



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

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In the Matter of the Application of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act, as amended involving employees of DELTA AIR LINES, INC.	39 NMB No. 11 CASE NO. R-7256 FINDINGS UPON INVESTIGATION – DISMISSAL December 7, 2011
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This determination resolves election interference allegations filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM or Organization) involving employees of Delta Air Lines, Inc. (Delta or Carrier). For the reasons below, the National Mediation Board (NMB or Board) finds that the laboratory conditions were not tainted.

PROCEDURAL BACKGROUND

On July 1, 2010, the IAM filed an application with the Board pursuant to the Railway Labor Act¹ (RLA), 45 U.S.C. § 152, Ninth (Section 2, Ninth), requesting the Board to investigate whether Delta and Northwest Airlines, Inc. (Northwest) were operating as a single transportation system for the craft or class of Fleet Service Employees.² The investigation established that Delta and

¹ 45 U.S.C. § 151, *et seq.*

² In the decision, the pre-merger Northwest employees are referred to as PMNW and the pre-merger Delta employees as PMDL.

Northwest constitute a single transportation system for the craft or class of Fleet Service Employees. *Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 NMB 351 (2010). On September 20, 2010, the Board authorized an election in this matter. On September 21, 2010, the Board scheduled the tally for November 18, 2010 with the voting period beginning on October 14, 2010.

The November 18, 2010 Report of Election results reflected that a majority of votes cast was for no representation, with 5,571 employees voting for no representation and 5022 employees voting for representation.³ Therefore, the Board issued a Dismissal on November 23, 2010. *Delta Air Lines, Inc.*, 38 NMB 33 (2010).

On December 14, 2010, pursuant to the Board's Representation Manual (Manual) Section 17.0, the IAM filed allegations of election interference, seeking a re-run election with "additional safeguards⁴ to ensure true choice of representation."⁵ Delta responded on January 25, 2011. In its response, Delta

³ There were 13,104 eligible voters in the Fleet Service Employees election. Prior to the challenges and election period, there were 14,075 potential eligible voters with the largest groups of employees in Atlanta (4901), New York/Flushing (1325), Detroit (1200) and Minneapolis (1141).

⁴ The IAM seeks the following remedies from the Board: 1) a re-run election using a mail ballot; 2) mandating that IAM representatives be allowed to hold meetings that are not monitored by supervisors in the workplace in non-work areas and during non-work time; 3) mandating that IAM representatives and Delta employees be allowed to post pro-IAM materials on bulletin boards and workplace walls and to freely distribute materials in the break rooms; 4) mandating that pro-IAM employees be allowed to wear t-shirts, pins, and hats displaying their support; 5) mandating that IAM representatives and Delta employees be allowed to address employees during briefings to promote the union; 6) mandating that IAM should be permitted to host a page on DeltaNet talking about the benefits of the union; 7) ordering Delta to give the IAM an updated mailing list of all eligible voters and access to Delta employee email addresses for eligible Stock and Stores employees; and 8) the Board should issue a notice, mailed to employees' homes and posted at the workplace, emphasizing that there is no requirement that any employee vote, that employees have the right to exercise a "write-in" option, and that if an employee chooses not to vote, that decision is not counted as a vote for or against representation. If the Board chooses not to order a re-run election with a mail ballot, the IAM seeks the following additional safeguards: prohibiting voting from Delta-issued computers or telephones (highlighted in its notice to employees) and prohibiting Delta from posting the NMB's hyperlink on DeltaNet.

⁵ The IAM's allegations in the Stock and Stores Employees Case No. R-7258, *Delta Air Lines, Inc.*, 39 NMB 92 (2011), incorporated by reference virtually all of the arguments in the Fleet Service Employees case. Therefore, much of the analysis in this decision will mirror that in *Delta Air Lines, Inc.*, above, as virtually the same arguments and evidence was presented by both IAM and Delta.

raised questions about IAM's conduct during the election. The IAM filed an additional response on March 8, 2011, and Delta replied on April 1, 2011. Participants submitted sworn statements and other documentary evidence in support of their positions. On June 6, 2011, the Board notified participants that an investigation was necessary to determine whether laboratory conditions had been tainted.

Between July and September, 2011, in-person and phone interviews with Delta management officials, IAM representatives, and randomly-selected employees were conducted in Atlanta, Detroit, Chicago, Minneapolis, Boston, Los Angeles, Salt Lake City, Seattle, Portland and New York by Investigator Cristina Bonaca and other Board staff. This determination is based upon the entire record in the case.

ISSUES

Were the laboratory conditions required for a fair election tainted? If so, what is the appropriate Board response?

CONTENTIONS

IAM

The IAM contends that Delta tainted the laboratory conditions required for a fair election and further, that its actions necessitate a re-run election with additional safeguards.

IAM argued that: 1) Delta engaged in surveillance and intimidation making employees fearful of supporting the IAM; 2) Delta coerced Fleet Service Employees into voting from Carrier computers creating, at a minimum, the impermissible impression of surveillance; 3) Delta manipulated the outcome of the election by coercing non-union Fleet Service Employees to vote from Delta computers, while blocking union voters from voting from Delta computers; 4) Delta discriminatorily denied IAM equal access to Fleet Service Employees and prohibited employees from posting pro-IAM information, discussing union matters, and wearing pro-IAM clothing or insignia; 5) Delta held daily captive audience meetings and one-on-one meetings throughout the system to convey anti-IAM information and misinform employees about voting; 6) Delta refused to provide a pay increase to IAM members despite the IAM's express approval of such an increase; 7) Delta commanded that employees "MUST VOTE" in the election; 8) Delta deceptively represented to Fleet Service Employees that the Carrier was part of the official NMB voting process; 9) Delta engaged in a

massive, omnipresent, and misleading anti-IAM campaign designed to suppress employees' free choice; 10) Delta routinely misrepresented Board precedent, rulings, and the RLA in an effort to confuse employees; and 11) the Board interfered in the election by failing to mail out duplicate Voting Instructions in a timely manner.

DELTA

Delta responded that by filing charges of election interference in this case, the IAM continues to promote its own self-interest and ignores the message of a majority of Fleet Service Employees who voted no in the representation election. Delta argues that none of the actions complained of by the IAM undermined the laboratory conditions necessary for a fair election. Finally, Delta raised questions about the IAM's conduct in 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.

The IAM 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

DISCUSSION AND FINDINGS

I. The Laboratory Period

The Board generally holds that laboratory conditions must be maintained from the date the carrier becomes aware of the organizing drive. *Delta Air Lines, Inc.*, 37 NMB 281 (2010); *Stillwater Central R.R., Inc.*, 33 NMB 100 (2006); *Mercy Air Serv., Inc.*, 29 NMB 55 (2001). However, in the absence of extraordinary circumstances, the Board will not consider evidence of occurrences prior to one year before the application was filed. *Delta Air Lines, Inc.*, 30 NMB 102 (2002). Therefore laboratory conditions had to be maintained beginning July 1, 2009, one year prior to the filing of the IAM's application.

II. Applicable Legal Standard

During election campaigns, a carrier must act in a manner that does not influence, interfere with, or coerce the employees' selection of a collective bargaining representative. *Cape Air (Hyannis Air Serv., Inc.)*, 37 NMB 35 (2009); *Stillwater Central R.R.*, 33 NMB 100 (2006); *AVGR Int'l Bus. Inc., d/b/a United Safeguard Agency*, 31 NMB 419 (2004); *Pinnacle Airlines Corp.*, 30 NMB 186 (2003). The Supreme Court in *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. and Steamship Clerks*, 281 US 548, 568 (1930) defined the meaning of the word "influence" in Section 2, Ninth of the RLA as "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.'"

When considering whether employees' freedom of choice of a collective bargaining representative has been impaired, the Board examines the totality of the circumstances as established through its investigation. In such an evaluation, each conclusion may not constitute interference in and of itself, but when combined with other factors, the totality evidences improper interference. *Delta Air Lines, Inc.*, 37 NMB 281 (2010); *Frontier Airlines, Inc.*, 32 NMB 57 (2004); *Piedmont Airlines, Inc.* 31 NMB 257 (2004); *Mercy Air Serv., Inc.*, 29 NMB 55 (2001). The Board makes an evaluation of the facts developed from its

investigation including submission provided by the organization and the carrier and past Board experience. *Midway Airlines, Corp.*, 26 NMB 41 (1998); *Evergreen Int'l Airlines*, 20 NMB 675 (1993); *America West Airlines, Inc.*, 17 NMB (1990).

