



NATIONAL MEDIATION BOARD
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37 NMB No. 11

December 1, 2009

NOTICE

TO: All Carriers and Labor Organizations

FROM: Mary L. Johnson
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SUBJECT: National Mediation Board's Policy on use of Hyperlinks to its
Voting Website

Effective October 1, 2007, the National Mediation Board (NMB or Board) began primarily conducting representation elections using both Telephone Electronic Voting (TEV) and Internet Voting. *Internet Voting Comment Period*, 34 NMB 200 (2007). Internet Voting was implemented after months of research and testing, and is both secure and encrypted.

In February of 2008, the Board decided to remove the hyperlink to the voting website from its website at <http://www.nmb.gov>, and instead instructed voters to type in the Internet address (URL)¹ to access the voting website at <https://www.ballotpoint.com/NMB/>. *Removal of Internet Voting Hyperlink on Board's Website*, 35 NMB 92 (2008). As a further safeguard, the Board additionally requested its participants not to post a hyperlink to the Board's voting website and cautioned that "the Board may consider hyperlinks to the voting website as possible evidence of election interference." *Id.*

On July 22, 2009, the Board received a request for reconsideration on this issue from the Association of Flight Attendants-CWA, AFL-CIO (AFA-CWA). As a result, the Board solicited comments on whether hyperlinks to the voting website should be permitted. *Comment Period re: Board's Policy on use of Hyperlinks to its Voting Website*, 36 NMB 147 (2009) (the comment period ran from September 22, 2009 through October 22, 2009).

¹ URL or Uniform Resource Locator is the address of the website in text rather than a hyperlink.

The following eight participants filed comments regarding the Board's policy on the use of hyperlinks to its voting website: 1) the AFA-CWA, 2) the Port Authority of New York & New Jersey (PATH), 3) the Regional Airline Association (RAA)², 4) Delta Air Lines, Inc. (Delta), 5) the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), 6) the National Railway Labor Conference (NRLC), 7) the Airline Industrial Relations Conference (AirCon), and 8) the Cargo Airline Association (CAA).³

I. COMMENTS

AFA-CWA

The AFA-CWA, in its July 22, 2009 submission, argued that the Board policy to remove hyperlinks "adversely impacts a union's ability to promote voter turnout. . . ." For flight attendants in particular, face-to-face communication is difficult, so AFA-CWA relies heavily on email and other online communication to urge its supporters to vote. In its opinion, a hyperlink makes the process more accessible to eligible voters, rather than requiring the employee to type in the correct URL.

AFA-CWA urges the Board to modify its current policy and allow parties in Board representation elections to post hyperlinks to the Board's Internet voting website in order to enhance Internet voter access, "so long as the hyperlink is not used to either track or identify the IP address of the person using the link."

PATH

PATH commends the Board for its efforts to increase the electronic security of representation elections and maintains that the Board's action of prohibiting hyperlinks to its voting website both prevents the tracking of IP addresses and helps ensure that elections are secure and anonymous. PATH states: "It is the Port Authority's position that the extra two to three seconds necessary to type the URL is well worth the added sense of security for voters The Port Authority hopes that the Board does not sacrifice its commitment to security and fairness for the sake of eliminating a minor inconvenience."

² The RAA represents North American regional airlines, among others, and has more than 30 member airlines, including Air Wisconsin Airlines Corp., American Eagle Airlines, Inc., Atlantic Southeast Airlines, Inc, Cape Air, and Chautauqua Airlines, Inc., etc.

³ The CAA is a nationwide trade association representing the interests of all-cargo carriers. Some of its U.S. airline members include ABX Air, Atlas Air, Capital Cargo, FedEx Express, Kalitta Air and UPS Airlines.

RAA

The RAA states that it believes the Board's current hyperlink policy is "sensible and fully consistent with its longstanding practice of ensuring the confidentiality of the election process." The Association believes that changing the Board's policy as AFA-CWA suggests "would create a very real risk that the security of the election process will be compromised, either intentionally by the party posting the link or by someone who hacks into the party's site." Even more worrisome, in RAA's estimation, is the fact that modifying the hyperlink might create the appearance of Board partiality in representation elections.

RAA points to the significant number of Board decisions which reinforce the importance of holding elections in a manner that maintains the sanctity of the secret ballot: *Allegheny Airlines, Inc.*, 26 NMB 409, 411 n.2 (1999); *Northwest Airlines, Inc.*, 26 NMB 269, 297 (1999); *America West Airlines, Inc.*, 26 NMB 195, 208 (1999) (discussion of ballot secrecy; "The collection of ballots, whether open or sealed, violates the secrecy of the ballot."); *United Air Lines*, 22 NMB 288, 320 (1995) ("Board hereby reaffirms its policy that NMB elections are to be conducted in such a manner as to ensure ballot secrecy.").

