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January 25, 2011

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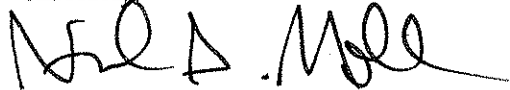
Re: Delta Air Lines, Inc. – IAM
NMB Case No. R-7257

Dear Ms. Johnson and Ms. Hennessey:

The response of Delta Air Lines, Inc, to the election challenges of the International Association of Machinists and Aerospace Workers regarding Delta's Passenger Service craft or class accompanies this letter. In addition to these materials, DVDs containing images of Delta's exhibits will follow under separate cover.

If you have any questions regarding the foregoing, please do not hesitate to call me at the number provided.

Sincerely,



Neal D. Mollen
of Paul, Hastings, Janofsky & Walker LLP

Enclosures

cc: Mr. Robert Roach, Jr.
Mr. Jay Cronk
Carla Siegel, Esq.
Michael Campbell, Esq.
Andrea Bowman, Esq.

BEFORE THE NATIONAL MEDIATION BOARD

_____)	
IN RE)	
)	
DELTA AIR LINES, INC.)	NMB Case No. R-7257
)	
_____)	(Passenger Service Employees)

**RESPONSE OF DELTA AIR LINES, INC.
TO IAM'S CHARGES OF
CARRIER INTERFERENCE**

January 25, 2011

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I. INTRODUCTION

Try as it might, IAM cannot lay its failure in this election on Delta. Since before the merger was completed in October, 2008, IAM has been more concerned about IAM's own interests than the will of the majority. IAM has manipulated the representation process from the beginning. IAM:

- Delayed filing to resolve representation;
- Finally filed to resolve representation in August, 2009 – but not for all groups;
- Requested the voting rules be changed;
- Suddenly withdrew its application to resolve representation for fleet service employees in October 2009;
- After the rules were changed, filed again to resolve representation in July, 2010 (and even then, not for Office and Clerical employees);
- After being rejected by the voters in every election, now seeks yet more changes to the voting rules.

It is now clear that IAM does not respect the will of Delta employees, but rather will continue to press the Board for changes to the voting rules until it gets the results it wants, notwithstanding that more than 80% of the passenger service employees voted and the vast majority clearly rejected IAM representation.

IAM's challenge rests on the assertion that Delta intimidated and overwhelmed employee free choice. To support that claim, however, IAM points primarily to Delta's lawful, and constitutionally protected, communications with Delta's employees.¹ IAM does not — because

¹ An employer has a First Amendment right to express its views on union representation issues. In *US Airways, Inc. v. NMB*, 177 F.3d 985 (D.C. Cir. 1999), the D.C. Circuit held that a carrier's First Amendment rights were violated when the NMB considered carrier speech, rather than carrier conduct, as evidence of unlawful interference, stating: “*Gissel* teaches that ‘an employer is free to communicate to his employees any of his general views about unionism or any of his
(continued...)”

it cannot — point to any acts of discipline by Delta against any employee for supporting IAM or for any conduct related to this election. Rather, IAM resorts to a classic approach: throwing as much mud as they can find, in the hope that some of it will stick. The wide range² and weak sources³ of IAM’s allegations give the lie to their arguments⁴.

IAM disparages the intelligence and sophistication of Delta employees — and of this Board — by suggesting that the employees were misled by Delta into thinking that they “must vote” because Delta encouraged voter turnout, or that those employees were so “overwhelmed” by Company communications that they lost their intelligence and free will. IAM submits no substantive evidence at all, however, to support these spurious allegations.

As described in detail in Section II, below, and in the accompanying Declarations of Michelle Carson Vaughn and Amy Schwarber, it was IAM, and not Delta, that mounted a

(...continued)

specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’” *Gissel*, 395 U.S. at 618 “[I]f unions are free to use the rhetoric of Mark Antony while employers are limited to that of a Federal Reserve Board chairman, ...the employer’s speech is not free in any practical sense.” (citation omitted). *Id.* at 993. *Accord NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 478-79 (1941); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969). The Board has subsequently acknowledged “the Carrier’s ability to communicate its constitutionally protected views on unionization to its employees.” *US Airways*, 26 NMB 323, 329 n.9 (1999); *accord, Delta Air Lines, Inc.*, 30 NMB 102, 126 (2002).

² IAM complains broadly of events which happened more than one year before the election and also of routine events which had nothing at all to do with the election, such as harmonization of pay periods and changes to Delta’s Ready Reserve program. *See infra* at III.F.

³ Most of IAM’s allegations are second or third hand hearsay from unidentified Declarants, at least some of whom seem to be IAM organizers who are not Delta employees. (*See, e.g.*, IAM Exs. 90, 125, 144).

⁴ Twelve IAM Declarants allege facts which, even if true, do not constitute interference. (*See* IAM Exs. 15, 19, 20, 32, 39, 42, 50, 54a, 68, 145, 201, 202). Many others are so lacking in detail as to be impossible for Delta to investigate or respond. (*See* IAM Exs. 90, 125, 128, 143, 161, 174, 199).

massive campaign calculated to scare and intimidate Delta employees.⁵ The total number of communications from IAM to Delta employees was *more than double* the number of Delta communications.⁶ DX 300.

If Delta had not communicated with its employees in response to the torrent of inaccurate, misleading and inflammatory IAM communications, Delta's employees would have been exposed only to IAM's self-serving communications and would not have had access to information correcting IAM's misstatements. Many of Delta's communications responded directly to IAM's personal attacks viciously vilifying Delta's management or frontline Delta employees who opposed IAM, or IAM statements at odds with the facts.

As Delta shows below, and in the accompanying Declarations and Exhibits, it was IAM's election campaign and overheated rhetoric that harassed, disrespected, and intimidated Delta's employees, not Delta's measured responses. In spite of the purposefully overblown rhetoric of IAM's communications, Delta directed its communications at preserving civility and fostering the even-handed application of Delta's uniquely liberal advocacy policy. Delta certainly made its views known, but it did so only in a truthful, respectful, and non-coercive manner.

Finally, it is worth underscoring the relatively paltry showing IAM has mustered in support of its charges. This election involved more than 15,000 passenger service employees,

⁵ See DX 5 (M. Carson Vaughn Dec.); DX 8 (A. Schwarber Dec.).

⁶ Copies of IAM communications to post-merger Delta employees, both print and electronic, are enclosed as DX 300, which contains 945 separate communications. Copies of Delta's communications relating to representation issues, both print and electronic, are enclosed as DX 301, which contains 401 separate communications. In both exhibits, the communications are dated from April, 2008 through the date of the vote tally on December 7, 2010. The same ratio holds for any time period: For 2009, the respective numbers were 359 IAM communications v. 89 Delta communications; for 2010, the respective numbers were 407 IAM communications v. 237 Delta communications.

most of whom worked approximately 240 days in 2010 prior to the vote count.⁷ Thus, there were more than 3,600,000 work shifts among Delta's passenger service employees during IAM's campaign in 2010 alone, each presenting opportunities for alleged interference. Yet, even if IAM's allegations were true, they raise only a handful of claimed incidents relative to the size of the craft or class and the scope of the campaign. IAM does not allege that a single one of its supporters — many of whom were very public in identifying themselves and aggressive in their campaign activities — was subjected to any form of discipline or adverse action by Delta. Indeed, IAM's own evidence confirms that Delta permitted IAM's supporters to engage in extensive advocacy activities at Delta facilities where the Company's supervisors work, and those managers properly administered Delta's non-discriminatory Advocacy Policy.⁸ In sum, nothing in the record before the Board even remotely justifies overturning the election results.

II. IAM CONDUCTED AN UNRELENTING, TWO YEAR CAMPAIGN ATTACKING DELTA

As set forth in detail in the accompanying Declarations of Michele Carson Vaughn and Amy Schwarber, IAM's two-year long campaign to represent Delta employees was both massive and vicious. IAM was fully aware of the high stakes for it in the Delta elections. On the upside, IAM stood to gain approximately 23,000 additional dues-paying members; on the downside,

⁷ Assuming five workdays per week for 48 weeks.

⁸ IAM does not challenge the terms of Delta's Advocacy Policy, presumably because the NMB found the same policy unobjectionable in 2002. 30 NMB 102, 137-39. Some of IAM's allegations relate to application of the much more restrictive pre-merger Northwest advocacy rules, which Delta replaced in February, 2010 after Delta received a single operating certificate. *See* DX 200; DX 2 (R. Ohm Dec.) ¶ 5. IAM, however, had lived under that Northwest policy for many years without complaint, and had agreed to contract terms which plainly limited their communications on union bulletin boards and their right of access to administration of their contract. DX 111.

IAM knew it might lose representation of the more than 10,000 pre-merger Northwest (“PMNW”) employees it had represented pre-merger. IAM marshaled its resources accordingly.

IAM’s own words describe its campaign at Delta: “IAM union organizers have been out day and night in the heat and cold handing out hundreds of thousands of handbills and flyers” and “[w]ebsites, hotlines, emails and every other known method of electronic communication have been utilized to give you easy access to our message.” DX 300/559. During the voting period, IAM’s Directing General Chair acknowledged that IAM had “inundated” Delta’s employees with campaign literature. DX300/913.

IAM’s Brief now characterizes Delta’s communications as “massive and omnipresent”⁹ — as if Delta’s communications were issued in a vacuum, unrelated to the size, scope and tone of the IAM campaign to which Delta was required to respond. IAM’s campaign was plainly based upon fear and confrontation. IAM communications were designed to scare Delta’s employees into believing they were at risk without IAM representation: that their seniority was at risk, their jobs would be outsourced and their package of pay, benefits and work rules would be decimated by a malevolent Delta management team. Delta did not stand silent in the face of such attacks and misrepresentations — because Delta felt an obligation to its employees to respond to IAM’s misleading and unfounded attacks. DX 1 (G. West Dec.) ¶¶ 15, 23; Declaration of Allison Ausband, DX 7 ¶¶ 8, 10, 11.

IAM’s campaign was not only voluminous, it was also exceptionally aggressive and vicious. IAM representatives repeatedly and aggressively made uninvited, unannounced visits to employee homes, in some instances refusing to leave until the employee agreed to take their

⁹ IAM Brief at 8.

literature. IAM also used extreme rhetoric rarely heard in such campaigns, calling Delta's executives "bent nosed crooks," as well as "money grubbing greedy liars" and "charlatans" and "greedy, deceitful, money grubbing liars." DXs 300/60, 300/797, 300/158, 300/837; DX 5 (M. Carson Vaughn Dec.) ¶ 28.

A. IAM's Campaign Was Massive in Terms of the Volume of Messages and the Means of Communication Used.

IAM's campaign included huge volumes of both printed and electronic communications, solicitation and distribution of literature at Delta facilities throughout the country. IAM did not stop at mere solicitation in the workplace, however. IAM systematically conducted uninvited, unannounced home visits with the purpose and effect of intimidating potential voters. *See* DX 5 (M. Carson Vaughn Dec.) ¶ 20(D), 21(B), 22(C), ¶ 36; DX 8 (A. Schwarber Dec.) ¶ 7; DX 7 (A. Ausband Dec.) ¶ 16. IAM also conducted rallies throughout the country, made systematic telephone calls to home and cell phone numbers to solicit support and to interrogate employees on their voting preferences. As one Delta employee reported:

IAM kept sending vote for IAM cards to my house literally EVERY single day, I was sick of them already, plus they even went so far as to come knocking to my house which I found very distasteful and intimidating. They could not tell me how they got my address plus after I told them clearly that I wanted them to stop harassing me, they came once more to my house and kept sending those cards. Also they would try to stop me on my way from the employee parking lot to work to talk to me and give me information and I kept telling them I already had all the information I need it and still they kept insisting. It was exhausting the way they would try to forced you to choose what they want instead of what I consider best for me.

DX 5 (M. Carson Vaughn Dec.) ¶ 9.

