sent a ballot which was returned to the NMB as undeliverable; four requested duplicate ballots after the deadline for requests passed; and one was part of an invalid group request.

AFA further alleges that approximately four flight attendants received ballots where the outer envelope was opened, or where the ballot envelope was stuck to another envelope.

C. Deceased Employee

On May 27, 2008, one day before the tally date and after the time for submitting status changes expired, Delta submitted a status change stating that the Carrier discovered on May 23, 2008 that flight attendant Janette Wood had passed away in January 2008. Delta did not submit any substantiating evidence and AFA did not respond to the status change.

On May 28, 2008, the Investigators found that Wood would remain on the List. The Investigators stated that they "are not obligated to accept status changes, absent extraordinary circumstances, if this information is provided less than seven calendar days before the count." The Investigators noted that Delta's status change was submitted "without supporting documentation, and [Delta] offered no explanation for why this status change was untimely."

DISCUSSION

Election Interference: Prima Facie Case

Section 17.0 of the National Mediation Board Representation Manual (Manual) provides, in part, as follows:

> Allegations of election interference must state a prima facie case that the laboratory conditions were tainted and must be supported by substantial evidence. Allegations of election interference not sufficiently supported by substantive evidence will be dismissed.

Under this section, the Board evaluates all allegations of election interference preliminarily to determine whether a *prima facie* case has been established. *Express One Int'l*, 25 NMB 420, 426 (1998). In determining whether a *prima facie* case has been established the Board considers whether the allegations and evidence, if true, might reasonably taint the laboratory conditions. *Express One Int'l, above* (citing *Fox River Valley R.R.*, 20 NMB 251, 259 (1993)).

The Board takes allegations of interference very seriously and believes properly supported allegations of conduct and/or communications by the carrier that, if true, constitute interference should be investigated using any and all means necessary and, if found to have tainted laboratory conditions, dealt with severely. However, not every statement or action by a carrier during an election constitutes interference, and not every allegation warrants further investigation. As stated earlier, in order to form a prima facie case, allegations must both be supported by substantive evidence and allege actions or communications that, if true, constitute interference. The Board carefully and thoroughly examines all allegations and supporting documentation submitted by the participants; however participants do not have an automatic right to an on-site investigation merely by virtue of filing interference allegations.[3] Neither carriers nor unions can use unsupported allegations or allegations that do not amount to interference to form the basis for a prima facie case requiring further investigation. For the Board to allow otherwise would be fundamentally unfair to all participants and could potentially result in on-site investigations in every representation proceeding, even where the interference claims have no merit whatsoever. As discussed below, after comprehensive and meticulous examination of all the allegations filed by AFA, the Board has determined that all of AFA's allegations either (1) are unsubstantiated second or third hand accounts or are otherwise not supported by substantive evidence; (2) do not rise to the level of interference under clear, longstanding Board precedent; or (3) in the few remaining allegations, constitute isolated incidents out of a workforce of 13,000 that do not amount to the kind of systematic, pervasive conduct that would have tainted laboratory conditions. Accordingly, the Board finds that AFA has failed to state a prima facie case of interference, and its allegations are dismissed.

[3] The Board has, in past cases, determined that allegations of interference made by both carriers and labor organizations failed to make a prima facie case and dismissed the allegations without conducting on-site investigation. *Air Logistics of Alaska*, 27 NMB 570 (2000); *Mesaba Aviation, Inc.*, 27 NMB 533 (2000); *Midway Airlines*, 26 NMB 154 (1999); *Express One Int'l*, 25 NMB 420 (1998); *America West Airlines*, 22 NMB 114 (1994); *San Joaquin Valley RR*, 21 NMB 391 (1994); *Fox River Valley RR*, 20 NMB 251 (1993).

Carrier Conduct

The Board has found that, "[d]uring 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." *Delta Air Lines*, 30 NMB 102, 114 (2002) (citing *Metroflight, Inc.*, 13 NMB 284 (1986)). The U.S. Supreme Court defined carrier "influence" 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 of the Railway Labor Act] 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."

In determining whether employees' freedom of choice has been impaired by carrier conduct, the Board examines the "totality of facts and circumstances . . . ." *United Air Lines*, Inc., 22 NMB 288, 314 (1995). Isolated incidents are not considered evidence of election interference unless they are part of a systemic campaign to interfere with employee choice. *American Airlines, Inc.*, 26 NMB 412, 452 (1999); *Continental Airlines*, 21 NMB 229, 251 (1994).

Campaign Communications

The Board has found that, although carriers "have the right to communicate with their employees during election campaigns," this right is "not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election." *Express Airlines I, Inc.*, 28 NMB 431, 453 (2001) (quoting *Air Logistics*, L.L.C., 27 NMB 385, 404 (2000)). Regardless of the organization's conduct, the carrier may not respond in a way that interferes, influences, or coerces employees in their choice of representation. *US Airways*, 24 NMB 354, 389 n.3 (1997). Specifically, carriers must refrain from making statements that are inaccurate or misleading, and must refrain from conducting "pervasive" or "overwhelming" anti-union campaigns. *See Delta Air Lines, above*, at 130-31; *US Airways, above,* at 391. Carriers may, however, accurately portray the way an employee can vote no, and disseminate publications expressing their views on the representation election. *Delta Air Lines, above,* at 131-34; *Express Airlines I,*

above, at 453-54. As the D.C. Circuit has stated, in applying the Supreme Court's decision in *Gissel Packing* to the RLA, "*Gissel* teaches that 'an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit.'" *U.S. Airways, Inc. v. NMB*, 177 F.3d 985, 993 (D.C. Circuit 1999) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)). As discussed below, based on the totality of the circumstances, the Board finds that AFA has failed to establish that the Delta's campaign communications tainted the laboratory conditions.