III. Surveillance

a. Increased Supervisory Presence and Intimidation

i.

IAM alleged that Delta management took part in a widespread effort to suppress the “yes” vote by making it clear that Delta knew who supporters were and that supporters were harassed, intimidated, or threatened. Three examples provided by IAM were that: 1) in January 2009, a Boston supervisor named Jason Long “rudely” asked PMNW IAM representatives to leave the PMDL break room, took information out of the hands of several employees, and threatened to call the state police; 2) an Atlanta manager, Joe Green, was allegedly monitoring employee conversations about representation in the break room and “push[ing] his way into the conversation”; and 3) an IAM General Chair was denied access to the break rooms in Indianapolis for handling employee complaints and grievances and was instead placed in a conference room near the manager’s office so that management could observe who was going to speak to the union.

ii.

Delta responded to the Boston incident with a declaration from Ramp Performance Leader (PL) Jason Long. Long stated that on the day in question, he received a call from operations that there were PMNW employees in a PMDL break room causing a disturbance. At the time, the PMNW operation was on the other side of the airport in a different terminal, approximately one-fourth mile away from the PMDL operation in Terminal A. Further, after September 11, 2001, employee badges have biometric readers which only allow access to certain areas of the airport. Long stated:

When I walked in, a PMNW BOS Cargo agent was in the break room his badge did not give him authority to be at Terminal A. Moreover, employees do not have, and never have had, authority to escort third parties to Terminal A. Thus, [he] was in an area he was not authorized to be in. When I walked into the break room There were about 4 tables covered with Union paraphernalia that I began picking up. I did not grab any material

from employees I advised [the PMNW employees] that they were not permitted in this area due to current security requirements.

Long further stated that when the PMNW IAM representatives refused to leave the break room, he then threatened to call the police. He also said that when he declined to return the advocacy material, the PMNW employee pulled the material from his hands. Long stated that the PMNW employees had left the break room by the time the police arrived.

Regarding the Atlanta incident, Delta responded with a declaration from Joe Green, Delta's Director of North American Cargo Operations. Green stated that while his office adjoined the domestic cargo break room, he never monitored conversations in break rooms or elsewhere on Delta property. Green stated that when he walked by the break room he would acknowledge employees present and say hello but never invited himself or pushed himself into employee discussions about union-related issues. Green stated that he remembered one specific conversation with two employees, where he discussed the fact that Delta has an open door policy and employees have always been welcome to share their concerns, along with several other topics including sports, and an upcoming barbeque.

Delta responded to the Indianapolis incident with a declaration from PL William Green. Green stated that on March 9, 2010, he witnessed an IAM General Chair at the ticket counter holding a contract booklet and talking about the union to Customer Service Agents working the ticket counter, while passengers were standing in line. Green stated that he asked the General Chair that he not conduct union business with working agents at the ticket counter.

Green explained that the advocacy policy allows active employees in the stations to which they are assigned to advocate in non-working areas during non-working times. Green stated that he advised the General Chair that if he was present to investigate complaints or grievances, Delta would provide him with a private conference room. The PMNW contract allowed General Chairs access to carrier property, with advance notice to management, to investigate complaints and grievances. Green stated that he provided a conference room but "after approximately 10 to 15 minutes, [he] returned to the conference room to discover that [the General Chair] had left and was meeting with employees in the airport's food court." The Carrier followed the practice of granting access to the General Chair for processing PMNW employee complaints and grievances by providing the conference room.

b. Surveillance – Voting on Company Computers

i.

IAM argued that Delta coerced employees into voting from company computers, creating improper surveillance or an impermissible impression of surveillance. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011). The Organization alleged that whenever an employee logged into DeltaNet⁶ using their company issued user identification name and their password, Delta knew who was accessing DeltaNet and when they did so. Thus, IAM contends that Delta could have known if an employee logged into DeltaNet and then accessed the NMB's voting site during the election period.

IAM stated that even if Delta was not tracking employees who visited the voting website, the Carrier gave the appearance of being able to monitor voting. As evidence, IAM refers to Delta's own privacy disclaimer which provides that "Delta reserves the right to access or monitor – without notice -- any access to the Internet or intranets and any transmission made via the Internet." Further, Delta is a customer of NetWitness, a monitoring program that allows Delta to recreate everything done on its computers.⁷

IAM argued that the appearance of surveillance was heightened by the location of company computers in airport areas where security cameras are omnipresent. Finally, IAM stated that Delta reactivated phone lines and computers in Atlanta in time for the election, creating its own private polling place. In the event of a re-run election, the IAM believes a mail ballot would best ensure the integrity of the voting process.⁸

⁶ Delta's Intranet for employees which requires login and password for access to certain portions, including pension information and benefits.

⁷ NetWitness is a Herndon, Virginia-based network security company that provides real-time network forensics and automated threat analysis solutions. It markets its flagship product NetWitness NextGen. Jay Fredericks, Delta's Managing Director, Information Technology, described NetWitness as a tool on the network part of the infrastructure that logs connectivity between Delta and the outside world.

⁸ See footnote 4 for the IAM's requested remedies in the event of a re-run election.

Delta responded that the IAM's allegations about the misuse or abuse of technology on Delta's premises are entirely speculative. Further, Delta contends that IAM's allegations are an unfounded attack on the integrity and security of the NMB's procedures for telephone and Internet voting. *See Delta Air Lines, Inc., above.*

Delta stated that it repeatedly urged its employees to vote from the privacy of their own homes, but did not prohibit employees from voting from work computers or telephones if they wished to do so. In a mailing to employees Delta stated: "We encourage you to vote in the privacy of your own home. Doing so will ensure you're able to make your own decision without outside pressure from anyone."

Delta openly stated that it reserves the right to monitor or investigate possible misuse of its systems or equipment. Accordingly, Delta has policies which allow it to monitor employees' computer use. Delta's Extranet policy includes the following stipulations, which employees agree to by logging in:

Delta may monitor activity on the DeltaNet Employee Portal. Violations of company policy regarding the use of the DeltaNet Employee Portal may result in disciplinary action, up to and including termination of employment

All transactional records, reports, email, software, and other data generated by or residing upon this system are the property of Delta Air Lines and may be used by Delta for any purpose. . . .

Delta's Human Resources Manual, as noted by the IAM, also states that "Delta reserves the right to access or monitor – without notice – any use of the Internet or intranet and any transmission made via the Internet or intranet, including review of individual files maintained by users on hardware, tape, or diskette."

Delta's Managing Director, IT, Fredericks discussed the possibility of monitoring the 45,000 personal computers system-wide. He stated:

All of these computers are enabled for some form of internet access. While there may be a record of what internet website(s) a user had accessed, Delta does not have the capability of monitoring how long the user was on an external website and what

the user did once they accessed the website. If [an employee] used a Delta computer to link to the NMB website and from there went to the NMB voting website, it is not possible for Delta to monitor what the employee did when they accessed the NMB's voting website.

Fredericks stated that Delta does not routinely monitor personal use of Delta telephones, computers, or DeltaNet, and has not accessed any "computerized historical data to determine how many persons have used company computers to access any website connected with a representation dispute." In addition, Fredericks denied that Delta installed large numbers of telephones or computers in preparation for the elections.

Fredericks stated that Delta does not possess the technology that would allow the monitoring of employee system activities to determine how they voted or even if they voted on the encrypted voting website. Fredericks stated that Delta only monitors computer usage that is viewed detrimental to the environment and then only pursuant to a request from HR or corporate security (i.e., triggered by an employee engaging in bad usage at work). Even when Delta is monitoring an employee using NetWitness software, if an employee were to go to an SSL⁹ encrypted website like BallotPoint¹⁰, NetWitness "could not get insight – you would see data but it wouldn't be readable in terms of data."

In addition to establishing that Delta did not monitor how employees voted, the investigation also established that the vast majority of Fleet Service Employees did not vote on Delta computers. In fact, the Investigator's review of the election data revealed that 1120 out of 10,593 Fleet Service Employees actually voted from a company computer.