1. IAM's Printed Campaign Materials. From mid-2008 until the date of the vote tally and beyond, IAM published and distributed large volumes of printed campaign

communications to Delta employees, including approximately 790 multi-page newsletters; 377 single-page flyers; 32 magazines; and 27 pieces of written correspondence. IAM mailed at least 9 pieces of campaign literature to employees' homes. DX 5 (M. Carson Vaughn Dec.) ¶ 9.

2. IAM's Websites, Blogs and E-Mail Communications. IAM also used electronic communications extensively to launch multiple attacks on Delta and implore Delta employees to vote "Yes" for IAM. Among these electronic media were two IAM-branded websites, IAM4Delta.org, and IAM143.org (which included a web log and videos), a blog operated by IAM representatives and supporters called Deltaramp.blogspot.com, e-mail newsletters, and pages and postings on social network media. DX 5 (M. Carson Vaughn Dec.) ¶ 10. DX 300 includes at least 58 website postings and 42 mass e-mails. In addition, IAM frequently supplemented its weekly newsletter with news-blast e-mails. In the seven-day period from October 14, 2010 (the day the Board mailed the fleet service voting instructions) until October 21, 2010, IAM made nine new postings on its IAM4Delta.org website. These items include articles telling Delta employees to vote yes; flyers telling employees to vote yes; two web videos in which various employees, IAM officials, and politicians encourage employees to vote yes.¹⁰

3. IAM's TV and Radio Blitz. Beginning on or about October 5, 2010, IAM launched a massive television and radio advertising blitz targeting employees in Atlanta, New York, Salt Lake City, Memphis, Detroit and Minneapolis. DXs 300/818, 300/827 (from the IAM4Delta.org website). IAM ran commercials on local television stations, and a copy of

¹⁰ Representatives John Lewis and James Oberstar appeared in videos posted on the IAM4Delta.org website on October 22, 2010. Five other members of Congress, Representatives Shelley Berkley and Loretta Sanchez and Senators Kirsten Gillibrand, Claire McCaskill, and Amy Klobuchar, gave endorsements for the IAM in a video entitled "Prominent Politicians Talk to IAM Members," posted on the IAM4Delta.org website on November 9, 2010. DX 231.

three IAM commercials is included as DX 231. This included commercials on popular sports programs such as NFL football games and ESPN. DX 5 (M. Carson Vaughn Dec.) ¶ 11.

4. **IAM's DVD.** During its campaign, IAM produced and distributed a DVD in which numerous IAM officials attacked Delta leaders and Delta policies. DX 231. Speakers in the video accuse Delta CEO Richard Anderson of “almost destroying” Northwest Airlines and of being an “architect” of the “Walmartization of the airline industry.” One speaker stated that Anderson, “Came to Northwest, filled his pockets, got a golden parachute, and went on.” Another stated that Anderson “simply has his paycheck at heart.” IAM posted the same video on its IAM4Delta website on October 17, 2010. DX 5 (M. Carson Vaughn Dec.) ¶ 12.

5. **IAM's Billboard.** Beginning approximately in February, 2009 and continuing throughout 2009 and 2010, IAM rented a large billboard near the Delta employee parking lot on Camp Creek Parkway in ATL and used it for election campaign purposes. DX 300/829.

6. **IAM's “Red Tales” Continuously Attack Delta Management.** IAM published a newsletter entitled “*Red Tales*” which it used to launch a number of vicious attacks on Delta. *See, e.g.*, DXs 300/74, 300/156, 300/161, 300/235, 300/277, 300/357, 300/558, 300/597. In fact, IAM changed the publication frequency of *Red Tales* from monthly to weekly beginning on or about December, 2008 so that Delta employees were subjected to weekly barrages of virulently anti-Delta messaging.

7. **IAM's “Journal” Magazine Attacks Delta.** IAM used its quarterly magazine, the IAM Journal, to further attack Delta and promote IAM campaign messages. DXs 300/378, 300/471, 300/616, 300/804. The Summer 2009 edition (DX 300/378) featured an

article entitled “Real Seniority or Delta Seniority,” which detailed the “differences” between the Delta seniority policy and IAM’s seniority policy. The article threatened that, if IAM were voted out an arbitrator could “erase[] decades of workers’ seniority.” The Fall 2009 edition (DX 300/471) contained an article entitled, “IAM Campaign at Delta Heats Up,” which stated that IAM expected Delta to run a voter suppression campaign: “[I]t is obvious that Delta will focus its efforts among workers on a ‘Don’t Vote’ campaign while trying to persuade the NMB to limit voting rights at every opportunity.” The Fall 2010 edition contained an article entitled “Historic Elections at Delta” which stated that “[a]n election win at Delta will preserve existing work rules, including pay and pensions, while preventing any unilateral changes to workers’ seniority rights, retiree health benefits and due process protections.”

8. IAM’s Weekly Hotline Repeats “Vote Union — Vote IAM.”

Beginning February 12, 2009, IAM utilized a Hotline updated weekly and then posted these online. *See, e.g.*, DXs 300/213, 300/216, 300/223, 300/239, 300/590, 300/684. At the end of every Hotline message, employees were directed “When the time comes, Vote Union — Vote IAM.”

9. IAM’s Focus on Delta’s Atlanta Hub.

Handbilling and Impeding Parking Lot Access. Beginning in April, 2008 and continuing through the voting periods, IAM organizers regularly stationed themselves at the Delta employee parking lot off the Camp Creek Parkway near the ATL airport and at the Lower Landside employee bus stop at the ATL airport. IAM organizers frequently stepped in front of cars in order to force the driver to stop and accept handbills while entering or exiting the parking lot. DX 8 (A. Schwarber Dec.) ¶ 8. This became a virtual gauntlet through which employees had to pass frequently for more than two years. Many employees expressed extreme frustration

with this, to the point that Delta was concerned about the potential for physical altercations and therefore issued a leader memo. DX 301/83. At the Lower Landside employee bus stop, IAM agents would mass and at times there would be as many as eight to twelve, making it almost impossible for an employee to avoid contact if they wished to do so. DX 5 (M. Carson Vaughn Dec.) ¶ 20(A).

Off-Airport Solicitation Events, General Chair Visits, Handouts and Giveaways.

From 2009 through the election, IAM conducted an estimated 60 well-publicized events to meet and campaign among Delta employees at or near the ATL airport. These events included: fish fries and similar events where IAM gave away IAM pins, pens, shirts, bumper stickers, and/or shirts, and also free beer and chicken wings, discounted alcohol, or the chance to win a new, flat screen television. IAM also sponsored planned events off-site such as organizing events at the MLK center in ATL.

Home Visits. Beginning March of 2010, IAM representatives began a systematic series of uninvited, unannounced, and aggressive home visits which many Delta employees found especially offensive. These Delta employees had neither invited such visits, nor provided their home addresses, and many complained loudly to the Company about these visits. *See* DX 5 (M. Carson Vaughn Dec.) ¶ 20(D); DX 8 (A. Schwarber Dec.) ¶ 7. Just two of many examples of those complaints reported by Delta employees in their own words are set out here:

- “Representatives of the IAM came to my house repeatedly, after being told very clearly that I was not interested and did not want them on my property. I even put up a sign stating “No Trespassing by IAM Representatives” but they opened my gate, walked up to my door and rang the bell regardless. They constantly called my elderly parents and demanded to speak with me, as their land-line phone # is the one listed in the White Pages at my address. I use a cell phone. They would not stop, and made at least 5 visits to my house — they were told not to come back after the first visit. I even sent an email to my station manager asking what I could do to make the IAM stop.” DX 5 (M. Carson Vaughn Dec.) ¶ 20(D).

- “On 3 occasions IAM representatives came to my house to talk to me about my vote. This is even after I told them the first time to remove me from any list of future visits. They asked if I needed help completing my vote?! I received 4 phone calls regarding the same even after I told them not to call me again. When arriving to work they approached me on 3 occasions immediately after I stepped off the bus with literature which I thought was very intrusive.” DX 5 (M. Carson Vaughn Dec.) ¶ 20(D).

Employees reported to Delta that when asked to leave, IAM organizers often would not leave until the employees accepted the IAM campaign material. During the week of March 22, 2010 alone, Delta received more than 145 unsolicited reports of uninvited home visits. Many employees asked how to stop these unwanted visits. It was obvious that IAM had access to a comprehensive Delta employee database as they were able to get the home addresses of thousands of Delta employees. IAM bragged in a Flashpoint memo dated April 8, 2010, that IAM representatives had contacted “thousands of employees though phone banks and door knocking.” DX 300/627.

Phone Banks and Mass Emails. Delta also received numerous employee complaints during the election period that IAM was conducting a systematic phone blitz to make uninvited phone calls to large numbers of Delta employees at the ATL Worldport. Calls were made to employees’ home phones and cell phones; some calls were robotic, while others were from individuals who identified themselves as from Delta, or as Delta representatives. When questioned further as to their identity, however, they stated that they were IAM representatives who said they were also Delta employees. DX 5 (M. Carson Vaughn Dec.) ¶ 20(E). These calls were solicitations and invitations to events aimed at ensuring Delta employees voted “YES.”

Delta also received numerous complaints that IAM was conducting systematic email blitzes to large numbers of Delta employees. DX 5 (M. Carson Vaughn Dec.) ¶ 20(E); DX 8 (A.

Schwarber Dec.) ¶ 9. The emails were sent to both the employees' Delta email account and to their personal e-mail addresses. It was clear from the number of employee complaints that IAM had somehow gained access to a comprehensive list of Delta employees' personal and work email addresses. These emails were sent to Delta frontline agents and Delta leaders without any regard for whether the addressee was a likely eligible voter. These emails were solicitation events aimed at ensuring Delta employees voted "YES." *Id.*

Special Events. IAM conducted a much-publicized, highly choreographed organizing event at the Martin Luther King Center on October 16. DX 300/758; DX 5 (M. Carson Vaughn Dec) ¶ 24(C). IAM also conducted fish fry events at its headquarters in ATL on October 15 and October 16. DXs 300/834, 300/847; DX 5 (M. Carson Vaughn Dec) ¶¶ 20(C); 24(C).

10. IAM's Focus on JFK Hub.

Handbilling and Impeding Parking Lot Access. Beginning in April, 2008, IAM organizers regularly stationed themselves at the employee parking lot used by Delta employees at JFK two to three days a week, hanging an IAM banner on the fence and handing out flyers. Delta employees complained that IAM organizers yelled profanities at them when they refused to take their materials. During the election the organizers became more aggressive towards the JFK employees by jumping in front of cars and not moving until they took their flyers at the stop light leading out of the parking lot, to the point where it became a safety concern. Agents reported this to Delta leadership, which asked the Port Authority to monitor safety. JFK employees also were approached and harassed by IAM agents at the Airtrain in Terminal 2 and 3 which employees rode to take public transportation home. *See* DX 5 (M. Carson Vaughn Dec.) ¶¶ 20-21.

Home Visits and Phone Calls. During the spring of 2010 and continuing thereafter, employees at JFK complained to Delta about uninvited, unannounced, and aggressive home visits and telephone calls from the IAM. Employees reported when asked to leave IAM organizers typically would not leave until the employees took their information. DX 5 (M. Carson Vaughn Dec.) ¶ 20(D). During the election period, employees reported that during such home visits and phone calls IAM representatives would ask them how they voted. DX 5 (M. Carson Vaughn Dec.) ¶¶ 21(B), 26.

11. IAM's Focus on Salt Lake City Hub.

Solicitation Booth. The SLC airport authority created solicitation booths to prevent random solicitation activity in and around the passenger terminal. Over several months leading up to and through the elections, IAM rented a booth near the employee bus stop. IAM representatives hung posters and flyers and gave out candy and IAM lanyards to employees. Passengers and employees could see the IAM materials on the countertop from the baggage carousels. At one point IAM had an LED running above the booth which said "Vote Yes for the IAM." Throughout the campaign IAM handed out cookies, pizza and T-shirts from this booth. DX 5 (Carson Vaughn Dec.) ¶ 22(A).