I. Delta Communications

A. DVD

In 2002, the Board reviewed election interference allegations from AFA after AFA was unsuccessful in unionizing Delta flight attendants. Included in those charges was AFA's allegation that two Delta videotapes sent to all flight attendants were coercive. In the first videotape, Delta's Vice President, In-Flight Service stated that Delta flight attendants were at the top of the industry in pay and benefits, that no union could guarantee anything, and that AFA only wanted to represent Delta's flight attendants for the dues income. The videotape also described how Delta pulled together after September 11, 2001. AFA argued that this was an inflammatory use of the September 11 tragedy in order to convince flight attendants to not vote for representation. In the second videotape, Delta's then-CEO stated that Delta opposes more unions, and that flight attendants should rip up their ballots if they wish to vote no. A flight attendant briefly referred to Delta's care for its flight attendants after September 11, 2001. *Delta Air Lines, above,* at 130-31. In 2002, the Board found that neither videotape "misstated Board or RLA procedures. Nor were the tapes coercive." *Id.* at 131. The Board also noted that Delta did not attempt to make flight attendants watch the tapes. *Id.*

Here, AFA cites Delta's April 2008 DVD as evidence of interference. As in the 2002 case, neither CEO Anderson nor any of the flight attendants interviewed on the DVD misstated Board or RLA procedures. The DVD in this case only briefly referred to September 11, 2001, and did not state that AFA only wants to represent the flight attendants in order to collect dues. In the April 2008 DVD, Anderson and the flight attendants noted Delta's "unique culture" and stated that a "vote no" on representation would preserve that culture. Additionally, there is no evidence that Delta management attempted to make Delta flight attendants watch the DVD in crew lounges or at their homes. Since Board precedent is clear that media of this nature is not

improperly coercive, the Board finds that the DVD is insufficient to establish a *prima facie* case of election interference. *See Delta Air Lines, above,* at 131. *See also Express Airlines I, Inc.*, 28 NMB 431, 453-54 (2001) (finding no interference where the carrier sent a videotape to employees' homes where the videotape contained accurate information, advised employees to tear up their ballots, and where employees were not forced to watch the videotape).

AFA also alleges that Anderson "wrongfully stated in the DVD that he was responsible for giving 'pay raises and domestic partner benefits to flight attendants,' at Northwest," however, in reality Northwest CEO John Dasburg gave those benefits. Anderson's statement does not change the Board's finding regarding the DVD. First, Anderson never stated he was CEO of Northwest at the time of the pay raises, and it is unclear whether the statement is actually untrue. In his declaration submitted to the Board, Anderson acknowledges that Dasburg was CEO of Northwest at the time of the pay raises, but that Anderson was Executive Vice President and Chief Operating Officer and had responsibility for executive level decisions on labor relations matters, including the decision regarding the referenced pay increase. Second, even if the statement was untrue, it is not the type of "inaccurate" or "misleading" statement that would rise to the level of election interference. *See, e.g., Aeromexico*, 28 NMB 309, 337 (2001) (misleading statements concerning Board procedure were evidence of interference); *Federal Express Corp.*, 20 NMB 7, 50 (1992) (misleading statements concerning dues obligations were evidence of interference). The issue of whether Anderson alone or Anderson together with Dasburg gave the pay raises at Northwest would not reasonably coerce Delta flight attendants to either vote for or against representation.

B. Newsletter

The Board analyzes allegations of improper communications in the context of the "totality of facts and circumstances." *United Air Lines,* 22 NMB 288, 314 (1995). The Board has found no interference in situations where the carrier did not attempt to overwhelm the employees with an overabundance of written materials, where the carrier's comments about the union "had a factual basis," and where the carrier held many meetings, but the meetings were voluntary. *American Airlines, Inc.*, 26 NMB 412, 448-49 (1999). For a finding of interference, the carrier's conduct must have been part of a "systematic carrier effort" to influence employee choice. *Delta Air Lines,* 30 NMB 102, 141 (2002). Thus, the Board has found interference where carriers have waged "pervasive" campaigns that "overwhelm the employees' ability to choose a representative freely." *US Airways*, 24 NMB 354, 391 (1997). For example, the Board has found interference where a carrier held 51 employee meetings in one month and discussed election issues with employees, and where the carrier

offered raises, handed out anti-union buttons, and "barrage[d]" the employees with anti-union meetings and communications. *Evergreen Int'l Airlines*, 20 NMB 675, 714 (1993); *Petroleum Helicopters, Inc.*, 25 NMB 197, 229 (1998).

After examining the weekly newsletters during the election period submitted by AFA in support of its interference allegations, the Board finds that the newsletters do not amount to a systematic campaign to influence employee choice. AFA points to no false statements in the newsletters, and the Board found no false statements in its own independent review of the newsletters. For example, AFA alleges that the October 26, 2007 newsletter "warns flight attendants against signing an AFA authorization card." The October 26, 2007 newsletter stated:

> Signing an authorization card is not an indication that you want to receive information, but an indication that you want union representation. Union authorization cards are legal documents. Once signed, they remain valid for one year. They are not necessarily used "just to get an election." Some unions may seek to use the cards to gain certification of a union without ever having an election or even if the union loses an election. Think seriously about the various issues and ramifications of signing such a card.

This statement was factual and accurately stated Board rules and procedure. *See* Manual Sections 3.0 and 7.0 (regarding age and content of authorizations and disposition of disputes by check of authorizations).