RAA contends that permitting participants to include a hyperlink on websites and/or in emails would create a substantial risk of a security breach to the voting system and effectively compromise the integrity of the Board's voting process. While the Board can assure that its own website and its contractor's <https://ballotpoint.com/NMB/> site are secure, it cannot be sure that other sites hosting the hyperlink are protected from hacking, malicious software (malware) and spyware. RAA lists some of the potential pitfalls of hosting hyperlinks: 1) the owner of a website can track the identity of those who click on a hyperlink on that site, particularly if access is protected by a password that the user must establish; 2) if the hyperlink is sent to the voter by email, the sender could include spyware that tracks the recipient's subsequent key strokes, allowing it to determine all sites the person visits thereafter; and 3) website owners or hackers who breach the security of a site can "phish" for voter information by including a hyperlink to a website that resembles the voting website which allows the collection of personal voter information.

RAA notes that with the rapid pace of technology and increasing potential to compromise the electronic voting process, the Board would be wise to continue with its cautious approach with respect to hyperlinks. In addition, RAA believes that voters already receive sufficient information about how to access the voting website or TEV phone number in their Instructions and posted Notice at the workplace. Further, the Board is currently allowing parties to post the text address of the voting website, thus providing another permissible means of informing employees where and how to vote.

Finally, RAA contends that by allowing organizations to post a hyperlink on their websites to the Board's voting website, the Board is in effect creating the impression that it supports the participant in the election. The RAA concludes by commenting that this *per se* endorsement by the Board, "would not be consistent with the Board's longstanding commitment to maintaining impartiality and avoiding the appearance of partiality in the election process."

Delta

Delta urges the Board to deny AFA's request to permit hyperlinks because of the "unacceptable risks that a hyperlink would pose to the security, integrity, and privacy of the balloting process in representation elections under the Railway Labor Act." Delta cites a number of Board decisions emphasizing the importance of maintaining the integrity and security of the balloting process. *Delta Air Lines*, 35 NMB 158 (2008); *United Air Lines, above*; *American Airlines*, 27 NMB 120 (1999).

Delta refers to the lengthy notice and comment period the Board went through before the promulgation of Internet Voting, and the considerable discussion of security and the safeguards the Board and its contractor have in place. *Internet Voting Comment Period*, 34 NMB 200, 202-4 (2007). Delta notes that the Board only enacted Internet Voting after it was certain that it could offer a safe method for employees to vote.

Delta additionally questions why posting the plain-text address of the voting website is an inadequate solution for AFA. AFA can share information with its constituents on its website or via email by providing the plain-text address of the voting website, and thus making it possible for flight attendants to type or "copy and paste" the address into a web browser. Delta writes: "Such a 'copy and paste' operation is not too great a burden on employees, especially when the alternative . . . carries such a significant risk of unlawful surveillance of voting activity. . . ."

Delta provided a declaration from an expert in computer technology and security, Christopher Racich.⁴ Racich identifies a number of security issues with allowing participants to post a hyperlink. "If a visitor to a website were to type in a password, or otherwise provide identifiable information, and then thereafter click on a hyperlink to the Board's website, it would be possible for the website operator to determine who had done so – matching the password to the activity."

Racich states, in addition, that the potential for wrongful conduct is also present if the hyperlink is distributed in an email. The email, which is in effect

⁴ Racich is the President and CEO of Vestigant, LLC, a professional services firm specializing in the field of computer forensics, and has worked in this field for over ten years.

a software command, has the potential to download spyware or other malware to the computer. Racich goes on to state that because the email is directed to a specific email address tied directly to an individual, the sender can determine “with little difficulty” whether the recipient has followed the link.

Racich then discusses electronic markers or “cookies”⁵ which allow website administrators to track each visit the individual makes back to the website. The administrator could only identify the individual if the website was password protected. Racich states that “a website operator would be able to monitor the visitor’s initial visit and each return visit, tracking ‘where’ on the web the visitor came from, and, most importantly for present purposes, where he or she went (e.g. the Board’s website).”

Finally, Racich cautions that future innovations in technology are likely to create even greater security risks. “The Board is not in a position to monitor advances in computer espionage software on a routine basis, and it was wise for the Board to issue a prophylactic rule that is sound today and will be tomorrow, even as technology changes.”