Other Airport Solicitation. At various different times during the elections, IAM representatives positioned themselves outdoors at the two bus stops where Delta employees get off and on the buses; IAM organizers handed out flyers and candy. IAM increased the number of people working the bus stops and the lobby after the announcement that Delta flight attendants voted down representation by AFA. During that week they were more aggressive with a more "in your face" approach. They also positioned themselves inside the terminal. During the last week of the election period, IAM representatives stood in the lobby area, near a door that many

employees use to enter into the bag room. IAM organizers were handing out cookies, candy and IAM handbills. IAM also held campaign meetings with food at the Terrace Restaurant located by Terminal One, in the Jazz Room at the airport, and other meetings offsite at nearby restaurants. DX 5 (M. Carson Vaughn Dec.) ¶ 22(B).

Home Visits and Phone Calls. Throughout 2010, Delta employees at SLC complained to Delta about uninvited, unannounced, and aggressive home visits by IAM organizers as well as phone calls to their homes and on personal cell numbers. DX 5 (M. Carson Vaughn Dec.) ¶ 22(C); DX 8 (A. Schwarber Dec.) ¶¶ 6-7.

12. Picketing. On three separate occasions during the campaign, IAM representatives engaged in picketing activities at the DTW airport using picket signs with various campaign themes. Likewise, IAM representatives engaged in campaign picketing activities at the MSP airport on two separate occasions during the campaign. DX 5 (M. Carson Vaughn Dec.) ¶ 23.

13. Station Visits by IAM Leaders Buffenbarger/Roach/Gordon. Just before the fleet service election voting period began on October 14, 2010, IAM requested that IAM President Thomas Buffenbarger and General Vice President Robert Roach be allowed to make station visits to Delta airport facilities at Memphis, Detroit and Minneapolis. Delta arranged for these station visits to take place and Mr. Buffenbarger and Mr. Roach, along with Stephen Gordon and other IAM officials, visited Memphis on October 15, 2010, Detroit on October 16, 2010 and Minneapolis on October 17, 2010. Delta also facilitated a station visit to Boston on October 21, 2010 by Mr. Roach and Mr. Gordon. IAM G.V.P. Robert Roach and Stephen Gordon made a station visit to ATL and met with employees on November 5, 2010;

IAM had scheduled Mr. Roach to return for another visit on Saturday, November 6; but Mr. Roach did not show up! DX 5 (M. Carson Vaughn Dec.) ¶ 24(A)-(C).

14. Campaign Parties in MEM, DTW and MSP. In connection with the Buffenbarger, Roach and Gordon station visits, IAM hosted parties for Delta employees in MEM (October 15), DTW (October 16) and MSP (October 17). DX 5 (M. Carson Vaughn Dec.) ¶ 24(B); DXs 300/828, 300/843, 300/854.

15. Rallies with Elected Officials. Congressman James Oberstar gave a speech at the MSP campaign rally on October 17. DX 231. Congressman John Lewis made a campaign speech for IAM at the MLK Center event on October 16. DX 231. Congressman Steve Cohen spoke in support of the IAM at the IAM rally in MEM on October 15. DX 300/828; DX 5 (M. Carson Vaughn Dec.) ¶ 24(D).

B. IAM's Vicious and Unrelenting Campaign Tactics.

Throughout its campaign, IAM used increasingly nasty tactics to scare employees about what life would be like without an IAM collective bargaining agreement. Testifying before the Minnesota legislature even before the merger closed, IAM Directing General Chair Stephen Gordon attacked Delta, stating that Delta had a “plantation style of management.” DX 5 (M. Carson Vaughn Dec.) ¶ 7. Apparently believing that fear, anxiety, distrust, and hostility would lead more Delta employees to vote for IAM, IAM set out to create that kind of atmosphere as part of its election campaign. IAM repeatedly warned that, without an IAM contract, employee seniority would be at risk, Delta would outsource jobs, would reduce pay and benefits and erode protective work rules, and would furlough employees, among many other things. Many employees asked Delta if those assertions were true.

1. IAM's Vicious, Unrelenting Attacks on Delta Management.

A cornerstone of IAM's campaign from the beginning was to attack Delta management, attempting to pit employees against their leaders, and to sow seeds of distrust. IAM regularly directed personal attacks at Delta executives, in an effort to portray them as demons and people of evil intent who were unworthy of employees' trust. The following are merely some examples of the many attacks IAM launched:

- IAM repeatedly characterized Delta as a plantation and Richard Anderson as the plantation owner. For example, an IAM flyer and weblog posting referred to Delta as the "New 'Andersonville'," referring to the infamous Confederate prison in which nearly 13,000 Union soldiers died of starvation and disease.. The tag line on the flyer states, "Welcome to the New 'Andersonville' Where starving is not just a 19th Century reality. 'Culture' and loyalty trump pay and benefits." The flyer goes on to declare that a second "civil war" has been won, and refers to Richard Anderson and the Northwest management team as "carpetbaggers." DX 300/82.
- Another IAM flyer referred to Richard Anderson and Delta's management team as "bent nosed crooks." The flyer further states, "We at Delta are just beginning to understand the depth of this man's [Anderson's] deceit and diabolical mind. He has no conscience or concern about our families... his mission is to enrich himself and his family and he is succeeding at our expense." DX 300/60.
- One IAM flyer referred to Anderson as "Tricky Dick" and insinuated that Anderson uses marijuana. DX 300/66; *see also* DX 300/150 (referring to Anderson as "Dick" Anderson).
- In *The Air Apparent*, a publication of Air Transport District 143, IAM accused Richard Anderson and Delta management of being "corporate liars." DX 300/30. IAM again called Anderson and Delta management liars in a flyer published in 2010, which stated "The time is now to send those money grubbing greedy liars a message. Vote Yes... Vote Union... Vote IAM! It is important you know where all the concessions and givebacks you made have gone. They're in the pockets of Richard Anderson, Ed Bastian, and all their cronies." DX 300/797.
- An IAM blog post warned in exceptionally harsh terms that Delta was a "sinking ship" and that the *management team was willing to "toss people overboard" and to "find someone else to sacrifice" in order to for the management team to "survive and cash out."* The post continued: "This scenario is real and you who trust these *charlatans* will find yourselves alone, floating and sucking water bubbles through your nostrils very soon unless you trust those who have protected

airline workers for decades; the IAM. Grab the life vest and paddle on to shore. We will wring you out and fix the ship, with or without the **greedy corporate hacks that sent you adrift in the first place.**” DX 300/158 (emphasis added).

- An article in the *The Air Apparent* decried, “[m]illions upon millions of dollars of our pay cuts and benefits reductions [that] have gone directly in to [Anderson’s] pockets. We say nothing and wait for our ‘industry standard pay,’ while his cronies fatten their own wallets with bonuses and retention pay incentives.” DX 300/376.
- An article in *Red Tales* accused management of stealing money from employees: “The CLT [corporate leadership team] simply used their employees as an ATM machine. Bankruptcy was used as a business tool at both Northwest and Delta to reach into the pockets of employees and take out millions.” DX 300/645.
- A 2010 flyer declared that employees needed to “Protect your future against the **greedy, deceitful, money grubbing liars** that are continually trying to destroy our livelihood, while they laugh all the way to the bank.” DX 300/837.
- IAM communications also regularly referred to Richard Anderson as “King Richard” who lords over and abuses the lowly “serfs” and “peasants,” *i.e.* the fleet service, passenger service, and stores employees: “Why is it that from King Richard down through his entire CLT they have guaranteed contracts for their salaries, stock options and incentive pay” DX 300/232.
- The Ledger, published by IAM Local Lodge 2319, published a picture of Richard Anderson wearing a crown on the front page of the newsletter, and goes further, calling Anderson “Richard the Scab Hearted.” DX 300/473.
- *Red Tales* articles stated that, without a union, the “peasants” would be defenseless against King Richard, “the very same King who has chopped off the heads of peasants in the past without a thought,” DX 300/582, and that “[a]lthough we do not trust the King, we trust the Lords of Wall Street who tell King Richard what to do even less. They care for nothing but gold and their actions are ravaging the land,” DX 300/747, and that “King Richard” has bribed the “peasants” with the promise of land if the union were voted out. The article concludes, “Without the title, the promise of land means nothing. He [King Richard] could take it from us tomorrow The King will have many tricks in the coming weeks to distract us. We need to keep our eye on the day when the decision will be ours, not the King’s.” DX 300/784.

2. **IAM’s Personal Attacks in Retaliation Against Delta Employees Who Voted No or Spoke Out Against IAM.**

Another cornerstone of IAM’s campaign was an aggressive attack on Delta employees who opposed the IAM. Delta received reports from employees who reported retaliation by IAM

supporters after the employee revealed his opposition or “no” vote. representation. DX 5 (M. Carson Vaughn Dec.) ¶ 36.

3. Creating Fear Regarding Outsourcing and Job Security.

IAM created a major issue among the PMNW employees by falsely repeating over and over again that Delta was likely to outsource jobs if IAM lost the election. Many employees asked Delta if those assertions were true.¹¹ Among the key IAM messages were the following:

- One IAM flyer ominously asks employees if they are “at will” employees. According to the flyer, “Yes, we are at-will employees. We can choose to terminate our relationship with Delta at any time but more importantly, Delta can terminate their relationship with each of us without our input or permission; for any reason, including a bad economy or lack of continued interest in having us around. Unfortunately, many of us are going to experience the at-will clause sometime early this fall.” DX 300/34.
- An IAM authorization card also predicted lay offs, featuring a hand holding an ax on the front of the card. The back of the card warns, “Big cuts are coming! Are you facing a layoff or loss of your job at Delta?” DX 300/48.
- Another IAM flyer published warned of impending layoffs and claimed that Delta would expand its ready reserve program and offer employees positions as ready reserves in lieu of layoffs. The flyer then warns, “Having no insurance and not building seniority towards pay increases is a dead-end career that will never change without union representation... The only chance for change and protection from this is by having a Union... the *IAM*.” DX 300/157 (emphasis in original).
- An IAM newsletter asked PMDL employees, “Who Will You Turn To When Delta Eliminates Your Job?” According to the article, “Without a union on the property who will be there for the Delta employees when layoffs hit the workforce? It certainly won’t be the new Delta management team and its team of outsiders. Being an employee of the new Delta family won’t mean a thing when you come between corporate profits or losses; the company ‘family’ then quickly dissolves. Comments change from how you were such a valuable resource and ‘family’ member to ‘Don’t take it personal, it’s strictly a business decision.’” DX 300/71.

¹¹ In fact, since the closing of the merger and continuing to date, no frontline Delta jobs in the U.S. have been outsourced.

- IAM regularly threatened that Delta would outsource jobs if the union were rejected. For example, IAM wrote, “The equation is — bad management decisions equal replacing your job with RHS and DGS. Take control of your future. Without the Machinists Union, who will keep Richard Anderson honest to his promises?” DX 300/224. Similarly, IAM’s *Red Tales* newsletter threatened that, if IAM lost the representation election, jobs in MSP would be outsourced but if IAM was elected, the MSP jobs would be protected. The same *Red Tales* further states, “[i]s destruction of career jobs and the lives of workers necessary for Delta’s success?” DX 300/143.
- IAM told employees, not that layoffs *could* happen, or even that they were *likely* to happen, but that they were an absolute certainty: “[i]t is a *certainty* that if pro union workers are not successful in their effort to win a representation vote that thousands of full time permanent jobs will be lost. Ready Reserve will continue to spread unabated with an accompanied loss of jobs with medical benefits and any measure of security.” DX 300/597 (emphasis added).
- An IAM hotline message warned that while management “state[s] our jobs are secure . . . history shows as soon as Delta gets rid of the Union, all jobs planeside will be subject to being outsourced. All jobs in Reservations are subject to being shipped offshore — they have tried and failed with India, but South Africa and Jamaica still are there. . . . Fellow employees, you need to look after yourself—no one else will.” DX 300/320.
- An IAM flyer entitled, “The IAM has protected you in the past from station closures and Delta will try more of the same” claimed that IAM prevented Northwest from outsourcing “all of the work in every station except the hubs DTW and MSP.” “On the other hand, Delta was free to slash pay, benefits and jobs in bankruptcy court without restraint.” DX 300/809.
- Another IAM flyer warned, “Delta wants an at-will, low-paid workforce and is expected to run their airline based on what is happening today in Salt Lake City, where the employees are 30% Full Time, 30% Part Time and 40% Ready Reserve.” DX 300/831.