DISCUSSION

The Board has held that surveillance can be the basis of an interference finding, however usually only as part of a "totality of the circumstances" analysis. Further, the Board has found that "the appearance or impression of surveillance has a chilling effect on employee behavior." *Pinnacle Airlines*,

⁹ SSL is Secure Sockets Layer technology. Web servers and Web browsers rely on the Secure Sockets Layer (SSL) protocol to create a uniquely encrypted channel for private communications over the public Internet.

¹⁰ BallotPoint is the Board's voting website.

Corp., 30 NMB 186, 223 (2003). While the Board has stated on occasion that surveillance is a per se violation of laboratory conditions, it has also refused to make this finding in the absence of egregious carrier actions. See *Union Pacific R.R.*, 34 NMB 21 (2006); *American Trans Air, Inc.*, 28 NMB 163, 180 (2000); *Petroleum Helicopters, Inc.*, 25 NMB 197 (1998). Moreover, in those cases where the Board found carrier interference based on surveillance, the Board also found other egregious carrier action. *Sky Valet d/b/a/ Commercial Aviation Servs. of Boston, Inc.*, 23 NMB 276 (1996); *Laker Airways, Ltd.*, 8 NMB 236 (1981).

The Board has generally found that an increased supervisory presence during the election period is not interference. *Delta Air Lines, Inc.*, 30 NMB 102, 117-18 (2002) (insufficient evidence to support that Delta increased the presence of supervisors in order to engage in or give the appearance of surveillance; further, no nexus between the alleged surveillance and any pattern of egregious activity such as discharge); *Aeromexico*, 28 NMB 309, 335 (2001) (Board found the evidence surrounding the organization's allegation of "surveillance, based on a heightened presence of management officials in hallways and break rooms, is contradictory and speculative.").

Increased Supervisory Presence

There were reports from some PMNW employees in Salt Lake City, Minneapolis and Boston, who believed there was an increased supervisory presence during the election period. However, other Fleet employees from the same hubs reported that they felt free to discuss their opinions about the union. In contrast, the majority of employees interviewed in Seattle, Portland, Detroit, and New York reported no increased supervisory presence, with a union organizer in Detroit stating that he had free reign in talking to employees.

As discussed in the Stock and Stores decision, *Delta Air Lines, Inc.*, 39 NMB 92 (2011), the investigation revealed that this perception stemmed from the different management structures of PMDL and PMNW. The PMNW structure was more informal with a senior front-line employee (Lead or Chief) helping to direct day-to-day activities. The PMDL workplace was more structured with supervisors (PLs) holding periodic meetings and assisting with the work to be completed. Thus, as Delta began to integrate the PMNW hubs with its culture, it placed more PLs in the PMNW hubs.

Some of the PMNW employees interviewed stated that they believed their PMDL counterparts were afraid to be seen talking to PMNW employees or

asking questions in front of supervisors. This belief was not supported by the interviews with the PMDL employees or other substantive evidence. One PMDL employee from LAX stated: “We would be in a group of PMNW and PMDL employees and the PMNW employees might bring up the union if we were not busy and we would have a conversation about it. . . . No one from management tried to stop us from having conversations. I didn’t feel like any one was spying on me to make sure that we did not have those conversations at work.”

When considering the totality of circumstances, the incident involving PL Jason Long does not constitute interference. The PMNW employees did not have access rights to the PMDL break room, therefore Long was within his rights to remove them. It seems, however, that Long’s manner was unnecessarily harsh in calling the police and refusing to return the advocacy materials. However, the incident was isolated and de minimis. *See Pan American World Airways*, 5 NMB 16, 27 (1969) (no election interference found where incident is isolated and de minimis). The incidents with the PLs in Indianapolis and Atlanta also do not constitute interference. These isolated incidents of interaction with supervisors regarding application and enforcement of the advocacy policy and access by the General Chairman to conduct union business may have contributed to some employees’ perception of increased supervisory presence; however, nothing in the behavior described rose to the level of surveillance or harassment.

The Board finds that there is an insufficient basis to find that Delta engaged in a systematic effort to monitor the IAM’s activities by having more supervisors in the workplace during the election period. The investigation revealed that the expansion of the Delta management structure into the PMNW hubs explained the increase in supervisory presence reported by some of the Fleet Service Employees. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011).

Voting on Company Computers

The employees interviewed stated that there was no pressure by Delta management that they vote from work, however employees knew they were free to use Delta computers to vote if they wanted to. One employee stated: “There was no written directive to vote, and there was no directive that we had to vote at work.” Another employee said that Delta “did not specify where you should vote from. Delta just wanted to make sure you voted.”

While few employees reported seeing Delta’s privacy disclaimer, most employees understood that they had limited privacy on a company computer.

This is also evidenced by the small number of Fleet Service Employees who actually voted from Delta computers. There was no credible evidence that banks of telephones and computers were set up in preparation for the representation elections.

Further, as discussed fully in the Stock and Stores Employees decision, 39 NMB 92 (2011), unlike in elections conducted prior to the NMB's rule change, whether an employee voted in this election did not indicate his or her support for the union. Before the Rulemaking,¹¹ the only way to vote "no" was to not vote so that ascertaining that an employee had voted necessarily meant that the employee had voted for representation. With the rule change, voting no longer means voting for representation only. The mere fact that a person is known to have voted no longer carries the potential threat of reprisal and potential coercive effect that it did in prior elections. *See Delta Air Lines, Inc., above.*

The investigation reveals that Delta did not create the impression of surveillance among the Fleet Service Employees, and there is no evidence that Delta monitored how the Fleet Service Employees voted.

IV. Denial of Internet Access in PMNW Hubs – Unequal Access

i.

IAM alleged that Delta used DeltaNet to manipulate the election by denying Internet access to those stations where Fleet Service Employees were most likely to vote for the IAM. At certain PMNW hubs like Minneapolis and Detroit, Fleet Service Employees were unable to access the link to the NMB's website (and then the link to the voting website) through their work computers during the election period. All of the Fleet Service Employees at PMDL hubs, like Atlanta and Salt Lake City, were able to access the voting website.

The IAM additionally contends that in Boston, where there were separate break rooms for PMDL and PMNW employees, PMNW Fleet Employees had Internet access taken away from their break rooms shortly before the election started and then reinstated after the election was complete. The IAM provided

¹¹ On July 1, 2010, following notice and comment rulemaking under the Administrative Procedure Act (APA), the NMB's representation rule change (Rulemaking or rule change) became effective. Under the new rule, in order to be certified as the collective bargaining representative, a union must receive a majority of the valid ballots cast rather than valid votes from a majority of eligible voters.

a statement from an IAM Grand Lodge Representative who stated that several months before the November 2010 election, “the PMNW Ramp Employees in Boston had their internet access taken away from their break rooms . . . except for Crew Chiefs.”

ii

Delta responded that the vast majority of locations had access to the Internet at the time of the election. With respect to the PMNW front-line Fleet Service Employees in Minneapolis, Detroit, and Boston, Fredericks confirmed that because of the PMNW “whitelist”¹² infrastructure, these employees were not able to access NMB.gov or the voting website from their work computers during the election period. Fredericks stated that the “reason for any difference in internet access from any given computer stemmed solely from the bona fide pre-merger difference between the two carriers’ computer network configurations and were unrelated to the representation elections. . . .” In contrast, the PMDL infrastructure used a “blacklist” infrastructure which allows access to everything on the Internet except for a list of prohibited sites.

Delta defended this oversight by explaining first that the below-the-wing infrastructure was last on its list to be converted to the PMDL infrastructure, and that secondly, the concept of the PMNW “whitelist” was that everything is blocked except for three or four websites which are specifically allowed. Fredericks explained that “at Northwest, management decided some years ago that computers in the workplace for business use by . . . Ramp employees would not have broad access to the internet. Instead, Northwest had a list of approved internet sites . . . to which all employees had access.”

Fredericks stated that “many computers still in use in ramp areas at MSP and DTW, however, continued to have the limited access available under the Northwest policy. I can attest that there was no discussion or decision made at Delta to delay changing these computers in order to have some unexplained impact on the election.” Delta also stated that most union shop committee members and PMNW Leads would have had access to the voting website, as those positions were granted wider latitude under the PMNW infrastructure. Fredericks also stated that the IAM’s offices at the workplace,

¹² A whitelist is a list of items that are granted access to a certain system or protocol. When a whitelist is used, all entities are denied access, except those included in the whitelist. Fredericks defined the whitelist as “everything is blocked except for those things which are specifically allowed.” Fredericks also noted that the whitelist differs depending on the status of the employee and employee grouping.

in Minneapolis and Detroit, did have broader Internet access during the election period.