As further evidence of interference, AFA cites the column by Joanne Smith, Vice President of Inflight Services in the November 2, 2007 newsletter, claiming that Smith "warns flight attendants from engaging in any Union activity aboard the aircraft, and directs them to 'notify your leader' if they observe such activity." In the November 2, 2007 issue Smith stated: "Delta has an advocacy policy designed to accommodate your right to support a union, oppose a union or simply be left alone – as well as Delta's right to serve our customers and avoid disrupting operations." Therefore, "Delta people are not allowed to engage in organizing in work or operations areas – which includes the gatehouse, jet bridge or on board our aircraft." Smith instructs flight attendants that if they "continue to receive or observe solicitation in work or operations areas please notify your leader." Smith's statement is legally accurate and is not evidence of interference. Based on well-established Board precedent, a carrier is permitted to have rules prohibiting solicitation in work areas on work time. *See, e.g., Delta Air Lines*, 30 NMB 102, 138-39 (2002);

Metro North Commuter RR, 29 NMB 458, 470 (2002). Thus, the Board has found no interference where a carrier enforces a legal non-solicitation policy, or requests that employees tell the carrier when other employees are violating the policy. *Id.*

AFA cites as evidence of interference the fact that the newsletters stated that "unions cannot guarantee anything" such as protecting its members from pay and benefit cuts or protecting its members from loss of seniority as the result of a merger. AFA alleges that the "most insidious" newsletters instructed flight attendants that the surest way to vote no and ensure no one else voted on their behalf was to tear up their ballots. The April 18, 2008 newsletter stated:

> The only sure way to vote no is to not vote at all. If you do not want to have the AFA as your exclusive representative: rip up and throw away the VIN and PIN you receive from the NMB. This is the surest way to vote no and will prevent anyone else from obtaining the information and perhaps voting on your behalf.

AFA also takes issue with the April 18, 2008 newsletter for stating that:

> Richard [Anderson] and Ed [Bastian] have said all along, we will protect our employees' seniority and our board-approved seniority protection policy has the backing of U.S. law. . . . 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.

None of the above statements is inaccurate, nor does AFA allege that they are inaccurate. Furthermore, flight attendants were not required to read the newsletter. When flight attendants logged into their Delta internet accounts, the newsletter would come up on the screen, but the newsletter was not sent to their personal email addresses or to their homes. Nowhere in the newsletter did Delta attempt to coerce the flight attendants not to vote for AFA. In fact, on several occasions the Delta newsletter specifically acknowledged the employees' right to make their own choice regarding representation. For example, different issues of the newsletter contained the following statements: "the decision regarding union representation is personal and should be based on your perspective of the facts" (December 7, 2007 issue); "Delta respects your right to decide whether union representation is right for you" (March 14, 1008

issue); "Delta respects your right to decide whether to have union representation" (March 20, 2008 issue); "[w]e realize this is your decision and we respect your right to choose whether union representation is right for you" (April 23, 2008 issue); "[y]our decision whether to vote for AFA or not vote so Delta flight attendants can remain union-free is your personal choice" (May 10, 2008 issue); "[w]e have said from the start of this election process that we respect your right to decide if unionization is right for you and we continue to honor that commitment" (May 23, 2008 issue).

The Board has determined that all statements made in the newsletter have a factual basis, reading of the newsletter was voluntary, and the newsletter did not attempt to interfere with employee free choice; therefore, under Board precedent and based on the materials submitted by AFA, the newsletters do not rise to the level of interference and no further investigation is necessary. *See American Airlines,* 26 NMB 412, 448-49 (1999).

C. Delta's "Give a Rip" Campaign

In the 2002 Delta/AFA case, Delta launched a similar campaign also using the slogan "Give a Rip." Pursuant to this campaign, Delta disseminated materials stating that flight attendants could show their opposition to AFA representation by not voting and by ripping up their ballots. In the 2002 case, Delta included the slogan on its literature, on posters in crew lounges, in flight attendant mailboxes, and in-flight supervisors wore "Give a Rip" pins. *Delta Air Lines,* 30 NMB 102, 131 (2002). The Board found no interference, noting that the Board "has repeatedly stated that accurately portraying the way an employee can vote no is not interference." *Id.* Specifically, in *Express I Airlines,* 28 NMB 431, 454 (2001), the Board found that a carrier flyer sent to employees informing them that in order to express their desire to remain unrepresented they could rip up their ballots did not taint laboratory conditions. In *Delta Air Lines,* 27 NMB 484 (2000), the Board found carrier videotapes presenting the carrier's view that union representation was unnecessary and instructing employees how not to vote did not taint laboratory conditions. Also, in *American Air Lines,* 26 NMB 412 (1999), the Board found no interference where carrier newsletters stated "the best way to avoid a union is tear up a ballot." Based on these three decisions, the Board found that the "Give a Rip" campaign was accurately portraying the way an employee could vote no and therefore did not taint laboratory conditions. *Delta,* 30 NMB at 132.

Here, Delta engaged in essentially the same conduct as in 2002. The carrier used the "Give a Rip" slogan on posters in crew lounges, on literature, and in its weekly newsletter. The Carrier explained in its newsletter that the slogan indicated that the best way to vote "no" to representation and to ensure

no one else voted for you was to not vote and tear up your ballot. As discussed above, the Board has repeatedly found that informing employees that they can vote no by ripping up their ballots is not interference. *See Delta,* 30 NMB at 132; *Express I Airlines, above; Delta,* 27 NMB at 502, 508; *American Air Lines, above.* As explained in the 2002 Delta case, longstanding Board precedent establishes that accurately indicating how an employee can vote no to a union does not taint laboratory conditions. *Delta,* 30 NMB at 131. Therefore, the Board finds, again, that Delta's "Give a Rip" campaign was not interference and further investigation of this campaign is not necessary.