4. Creating Fear Regarding Changes to Pay, Benefits and Work Rules.

The facts showed that Delta’s compensation package was better for employees than that reflected in IAM’s pre-merger contract at Northwest. Nonetheless, IAM attempted repeatedly to convince Delta’s employees that Delta would take away pay and benefits and adversely change work rules. Many employees asked Delta if IAM’s claims were true. These were among IAM’s messages:

- IAM's Air Transport 143 *Union "Yes"* newsletter predicted that if union representation were rejected, pay and benefits at Delta would be cut dramatically. According to the article, the "truth is that Delta management's goal is to weaken the industry-standard pay and lower it. The promise will be fulfilled; we will receive less pay and benefits because there will be no one left to advocate on our behalf and the standard will be forever debased and deflated." DX 300/98.
- An IAM blog post threatened, "Without the protection of a contract, we leave ourselves exposed to these perilous times and will be the ones sacrificed if the economy worsens. It simply makes sense to organize, unionize and protect our position, money and families. DX 300/116.
- Another IAM blog post, entitled "Let's Talk Fear," stated, "As a NW employee, if the IAM does not win the representation election, I FEAR having my pay and benefits managed by Delta. I FEAR losing my 12 sick days per year with unlimited accruals and getting stuck with Delta's 7 days per year. I FEAR losing my 12 OJI days per year with unlimited accruals and getting stuck with Delta's NOTHING, NO OJI days what so-ever. I FEAR looking forward to my 6 weeks vacation because I may get stuck with Delta's 4 or 5 weeks." DX 300/109.
- An IAM flyer warned that pay and benefits would decrease dramatically without unions: "Third World here we come unless we keep the standards high by voting in the IAM to represent us at Delta... Those of you who don't understand where your wages and benefits come from will soon find yourselves learning a hard history lesson if you ignore this union campaign. Join the fight and save your dwindling lifestyle." DX 300/164.
- IAM continuously threatened that employees would lose their retirement if the IAM were voted out. One IAM flyer, entitled "Your Pension Is At Risk!," stated: "The only way we will keep this secure, employer funded and growing pension is to be represented by the IAM.." DX 300/105. Another IAM flyer, entitled, "Is this the retirement you dream about?," depicts a garbage area on the front, and on the back claims that 401(k) accounts in the United States lost \$1.1 trillion in the year ending October 31, 2008, while the IAM National Pension Plan had "not gone down one cent." DX 300/180.
- IAM repeatedly warned that, without a union, Delta would "race to the bottom" and would "Walmartize" the industry. As an article in *Red Tales* wrote, "At the heart of solving that crisis is maintaining career jobs, ones that can pay mortgages, buy cars and pay the bills. That means union jobs and union protection. Without a union, Delta will Walmartize us." DX 300/221. Another *Red Tales* wrote, "Every worker in the U.S. has some sense that a 'race to the bottom' is taking place. We see it all around us: contracting out, Ready Reserve, higher percentage of part time While having a union cannot always stop this process, it is the only way workers can battle back and win. **Without a union there is simply no bottom in the "race to the bottom."** DX 300/386 (emphasis in original).

- Other *Red Tales* articles repeated the claim that Delta was “WalMartizing” the airline industry: “A victory for Delta against the IAM will mean an even greater expansion of the use of disposable workers and the imposition of lower wages and slashed benefits for those who hang on to permanent employment... On the other hand, a union victory with 30,000 IAM members at Delta will be the spring board for a rising industry standard.” DX 300/551. *See also* DX 300/608 (“Delta is moving quickly to WalMartize our industry. That’s not good for anybody, except shortsighted executives who aim to line their pockets. This process can be stopped, but only with a union contract”).
- An IAM flyer entitled “IAM Members Can Lose...” threatened that, if IAM were rejected, employees could lose benefits and favorable work rules including: lower medical premiums, a guaranteed and growing pension, unlimited sick-time accruals, systemwide seniority and bumping rights, and job security. DX 300/273.
- Another flyer called “Cast an Informed Vote” accused Delta management of wanting to keep the union out so that there would be “more money in their pockets and less in yours.” DX 300/283.
- Upon the announcement of the Southwest Airlines/AirTran merger, IAM began threatening that Southwest’s arrival in Atlanta would cause Delta to implement pay and benefit cuts. In a home mailer sent in October 2010, IAM claimed that the Southwest Airlines/AirTran merger would result in Delta being “forced to compete with Southwest’s low fares...” and that “Delta will subsidize those low fares the same way they have in the past: front-line employee layoffs system wide, increased subcontracting and pay and benefit cuts. As Delta tries to match Southwest’s low fares they won’t offer to match the wages and job security the IAM negotiated for Southwest employees, such as \$26.35 an hour for Passenger Service Agents. The best way to **PROTECT YOURSELF AND YOUR FAMILY** is the same way Southwest Airlines employees protect themselves — with an IAM contract.” DX 300/890 (emphasis in original).
- In the November 10, 2010 Red Tales, IAM warned, “We all know who pays for fare wars — the employees. The groups that have no union will be fair game for Delta. Delta will simply take what they need from non union employees because they have no contract, no legal protections of wages and benefits.” DX 300/912.

5. Creating Fear Regarding Discipline and Discharge.

Despite Delta’s positive record of employee relations, IAM attempted to get employees to believe that they would face arbitrary discipline and discharge without an IAM contract.

Examples include:

- An IAM flyer entitled “Job Security” threatened, “Without a union contract, management can terminate employees ‘at will’ — in other words, for just about any reason they want. DX 300/308.
- Another IAM flyer entitled “More Union Advantages” compared the differences between Delta’s disciplinary process and IAM’s grievance process, stating: “Many Delta employees report to our organizers that their coworkers stand accused and are guilty because Delta management say they are. Employees’ fate, many times, have been decided before they even set foot inside the manager’s office. Charges are cited verbally and not in writing. Delta views the whole process as thorough, fair, and consistent with Delta’s methodology; ask any Delta manager who’s participated in it.” DX 300/316.
- An IAM flyer entitled “Delta’s Open Door Policy” warned that Delta employees can be fired at any time because they are not “protected” by a union contract. “If you are an employee with a problem, Delta managers will keep the door open just long enough to escort you to the street; terminated with no job, no recourse and no hope.” DX 300/417.
- IAM’s *Red Tales* falsely claimed that a ticket agent in MSP was singled out and “bullied” by a performance lead, ultimately ending in the ticket agent’s termination, because the ticket agent filed a complaint against his performance lead. The story ends by warning, “We know this story illustrates what Delta means when they talk about a ‘direct relationship.’” DX 300/429. Similarly, another *Red Tales* threatened, “Even if you obey all the rules in the manual, Delta can terminate you at any time for any reason.” DX 300/477.
- An IAM flyer warned that an “ugly” part of Delta was “the atmosphere of fear you work under daily. Knowing you could lose your job for the smallest infraction of company policies or rules that can change at the whims of management. They suspend you indefinitely. They don’t return your calls or respond to written communication and rarely do they believe an employee’s side of the story, regardless of the facts. We’ve heard these horror stories time and time again from decent Delta employees who were charged with bogus company infractions. The negative aspects of the company seem to far out-weigh the positive ones. The scales can tip the other way though, with a union contract.” DX 300/648.
- Another flyer proclaimed, “Yes, Delta Hires and Fires YOU at will... Delta may terminate the employment relationship with any employee at any time and for any reason.” DX 300/712.

6. Creating Fear Regarding Seniority Integration.

Early in its campaign, IAM claimed that if it were not elected, employees would be subjected to an arbitrary seniority integration process at the whim of Delta rather than a “fair and

equitable” process. IAM stressed in communications that the IAM date of hire seniority integration policy was the only fair way of integrating the Delta and Northwest seniority lists. Again using the “fear” playbook, IAM predicted utter mayhem if IAM were voted out. Some examples are:

- An IAM *Merger Watch* warned employees to “Beware of Seniority Integration Policies.” While the article acknowledges that federal law requires seniority integration to be “fair and equitable,” the article attempts to frighten employees into believing that an arbitrator could staple a group of employees to the bottom of a seniority list under the “fair and equitable” standard. DX 300/93.
- An IAM flyer asserted that “[i]f you are a pre-merger Delta employee you have no guaranteed ‘right to recall,’ you do not have ‘system seniority;’ therefore, you do not have the right to ‘exercise seniority’ to preserve your employment. Without a union, you will continue to be told where you can go to work.” DX 300/285.
- In another *Red Tales* article, entitled “Seniority In Real Life,” IAM reported — falsely — that 22 baggage handlers in Tampa (“TPA”) were to be laid off. The article claimed that, if these baggage handlers were protected by IAM contract, they would be able to exercise their seniority to bump into another position. With no CBA, IAM stated, “[t]hey are simply out of luck.” DX 300/328.
- An IAM flyer entitled, “Economy Tanks” threatened that Delta employees did not have guaranteed seniority protection while out of work or recall rights based on seniority. DX 300/367.

7. Home Visits Created Fear As Well.

The IAM’s uninvited and aggressive home visits to Delta employees created fear as well. On one occasion when IAM representatives visited an employee’s home, they interrogated the employee’s children about their parents whereabouts, attempting to instill trust in the children (one of whom was seven) by identifying themselves as Delta employees, and arguing with the children, stating “Are you sure your mother is not home? We KNOW that today is her day off, we work for Delta and she is scheduled off today.” This frightened the children; yet, when asked repeatedly to leave, the IAM agents refused to do so, loitering for 20 minutes on the employee’s

porch and leaving a bag of papers on the porch bench. The Delta employee was understandably upset and felt her family's privacy had been disturbed, and was particularly appalled that IAM representatives had used "working for Delta" to try to gain the trust of her children. Our employee told us, "I am pretty upset, and do not want them to show up at my door again." DX 8 (A. Schwarber Dec.) ¶ 7.

Another aggressive IAM encounter involved a female employee living alone in a duplex who had her home visited multiple times by IAM. On one occasion, the employee answered her doorbell to find a man standing on her porch, who stated that he was from Delta (but was holding IAM information). She asked him to leave, at which point he shouted at her loudly, "you need to listen to me," "it's the future of your job," and when she tried to close the door he reached in and grabbed it, pulling it back open, continuing to scream at her. Concerned about the shouting, the employee's landlord (who lives above her) then appeared and asked him to leave, but he refused until the landlord used a more forceful tone, at which point the IAM representative finally left. The employee was left scared, particularly since the IAM representative had physically overpowered her. Our employee told us, "If my landlord hadn't been there I really don't know what this guy would have done." DX 8 (A. Schwarber Dec.) ¶ 7.

C. IAM Interrogated Delta Employees as to How They Had Voted or Would Vote.

Delta received numerous complaints from employees who had been asked and/or coerced by IAM supporters to disclose how they voted. DX 5 (M. Carson Vaughn Dec.) ¶¶ 18, 36; DX 1 (G. West Dec.) ¶ 24; DX 8 (A. Schwarber Dec.) ¶¶ 6, 12; DX 7 (A. Ausband Dec.) ¶ 17. Additionally, IAM supporters approached employees at work to ask how they had voted. On November 12, 2010, an employee asked several fellow employees on the work floor how they had voted. When they told her they had voted "no," the employee responded, "well if you're OK

with losing your sick and vacation time” and proceeded to tell others in the break room that these employees had voted “no.” DX 8 (A. Schwarber Dec.) ¶ 12.