IAM

The IAM believes that the Board should post the hyperlink on its own website and allow participants to post the hyperlink on their individual websites. In addition, the IAM encourages the Board to adopt a rule that “using the posting of the hyperlink to track who votes or how a person votes is interference.” The IAM believes that such a rule would properly balance the NMB’s interest in protecting the secrecy of the ballot with its interest in not discouraging votes.

The IAM discusses the BallotPoint Election Services⁶ secured voting site. The IAM’s declarant, Bradley Schmelzer, its in-house Director of Information Services,⁷ stated that once a person connects to a site that begins with the text “https”, like the BallotPoint voting site, “all of the information communicated from the link to the site is encrypted.” Thus, in Schmelzer’s estimation, there is no way to discover the identity of anyone who clicked on the hyperlink or what they did after they clicked on the hyperlink.

⁵ A “cookie” is a small computer file that is placed on a computer by a website, often without the knowledge of the computer user.

⁶ The Board’s provider for Internet and TEV elections.

⁷ Schmelzer also holds an ENCE Computer Forensic Examiner certification and has worked for ten years in the Information Systems industry.

The IAM characterizes the Board's decision to remove the hyperlink from its website and from participants' websites as constituting "an affirmative action to discourage voting." The IAM writes: "Many people are not familiar with the 'https' designation and may not properly type in the address [or] could still give up on trying to vote if they type in the address wrong and cannot find the ballot."

The IAM believes that there is no threat to the secrecy of the ballot by allowing the parties to post the hyperlink on their own websites. The IAM writes, "if a party were to track people who 'hit' on the hyperlink . . . the most information they would get is that someone with a certain Internet Protocol address . . . clicked on the link," rather than the identity of an individual or how they voted.

Finally, the IAM advises the Board to admonish carriers that the placement of tracking keystroke technology on computers where employees vote would be considered election interference.

NRLC

The NRLC recognizes that the Board has taken great steps to insure the integrity of the current Internet balloting process and the privacy of voters. The NRLC comments: "Unless it can be certain that hyperlinks cannot compromise that process, we urge the Board not to permit them."

AirCon

AirCon believes that the Board's current policy on hyperlinks is sound and that "no changes are warranted." AirCon contends that allowing organizations to post hyperlinks on their websites or in a campaign email is problematic for several reasons. For one, allowing hyperlinks on an organization's website could result in possible security breaches, vote tracking, and generally could erode voter trust in the confidentiality of the Board's election process.

AirCon's main argument is that allowing a participant to post a hyperlink from its website to the voting website is "akin to placing a 'Vote McCain' or 'Vote Obama' sticker on the doorway into a brick-and-mortar polling place." AirCon believes that both organizations and carriers have the right to express their views regarding representation elections, including through their websites, but "there is no place in the United States that would permit such active campaigning/electioneering activity at the door of a polling place in a political election." AirCon opines that the Board should not allow its participants to engage in such activity "at the 'entryway' to an internet voting site in a representation election."

AirCon cites considerable legal precedent and regulation prohibiting campaign activity “in and near” a polling place, including National Labor Relations Board decisions and many state laws. See e.g., D.C. Code § 1-1001.10(b)(1)(2)(A) (2009) (No person shall canvass, electioneer, circulate petitions, post any campaign material or engage in any activity that interferes with the orderly conduct of the election within a polling place or within a 50-foot distance from the entrance and exit of a polling place). Even the Supreme Court has upheld the constitutionality of a Tennessee statute which limited political speech in and around polling places. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (“[a] restricted zone around polling places is necessary to protect that fundamental right [i.e., “the right to cast a ballot in an election free from the taint of intimidation and fraud”]).

AirCon concludes by commending the Board for its willingness to embrace new technologies in order to enhance representation elections under the Railway Labor Act (RLA).⁸ Allowing a hyperlink from a partisan website to the official voting website would, in AirCon’s estimation, undermine the perception of confidentiality and security in Board-sponsored elections and be contrary to a significant body of law prohibiting active campaigning in the vicinity of a polling place.

CAA

CAA states that the issue of the permissibility of hyperlinks is between the Board and the voting employee, as a customer of the Board’s Internet voting services. The three issues for employees to consider, in CAA’s estimation, are convenience, security and impartiality.

CAA contends that the Board, in promulgating Internet Voting in addition to TEV voting, made it more convenient for employees by broadening the methods for an employee to cast his or her vote in an election. Both the Board Notice and Instructions provide the address to the Board’s voting site, and an employee can still call the TEV number in the alternative. CAA disputes AFA-CWA’s contention that a hyperlink on its organizational site would “greatly enhance” the likelihood of voting. On the contrary, CAA believes there would be no added convenience for an employee to first visit the AFA-CWA website in order to access the Board’s balloting website as it would add an unnecessary step to the process.