D. Delta's "Misstatement" Regarding Voting Procedures

AFA's allegation that Delta misstated Board procedures is based on an uncorroborated email submitted to AFA by a union organizer who was not a witness to the alleged misstatement. The email provided by AFA, sent from a flight attendant to an AFA organizer, states that the flight attendant was told that an unidentified newly hired flight attendant was told by management that she could not vote unless she had been employed by Delta for one year. Such uncorroborated, third-hand evidence could not be a reasonable basis for finding election interference. *Express One Int'l,* 25 NMB 420, 426 (1998) (in determining whether a *prima facie* case exists the Board considers whether the evidence might reasonably taint the laboratory conditions). Even assuming the truth of the allegation, there is no evidence that this was more than an isolated incident nor is there evidence that the management official who allegedly misstated procedures was a high-level management official or that the misstatement was part of a larger campaign to interfere with employee choice. The Board has not found interference based on "isolated incidents." *Continental Airlines,* 21 NMB 229, 251 (1994). For example, in *Continental, above,* the organization presented evidence that four low-level management officials had made threats to employees regarding the consequences of electing a union. The Board stated that "the absence of threats by senior management and the lack of evidence demonstrating an effort by carrier officials to coerce employees lead the Board to conclude that these isolated incidents did not taint the laboratory conditions." *Id.* The fact that AFA only cites one incident, in a workforce of over 13,000 flight attendants, also leads the Board to conclude that this was an isolated incident not worthy of further investigation and is insufficient to taint laboratory conditions.

II. Surveillance and Harassment of Employees

A. Surveillance

The Board has stated that surveillance, or even the appearance of

surveillance, may be a sufficient basis for a finding of interference. *Delta Air Lines, Inc.*, 30 NMB 102, 115. In those cases where the Board has found carrier interference based on surveillance, the Board also found other "egregious carrier action" such as ballot collection or discharge of employees for signing authorization cards. *Delta, above* (citing *Laker Airways, Ltd.*, 8 NMB 236 (1981); *Sky Valet d/b/a Commercial Aviation Servs. of Boston, Inc.*, 23 NMB 276 (1996)).

The Board has generally found that an increased supervisory presence during the election period is not surveillance. *Delta Air Lines*, 30 NMB 102, 115 (2002) (*citing Aeromexico*, 28 NMB 309 (2001)). The Board has recognized that "it is not unusual for carrier management to increase their presence in . . . crew lounges during particular time periods to ensure compliance with carrier policies." *Delta, above,* at 117.

AFA argues that the "most oppressive feature" of Delta's anti-union campaign was the "omnipresence" of supervisors in crew lounges and airport concourses where AFA activists were working. Yet Delta submitted evidence that supervisors were in crew lounges for reasons other than surveillance of AFA activists. Supervisors' offices are located in the flight attendant lounges so they are often present to perform their own job duties such as pre-flight briefings, interacting with flight attendants as part of their management duties, conducting Delta-sponsored events, or taking breaks. The fact that AFA submitted no specific incidents of surveillance other than managements "omnipresence" also strengthens Delta's claim that the presence of management was for reasons other than surveillance. Accordingly, the Board finds that AFA has not submitted substantial evidence of surveillance warranting further investigation.

B. Harassment

The Board has also held that interrogation of employees regarding their representation choice is per se evidence of interference. *See, e.g., LSG Lufthansa Servs., Inc.*, 27 NMB 18 (1999); *Sky Valet*, 23 NMB 276 (1996). Discipline and discharge for union activities is also a violation. *Key Airlines,* 16 NMB 296 (1989).

In order to be per se evidence of interference, however, the incidents must actually involve harassment of employees by management officials in attempts to coerce the employees. *See LSG Lufthansa Servs.,above,* at 40-41. In a workforce of over 13,000 flight attendants and bases across the United States, AFA alleges approximately 23 instances at three different Delta bases in which supervisors harassed AFA organizers or flight attendants attempting to

get more information about AFA. As discussed below, the Board finds that none of these 23 incidents rises to the level of harassment that would taint laboratory conditions and interfere with employee free choice.

1. Harassment by Hotel Employees or Other Flight Attendants

For a finding of carrier interference, the carrier must have perpetrated the interfering incident. Four incidents cited by AFA did not involve anti-union activity by management officials. One undated incident involved the manager of a hotel requesting that AFA stop organizing in the hotel. There is no evidence or allegation that Delta management, or even a Delta employee, was involved in this incident. Nor does AFA allege that anyone from Delta was informed of this incident. Accordingly, this incident is not evidence of interference. An incident on April 26, 2008 involved a flight attendant wearing an anti-AFA sign and telling union organizers they were "gullible." Another incident on April 26, 2008 involved a flight attendant calling AFA organizers "scum." There is no indication management was involved in or informed of either of these incidents. Accordingly, these incidents are also not evidence of carrier intereference Finally, on May 5, 2008, a flight attendant was wearing a home-made anti-AFA t-shirt and handing out anti-union materials. An AFA witness heard a supervisor tell the flight attendant that she would "take care" of the "costs." There is no direct evidence that "costs" referred to carrier sponsorship of anti-union materials. The supervisor involved stated that the costs she was referring to related to expenses for a Delta marketing event the flight attendant was involved in and unrelated to the AFA campaign. Even assuming, however, that the supervisor was offering to pay for the anti-AFA materials, this single, isolated occurrence is not evidence of interference. These four incidents, taken together, are not substantial evidence of election interference warranting further investigation.

2. Incidents Where Management Relented

On April 24, 27, and 28, 2008, AFA alleges that Delta managers told AFA supporters to cease certain organizing activities, the supporters refused, and then, after checking with higher management, or, in one case, other flight attendants, the managers relented and allowed the organizers to go on with their activities. In one case, the manager's mistake caused only a brief pause in organizing activities. In the two other cases, supervisors told organizers to remove AFA materials but the organizers refused and the materials remained visible while the supervisors checked with other management officials, causing no interference in organizing activities.

The Board finds that these incidents do not provide substantial evidence of election interference. The three incidents occurred over a five week election period in an election involving over 13,000 flight attendants and in each instance there was no substantial or prolonged interference with organizing activities. Therefore, these incidents are not evidence of a "systematic pattern" of harassment. *American Airlines, Inc.*, 26 NMB 412, 452 (1999).

3. Supervisors Wearing Flight Attendant Uniforms

On April 23, 2008, AFA alleges that Delta supervisors stood in front of the AFA information table in the Atlanta flight attendant lounge and one of them was wearing a flight attendant uniform. A Northwest flight attendant also alleges that he saw a Delta supervisor in a flight attendant uniform posing as a flight attendant.