D. Despite Massive Communication, IAM Made No Attempt to Educate Employees on the New NMB Voting Rules.

When the NMB’s voting rule changes became effective in July, 2010, Delta’s communications immediately started to focus on educating Delta employees with unresolved representation issues about the NMB’s new voting rules. DX 1 (G. West Dec.) ¶ 12; DX 301/61. Included in the 56,000 Delta employees with unresolved representation issues, Delta had approximately 16,000 passenger service employees throughout the U.S. With the new voting rules in effect, it was important and necessary to educate employees that the rules had changed. IAM, however, did not bother to advise Delta employees that the way to vote “no” had changed and that the only way to vote “no” was to cast a vote.

While the NMB provided voting instructions, it did not have the resources to engage in any extensive process to educate voters about the changed voting rules. As a result, it was left to Delta to educate employees about the profound change that had just occurred in the voting rules. In particular, Delta’s materials pointed out that the way to vote “no” is now the exact opposite of what Delta’s employees had previously been told, and that voter turnout now could have a significant effect on the outcome of an election. For that reason, Delta’s message to employees was: “you must vote to be counted.” Delta advised employees that, in order for their vote to count, they had to actually cast a vote. Due to the voting rule change, this message was integral to try to ensure that employees knew that not voting was no longer considered as a vote against representation. In contrast, IAM communications offered only one message and one choice: that employees should vote Yes for IAM.

E. Delta Employee Complaints Regarding IAM Interference.

During the campaign and voting period, Delta received complaints from employees regarding IAM's harassing and intimidating behavior. After the vote count, employees asked for a process by which they could submit information about what had occurred during the election. DX 5 (M. Carson Vaughn Dec.) ¶ 36. Based on these requests, the Company created a place on DeltaNet where employees could voluntarily choose to submit information and to express their views about IAM's claims of interference. As of January 23, 2011, the Company has received comments from more than 1,700 Delta employees stating that the Company did not interfere in the election. Additionally, the Company has received comments from approximately 200 employees reporting that they believed IAM had interfered in the election. DX 5 (M. Carson Vaughn Dec.) ¶ 36.

F. IAM Used Paid Union Leave Time and Company-Paid Travel to Conduct Its Campaign.

Under the pre-merger NWA-IAM contract, union business leaves were to be granted for the purpose of administering the contract, investigating grievances and similar union business. *See generally* DX 2 (R. Ohm Dec.) ¶ 6. Throughout the election period IAM sought, and Delta granted, an extraordinary number of hours of union business leave for many IAM representatives who used their union leave for organizing. *Id.* ¶¶ 7-9. Furthermore, the IAM leadership expressed a need for union leaves of absence over and above normal or historic levels. DX 2 (R. Ohm Dec.) ¶ 7. Even though no such contractual right existed, Delta agreed to permit IAM to use leave in this way under certain circumstances. Delta thus *approved* union leave ranging from 1,600 to 6,750 man-hours per month from May, 2008 through November, 2010 — *far* in excess of what IAM had historically requested. DX 2 (R. Ohm Dec.) ¶ 9. In addition, even after the Federal Aviation Administration granted Delta a single operating certificate for the combined

Northwest-Delta system, the Company continued to provide free, positive-space travel privileges to numerous IAM officials traveling on union business, which they often used for campaign purposes. *Id.* ¶ 10.

III. ARGUMENT

A. IAM's Attacks on the Security and Integrity of the Voting Process Are Cynical and Entirely Without Merit

Delta's leaders repeatedly urged its employees to vote *in the privacy of their own homes* promptly upon receipt of their VIN and PIN numbers from the NMB. DX 1 (G. West Dec.) ¶ 21. Delta did not, however, prohibit voting by means of company computers or telephones at work if employees wished to do so. As a result, like AFA before it, IAM now urges loudly that the Board must find something improper about the option to use available company telephone or computer equipment for voting, among many other voting options.

IAM's allegations about the misuse or abuse of technology on Delta's premises are entirely speculative; they confirm IAM's reliance on innuendo in lieu of facts. Like AFA before it, IAM never once offers facts to support its professed concerns that permitting the option to vote at work might not facilitate employee freedom of choice. In effect, IAM is asking this Board to create a double standard, a new rule that unions and their supporters can provide telephones or computers to facilitate voting, but carriers cannot even allow voting on company equipment as one option among many if an employee wishes to do so. Such a rule not only would be a step backwards in light of the ubiquitous presence of electronic communications devices in modern society, it would falsely cast doubt on the integrity and security of the Board's voting process. At bottom, the suggestion that the integrity and security of the Board's voting process was or could be tainted by Delta is not supported by any substantive evidence.

IAM does not make a single factual allegation that anyone at Delta could have breached – much less actually breached – the security of the NMB’s encrypted voting website to determine how any employee voted in this representation election — or even that anyone *tried* to do so. Nor does IAM offer any evidence that Delta monitored or attempted to monitor any voting activity. In fact, the record leaves uncontested Delta’s sworn statements that *there was no such monitoring*. DX 75 (First J. Fredericks Dec.) ¶ 3; DX 76 (Second J. Fredericks Dec.) ¶ 2; DX 77 (Third J. Fredericks Dec.) ¶ 2. Section 17.0 of the NMB Representation Manual requires that the Board dismiss allegations of interference when they are not supported by “substantive evidence.” Clearly, IAM’s speculations and hypothesizing about what might have been *possible* does not come close to presenting even a *prima facie* case. IAM’s suggestion that Delta engaged in surveillance of voting is not supported by *any* factual evidence.

IAM’s arguments about use of company computers and telephones are actually a brazen, unfounded attack on the integrity and security of the NMB’s procedures for telephone and internet voting — not only in the election at issue here, but in every election that has been or will be conducted under those procedures. The Board’s procedures have now been in place for eight years¹² without raising any legitimate security concerns — and with no restrictions on the use of company (or union) telephones or computer equipment for voting. IAM does not dispute that employees have been permitted to use company computers in each of the four other post-merger representation elections held among Delta employees in the past two years, without objection

¹² The NMB adopted telephonic electronic voting in 2002, 29 NMB 490 (2002), and added Internet voting in 2007, 34 NMB 200 (2007).

from anyone.¹³ It appears that unions seeking to represent Delta employees have been happy to have employees vote using company computers and telephones when the only option was to vote “yes,” but do not want employees to have that option now that the employees have the option to vote “no.” IAM also presents *no* evidence as to how many (if any) employees voted on company computers or telephones (or, for that matter, how many voted using a computer or telephone owned by IAM or an IAM supporter).

Before the Board adopted internet voting in 2007, it went to great pains to ensure the security and fairness of the system, and as the Board has recognized, “[i]nternet Voting was implemented after months of research and testing, and is both secure and encrypted.” *Subject: National Mediation Board’s Policy on Use of Hyperlinks to Its Voting Website*, 37 NMB 65 (2009). The Board opened a comment period for concerned parties and devoted a considerable discussion to the security and safeguards that the Board required before approving internet voting. *See Internet Voting Comment Period*, 34 NMB 200, 202-4 (2007). In its discussion at the time, the Board noted that the same vendor was used for both TEV voting and Internet voting, *Re: Introduction of Internet Voting / Mock Election*, 34 NMB 71 (2007), and that “[t]here has never been a single, substantiated challenge to any TEV-based election conducted by the Board.” 34 NMB 200, 202.

IAM’s entire argument on this issue is premised upon nothing more than a claimed “risk” of monitoring or surveillance. Like nearly all employers, Delta reserves the right to monitor or investigate possible misuse of its systems or equipment. That fact is unremarkable and proves

¹³ This fact alone makes IAM’s position here untenable. It would be exceptionally unfair to Delta’s employees for the Board to apply its rules inconsistently among carriers — but even more so for different elections at the same carrier, in connection with the same merger.

nothing.¹⁴ (It would be surprising if IAM also did not reserve such a right on its computers.) Nonetheless, IAM argues, without any supporting evidence, that the Board should (1) establish a new policy that voting cannot be done on company computers (but presumably could be done on computers provided by a union or union supporters, which carry exactly the same risk of monitoring), and (2) apply that policy retroactively to overturn the Delta fleet service employees' election.. IAM Brief at 41.

IAM's argument proceeds from the proposition that when a union loses a vote it felt it would win, there must have been something wrong with the Board's voting process. IAM argues that because most computers might retain data which, if monitored, could reveal what websites the computer has visited, the Board must find that a company engages in improper conduct whenever it fails to preclude employees from using company computers for voting purposes.¹⁵ Such a rule, of course, would make voting less convenient for employees by depriving them of one option to vote at work if that is their preference, an option that is readily at hand to most employees in the modern day work environment. Such a rule would also place the employer in the virtually impossible position of policing the use of company computers in advance, *i.e.*, attempting to prohibit employee use of company computers for voting while permitting their use

¹⁴ Virtually all computers, including those provided by IAM or IAM supporters, are likely to retain some form of electronic record of websites visited. DX 77 (Third J. Fredericks Dec.) ¶ 5. That fact alone means nothing, absent evidence that such raw data was in fact accessed and monitored so as to interfere with a fair election. If the mere "risk" of monitoring is to be the basis for Board action, then any rules developed on that issue must be equally applicable to computers, telephones, and other devices provided by a union or union supporters, who are equally able to monitor in the same way. *Id.*

¹⁵ IAM egregiously overreaches in its attempt to bring this case within the ambit of NMB precedent which properly condemns actual ballot collection. Ballot collection is on its face a direct intervention in an election. Allowing an employee to choose the option to use a company telephone or computer is not intervention at all.

for a wide range of other activities.¹⁶ And as noted, perhaps most important, such a rule would be an implicit admission that the Board's electronic voting process is inherently flawed – an implication that would call into question the validity of both past and future elections, but which is not supported by any evidence.

B. Delta Did Not Interfere with Employee Choice by Holding Voluntary Employee Meetings.

IAM complains about voluntary meetings held by Delta leaders in order to answer questions and provide information to employees about union issues. As set forth in the Declaration of Gil West, DX 1 at ¶ 14, and the Declaration of Allison Ausband, DX 7 at ¶ 7, Delta's leaders in ACS, Cargo and Reservations conducted voluntary briefings to answer questions and provide information to employees about union issues. Those meetings frequently followed briefings or team meetings where employees coming on duty are briefed about operational issues. All of the leaders, however, were trained and given scripts to follow to make clear that the voluntary briefings were in fact voluntary, and to allow time for those employees who did not want to participate to leave the area — and many did so. *Id.*

IAM offers no evidence at all that these meetings were anything other than voluntary. IAM's own declarants acknowledge that Delta's leaders made clear statements indicating when an operational briefing was concluded and a voluntary meeting was about to begin. For example, the declarant of IAM Exhibit 116 alleges “after our team meetings, Danielle McCarter states, I have a quick briefing to do and you all can stay if you like or you can leave.” IAM Ex. 116.

¹⁶ Such a task would be extremely difficult with a network the size and scope of Delta's, with a worldwide network of more than 45,000 computers and more than 90,000 telephones. DX 4 (J. Fredericks Dec.) ¶ 2.

The NMB has long held that it “does not consider meetings with employees to be improper unless the meetings are mandatory *and* coercive.” *Continental Airlines*, 27 NMB 463, 476 (2000) (emphasis added) (citing *Virgin Atlantic Airways*, 24 NMB 575 (1997); *Washington Central R.R. Co.*, 20 NMB 191 (1993)).¹⁷ In *America West*, 30 NMB 310 (2003), the carrier discussed the union organizing campaign in voluntary portions of regular team meetings and in specially-scheduled “State of the Airline” meetings. *Id.* at 326-27. The special meetings were voluntary and the carrier officials who conducted these meetings “were instructed not to threaten, interrogate, make promises to, or spy on employees with regard to the union campaign.” *Id.* at 328. The Board found no interference, explaining that the facts presented “fall far short of the level needed to support a charge of carrier interference. The record demonstrates that the ...meetings were voluntary and that many employees did not attend those meetings.” *Id.* at 342.

Here too, the meetings were expressly made voluntary, many employees did not attend (and suffered no adverse consequences), and the scripted content of the messages was non-coercive and informational. There was no intrusion into laboratory conditions.