Delta contends that no one in its corporate communications or management knew this limitation existed and they would have easily modified the White List to add NMB.gov and BallotPoint as permissible websites if it had been brought to their attention. Fredericks stated:

To the best of my knowledge, and to my great surprise, no one involved in the election ever called this problem to Delta's attention prior to the filing of the IAM's interference charges. Despite receiving well over 1,000 calls a day at the Delta IT Help Desk, including calls on other Internet and DeltaNet access issues, there was not a single call during the voting period reporting an issue with accessing the NMB or BallotPoint websites. Had there been, we would have promptly addressed the matter.

The perceived disparity of access to the Internet at a specific hub, according to Fredericks, was because access to the Internet depended on whether the specific computer was configured based on the PMDL or PMNW infrastructure. Therefore, computers in PMDL break rooms configured based on the PMDL infrastructure would have allowed employees to access the voting website, while computers in the same hub in PMNW break rooms and configured based on the PMNW infrastructure would not have allowed access. According to Fredericks, "if a PMNW employee used a Delta configured computer, that employee's internet access would be no different from that of a PMDL employee using the same computer. The same would be true if a PMDL employee used a PMDL computer."

In response to the IAM's contention that Delta removed Internet access from PMNW employees and their work areas in Boston, Fredericks stated that he found no evidence of any action taken to modify the access rights of any employees in Boston in and around the election time frame. He contends there was no change to the configuration or Internet access capabilities of the personal computers in the Gate 20 break room before, during, or following the election. Fredericks stated:

In March 2009, the PMNW facilities at the BOS airport were consolidated into the then existing Delta terminal and gate space. When the Gate 20 break room was created . . . it contained one PC. There were also three PCs in the office adjacent to the break room set aside for the use of Lead agents. All four PCs were configured

to run Northwest software. From the time the Gate 20 break room was created through the end of the Fleet Service election on November 18, the ability of either PMNW or PMDL employees to access the internet from the PCs in either break room or adjoining Lead agent's office did not change [and still has not changed]. In mid-November, one of the three PCs in the Lead agent's office was de-installed and moved to another location. In mid-December 2010, one of two remaining PCs in the Lead agent's office was reconfigured with Delta software.

DISCUSSION

It is troubling that some PMNW front-line Fleet Service Employees, who, according to the IAM, were more likely to vote in favor of representation, were not able to access the voting website from work while their PMDL counterparts were able to do so. However, the evidence indicates that Delta's failure to add the NMB and voting website's addresses to the permitted "whitelist" was truly an oversight and not orchestrated to disenfranchise pro-IAM voters.

The PMNW employees interviewed in Minneapolis and Detroit substantiated Frederick's testimony that they never had Internet access and this did not change during the election period. A PMNW employee and union officer handling grievances in Detroit and Milwaukee during the election period stated that all of the PMNW stations required authorization codes to get to the Internet. He further stated: "I did not tell Delta management this was an issue. We took photos and made a declaration. I did not tell Delta because we didn't think they would do anything PMNW computers never allowed us access to the Internet This did not change during the election - it was always the case."

With respect to the allegations involving the Boston break room, two employees did report that their access to the Internet was limited prior to the election and then reinstated shortly thereafter. The fact that one computer was reconfigured in December 2010 to the PMDL system, thus allowing broad Internet access, may have been the reason employees thought that Internet access returned after the election. However, there is no credible substantive evidence supporting the proposition that the Gate 20 break room had broad Internet access before the election.

The Board finds that as PMNW Fleet Service Employees had access to the voting website from their personal computers, as well as the ability to vote from

a telephone, the denial of access on workplace computers in certain PMNW hubs and break rooms does not rise to the level of election interference.

V. Advocacy Policy

i.

The Organization contends that Delta discriminatorily applied its advocacy policy by: denying the IAM access to employees in the workplace; preventing the Organization from posting information or discussing union matters; and preventing employees from wearing pro-IAM insignia. The IAM contends that the advocacy policy was not enforced against “no representation” advocates. IAM argued that Delta management erred when it threw out unattended union literature in break rooms and prohibited posting of advocacy materials on union bulletin boards and in break rooms while not doing the same with respect to “no representation” materials.

The IAM provided many examples of what it characterized as Delta’s discriminatory treatment. IAM stated that union supporters alerted management about anti-union statements that had been written on the inside walls of an aircraft but Delta did nothing to remove the statements. Many examples of alleged misapplication of the dress code with respect to the advocacy policy were also provided.

In addition, General Chairman Richard Suarez was not allowed to host an advocacy meeting at LAX. Randall Ohm, Delta’s Senior Labor Counsel-Ground Minneapolis during the election period, informed Suarez that he could not hold that advocacy meeting because he was not an active employee in that station.

ii.

As discussed previously in *Delta Air Lines, Inc.*, 39 NMB 92 (2011), Delta contends that it applied its advocacy policy evenhandedly throughout the laboratory period. The PMNW advocacy policy remained in effect through 2009. The Northwest/IAM Equipment Service¹³ and Stock Clerk (ESSC) collective bargaining agreement (CBA) allowed union bulletin boards in agreed-upon locations but expressly limited postings to notices of social events,

¹³ The PMNW customer service agents and ramp employees are called Equipment Service Employees at Northwest.

internal union elections, and other union business. All other postings were expressly prohibited.¹⁴ Ohm stated that the practice after August 2009 was to allow professional and non-inflammatory campaign-related material and articles on union bulletin boards.

In February 2010, shortly after the FAA issued a single operating certificate to Delta, the Carrier issued an advocacy policy for the merged airline. The advocacy policy states that active employees in the station to which they were assigned could advocate and distribute literature in support of or in opposition to union representation and wear or display union insignias in non-work and non-operational areas during non-working time provided that they were not unprofessional, offensive, or inflammatory.¹⁵

¹⁴ Article 26.F of the CBA (“When requested, a bulletin board for Union use, marked ‘International Association of Machinists and Aerospace Workers’ will be provided by the Company . . . and shall be reserved for the exclusive use of the Union for posting notices restricted to: 1) Notices of Union recreational and social affairs; 2) Notices of Union elections and the results thereof; 3) Notices of Union meetings and appointments; 4) Informational bulletin (non-political, non-propaganda) issued by the President/Directing General Chair of the District Lodge. There shall be no other distribution or posting by employees hereunder of advertising or political matter, notices or any kind of literature upon the Company’s property.”); *See also* June 16, 2009 letter to Stephen Gordon, then President/General Chair of IAM, from then Senior Labor Counsel Randall Ohm, describing the PMNW advocacy policy (“...the policy in effect at pre-merger Northwest prohibited the IAM from distributing or posting on company premises any material except materials related to the IAM’s administration of the contract, routine meeting notices or non-political, non-propaganda informational bulletins. . . . Any campaign activity or solicitation in work areas during work time will be regarded as a serious violation Northwest’s rules prohibit the posting or affixing of campaign stickers or literature to walls, bulletin boards, and any other Company property Company rules permit employees to wear a single union insignia pin on their uniform so long as the pin is of appropriate size (1 1/2 inch or less in diameter).”).

¹⁵ In relevant part, the new advocacy policy provides: “Solicitation or advocacy activities by Delta people on Delta premises are permitted only in non-work and non-operational areas, such as lounges and break rooms, and only during a person’s non-working time 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. . . . Unless the activities are sponsored by Delta, solicitation or advocacy activities by people who do not work for Delta are not permitted on Delta premises at any time. . . . Items that advocate a position (such as ... material for or against a union) are not permitted on bulletin boards or on walls or other areas on Delta premises. 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

Ohm contends that the IAM used “union business leave,”¹⁶ company paid time, and company travel privileges for their campaign without interference from Delta. According to Ohm, the Carrier granted a total of 108,809 hours of union leave between May 2009 and November 2010.

Shop committee members and General Chairs, employees designated by the IAM to investigate and handle verbal complaints or written grievances, were granted access to Delta property where employees were assigned as long as they provided the Carrier “advance notice” and the intent was to investigate complaints and grievances. According to Ohm, he received reports that union representatives, who were granted access for union business, were in fact engaging in election campaign activity in break rooms and areas used by non-contract PMDL employees. Ohm confirmed that “union business leave” did not entitle shop committee members to actively campaign on the property.