Delta responds that it is not unusual for supervisors to be in uniform as they need to be ready to fly. Also, the supervisor involved in the April 23 event stated that all Atlanta supervisors wear a flight attendant uniform on Wednesdays and April 23 was a Wednesday. She also states that she did not attempt to harass or intimidate flight attendants into not speaking to AFA supporters.

AFA has not alleged that any of the supervisors wearing flight attendant uniforms attempted to talk to anyone about the election, and AFA offered no explanation as to why supervisors wearing flight attendant uniforms would interfere with AFA's organizing campaign. Delta has offered a reasonable explanation for why the supervisors were in uniform. Since there is evidence that the supervisors were in flight attendant uniforms for legitimate business reasons, and AFA offered no evidence that these interfered with union activity, the Board finds no reason to further investigate these incidents. Accordingly, the Board finds that these incidents are not substantial evidence of carrier interference.

4. Atherley – Cinotto Incident

AFA alleges that Delta flight attendant and AFA organizer Jean Marie Cinotto was disciplined as a result of her union activities, in contravention of the RLA. Cinotto was not formally disciplined, but rather the discipline took the form of a phone call from Delta Field Service Manager Colleen Atherley allegedly "warning" and "cautioning" Cinotto about the tone she took in an email regarding her vacation time.

The Board notes that if Cinotto were formally disciplined because of her union activity, this incident would be troubling. *Key Airlines*, 16 NMB 296, 309 (1989) (discharge or transfer of employee based on union activity was interference). Based on a careful review of the allegations and the lengthy email chain between Cinotto, Atherley, and other supervisors submitted by AFA, the Board concludes that there is no evidence that Atherley disciplined Cinotto because of union activity. *Petroleum Helecopters,* 25 NMB 197, 235 (1998) (no interference found where an employee was discharged for safety violations and carrier was unaware of his union activity).

Cinotto communicated frequently with supervisors regarding her paid personal time, which had been improperly calculated. In these emails neither Cinotto nor her supervisors mentioned Cinotto's organizing activities. In fact, it is unclear whether her supervisors were aware of her activities. The issue was resolved on April 24, 2008, when a supervisor emailed Cinotto that her time had been accurately recalculated. The telephone call between Cinotto and Atherley was not recorded and each woman gives a different account of what was said. Neither party, however, stated that Atherley indicated she was warning Cinotto as a result of Cinotto's organizing activities, or that Atherley was even aware of such activities. The only evidence connecting the warning to Cinotto's union activity is Cinotto's own statements in her April 25, 2008 email. Cinotto simply asserts that Atherley "appear[s] to be trying to interfere with our election by attempting to intimidate [Cinotto]." There is no evidence that the verbal warning was reduced to writing or had an adverse impact on Cinotto's employment. AFA failed to establish a nexus between the verbal warning and the election is tenuous, at best, and this allegation is insufficient to establish a *prima facie* case of interference.

5. Solicitation and Access

A carrier is permitted to have a solicitation policy reasonably restricting employees' rights to solicit during work hours and on carrier property. *See Delta Air Lines, Inc.,* 30 NMB 102, 134-35 (2002). If a carrier's solicitation policy is applied unevenly, i.e., only enforced against labor organizations, the Board has found that this may be evidence of election interference combined with other anti-union carrier activity. *US Air*, 17 NMB 377, 423 (1990) (the "carrier's policy prohibiting the dissemination of [union] campaign literature . . . combined with the pervasive and determined campaign against unionization . . . and the inaccurate and possibly misleading statements . . . influenced the employees in derogation of their RLA rights."). Where there is insufficient evidence of systematic, uneven, or discriminatory enforcement of the carrier's rules on solicitation and access, the Board will not find interference. *Delta,* 30 NMB 102, 134 (2002); *American Airlines*, 26 NMB 412 (1999).

Delta's solicitation policy provides, in pertinent part:

> These policies are designed to accommodate employees' rights to support or oppose a union, or simply to be left alone, as well as Delta's right to serve our customers and to avoid disruption of operations.
>
> **Solicitation and Advocacy Activities**
>
> **By Delta Employees**
>
> Solicitation or advocacy activities by Delta people on Delta premises are permitted only in non-work and non-operations areas, such as lounges and break rooms, and only during a person's non-working time.
>
> -An aircraft is always a work/operations area. Solicitation or advocacy activities are not permitted on board aircraft at any time.
> -Other work areas include gatehouses, jetways, briefing rooms, and the ramp.
> -Parking lots are considered non-work areas, but solicitation activities must not interfere with traffic or harass people.
> -If an area in a lounge or break room is used for work and non-work purposes, solicitation or advocacy activities are permitted in that area only when it is not being used for work purposes.
> -Solicitation or advocacy activities may never be undertaken in a harassing manner or in a manner that interferes with people who do not wish to be solicited.
> -Advocacy materials must not be unprofessional, offensive or inflammatory. Materials may not be left unattended.
> -Leaders have the right to restrict congestion in lounges and break areas and to provide for quiet areas for flight attendants where advocacy and solicitation activities may not occur.

> **Bulletin Boards**
>
> . . .
>
> Items that advocate a position (such as political material, material for or against a social policy, material for or against a union) are not permitted on bulletin boards or on walls in other areas on Delta premises.
>
> **Pins, Buttons or Other Message-Bearing Items**
>
> -Other than Delta-sponsored programs or initiatives, no buttons or other items (including caps, shirts, jackets or any other clothing) that convey a message or advocate a position or cause may be worn or displayed in work areas or on work time.
>
> . . .