C. Delta Did Not Misrepresent Board Rules or Procedures.

IAM complains that Delta misrepresented NMB rules and/or procedures for the voting process. IAM Brief at 31-36. The Board has repeatedly confirmed that accurate descriptions of the Board’s processes, such as how to vote “no,” do not constitute interference with laboratory conditions. *Delta Air Lines, Inc.*, 30 NMB 102, 131 (2002), citing *Express I Airlines*, 28 NMB 431, 454 (2001); see also *Delta Air Lines, Inc.*, 35 NMB 271, 290 (2008) (“longstanding Board precedent establishes that accurately indicating how an employee can vote ‘no’ to a union does

¹⁷ In *Stillwater Central Railroad*, 33 NMB 100, 138 (2006), the Board found interference in part because, during mandatory meetings, the carrier “repeatedly interrogated and polled employees on their view of the union.”

not taint laboratory conditions”); *Delta Air Lines, Inc.*, 27 NMB 484, 499-500 (2000) (videotapes sent to employees advised them the best way to vote no (under the prior rules) was to ‘rip up’ the ballot); *American Airlines, Inc.*, 26 NMB 412, 421 (1999) (newsletter stated “the best way to avoid a union is to tear up a ballot”). The need for voter education about the process was exceptional in this case because of the new voting procedures, and because of the size of the electorate.¹⁸ We address each of IAM’s allegations below.

1. Delta Accurately Told Employees that They “Must Vote to Be Counted.”

IAM repeatedly quotes *in part* from Delta’s voter education message that an employee “must vote in order for your view to be counted.” IAM argues, without factual support or citation to *any* record evidence, that “[b]y placing the words ‘MUST VOTE’ in capital letters and bold typeface employees were given the distinct impression that they were required to vote.” IAM Brief at 3. IAM goes further and claims specific causation — insisting that Delta’s “‘must vote’ [message] had a clear and unmistakable impermissible impact on the election.” IAM Brief at 4.

This remarkable assertion *also* comes without any citation to the record or *any* evidentiary support. It is rhetoric and nothing more. Stretching its credibility past the breaking point, IAM argues that otherwise permissible statements were improper because one IAM Declarant supposedly perceived that the statements were made in a “militaristic” tone of voice and were therefore intimidating. *See* IAM Brief at 4.

¹⁸ When the IAM had filed its initial application for Delta’s Fleet Service group approximately one year earlier, Delta had begun communications describing the way to vote “no” under the old Board rules. DX 1 (G. West Dec.) ¶ 12. As recently as one month prior to the start of the voting, only the old voting rules and procedures were posted on the NMB website. This caused some employees to question whether the new or old voting rules would apply to the Delta elections. These facts made voter education efforts more difficult, and more important. *Id.*

The *actual* evidence belies IAM’s grossly exaggerated claims. Try as it might, IAM cannot twist this message of encouragement into a command.¹⁹ The message, “you must vote in order for your view to be counted,” was fundamental to making employees aware of the key difference between the old NMB voting rules and the newly changed voting rules. This message explained to employees that the NMB rules had changed, and that under the new rules only actual votes would be counted.²⁰

Voter education was especially necessary and appropriate in this case. The new voting procedures are a marked change from the Board’s 75-year practice. In prior elections, employees were advised that there was no place to vote “no” on the ballot and, therefore, the way to vote “no” was simply not to vote — and the NMB expressly approved of those statements. *Delta Air Lines, Inc.*, 35 NMB 271, 289 (2008); *Delta Air Lines, Inc.*, 30 NMB 102, 131 (2002). Because Delta has more than 15,000 passenger service employees in airport and reservations centers across the United States, DX 5 (M. Carson Vaughn Dec.) ¶ 3, it was both appropriate and necessary to make this large and widespread workforce aware of the changes to the Board’s voting procedures.

Unfortunately, Delta carried that burden alone. While the NMB promulgated new voting instructions, the Board did not have the resources to engage in voter education efforts, leaving

¹⁹ Of the millions of words used by Delta and IAM in this campaign, IAM attempts to expand one snippet of a statement by Delta CEO, Richard Anderson, beyond recognition. IAM Brief at 3. In full context, that statement was “You’ve heard me say this before — this is an incredibly important decision. Every single person at Delta needs to cast a vote — I can’t say that often enough. Regardless of what your point-of-view is, everybody has to cast a vote.... So, I can’t emphasize enough how important it is for people in all the workgroups to vote. Have your voice heard. Those of you that have voted, make sure your colleagues you work with vote.” IAM Fleet Ex. 3. In context, these are clearly words of encouragement, not words of command.

²⁰ Significantly, most of Delta’s statements encouraging employees to vote, *i.e.*, to participate, did not themselves urge *how* the employee should vote. *See, e.g.*, DX 301/196.

that to the participants — as had been suggested by union representatives during the rulemaking. Nor did IAM even once advise employees that the way to vote “no” had changed. Delta’s voter education efforts not only were appropriate, they were essential to effectuate the employees’ right under the Railway Labor Act to understand how to participate in determining who, if anyone, would be the representative of the craft or class.²¹

2. Delta Did Not Misrepresent the Process or Consequences of a Write-In Vote or a Run-Off Election.

Delta truthfully told its employees that write-in votes could affect the outcome of the election, and could help IAM win the election. This statement is both objectively true and constitutionally protected. Indeed, Board member Dougherty said virtually the same thing in her published dissent to the Board’s adoption of the new voting rules: “Assuming some voters will use the write-in option, its inclusion could affect the outcomes of elections under the revised rule.” 75 Fed. Reg. 26,062, 26,088 (May 11, 2010) (dissent of Chairman Dougherty).

²¹ It is, of course, well-settled that employee rights under Section 2, Fourth of the RLA include the right to reject union representation. *Bhd. of Ry. & S.S. Clerks v. Ass’n for Benefit of Non-Contract Employees*, 380 U.S. 650, 669 n.5 (1965) (RLA commands that “employees are to have the option of rejecting collective representation.”); *Russell v. NMB*, 714 F.2d 1332, 1343 (5th Cir. 1983) (under the RLA, “employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well.”). It is likewise well-settled that public policy in the United States strongly favors encouragement of voter participation in elections, as reflected in the National Voter Registration Act of 1993 (the “Motor Voter Act”), in which Congress stated: “the right of citizens of the United States to vote is a fundamental right” and “it is the duty of the Federal, State, and local governments to promote the exercise of that right.” (Pub. L. 103-31, Sec. 2, May 20, 1993, 107 Stat. 77.) *See also* the Help America Vote Act of 2002 (Pub. L. 107-252, October 29, 2002, 116 Stat. 1666); the Voting Rights Act Reauthorization and Amendments Act of 2006 (Pub. L. 109-246, July 27, 2006, 120 Stat. 577); and the Uniformed and Overseas Citizens Absentee Voting Act (Pub. L. 99-410, August 28, 1986, 100 Stat. 924-930); and the Military and Overseas Voter Empowerment Act of 2009 (Pub. L. 111-184, October 28, 2009, 123 Stat. 2190). State public policies also encourage voter participation, as reflected in state laws in 30 states requiring time-off from work for voting in governmental elections, 23 of which require *paid* time off from work for such voting.

IAM, of course, made no efforts at all to explain to Delta employees that write-in votes could ultimately help IAM to prevail. IAM's motives on this point are transparent: a voter writing-in an organization or individual other than IAM was obviously not an IAM supporter, and might not realize that a write-in vote could benefit IAM. The Board should not favor union attempts to be coy about the consequences of write-in votes.

Surely it cannot be improper for a carrier truthfully to educate employees to potentially misunderstood features of the Board's practice as to the impact of write-in votes. Without Delta's accurate communications about the write-in process, most employees would have had no way to know that a write-in vote could assist in the election of another candidate.²² Given these facts, it defies credulity to suggest that Delta's statements to the effect that, "[c]asting a write-in vote could help the IAM win," is a misrepresentation of the Board's voting rules. Delta truthfully and accurately told its employees that most write-in votes are likely to be counted as votes for representation that could help IAM win the election, both by reducing the number of "no" votes and because, under the Board's rules, "no representative" could not be an alternative in a run-off election.

²² In a political election, if there is to be a run-off, the standard practice and expectation in U.S. elections is that the run-off will be between the two choices that received the highest number of votes. Under the NMB's voting rules, however, "no representative" would not be a choice in a run-off election even though "no representative" received more votes than any of the write-in candidates, but came up short of a majority. (*See* Member Dougherty's Dissent to the Board majority's adoption of the rule change, 75 Fed. Reg. 26,062, 26,087-88 (May 11, 2010) (dissent of Chairman Dougherty) which was not disputed by the majority on that point.) Under these circumstances, few people would reasonably dispute that the IAM would be the likely winner. *See also* 75 Fed. Reg. 26,062, 26,082 n.34 (explaining that all write-in votes are counted as votes for representation under the new voting rules, despite addition of "no" option).

3. Delta Did Not Misrepresent the Board's Decertification Process.

IAM complains that Delta misrepresented the process of decertification under the Board's rules. IAM Brief at 32-33. As with the other claims of misrepresentation, IAM's claims regarding decertification are baseless. Indeed, there is a Board decision almost precisely on point. In *American Airlines, Inc.*, 26 NMB 412, 448 (1999), the Board rejected allegations of interference very similar to IAM's allegations here. In particular, the Board described the carrier's conduct as follows:

the carrier had told its employees that "the decision you have before you . . . is one we all will have to live with for a long time. Deciding on union representation is very much like deciding whether to marry . . . a union can be very difficult to divorce. [the airline's executive] also informed employees that "no unionized large group at a major airline has ever successfully voted to become non-union again."

26 NMB at 419. The Board proceeded to find that "[c]ontrary to CWA's assertion, the information American provided regarding the Board's procedures was accurate. The Carrier did not misrepresent the Board's voting procedures or how to vote against the union." 26 NMB at 448.

In her dissent to the Board Majority's decision adopting the rule change on May 10, 2010, at pages 94-98, Member Dougherty made substantially the same points as Delta has made regarding the Board's current decertification procedures. Member Dougherty said, among other things:

The most confusing and obfuscatory practice in all of the Board's representation procedures is the Board's convoluted decertification process. This process, not the current voting rule, is clearly the biggest obstacle to employee expression of choice under the RLA [A]dding the "no union" option to the ballot without removing the straw man requirement will only make the procedure more confusing. Employees will be faced with a ballot that has

both the name of the straw man and the “no union” option. Some employees desiring “no union” will think they should vote for the straw man – since that is the name for whom they signed an authorization card – and some will vote for “no union.” Yet these vote counts will not be consolidated in favor of decertification – to the contrary, the union will be decertified only if one of these options receives a majority of the votes cast – an outcome made *less* likely by the Majority’s new rule.

Delta’s communications accurately explained the straw man process for decertification, as described by the Fifth Circuit in *Russell v. NMB*, 714 F.2d 1332, 1337 n.3 (5th Cir. 1983), and as described by Member Dougherty in her dissent. Although the Board Majority declined to address the decertification process in connection with the rule change, in Member Dougherty’s words, it “strains credulity” to suggest that what the Fifth Circuit, Member Dougherty and Delta have said in describing the Board’s decertification process misrepresents the Board’s procedures.