The security and integrity of Board elections has always been of primary importance. *Internet Voting Comment Period*, 34 NMB 200, 202 (2007); *Northwest Airlines, Inc.*, 26 NMB 269 (1999) (prohibiting the copying of ballots); *United Air Lines*, 22 NMB 288, 319-20 (1995) (prohibiting ballot collection). CAA comments that from the perspective of the employee or internet customer,

⁸ 45 U.S.C. § 151, *et seq.*

security is paramount. “The voting employee must have complete confidence that: his or her vote is being recorded; it is being recorded accurately; no one has the ability to alter the vote; and no one has monitored or can learn the vote, except for tallying purposes.”

Further, CAA contends that hyperlinks from an organization’s website to the Board’s website might give voters the impression that the NMB has approved the content including a message to vote for a particular organization which could “substantially erode the NMB’s reputation for impartiality.”

In sum, CAA believes the Board should continue to protect its impartiality by prohibiting any website hyperlinks to the Board’s balloting website.

II. DISCUSSION

Section 2, Ninth of the RLA provides that when investigating a representation dispute:

[T]he Mediation Board shall be authorized to take a *secret ballot* of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as *shall insure the choice of representatives by the employees without interference, influence, or coercion. . . .*

(emphasis added.) The Board has consistently found that interference with collection of authorization cards or with NMB voting procedures, including the solicitation of ballots, is a basis for finding election interference. *Washington Cent. R.R.*, 20 NMB 191, 231 (1993); *Metroflight, Inc.*, 13 NMB 284, 290 (1986); *Laker Airways, Ltd.*, 8 NMB 236, 250 (1981).

When the Board decided to remove its hyperlink to the voting website and asked participants to do the same, it was acting out of an abundance of caution and with the intent to prevent any outside party from tracking persons who visit the voting website. The Board was seeking to balance the integrity and confidentiality of the voting system with the convenience and accessibility of the voter.

The concern was that since Board elections operate on the premise that employees who vote are in effect voting “yes,” one could track the persons accessing the voting website and have a general idea of participation in an election. See NMB Representation Manual, Sections 13.304-1 and 13.304-2. The potential to link the identity of the person voting and the content of the

vote, which is possible in certain instances with the use of hyperlinks and malware, was also a concern. In addition, the Board considered the fact that employees are able to vote by calling the TEV number in addition to typing in the voting website's address, which is provided in the posted Notice and Instructions.

After receiving a request for reconsideration on this issue from the AFA-CWA, the Board consulted with several experts in computer technology and security. The Board also reviewed the eight submissions from participants. After careful consideration, the Board is reinstating the hyperlink to the voting website from its website at www.nmb.gov. An eligible voter may now go to the NMB's home page and click on the following hyperlink: "*Click here to vote in a representation election.*" The hyperlink will bring the employee to the voting website at <https://www.ballotpoint.com/NMB/>. Once at the secure voting website, the employee would enter his or her randomly assigned Voter Identification Number (VIN) and Personal Identification Number (PIN) to access the proper election.

This method is secure for two reasons. First, www.nmb.gov is maintained by the National Mediation Board and by the Government Printing Office – both neutral government agencies. Second, the population of persons visiting the NMB's home page is very diverse. There are multiple topics of interest, including: *Officials & NMB Directory; What's New; Public Information; Documents & Forms; Help Desk; Mediation; ADR Services; Legal Affairs/Representation; Arbitration*, and more. Therefore, only a small portion of those visiting the NMB's home page would be coming to access the hyperlink and vote, thereby neutralizing the concern that a person could "track" employees voting in a particular election.

The Board is continuing to direct its participants, *which includes any carrier or organization, and individual involved in the election*, not to post a hyperlink to the Board's voting website. The use of a hyperlink to track persons accessing the voting website, <https://www.ballotpoint.com/NMB/>, and impair the confidentiality of the voting process may constitute evidence of election interference. *See United Air Lines, Inc.*, 22 NMB 288, 320 (1995) ("[T]he Board hereby reaffirms its policy that NMB elections are to be conducted in such a manner as to ensure ballot secrecy.").

Participants may provide hyperlinks to the Board's website, www.nmb.gov, and may post the text address of the voting website if they wish to direct employees where to vote in an NMB election.

III. CONCLUSION

The Board's objective in reinstating the hyperlink on its own website is to provide a hyperlink option for any employees who might have difficulty typing in the voting address, while preserving the integrity and security of the voting system. The Board's amended hyperlink policy will be effective as of December 1, 2009.