As evidence of interference, AFA cited several incidents where organizers were prevented from organizing based on Delta's solicitation policy. First, AFA cited the three incidents in Los Angeles where flight attendant Corsello was prohibited from displaying large AFA posters or t-shirts. The supervisor involved in two of these incidents stated that she was acting in accordance with Delta's policy, and, in fact, had checked with Delta's Law Department to make sure she was enforcing the policy correctly.[4] Second, AFA cited the two incidents in Atlanta where flight attendant Weinfurtner and AFA organizer Cornelius were questioned about their organizing efforts in secured areas. Joanne Smith, Delta's Senior Vice President of In-Flight Services, states that she investigated the incident and determined that there had been no interference. Finally, AFA cited the incident in Atlanta where organizers were asked to move a table. The supervisor involved stated that he asked the organizers to move the table because it was blocking a heavily trafficked area.

After careful evaluation of the evidence submitted, the Board finds that these incidents do not establish a *prima facie* case of election interference, as they could not have reasonably tainted laboratory conditions. First, AFA does not allege, nor is there evidence, that Delta enforced its solicitation policy in an uneven or discriminatory manner. Second, seven isolated incidents in a work force of over 13,000 line flight attendants at a carrier with crew lounges across

[4] As noted above, the supervisor involved in the May 1, 2008 incident was unavailable prior to the deadline for filing; however, the action allegedly taken by the supervisor was permissible under Delta's solicitation policy.

the United States does not establish a systematic campaign to thwart union organizing.

This case is similar to *American Airlines,* 26 NMB 412, 452 (1999), where, although the enforcement of the carrier's solicitation policy varied by station, the Board found that the incidents were isolated and did not support a finding of system-wide interference. Furthermore, in *American Airlines, above*, and in *Delta Air Lines,* 30 NMB 102, 138 (2002), the Board also noted that its finding of no interference was partially based on the fact that the carriers generally allowed union activity within the carriers' advocacy guidelines, and provided areas where unions could organize. Similarly, in this case, based on the AFA materials in evidence, and declarations from Delta managers and flight attendants, it appears that Delta generally allowed AFA to set up tables in the crew lounges and hand out literature to flight attendants throughout the organizing campaign.

6. Other Incidents of Harassment

AFA cited approximately seven other incidents of alleged harassment. AFA first cited the incidents described by Weinfurtner and Cornelius on May 6, 8, and 15, 2008, and on another unidentified date in Atlanta, where Delta supervisors allegedly interrupted AFA organizers while they were attempting to disseminate union-related information. Next, AFA again cited the incident where organizers were asked to move a table. AFA also cited the incident in which a supervisor discussed seniority and the election with flight attendants on an aircraft. Furthermore, AFA cited the incident where an unidentified Delta supervisor called an unidentified flight attendant at home to ask her to disclose her PIN number and asked her not to discuss the campaign. Finally, AFA cited Cornelius's email to Gilmartin in which Cornelius described incidents of Delta officials driving by him and taking pictures of him while he was organizing in a parking lot, and reported other incidents of harassment that he heard about, but neither experienced or witnessed.

As discussed above, isolated incidents are not considered evidence of election interference unless they are part of a systemic campaign to interfere with employee choice. *Continental Airlines,* 21 NMB 229, 251 (1994). Considering the vagueness of these allegations and the vastness of Delta's workforce, the Board finds that these incidents could not have reasonably tainted laboratory conditions. Regarding the incidents in Atlanta, the flight attendants involved allege only that they were interrupted, but not prohibited from engaging in union activity. In fact, the supervisors involved in the three incidents all state that they interrupted the organizers to discuss legitimate airline business, not to interfere with organizing. Furthermore, these

interruptions lasted mere minutes and then the organizers continued with their union activity. According to a statement from the supervisor in the table-moving incident, the table was in a high traffic area and blocking people's way so he asked the organizers to move it in accordance with Delta's advocacy policy.

The allegation that a supervisor called a flight attendant inquiring about her AFA PIN number and asking her not to discuss the campaign is only described third hand in an email from an AFA organizer who heard about the incident from a third party who was not involved in the event, and it is unsubstantiated even by the flight attendant involved. In fact, when the organizer requested more information from the flight attendant in order to use the incident as evidence of interference, the flight attendant did not respond. Regarding Cornelius's letter, the Board finds no interference with laboratory conditions where supervisors observe organizers working in a public parking lot. *See America West Airlines, Inc.*, 30 NMB 310, 324-25 (2003) (supervisors' "dirty looks" and "one-on-one encounters" insufficient to support finding of interference). The remaining allegations in Cornelius's letter are sweeping, vague and unsubstantiated. They contain no names, no dates, no identifying details of the officials or the employees involved, and little indication as to where the incidents took place. Broad and unsupported allegations such as these cannot be investigated further by the Board.[5]

III. Changing Wages or Benefits

The Board has found that "[c]hanges in working conditions during the laboratory period 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.'" *American Trans Air, Inc.*, 28 NMB 163, 178 (2000). Thus, where a carrier increases wages or benefits unexpectedly during the election period, the Board will generally find election interference. *Id.* On the other hand, where the carrier presents evidence that a pay or benefit increase was pre-planned, pertained to all employee groups, and was not deliberately linked to rejection of representation, the Board will not find that the pay increase tainted the laboratory conditions.

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[5] AFA did not attempt to rebut with further details Delta's contention in its June 20, 2008 response that the allegations in the Cornelius letter were unsubstantiated, and contained no names or dates that would allow further investigation. In most interference cases, the participant alleging interference files a rebuttal submission after the other participant has filed its response. The Board notes that AFA did not file such a rebuttal or request the opportunity to submit additional details. Had AFA done so, the Board would have granted the Organization's request.

See Delta Air Lines, 27 NMB 484, 508-09 (2000); *Petroleum Helicopters, Inc.*, 26 NMB 13, 36-38 (1998).

A. Three Percent Pay Increase

It is undisputed that Delta increased pay for all U.S. non-contract employees three percent on July 1, 2008. AFA claims that the pay increase tainted the laboratory conditions because it was designed to encourage flight attendants to reject representation. Delta argues that the pay increase was pre-planned and that there were legitimate business reasons for the timing of the pay increase and therefore it is not evidence of interference.