With respect to the incident involving IAM General Chair Suarez, Ohm stated that he properly denied Suarez access to advocate on the property as he was not an active employee in LAX.¹⁷ And as discussed above, being on “union business leave” did not entitle persons to campaign; rather they could handle grievances and other union business.

DISCUSSION

A carrier is permitted to have an access and solicitation policy which reasonably restricts employees’ rights to solicit during work hours and on carrier property. *Delta Air Lines, Inc.*, 37 NMB 281, 310 (2010); *Delta Air Lines, Inc.*, 30 NMB 102, 134-35 (2002); *See also USAir*, 17 NMB 377 (1990) (Board found carrier’s advocacy policy was applied only to union campaign materials and therefore, interfered with employee free choice). The Board will not find interference where there is insufficient evidence of systematic, uneven, or discriminatory enforcement of the carrier’s rules on solicitation and access. *American Airlines*, 26 NMB 412 (1999).

time. The single exception is a small lapel pin equivalent to a piece of jewelry and no larger than the Delta service aware pin.”

¹⁶ Union business leave is a leave of absence granted to an employee from their normal employment duties to conduct union business or attend conferences or conventions on behalf of the IAM.

¹⁷ Delta’s advocacy policy does not permit non-employees or inactive employees on its premises.

With respect to the allegation that Delta failed to clean anti-union statements on the inside of a plane in a timely manner, there is no evidence here that Delta intentionally delayed the cleaning of the offending messages. Further, Delta cannot be held responsible for the actions of one or two advocating employees, who were not shown to be acting at the direction of management.

The incident involving GC Suarez was not a violation of the advocacy policy. As Suarez was an inactive employee, he was only authorized to be on company property to discuss union business. And, as discussed above, “union business leave” did not entitle shop committee members or other IAM officials to actively campaign on the property.

The employee interviews reflected differences depending on what hub they were working in, but overall, the advocacy policy was enforced even-handedly when it was enforced. As one might expect, the advocacy policy was enforced in Atlanta with no advocacy materials allowed in working areas, and unattended union literature thrown away. One PMNW employee stated that he saw “Keep Delta My Delta” pins in parking lots but not in working areas. Another Atlanta employee stated that: “We could speak on our break time and in a break room. We could wear a small pin.” The same employee stated that PL Prather asked employees to remove “no representation” campaign material in addition to pro-representation materials. There was testimony from some PMNW employees who believed that the advocacy policy wasn’t enforced as stringently with respect to “no representation” employees, but this belief was not supported by substantive evidence.

One union organizer and Fleet Service Employee in Boston commented: “We were still wearing our PMNW uniforms with the IAM patch during the election. I had some Delta hats and had the patch sewn on the side of the hat . . . We could sometimes wear the advocacy material in working areas.” Another Boston employee stated that “Yes” buttons and t-shirts were not allowed in working areas once the election started. In both Los Angeles and Minneapolis, employees stated that advocacy materials were allowed in working areas and on union bulletin boards. With respect to Detroit, Fleet Service Employees stated that while the advocacy policy was usually enforced in working areas requiring the removal of pro-IAM t-shirts, advocacy was allowed in the break rooms.

Most of the examples provided by the IAM of alleged discriminatory application of the advocacy policy were not in fact violations. Delta’s policy

prohibits the wearing of advocacy materials in working areas, allows management to dispose of “unattended” advocacy materials in break rooms and other non-work areas, and limits advocacy on its premises to active employees assigned to that station. While there were some isolated incidents in which IAM supporters and “no representation” advocates were treated in an unequal manner, this did not occur system-wide. *See American Airlines*, 26 NMB 412 (1999) (Board found no system-wide interference where variations in the carrier’s enforcement of its solicitation policy across stations resulted in isolated incidents of discrimination.). Accordingly, the Board finds insufficient evidence of widespread systematic discriminatory application of Delta’s Advocacy Policy.

VI. Captive Audience and One-on-One Meetings

i.

IAM alleges that Delta held daily captive audience meetings and one-on-one meetings throughout the system to convey anti-IAM information and misinform employees about voting. IAM contends that Delta supervisors or managers conducted daily “voluntary” briefings at the end of operational work briefings where they discussed the union campaign and the representation election. IAM argued that while employees were sometimes told they could leave the voluntary briefing, leaving would have clearly identified them as union supporters. Managers were instructed to brief employees using notes provided by corporate communications. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011).

ii.

Senior Vice President, Airport Customer Service (ACS), Gil West described the voluntary briefings as “optional communication briefings for our employees” led by PLs usually at the conclusion of the Operational Briefing. When any topic regarding union activity or campaign-related needed to be discussed, Delta ensured these topics were covered in the voluntary briefings. According to West, PLs were trained in how to communicate that the briefings were voluntary and they would make an announcement at the end of the Operational Briefing that employees were free to leave if they did not want to attend the voluntary briefing.

DISCUSSION

Carrier meetings with employees are not improper unless they are mandatory, coercive, or significantly increase in frequency during the election

period. *Mercy Air Serv., Inc.*, 29 NMB 55 (2001); *LSG Lufthansa Serv., Inc.*, 27 NMB 18 (1999). The Board also examines the content of carrier communications at the meetings to determine whether the communications are coercive, contain material misrepresentations, or combined with other carrier actions, improperly influenced the employees in their choice of representative. “[I]solated incidents” of potentially questionable carrier activities are insufficient to warrant a finding that the laboratory conditions necessary for a fair election have been tainted. *Northwest Airlines, Inc.*, 19 NMB 94 (1991); *US Air, Inc.*, 18 NMB 290 (1991); *Pan American World Airways*, 5 NMB 16, 27 (1969) (no election interference found where incident is isolated and de minimis); *see also Delta Air Lines, Inc.*, 39 NMB 92 (2011).

There was no evidence of any one-on-one meetings between individual employees and managers in the Fleet Service Employee craft or class where managers discussed the election or polled employees on their views. Some PMNW employees stated they were called into manager’s offices to discuss violations of the advocacy policy, but there were no reports of the election being discussed in a one-on-one forum.

Operational briefings were followed by voluntary briefings in virtually all hubs, but employees stated that managers always stressed that the meetings were voluntary and gave people an opportunity to leave before beginning the discussion. The voluntary briefings did occur with more frequency as the election neared. There was testimony that reflected pro-representation advocates were fearful of speaking openly during voluntary briefings. One Portland employee stated: “I think for the most part people felt intimidated during these briefings because they felt fear that they would lose their jobs if they asked questions.” However, no employees interviewed testified that they had suffered any adverse action as a result of their speaking out during a voluntary briefing or not participating in a voluntary briefing.

In addition, there were town hall meetings at most hubs before and during the election period. Employees stated that Leaders and other Delta management discussed operational performance, pay, and benefits. While the election was not specifically raised, management would answer questions if asked. There was substantive evidence that town hall meetings had been conducted regularly following the merger, in both PMDL and PMNW hubs.

The Board finds no evidence that there were any one-on-one meetings with supervisors where the election or representation was discussed, and insufficient evidence that the voluntary briefings were mandatory or coercive.

In sum, the Board finds that the voluntary briefings did not taint the laboratory conditions.

VII. Pay Increase

i.

The IAM contends that the pay increase for non-contract employees on October 1, 2010, was done to persuade Fleet Service Employees to vote against the union. See *Delta Air Lines, Inc.*, 39 NMB 92 (2011). After the announcement, IAM General Vice President Robert Roach wrote to Delta to remind it that nothing in the IAM contracts prevented it from providing these raises to contract employees. Delta responded with a letter which stated that it was IAM's failure "to support expedited resolution of post-merger representation issues and seniority integration that is preventing the alignment of the compensation package."

IAM argued that Delta's communications to employees clearly linked the pay raise to the election by stating that union members would not receive the raise. In addition, IAM contends that supervisors in the largest hubs told employees that they would only receive the raise if they voted against representation. See also discussion in *Delta Air Lines, Inc.*, 39 NMB 92 (2011).

ii.

Delta stated that the pay increases were pre-planned, and since its emergence from bankruptcy, it had consistently and publicly committed to its non-contract employees that they would receive industry-wide standard pay by the end of 2010. Post-merger, Delta had consistently communicated that until resolution of representation issues, the packages of pay, benefits, and work rules would be maintained separately for PMDL and PMNW employees. The Carrier stated that it did not accept the IAM's offer to increase pay rates for its contract employees as it wanted to align pay, benefits, and work rules and would not piecemeal the process.