Delta’s communications also accurately reported to its employees that Delta is not aware of any reported case of such an approach ever being successfully invoked in a large, widespread group involving thousands of employees. Indeed, Delta’s research has found only eight reported instances of successful decertification in the airline industry, and none involved a unit larger than 145 employees.²³

Delta’s related statements were also correct. Under the straw man process, the NMB does *not* accept authorization cards that directly seek an election to obtain non-union status. Rather, the Board’s Representation Manual expressly requires authorization cards (Secs. 1.02 and 3.0) and defines the participants in a representation dispute to include “any labor

²³ *Jet Linx Aviation Corp.*, 33 NMB 83 (2006) (28 eligible voters); *Air Logistics of Alaska*, 30 NMB 245 (2003) (23 eligible voters); *Delta Air Lines, Inc.*, 29 NMB 408 (2002) (145 eligible voters); *Iberia International Airlines of Spain*, 18 NMB 83 (1990) (30 eligible voters); *Swissair*, 16 NMB 150 (1989) (12 eligible voters); *Jet America Airlines*, 12 NMB 185 (1985) (5 eligible stock clerks and 37 eligible mechanics); and *Jet America Airlines*, 13 NMB 57 (1985) (29 eligible voters).

organization(s) or individual(s) seeking to represent a carrier’s employees” That is the derivation of the “straw man” approach described by the Fifth Circuit in *Russell*, i.e., an individual must become an “applicant” who is “seeking to represent a carrier’s employees. . .” even though the individual’s true intention is to disclaim that status after he or she is elected. The *Russell* case directed the Board to process an application from an individual who nominally sought to represent the employees — but only for purposes of securing an election. 714 F.2d at 1347. Nonetheless, pursuant to the Court’s order, the Board treated Mr. Russell as an applicant seeking to represent the carrier’s employees, and permitted him to disclaim after certification. At no point did the Board indicate that it would entertain any application to decertify an incumbent representative.²⁴

D. Delta Did Not Deny Pay Increases, or Promise Pay Increases, to Influence Votes.

IAM argues that Delta’s failure to extend its 2010 pay increases to pre-merger Northwest fleet service employees “[c]learly [sent] the message . . . that if the employees vote against the union, they will get a large pay increase.” IAM Brief at 28-31. Delta’s actions, however, were not based upon union status, but upon the existence of a pre-merger IAM *contract*, and Delta’s commitment to continue to apply the pay, benefits and work rules specified by that contract agreement as the status quo pending resolution of representation issues. *See Association of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432, 1439-40 (D.C. Cir. 1994) (“Absent agreement to the contrary, the employees in an ‘absorbed’ unit start out with the rates of pay,

²⁴ Indeed, in *Chamber of Commerce*, 14 NMB 347, 357-58 (1987), the Board interpreted *Russell* narrowly, stating that the Fifth Circuit “stopped short of finding that the Board can entertain decertification petitions absent specific Congressional amendment of the Act” and said that *Russell* merely means that “the Board must process all applications for its representation services equally, without examination of the motivation behind the applications. In fact, the NMB argued successfully before the Court that decertification was not the issue before it.”

rules, and working conditions existing under the contract in effect before the change in representative. The carrier may not unilaterally modify these terms except pursuant to bargaining and after exhausting the procedures”).²⁵ That payment went *only* to PMNW employees who had been represented by IAM — and these facts completely undermine IAM’s argument. IAM is also flatly wrong when it asserts (IAM Brief at 30) that in the present case, Delta did not communicate to its non-contract employees that the 2010 pay increase would become effective “**regardless of the outcome of the election.**” (emphasis by IAM). In fact, Delta conveyed exactly that message, repeatedly, in Company communications. DX 3 (R. Kight Dec.) ¶ 10; DX 301/334.

In effect, IAM argues that this Board should hold that following Delta’s acquisition of Northwest, Delta had no choice but to grant the former Northwest employees the best of both worlds: to continue to honor their IAM contract where that was more beneficial, but also to extend to its members any improvements that Delta had previously planned for the pre-merger Delta employees. Any other course of action by the surviving carrier following a merger, IAM argues, is discrimination and interferes with a free and fair representation election.²⁶ IAM, however, fails to cite a single case to support this proposition, and the *US Airways* case holds exactly the opposite.²⁷ IAM also fails to explain how it would be determined which portions of

²⁵ Delta’s consistent and unambiguous commitments — to honor existing PMNW collective bargaining agreements and to align pay and benefits and work rules as a package for all work groups — are discussed in great detail in the accompanying Declaration of Gil West, DX 1, at ¶ 5, and will not be recounted in such detail in this brief.

²⁶ We doubt, of course, that IAM would be making this argument if its contract had been uniformly more beneficial to the fleet service employees.

²⁷ Delta’s research has revealed no case in which the NMB has *ever* found that failure to give an extra-contractual wage increase (or other improvement) to union-represented employees constitutes election interference. The implications of IAM’s argument are breathtaking: IAM

(continued...)

the pre-merger Delta package and which portions of the pre-merger Northwest package would be required to be provided to IAM-represented employees who were covered by an existing contract.

In *Delta Air Lines, Inc.*, 37 NMB 281, 306-09 (2010), IAM made arguments parallel to those it makes here in challenging Delta's general pay increases for non-contract employees effective October 1, 2010. IAM argued there that it was discriminatory to provide pay increases to non-contract employees while holding union-represented employees to their contractual pay rates and increases. IAM argued that Delta was using the pay increases as a "carrot" to influence the election. *See* 37 NMB at 290.

The Board rejected those arguments as to Delta's Simulator Technicians, and the Board's rationale applies equally here. The Board unanimously rejected the same claims that IAM makes now, finding no problem with granting the pay increase to non-contract employees,²⁸ expressly finding that "Delta provided ample evidence that it had consistently communicated to its

(...continued)

would require an incredibly unique form of "equal treatment" with its members receiving extra-contractual improvements given to its non-union counterparts at Delta, without regard to any other factors, such as offsetting variations in benefits or work rules.

²⁸ By a 2-1 vote, the Board found that the *timing* of the announcement, which in that case was made on the first day of the voting period, tainted laboratory conditions. *Id.* at 309. The timing of the announcement is not an issue in the flight attendant election, of course, because (1) Delta's February 4, 2010, announcement was many months prior to the date when IAM filed its renewed representation application in this case; and (2) it was IAM, not Delta, who controlled the timing of their application; and (3) Delta had no way of knowing when IAM would finally file its application for investigation of a representation dispute, especially since IAM had already waited more than 18 months after Delta's acquisition of Northwest. The other cases cited by IAM all involved pay or benefit changes that had not been contemplated until after laboratory conditions attached. Moreover, in each, the carrier had violated laboratory conditions in multiple respects, suggesting an improper motive that does not exist here. *See, e.g., Mercy Air Serv.*, 29 NMB 55 (2001); *Stillwell Central R.R.*, 33 NMB 100 (2006); *compare Delta Air Lines*, 27 NMB 484 (2000) (pre-planned changes; no violation of laboratory conditions).

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 308.²⁹ The Board also indicated that if Delta had waited until March or April, 2010 to announce the increase, instead of February during the election period, the pay increase would not have violated laboratory conditions. These conclusions apply equally other employees and dispose of IAM’s “carrot” argument.³⁰

What IAM fails to mention — but cannot dispute — is that pre-merger Northwest employees in other workgroups — whether union or non-union — received the benefit of Delta’s pay structure only when representation was finally resolved and the rest of their package was also aligned.³¹ This meant that pre-merger Northwest pilots and dispatchers did not receive stand-alone pay increases in the absence of alignment of their complete package of wages, benefits and work rules. There is nothing at all in Delta’s statements that conditions or ties Delta’s alignment of pay, benefits and work rules to fleet service employees to non-union status, as distinguished from merely having the ability to align the complete package in the same way as other groups, including the pilots and dispatchers. Either result led to harmonization of pay,

²⁹ Delta provides the same evidence here. DX 1 (G. West Dec.) ¶ 5.

³⁰ Delta was in a “damned if you do, damned if you don’t” position. If Delta had excluded the pre-merger Delta passenger service employees from the across the board general increase announcement for all other noncontract employees, the IAM would surely have argued that the denial of the pay increase constituted election interference. *See Washington Central R.R.*, 20 NMB 191, 203 (1993) (failure to make periodic adjustments on the grounds that a union campaign is underway and the carrier must maintain laboratory conditions can be violation); *US Airways*, 24 NMB 354 (1997). In this no-win scenario, Delta properly decided to honor its commitment, to treat its pre-merger Delta employees fairly, and thus to include them in the pay increase provided to all other noncontract employees.

³¹ Delta brought pre-merger Northwest pilots into alignment with the pre-merger Delta rates of pay, but only in return for giving up other features in their pre-merger contract so that the package remained cost competitive. Similarly, pre-merger Northwest dispatchers were brought into alignment with the pre-merger Delta rates of pay in return for trade-offs so that the package remained cost competitive. Neither of those groups received a pay increase as a standalone benefit.

benefits and work rules for those groups, whether union or non-union. But that did not mean cherry-picking only the best features from each pre-merger package. Rather, it involved trade-offs to assure the resulting package remained at a competitive cost.³²

1. Previously Planned General Wage Increases Do Not Constitute Election Interference.

Both Delta's commitment, and the actual announcement, to bring its U.S.-based, frontline, non-contract employees to industry standard wage rates by the end of 2010 were made long before laboratory conditions attached in this case. As the Board noted in its decision relating to Delta's Simulator Technicians, the NMB has repeatedly held that general wage increases and other changes in pay and benefits that were previously planned do not constitute election interference. *Delta Air Lines, Inc.*, 37 NMB 281, 306-09 (2010); *see also Petroleum Helicopters, Inc.*, 26 NMB 13, 38 (1998) (“[C]oincidental timing of a previously planned change in compensation is not, by itself, sufficient grounds for finding interference”).³³

³² IAM cites *Laker Airways*, 8 NMB 236 (1981), for the proposition that the promise of future benefits as a “carrot” to influence voting is improper. Here, however, Delta made no such promise. The PMNW passenger service employees were promised nothing if they voted against representation. Instead, in response to their questions, Delta told them that it could *not* make any promises but that they could look at how Delta had treated other employee groups in similar circumstances post-merger. DX 4 (R. Kight Dec.) ¶ 13. The First Amendment entitles Delta at a *minimum* to make “objective, nonmisleading predictions of the likely effects of union representation,” *US Airways, Inc. v. NMB*, 177 F.3d 985, 990 (D.C. Cir. 1999) (citations omitted). Here, Delta did not make any predictions, it merely pointed to existing facts that are matters of public record. The other cases cited by IAM are equally distinguishable. In *Atlas Air, Inc. v. ALPA*, 232 F.3d 218, 221 (D.C. Cir. 2000), the carrier made a series of direct, explicit threats during election period to disqualify pilots from profit-sharing plan if they voted in a union. In *Melville Confections, Inc. v. NLRB*, 327 F.2d 689, 691 (7th Cir. 1964), the employer publicized a restriction against union member participation in a profit-sharing plan. In *Key Airlines*, 16 NMB 296, 309-10 (1989), the carrier gave unscheduled pay increases to pilots and flight engineers, but not to fleet service employees who were in the midst of a representation election.

³³ *See also Union Pacific R.R.*, 34 NMB 21, 47 (2006) (“Changes in pay that were planned before the laboratory conditions attached, or where there is ‘clear and convincing evidence of a

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The NMB has also found, in two prior *Delta* cases, that earlier Delta pay increases and changes to benefits that were previously planned and made for legitimate business reasons did not constitute election interference even when announced during an election period. See *Delta Air Lines, Inc.*, 27 NMB 484 (2000), and *Delta Airlines, Inc.*, 35 NMB 271 (2008). In the latter case, finding no interference, the Board stated:

After careful review of the evidence, the Board finds that the pay increase was pre-planned, was for legitimate business reasons, and was not intended to influence employee choice. . . . [I]n this case, the July 1, 2008 raise was announced before IAM filed its application with the Board (although the amount of the raise was not announced until after the election was announced), and the raise had been planned in 2007, as part of Delta's emergence from bankruptcy. . . . See also *Continental Airlines*, 27 NMB 463, 477-76 (2000); *American Airlines*, 26 NMB 412, 455 (1999); *USAir*, 17 NMB 377, 426 (1990) (all cases where the Board found no interference because the carrier submitted evidence that pay raises instituted during the election period were pre-planned). The Board also notes the fact that the pay increase was instituted across the board, not just to fleet service employees, and this is further evidence that the pay increase was not instituted to influence employee choice.