After careful review of the evidence, the Board finds that the pay increase was pre-planned, was for legitimate business reasons, and was not intended to influence employee choice. The situation in this case is similar to the situation presented in *Delta Air Lines*, 27 NMB 484 (2000). In *Delta*, during the election period, the carrier extended benefits to its part-time employees and instituted a computer purchase program, both of which the organization claimed tainted laboratory conditions. The Board found no interference because the carrier announced the changes before the election period, there was evidence that the benefits had been under consideration for several months before they were instituted, and there was evidence that Delta knew other companies had these same benefits. *Delta, above,* at 502-03. Similarly, in this case, the July 1, 2008 raise was announced before AFA filed its application with the Board (although the amount of the raise was not announced until after the election was announced), and the raise had been planned in 2007, as part of Delta's emergence from bankruptcy. Also, as in *Delta, above,* here, the raise was an attempt to extend to Delta employees the same pay that was being offered by other airlines which Delta had been unable to offer previously due to its bankruptcy. *See also Continental Airlines,* 27 NMB 463, 477-76 (2000); *American Airlines*, 26 NMB 412, 455 (1999); *USAir*, 17 NMB 377, 426 (1990) (all cases where the Board found no interference because the carrier submitted evidence that pay raises instituted during the election period were pre-planned). The Board also notes the fact that the pay increase was instituted across the board, not just to flight attendants, and this is further evidence that the pay increase was not instituted to influence employee choice. *Delta, above,* at 509. Finally, Delta specifically stated to its employees that the pay increase would go into effect regardless of whether AFA won the election.

B. Voluntary Program

The voluntary program was announced in March of 2008, but flight attendant departure dates were set in July or later. According to declarations

from Delta management officials, the voluntary program had been pre-planned as a business measure to reduce the number of flight attendants on the payroll without resorting to involuntary furlough. Approximately 821 flight attendants chose to participate in the voluntary program.

First, AFA contends that the voluntary program tainted laboratory conditions because it constituted a benefit conveyed during the election period. As discussed above, changes in working conditions during the election period "may taint laboratory conditions, except if the changes were planned before the laboratory conditions attached, or if there is 'clear and convincing evidence of a compelling business justification.'" *American Trans Air, above.*

There is no evidence that the voluntary program was put in place in order to affect the outcome of the election. In fact, there is credible evidence that the program was announced for the legitimate business purpose of reducing positions due to the weakening economy without involuntary furloughs. Moreover, like the pay raise, the voluntary program was offered to all eligible non-pilot employees, not just flight attendants. Thus, the Board finds further investigation of the voluntary program is unnecessary because it could not have reasonably tainted laboratory conditions.

Second, AFA argues that the flight attendants who participated in the voluntary program would be discouraged from voting since their time at the Carrier was limited. Manual Section 9.2 states: "All individuals working regularly in the craft or class on and after the cut-off date are eligible to vote in an NMB representation election." Manual Section 12.3 provides that: "Employees who leave the craft or class prior to the ballot count are not eligible."

It is undisputed that the flight attendants participating in the voluntary program were working regularly in the craft of class after the cut-off date and prior to the ballot count, and therefore were eligible to vote under the Manual. Even assuming all 821 flight attendants in the voluntary program did not vote for representation and would have had they not been offered the voluntary program, their votes would still not have been material to the outcome of the election.

IV. The Board's Conduct

The Board has broad discretion in investigating representation disputes. Section 2, Ninth, of the RLA provides that "[i]f any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter,

it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute" and certify the resulting representative for the relevant craft or class. The U.S. Supreme Court has held that "[t]his command is broad and sweeping" and that it is the Board's duty to "make such investigation as the nature of the case requires." Thus, an investigation is "essentially informal" and "is 'not required to take any particular form.'" *Brotherhood of Rwy. & Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661-62 (1965).

A. Opened or Misdirected Ballots

AFA alleges that approximately four flight attendants received ballots that were opened or misdirected. There is no evidence that the unsealed and misdirected voting instructions were the result of anything other than the normal wear and tear that results from a mass mailing. The Board sent ballots to over 13,000 eligible voters. The fact that four envelopes were opened or misdirected does not indicate the type of "widespread voter confusion and uncertainty" that the Board has in the past relied on to determine that the election was so tainted as to require a re-vote. *United Airlines, Inc.*, 27 NMB 221, 227 (2000).

B. Duplicate Ballots/Un-received Ballots

Manual Section 13.206 provides:

> Voters may request duplicate Instructions, including a VIN and a PIN, by contacting the NMB in writing. The request must be signed by the voter requesting the Instructions and mailed in an individual envelope; group requests are not accepted. Requests by telephone, facsimile or electronic mail are not accepted. Requests received less than five (5) days before the tally will not be honored. Requests dated or received prior to the mailing of the Instructions will not be honored.

(Emphasis in original.)

As stated above, the Board sent duplicate voting instructions to all eligible voters who filed requests in accordance with Manual Section 13.206. Considering the small number of voters who did not receive ballots, and the fact than many of the named individuals never informed the NMB that they did not receive ballots so that the Board could rectify the situation, AFA's

allegation does not rise to the level of a *prima facie* case of election interference.

C. Changed Tally Date

The Board finds no merit with AFA's assertion that the change in tally date had a prejudicial effect on the organization. The tally date was changed early in the election period, before any mailings were sent to the voters by the NMB. Other than its conclusory statement of prejudice, AFA offers no proof that the change in the tally date caused widespread voter confusion. Given the Board's broad mission to investigate and expeditiously resolve representation disputes, the Board finds that it was within its discretion to change the date of the election, and that the change did not prejudice AFA such that a re-run election would be required. *Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. at 661-62 (the Board's duty to investigate is "broad and sweeping" and is "not required to take any particular form"); *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963) (RLA's primary purpose is expeditious resolution of representation disputes), *cert. denied,* 376 U.S. 913 (1964).