Delta contends that it continued to honor the prior contracts in place. Delta stated that it made payments to IAM contract employees consistent with the PMNW CBA's. The Northwest-IAM agreement for ESSC employees contained a side-letter agreement in which Northwest committed to distribute a total amount of \$13 million to ESSC employees in December 2010. In June, Delta confirmed its intention to make this payout when due, regardless of the

outcome of any representation election. The actual payout was announced on December 19, 2010 and paid on December 30, 2010.

Delta relied on the Board's election interference decision involving the Simulator Technicians¹⁸ which involved the same October 2010 pay increase. There the Board found that, "Delta provided ample evidence that it had consistently communicated to its employees, since emerging from bankruptcy, that it would provide pay increases so as to bring employees to industry-wide standard by the end of 2010." *Id.* at 308. In the Simulator Technicians case, the Board found the timing of the pay increase announcement on the first day of voting to be interference – not the pay increase itself. *Id.* at 309 ("there is insufficient evidence to support the timing of the February 4, 2010 announcement, particularly with a delayed effective date until October 1, 2010.").

Delta produced a number of documents supporting its contention that the pay raise was planned much prior to the filing of IAM's representation application. On April 14, 2008, Delta's CEO Richard Anderson and President Ed Bastian issued an internal memorandum to its U.S. based employees that states:

Upon closing of the merger, Delta frontline employees will receive pay increases that will continue our progression toward industry-standard pay for all workgroups by the end of 2010. . . .

During the integration of the two carriers, Delta's frontline employees will continue to receive pay increases in keeping with Delta's commitment to move frontline employees to industry-standard by the end of 2010. Northwest's contract employees will continue to receive pay increases in accordance with their existing collective bargaining agreements.

Delta stated that the Q&A document that accompanied the February 4, 2010 pay increase announcement further bolsters the fact that the increase was pre-planned. Question number eight of the Q&A asked why the premerger Northwest employees represented by the IAM and AFA are not getting the raise. The answer provided:

¹⁸ *Delta Air Lines, Inc.*, 37 NMB 281 (2010).

Just as we are honoring the commitment made to Delta people three years ago, we also have continued to honor the packages of pay, benefits and work rules provided for in the contracts still in place in workgroups where representation has not yet been resolved. When representation is resolved, we plan to begin the process of fully aligning the pay, benefits and work rules of employees in those groups. Those elements represent a total package

Delta also provided a transcript from an employee conference held at the time of the merger announcement, April 2008. Richard Anderson states: "...upon closing of the merger, Delta frontline employees will receive pay increases that will continue our progression toward industry standard pay for all work groups by 2010."

Delta further contends that its managers were not prohibited from telling non-contract employees that they would receive a pay increase, as it was pre-planned and had been found permissible in the Simulator Technician decision. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011).

DISCUSSION

The Board has found that changes in pay which were planned before laboratory conditions attached, or where there is "clear and convincing evidence of a compelling business justification," do not taint laboratory conditions. *Frontier Airlines, Inc.*, 32 NMB 57, 65 (2004) (pay increases were pre-planned and based on a compensation review showing wages to be below market rate); *Continental Airlines, Inc./Continental Express, Inc.*, 27 NMB 463, 477-478 (2000) (compensation procedure was based on a continued business practice); *Dakota, Minnesota & Eastern R.R. Co.*, 25 NMB 302, 315 (1998) (no interference when pay increases were granted as part of an audit done prior to commencement of organizing campaign). In contrast, changes in wages or benefits during the laboratory period which were not planned prior to an organizing drive or that were timed to affect the outcome of an election have tainted laboratory conditions. *See Stillwater Central R.R., Inc.*, 33 NMB 100, 141 (2006); *Petroleum Helicopters, Inc.*, 25 NMB 197, 232 (1998).

The Investigation disclosed that employees received information from Delta regarding the pay increase for non-contract employees, with the explanation being that contract employees were still covered by the CBA and accordingly, would not receive the pay increase. Moreover, the PMNW contract

employees received the December 2010 payout based on the pre-merger contract.

The Board has previously found that Delta had consistently communicated to its employees, since emerging from bankruptcy, that it would provide pay increases so as to bring employees to industry-wide standard by the end of 2010. *Delta Airlines, Inc.*, 37 NMB 281, 308 (2010) (finding the timing of the announcement of the pay increase, rather than decision to give the pay increase constituted interference). In this case, the timing of the announcement was not challenged and the communications to employees about the pay increase were factual. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011). As such, the pay increase for only PMDL Fleet Service Employees did not taint laboratory conditions.

VIII. Carrier Communications

i.

The IAM charged that Delta's communications during the election campaign were misleading, massive, and overwhelming.

Delta responded that its communication were truthful, consistently identified Delta as their source, and were protected by the First Amendment. Further, Delta contends that a significant portion of its communications during the election were in response to communications from IAM or IAM supporters which misrepresented facts. Moreover, Delta argued that it trained its managers and supervisors about obligations under the RLA and allowed the IAM many forums through which to communicate with employees.

The representation election in the Fleet Service Employees craft or class at Delta was one of the first elections run under the new election rule.

a. "Must Vote" Message

The IAM stated that when an employee logged into DeltaNet during the election period, the first thing that popped up was a box that read "Decision 2010 - Whether you are casting a YES or NO vote you MUST VOTE to be counted. Click here for more information." IAM argued that Delta "commanded" employees "MUST VOTE" through pop-ups on DeltaNet and Delta's "Decision 2010" voting information page, through communications from CEO Richard Anderson, and through communications from PLs who made

announcements to the effect that “the rules had changed and now everyone must vote.”

The IAM provided a number of Delta communications as examples of the Carrier’s “coercing” message that employees “must vote.” For instance, in an election pamphlet mailed to employees, Delta stated: “The Voting Rules Have Changed. TO BE COUNTED YOU MUST **VOTE**.” Further, in an October 15, 2010 communication from Richard Anderson on DeltaNet, he stated: “Every single person at Delta needs to cast a vote – I can’t say it enough. Regardless of what your point of view is, everybody has to cast a vote.” The IAM further contends that this message flowed down through every level of supervisor. See *Delta Air Lines, Inc.*, 39 NMB 92 (2011).

Delta responded that the message “You must vote to be counted” was accurate, truthful, and fundamental to making employees aware of the rule change.

b. Biased NMB

IAM alleged that Delta communicated to employees the message that the Board and its members are biased. See *Delta Air Lines, Inc.*, *above*. IAM relied on a September 23, 2009 memo from Richard Anderson titled “ATA, Delta Opposed Request to Change Union Election Voting Rules.” In the memorandum, Anderson states: “We do not believe the NMB has the authority to change the voting rules. If they were to adopt the requested change it would be an unprecedented exercise of authority.” The memo also contains Q & A’s that question the Board’s motivation in engaging in a rule change after 75 years. Q&A Number 5 asks:

Has the NMB ever considered this type of rule change in the past? Yes this issue has come up four times in the past 75 years since the majority rule has been in effect. Each time the NMB decided that the majority rule should not be changed Nothing has changed except the composition of the NMB. Politics is not a good enough reason to change a rule that has worked well for 75 years.

IAM asserted that Delta management encouraged employees to write the Board and oppose the rule change, and provided a memorandum and template letter for that purpose. See *Delta Air Lines, Inc.*, 39 NMB 92, 113 (2011) (“Regardless of your thoughts on the rule change itself, Delta has significant concerns that the NMB and the unions have targeted Delta and Delta people

for discriminatory treatment. . . . If Delta people wish to express their views, they have the right to contact their elected officials and the NMB. There is absolutely no obligation to do so. However, in response to many employee requests, we offer the attached letter as a template if employees wish to use it to write to the NMB.”).

Relying on the D.C. Circuit’s decision in *US Airways, Inc. v. NMB*, 177 F.3d 985 (D.C. Cir. 1999), Delta responded that an employer has a First Amendment right to express its views on union representation issues, and further that employees have the right to petition their government for “redress of their grievances.”

c. Misrepresented Not Voting

IAM alleged that Delta misrepresented the meaning of not voting to suppress the “yes” vote. IAM alleged that management told employees that if they did not vote, it would amount to a vote for the union. IAM provided evidence that PL, ACS, James Prather stated at a voluntary briefing in the fall of 2010 that “under the new rules it would count as a ‘yes’ vote if you elect not to participate in the vote.”