D. Janette Wood

The Manual Section 12.3 states: "The Investigator is not obligated to accept status changes in employee status, absent extraordinary circumstances, if this information is provided less than seven (7) calendar days before the scheduled count."

AFA challenges the Board's refusal to strike deceased flight attendant Janette Wood from the List. Both AFA and Delta were unaware of the status change involving Wood until after the deadline passed for submitting status changes. The change was submitted to the Board by Delta one day before the tally with no supporting documentation, and AFA did not submit any response. Although the Board is under no obligation to accept status changes that do not conform to the Board's Manual and are not supported by any documentation, and although the Board's decision not to strike Wood from the List was not material to the outcome of the election, the Board finds, in the circumstances of this case, that Wood's name should be struck from the List and a revised tally should issue.

CONCLUSION

The revised tally, removing Wood's name from the List, is as follows: of 13,379 voters, 5,306 cast valid votes for representation. This remains less than the majority required for Board certification.

The Board further finds that AFA has failed to establish a *prima facie* case of election interference. Therefore, as there is no further basis to proceed, the Board closes its file in this matter.

By direction of the NATIONAL MEDIATION BOARD

Mary L. Johnson
General Counsel

Copies to:
Andrea L. Bowman
John J. Gallagher
Edward J. Gilmartin
Veda Shook

Harry Hoglander, dissenting.

I write separately from my colleagues because I believe the Association of Flight Attendants – CWA (AFA) has established a *prima facie* case of election interference and that the National Mediation Board (NMB or Board) should conduct an investigation. By failing to direct such an investigation, the Board Majority has abrogated their duty under the Railway Labor Act (RLA or Act).

Section 2, Ninth of the Act requires the Board to "insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." 45 U.S.C. § 152, Ninth. Section 2, Fourth of the Act is no less clear in its admonishment 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 . . . .

45 U.S.C. § 152, Fourth.

To carry out this statutory mandate, the Board must ensure that the laboratory conditions necessary to a fair election are maintained so that employees are able to cast their votes in an atmosphere free of coercion. When a participant has alleged election interference, as AFA has in the instant case, the Board determines whether that participant has presented a *prima facie* case and a basis for further investigation. To do this the Board considers whether the allegations and evidence, if true, might reasonably taint the laboratory conditions. *Fox River Valley R.R.*, 20 NMB 251 (1993).

Reviewing all of the documents submitted by AFA in support of its allegations and assuming the truth of those allegations, I find that the AFA has established a prima facie case that Delta may have tainted the laboratory conditions and that the Board must go forward with additional investigation.

My colleagues disagree and find that AFA's allegations are either attenuated and unsubstantiated or the conduct alleged is isolated and de minimis. I disagree. AFA alleges conduct by Delta that if true goes to the very heart of the coercive power of an employer in the workplace. Increased supervisory presence, as alleged by AFA, can and does have a chilling effect on employee free choice because the fear of surveillance leads employees not to talk to organizers, not to take union campaign literature, and not to be informed about their choices in an election. AFA not only alleges that Delta increased the supervisory presence throughout its system but that these supervisors interfered with employees' organizing activities, harassed employee organizers, questioned employees about their union activity, and prevented employees who supported AFA from communicating with their colleagues. AFA also alleges that this surveillance occurred throughout Delta's system in crew lounges where employees necessarily gather to talk. One must recognize that the Atlanta crew lounge, Delta's largest, had scores of Flight Attendants observe these "isolated instances" of alleged "supervisory intimidation." These same Flight Attendants became an army of "eye witnesses" that flew from Atlanta to various destination cities, where in similar crew lounges they recounted firsthand what they had witnessed to their fellow Flight Attendants throughout the Delta network. As I noted in a prior decision involving allegations of election interference by AFA against Delta, an "isolated incident" that is witnessed in an Atlanta crew lounge is no longer isolated when it is reported and discussed in New York, Los Angeles, Boston and Salt Lake City within a matter of hours. *See Delta Airlines, Inc.*, 30 NMB 102, 152 (2002). My colleagues fail to recognize that even isolated incidents of surveillance, harassment and interference can have a chilling impact on the election process.

The Board has also recognized that a pervasive communication campaign by a carrier can interfere with employees' freedom of choice by overwhelming employees' ability to freely choose a representative. In the instant case, AFA alleges that Delta inundated its employees with campaign communications through a newsletter, DVDs mailed to employees' homes and it's "Give a Rip: Don't Click, Don't Dial" slogan and campaign materials which were set up in all of its crew lounges. AFA alleges that at the same time Delta was disseminating its anti-union message it was interfering with employees' ability to communicate their pro-union message.

AFA also alleges that Delta tainted the laboratory conditions through its conferral of benefits—a three percent raise and an early retirement program—on its flight attendants during the organizing campaign. The Board has long held that the granting of a benefit during an organizing drive constitutes carrier interference. *Key Airlines*, 16 NMB 296 (1989). Further, such an allegation raises complex issues of proof regarding the carrier's established practices and the manner and timing of the decision to confer the benefit. The torturous path by which the benefits were offered, rescinded, and then re-awarded, certainly would raise eyebrows if not serious doubts regarding the timing of the re-awarded benefit. Yet my colleagues are content to accept Delta's assurances that the benefits were unconnected with the organizing campaign without further independent investigation. I would not.

The issue in this case is simple: whether AFA's allegations are sufficient to trigger a Board investigation. I would find that these allegations if true might reasonably have tainted the laboratory conditions necessary for an election. I find guidance in the words of the Fourth Century Chinese philosopher Mencius, he advised "Never miss an opportunity to find the truth, the risk is small and the reward is great". Therefore, I would direct the Board to further investigate so that the employees of Delta may be assured that they will be able to exercise their right to choose a bargaining representative free of employer influence and coercion.

I reserve the right to expand my remarks at a future date.