Delta responded through a declaration from James Prather where he acknowledged that he had “mistakenly said that failure to vote was like a ‘yes’ vote.” After being challenged by several union representatives in the audience and conferring with a PL present, he apologized for the misstatement. “I then re-emphasized that in order to be counted under the NMB’s new voting rules, an employee would have to actually vote.”

d. Decertification

The IAM stated that Delta consistently, and through multiple mediums, communicated to employees that there was no procedure for decertification. IAM contends that the Carrier told employees that if the IAM wins, the employees would be represented for life because the Board did not adopt an “equal” decertification procedure at the time it changed the rules. *See also Delta Air Lines, Inc., above.*

For example, Delta distributed a flyer to employees titled “Keys to the Game, 10 Big Game Changers.” One bullet states: “There’s No Turning Back. Under the voting rules for airline employees, the decertification process is highly complex. History has shown that it is virtually impossible for a large, widespread group like ours, once unionized, to become non-union under rules

like these.” Further, in a May 2010 letter from Gil West to ACS employees, he stated:

What’s even more concerning [about the new voting rules] is that the NMB did not provide employees with a comparable decertification process. By not including a comparable decert process in this change, the NMB has made it easier for the IAM to be voted in and nearly impossible for large workgroups like ours to vote out the union entirely. We strongly believe that you should always have the right to an equal process to decertify a union and return to union-free status.

Delta responded that it accurately described the Board’s “straw man” process for decertification. The Carrier also stated that its communications accurately reported that based on its research it is not aware of the “straw man” process working to decertify any group larger than 145 employees.

e. Write-in Vote

IAM contends that Delta misrepresented the “write-in” vote by telling employees that a “write-in” vote would help the IAM, and encouraged them to vote “No” instead. The Organization provided two examples of Delta’s alleged misrepresentation. In a “Decision Time” flyer where the Carrier outlined the voting options, it stated: “This is the WRITE-IN OPTION and is likely to be considered either a vote for representation or a non-vote, either of which could help the IAM win.” In a memorandum from Gil West discussing the rule change, he stated: “Under the new voting rules, the election results will be based on the ‘majority of people voting.’ This means that under the new rules if you do not want IAM representation, you will have to vote ‘NO’.”

Delta responded that it correctly told employees that write-in votes could affect the outcome of the election, and help IAM win the election. Delta contends this statement is both objectively true and constitutionally protected. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011).

f. Delta Represented it was part of the Official Voting Process

The IAM contends that the three-step voting process, outlined in the “Decision 2010” page on DeltaNet during the election period, deceptively represented that Delta was part of the official voting process. Delta instructed its employees that the first step in the process was to visit the employee’s departmental page or talk to the employee’s supervisors “to get the facts.” The

second step was the NMB mailing the voting Instructions, and the third step was going to the voting website and casting a vote.

IAM alleged that Delta repeatedly misinformed employees that speaking to their supervisors was part of the official process, and encouraged employees to see their supervisors for help voting. A series of videos were shown on DeltaTube that were titled “Instructions for Voting” which walked employees through the voting process. Additionally, flyers were distributed where Delta encouraged employees to contact their Leaders for assistance in if they had not yet received their VIN and PIN. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011).

Delta responded that the Delta culture is one that stresses direct communication between employees and Leaders, and further, Delta was trying to educate its employees about the rule change. West stated that:

[C]ommunications with our employees has always been an essential part of Delta’s uniquely strong culture of employee relations. . . . The tone and the content of Delta’s communications in connection with the election had three principal purposes: (i) voter education about the election process, (ii) correction of misrepresentations or misinformation circulated by IAM representatives or frontline employees, and (iii) expression of Delta’s own views with civility and professionalism.

Moreover, Delta provided the NMB’s contact information to employees who had not received their Instructions, and posted the election Notices as it was required to do.

g. Massive and Overwhelming Communications Campaign

i.

The IAM argued that the number of: mailings to employees’ homes; messages and pop-ups on DeltaNet; posters, flyers, videos, memos at the workplace; and communications from leaders/supervisors at “voluntary” briefings and town hall meetings, overwhelmed employees to the extent that it suppressed their free choice. IAM contends that there were “ask me” tables near break rooms where supervisors staffed tables to answer questions about the voting process and the Delta culture and handed out goodies. Further, Delta routinely posted anti-IAM and “vote NO” materials on all the bulletin boards, and break rooms, including six foot tall posters and posting materials near free food.

Some of the communications that IAM complained of included: telling employees that if the union was voted in, none of their current privileges and benefits would be guaranteed; implying that IAM could put dues money towards employee pensions; distributing flyers of things IAM cannot do in an election, implying that IAM would in fact do those things; distributing flyers telling people what they could do if the IAM was harassing them at home; distributing flyers stating that IAM has increased its dues without telling members; and telling employees that only non-contract employees would receive the October 2010 pay increase.

ii.

Delta responded that its campaign was aimed at educating employees about the rule change. Moreover, Delta responded that all of the communications complained of were truthful, identified Delta as their source, and protected by the First Amendment. See *Delta Air Lines, Inc.*, 39 NMB 92 (2011). Finally, Delta argued that its relatively few communications to employees stand in contrast to the IAM's massive, relentless campaign that attacked Delta and its management from 2008 through November 2010.

DISCUSSION

A carrier may communicate its views regarding representation in a non-coercive manner during an election. *Federal Express Corp.*, 20 NMB 659 (1993); *USAir/Shuttle*, 20 NMB 162 (1993); *USAir*, 17 NMB 377 (1990). However, the Board also has found that a carrier's right to communicate is "not without limit, and even conduct which is otherwise lawful may justify remedial action when it interferes with a representation election." *Air Logistics, L.L.C.*, 27 NMB 385, 404 (2000) (quoting *Laker Airways, Ltd.*, 8 NMB 236, 253 (1981)). As such, the Board examines the content of carrier communications to determine whether the communications are coercive, contain material misrepresentations, particularly about the Board's processes or the Act, or combined with other carrier actions, influence the employees in their choice of representative. The Board has found interference where the communications include threats about consequences of voting for an organization. See *Petroleum Helicopters*, 25 NMB 197 (1998); *USAir, Inc.*, 18 NMB 290 (1991); *Mid Pacific Airlines*, 13 NMB 178 (1986); *Allegheny Airlines, Inc.*, 4 NMB 7 (1962).

The Board has found no interference in situations where the carrier's comments had a factual basis, and where review of the materials was voluntary. *Delta Air Lines, Inc.*, 37 NMB 281, 314-316 (2010); *Delta Air Lines, Inc.*, 35 NMB 271, 286 (2008). While carriers must refrain from making

statements that are inaccurate or misleading, carriers may accurately describe the way an employee can vote no, and disseminate publications expressing their views on a representation election. *Delta Air Lines, Inc.*, 30 NMB 102, 127-132 (2002); *Express Airlines I, Inc.*, 28 NMB 431, 453-454 (2001).

“Must Vote” Message

As discussed in the Stock and Stores election interference decision, 39 NMB 92 (2011), Delta’s communications campaign strongly encouraged employees to vote. Delta believed it had to “get out the vote,” as the rule change now requires employees to affirmatively vote no against representation. *See Delta Air Lines, Inc.*, 39 NMB 53 (2011). The Board finds that Delta’s neutral statements encouraging employees to vote in a representation election and stating that employees must vote to be counted are non-coercive. Delta’s communications did not state that voting is mandatory and did not contain threats of adverse action for failing to participate in the election. Further, none of the employees interviewed believed that voting was mandatory. In sum, because Delta’s communications were neutral and non-coercive, the Board finds that the Carrier’s “Must Vote” message did not taint laboratory conditions.

Carrier Communications

Biased NMB

The Board finds that Delta’s communications about the NMB and the rule change do not constitute election interference. Employees remembered hearing about the rule change from managers, co-workers, and even from the IAM, but mostly in the context of the message that “you must vote to be counted.” One employee stated that Delta “put information out that there was a change, regarding what it means to have a majority.” As discussed in *Delta Air Lines, Inc.*, 39 NMB 92 (2011), it was clear that Delta did not support the Rulemaking and expressed this view to its employees. However, Delta’s position was also expressed in its comments during the Rulemaking and is addressed by the Board in the final rule.

Misrepresenting Not Voting

With respect to Delta misrepresenting the meaning of not voting, one misstatement by a management official that was promptly corrected is not sufficient to interfere with the laboratory conditions. *See Delta Air Lines, Inc., above.* As the Board has found in prior cases, actions which might be

objectionable if found to be part of “a systematic carrier effort,” do not taint laboratory conditions when they only occur in isolated instances. *USAir*, 18 NMB 290 (1991); *Northwest Airlines*, 19 NMB 94, 110 (1991). Moreover, none of the employees interviewed remembered Prather’s misstatement.

Decertification

With regard to Delta’s statements about decertification, the Board finds that Delta did not materially misrepresent the process and interfere with the election. *But cf. USAIR*, 17 NMB 377, 390 (1990); *Era Aviation*, 27 NMB 321, 338 (2000). Some employees did remember hearing that it was very hard to decertify the union, with one Atlanta based employee stating: “I remember them (Delta) saying that it would be very difficult to decertify with a large, spread-out group like ours.”

While Delta mistakenly suggests that decertification under the RLA was altered by the Rulemaking, Delta’s campaign material accurately describes the “straw man” process. *See Delta Air Lines, Inc., above*. The basic information conveyed by Delta about the process for obtaining an election to replace or remove a certified union representative was not a misrepresentation of NMB processes.

“Write-in Vote”

Delta did accurately describe how a “write-in” vote could contribute to the IAM winning the election, when it communicated to employees that a “write-in” vote could be considered a vote for representation or a void vote.

Delta Represented it was part of the Official Voting Process

The Board does not find that Delta represented it was part of the official voting process, as the communications did not state or imply that Delta was running the election. *See Delta Air Lines, Inc., above*. Moreover, Delta posted the required election Notices in work areas and provided the NMB’s contact information for employees who had questions or needed duplicate Voting Instructions. Further, the interviews with Fleet Service Employees reflected that they understood that the NMB was administering the representation election.

Delta's Communication Campaign

Upon careful review of Delta's communications campaign, the Board finds that it did not taint laboratory conditions by suppressing employees' free choice. The Board's evaluation of a carrier's campaign considers "whether the speech in the context of the 'totality of the circumstances' impermissibly interferes with employee free choice." *Delta Air Lines, Inc.*, 39 NMB 92 (2011); *American Airlines*, 26 NMB 412, 448 (1999); *Petroleum Helicopters*, 25 NMB 197, 205, 221 (1998).

The communications did not contain threats of reprisal, promises of benefits, and did not contain "material" misrepresentations of the Board's processes or the RLA. The information presented was within the knowledge of the employees to whom they were addressed or was otherwise obtainable by those employees if they sought to test the veracity of the information. Throughout the campaign, Delta and IAM had and took the opportunity to clarify perceived inaccurate information or falsehoods. *See Delta Air Lines, Inc.*, 39 NMB 53 (2011). In addition, employees were under no obligation to review the advocacy materials on the Decision 2010 page on DeltaNet, or the materials circulated at work or sent to their homes.

While Delta's campaign was certainly voluminous, the communications had a factual basis and the most prevalent messages ("You must vote to be counted") stated a neutral "get out the vote" message. *See Delta Air Lines, Inc.*, 39 NMB 92 (2011); *Delta Air Lines*, 35 NMB 271, 286 (2008); *American Airlines*, 26 NMB 412, 448-49 (1999). Employees were inundated with communications from both Delta and the IAM, and while they tired of the propaganda, there was no evidence that the material impaired their free choice in the election. Accordingly, the Board finds that the carrier's communications did not taint the laboratory conditions.

IX. Interference by the Board

The IAM alleges that the Board interfered with the election by not mailing out duplicate Voting Instructions in a timely manner. The IAM provided a letter from the secretary of IAM Local Lodge 1883 stating that nine Fleet Service Employees who had requested duplicate Voting Instructions had not received them as of November 18, 2010, the day of the tally.

The Board mailed out a Notice to Employees on October 7, 2010, which was posted in all stations and clearly stated that "No [duplicate ballot] requests

will be accepted after November 15, 2010.”¹⁹ The same information was provided in the Instructions mailed to each employee.

The investigation revealed that all duplicate ballot requests received by the Office of Legal Affairs by the deadline of November 15, 2010, were processed. Further, it was verified that seven out of the nine employees referred to above were in fact mailed duplicate Voting Instructions. The other two employees’ requests for duplicate ballots were not received by the Office of Legal Affairs until after the November 15, 2010 cut-off date. As such, there is no evidence that the Board interfered in the election by failing to mail duplicate Voting Instructions in a timely manner. *But cf. AirTran Airways*, 26 NMB 226 (1999) (Board re-ran election because all employees failed to receive their ballots).

X. IAM’s Other Allegations

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

XI. Interference by the IAM

i.

Delta contends that the IAM orchestrated a two-year campaign which was intended to scare and intimidate Delta employees. The Carrier argued that the IAM’s many communications, such as billboards, DVDs, radio and television advertisements, campaign materials, events, newsletters, emails, hand billing, and picketing, had the intent of attacking Delta management. Further, the IAM’s messaging created fear that if the IAM lost the election, Delta would outsource jobs, change work rules, benefits, and pay, and enforce arbitrary discipline and discharge. In addition, Delta alleged that the IAM utilized rumors, whisper campaigns, and unannounced home visits in an effort to convince employees to vote for representation. Finally, the Carrier asserted that the Organization attacked and retaliated against pro-Delta employees, and interrogated Delta employees as to how they voted or would vote.

IAM responded that Delta’s implication that it interfered in the election was merely a ploy to distract the Board from the actual issues in the case.

¹⁹ The tally was on November 18, 2010.

Further, IAM contends that Delta did not actually charge the IAM with interference. See *Delta Air Lines, Inc.*, 39 NMB 92 (2011).

iii.

The same analysis of whether the laboratory conditions have been tainted applies to union interference and carrier interference. However, as the carrier has unique power in the workplace, similar facts when applied to a carrier or a union could lead to different conclusions about whether the laboratory conditions have been tainted. See *America West Airlines, Inc.*, 30 NMB 310, 347 (2003); *Delta Air Lines, Inc.*, 30 NMB 102 (2002); *United Air Lines, Inc.*, 22 NMB 288 (1995); *Air Wisconsin*, 16 NMB 235, 239-240 (1989).

The Board does not find that the IAM's communications campaign tainted laboratory conditions. See *Delta Air Lines, Inc.*, 39 NMB 92 (2011); *United Airlines, above* at 319. The interviews reflected that the Fleet Service Employees received about the same amount of mail from the IAM as they did from Delta. Some employees interviewed did receive calls and some unannounced home visits from the IAM, but there was no evidence that the calls or visits were harassing in nature. Most employees merely stated that the IAM left advocacy materials at their front door, and representatives left the premises when asked. One employee stated: "I did not feel pressured from either group. There was propaganda from both sides, maybe more from IAM, but the decision was totally mine."

As in the Stock and Stores election interference decision case, *Delta Air Lines, Inc., above*, employees reported seeing fewer IAM advocacy materials at work as they were primarily limited to attended break room tables, union bulletin boards, and the union office. In sum, there was no evidence of coercion or intimidation by the IAM's communications. While there was some testimony that IAM advocates campaigned in an aggressive manner, most employees understood that the stakes were high for both Carrier and Organization, and therefore, emotion on both sides was to be expected.

CONCLUSION

Based upon the totality of circumstances, the Board finds that the laboratory conditions required for a fair election were not tainted.²⁰ This conclusion is based on the totality of circumstances.

By direction of the NATIONAL MEDIATION BOARD.



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²⁰ Member Hoglander notes that the totality of the circumstances in the instant case is distinguishable from *Delta Air Lines*, 30 NMB 102 (2002). In his view, the Board's investigation in 2002 revealed carrier support for an anti-union group of employees known as the "Freedom Force" and widespread evidence that Delta did not even-handedly apply its Advocacy Policy to the union and anti-union advocates. In 2002, the record established multiple incidents of supervisors and managers taking notes and photographs of AFA activists and other flight attendants while the activists were in the lounges. There were no such allegations or evidence in the present case.