(...continued)

compelling business justification,' do not taint laboratory conditions.”) (citing *Frontier Airlines*, 32 NMB 57 (2004) and *Delta Air Lines*, 30 NMB 102 (2002)); *American Airlines, Inc.*, 26 NMB 412, 454, *recons. denied*, 27 NMB 120 (1999) (a pay increase while an election is pending is not interference “when these actions were pre-planned, or if there is ‘clear and convincing evidence of a compelling business justification.’”) (citation omitted); *US Air*, 17 NMB 377, 425-26 (1990) (finding no interference based upon wage increase because the carrier had “established a historical pattern of granting wage increases . . . every July 1”); *America West Airlines, Inc.*, 17 NMB 79, 97 (1990) (no interference when airline implemented a 401(k) plan that had previously been under development); *Federal Express Corp.*, 20 NMB 7, 56 (1992) (improved jump-seat benefit not interference because agreement with another carrier “was the result of several months of negotiations [that predated the union campaign], and the announcement of the agreement [shortly after the ballots were mailed] was made in the regular course of business.”); *Continental Airlines/Continental Express*, 21 NMB 229, 254-55 (1994) (no interference despite the carrier's implementation of substantial wage and benefit increases).

Delta Air Lines, Inc., 35 NMB at 299. Because the 2010 increase fulfilled a long-term commitment to raise frontline, noncontract employee pay to industry standards by 2010, IAM's allegations fail to make even a *prima facie* case of interference necessary to invoke a Board investigation.

E. Delta Did Not Interfere with Employee Freedom of Choice.

IAM labels as interference with laboratory conditions many of Delta's day-to-day post-merger operational decisions, such as changing payroll periods, hiring new employees, or making changes to Delta's Ready Reserve program. Yet such changes are obviously ongoing at any carrier, and especially so following a merger. The Board should be especially cautious, therefore, in examining whether the proponent has offered any evidence at all that such decisions are somehow related to the union election campaign. IAM's allegations here do not withstand such scrutiny, because IAM offers no evidence that any of the actions they cite was connected in any way to the election.

1. The Volume of Campaign Materials Cannot Constitute Interference.

As discussed in Section II above, the total number of IAM campaign communications was more than double the total number of Delta communications, despite the fact that IAM devoted *no* communications at all to voter education about the new voting procedures. The relative volume of communications thus contradicts IAM's argument that Delta somehow "overwhelmed" its fleet service employees with communications. In fact, as demonstrated above, Delta's communications were necessary to respond to vicious, unrelenting attacks and misinformation produced by IAM.

Even if the number of Delta communications had approached or matched (or even exceeded) those of IAM, the volume of communications cannot be the basis for circumscribing

freedom of speech. A carrier has a First Amendment right to communicate to employees its views about a union representation campaign. *US Airways v. NMB*, 177 F.3d. 985 (D.C. Cir. 1999); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-19 (1969). Nonetheless, according to IAM, the Board can premise a re-run election solely on the asserted fact that Delta *spoke too much*, even if what Delta said was entirely lawful (*i.e.*, was not coercive, threatening or intimidating) if it allegedly “drowned out” IAM’s speech. To IAM, “too much” otherwise permissible speech can constitute *independent* grounds for a re-run election.

That is not — indeed, could not be — the law. An employer has a First Amendment right to communicate with employees about union issues, and to explain its views to its employees so long as it does so without threats or coercion. *See US Airways*, 177 F.3d. at 993 (“*Gissel* teaches that ‘an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’”) (citing *Gissel Packing Co.*, 395 U.S. at 618); *see also US Airways*, 26 NMB 323, 329 n.9 (1999) (acknowledging “the Carrier’s ability to communicate its constitutionally protected views on unionization to its employees.”); *accord Delta Air Lines*, 30 NMB 102, 126 (2002).

More particularly, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The notion that the RLA might restrict the *volume* of otherwise-permissible employer speech is offensive to the very purpose of the First Amendment and would fall easily under strict scrutiny analysis. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994) (speech restrictions that turn on the identity of the speaker “demand strict scrutiny” because “they reflect the Government’s preference for the

substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say”).

But even if the Board were otherwise willing to adopt a constitutionally infirm construction of the RLA that would condemn employer speech merely because it is alleged to have “drowned out” opposing union speech, such a rule could not be applied in *this* case given the facts.³⁴ IAM’s own campaign was of unprecedented dimensions, with the number of IAM communications by any objective measure far exceeding Delta’s communications in the same time period. DXs 300, 301; 5 (M. Carson Vaughn Dec.) ¶ 8. IAM not only somehow gained access to home addresses, telephone numbers and personal email addresses for a large number of the eligible voters, it also had access to Delta facilities, aggressively confronted employees in parking lots, and pursued voters both at work and at home. DX 5 (M. Carson Vaughn Dec.) ¶ 20(D); DX 8(A. Schwarber Dec.) ¶¶ 4, 6-9, 12. Thus, this is not a case in which a small group of overmatched employees struggled to be heard over the din of an overwhelmingly more pervasive employer campaign; this election matched Delta and one of the largest unions in the airline industry, one that itself claims to represent more than 730,000 employees. Even with unfamiliar voting rules, there was more than 80% voter participation, with the vast majority clearly expressing their choice to reject IAM representation. Try as they might, IAM cannot lay its failure in this election on Delta.

³⁴ The Board need not (and in fact cannot) enter into that constitutional thicket. Even courts “are obligated to construe statute[s] to avoid [constitutional] problems” if it is “fairly possible” to do so. Thus, “[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237-38 (1998) (citation omitted); *see also Miller v. French*, 530 U.S. 327 (2000) (constitutionally doubtful constructions should be avoided where “fairly possible”); *Ashwander v. TVA*, 297 U.S. 288, 348, (1936) (same) (Brandeis, J., concurring).

2. Delta Enforced Its Advocacy Policy in an Evenhanded Manner.

Prior to Delta's acquisition of Northwest, the longstanding Northwest advocacy policy prohibited any union organizational activity on Company premises. That policy had been in place for many years and had been applied even-handedly during the election campaign run by IAM and the Aircraft Mechanics Fraternal Association in the early 1990's, in 1998, and again in 2002. DX 2 (R. Ohm Dec.) ¶ 3; DX 200.

Apart from Northwest policy, the IAM contract with Northwest contained provisions—obviously agreed to by IAM—which limited the subject matter of items which could be posted on union bulletin boards, and also limited access to Northwest facilities for IAM officials to purposes of contract enforcement and administration. DX 2 (R. Ohm Dec.) ¶¶ 4, 12; DX 111. Now, however, IAM complains about the enforcement of those very restrictions! *See* IAM Exs. 55, 115. In fact, subsequent to the acquisition, Delta has progressively *increased* opportunities for advocacy among Delta's employees. Following its acquisition of Northwest, but prior to receipt of a single operating certificate, Delta (acting with Northwest) reached agreement with IAM to (1) permit union campaign materials on union bulletin boards, despite contractual prohibitions;³⁵ and (2) permit union officials increased use of union business leave for any purpose³⁶—which IAM obviously used (with pass privileges) to participate in IAM's campaign activities. Following receipt of the single operating certificate, Delta changed the more restrictive advocacy policy that had long been in place at Northwest, adopting Delta's longstanding — and more liberal — Advocacy Policy. DX 2 (R. Ohm Dec.) ¶¶ 4-5. Delta's policy permitted employees who work at a location to engage in advocacy on union

³⁵ DX 2 (Ohm Dec.) ¶ 4.

³⁶ *Id.* ¶ 9.

representation issues on non-work time in non-work areas, such as break rooms. In fact, when an employee in support of the union asked about setting up an “Ask Me” table, Delta management informed her that if she “wanted to set up a table in a common non-work area during her non-working time, she was welcome to do so.” DX 33 (B. Johnson Dec.) ¶ 6. Delta leaders testify that pro-union employees regularly engaged in advocacy on non-work time in non-work areas—as did some employees opposed to union representation. DX 1 (G. West Dec.) ¶ 21 DX 8 (A. Schwarber Dec.) ¶ 12. Delta instructed its local leaders to enforce Delta’s Advocacy Policy in an evenhanded manner, and discussed that enforcement in conference calls for leaders. DX 6 (Bowman Dec.) ¶ 5. Thereafter, Delta permitted visits to Delta premises by IAM’s national officers³⁷, and by representatives of IAM’s National Pension Plan, who had no even arguable right of access to Delta’s premises. DX 2 (R. Ohm Dec.) ¶ 13; DX 5 (M. Carson Vaughn Dec.), ¶ 24(A). While Delta extended such courtesies, IAM organizers elsewhere purposefully tested Delta’s Advocacy Policy by gaining unauthorized access to two Reservations centers and then refusing to leave unless law enforcement authorities were called. DX 2 (R. Ohm Dec.) ¶¶ 13-14. IAM representatives challenged Delta leaders repeatedly about enforcement of plainly valid limits on uninvited access to Delta’s premises by individuals who did not work at those facilities (who, therefore, did not have badges that authorized access). DX 2 (R. Ohm Dec.) ¶ 13-15.

IAM complains about a few occasions on which union business leave was denied for operational reasons, but fails to mention that record amounts of union business leave were

³⁷ Delta had no obligation at all to permit IAM International President Buffenbarger, and IAM Transport Division President Robert Roach, to enter Delta’s premises, but Delta granted their requests to make those visits. DX 5 (M. Carson Vaughn Dec.) ¶ 24(A-C). Incredibly, Mr. Roach then failed to show up for a visit which had been scheduled and announced to employees. *Id.*

allowed. DX 2 (R. Ohm Dec.) ¶ 7.³⁸ Likewise, IAM complains that uniform requirements were enforced, but offers no evidence that Delta’s enforcement was systematically inconsistent or discriminatory in any way between pro-union and anti-union employees. Delta’s Declarants, in contrast, attest to their training and practice of even-handed enforcement of Delta Policy. See DX 6 (A. Bowman Dec.) ¶¶ 2, 5 (describing extensive compliance training for supervisors); DX 66 (L. Witherspoon Dec.) ¶ 3.

IAM’s argument appears to be premised on the belief that an employer interferes with employee free choice if the employer has and uses access to its employees that the union does not enjoy. That is simply not the law. “A carrier is permitted to have an access and solicitation policy reasonably restricting employees’ rights to solicit . . . on carrier property.” *Delta Air Lines*, 37 NMB 281, 310 (2010) (citing *Delta Air Lines, Inc.*, 30 NMB 102, 134-35 (2002) and *American Airlines*, 26 NMB 412 (1999)); see also *Delta Air Lines*, 35 NMB 260, 295 (2008) (same). Delta was thus entitled to communicate with its employees, on its property, and it is not obligated to provide anything like “equal” access to IAM’s organizers or officials. See *infra* at V.C.4; see also *American Airlines*, 26 NMB 412, 451-52 (1999) (no interference where, despite not having as much access to employees as the carrier, union had access and used it; “while the degree of access may have varied from station to station, [the union] was not denied access to any station on a system-wide basis.”); *USAir*, 18 NMB 290, 334 (1991) (“Denial of access to employee break rooms, standing alone, is not a sufficient basis for finding interference.”); *USAir*,

³⁸ The IAM’s complaints are so exaggerated as to destroy what little credibility they might otherwise have had. For example, the IAM complains that eight hours of Union business leave was denied at the SEA Res center on May 11, 2010, (IAM Ex. 74) but totally fails to mention that a total of 47 hours of such leave was requested for that day, and thirty-nine hours was *granted*, while the remainder was denied because of operational staffing needs. DX 8 (A. Schwarber Dec.) ¶ 10.

20 NMB 162 (1993) (no interference where carrier had access to home addresses of certain employees and used them for campaign purposes, and union did not). In this case, moreover, the record is “overwhelming” that IAM had more than ample access to campaign among Delta’s employees. IAM’s problem was not access, it was IAM!

3. Delta Did Not Discriminatorily Deny IAM the Ability to Post Materials on Their Bulletin Boards.

By August, 2009, IAM began to post election campaign bulletins and newsletters frequently on IAM bulletin boards on Company property.³⁹ The Company then reached an understanding with IAM, confirmed on August 19, 2009, in which the Company *agreed* to let IAM post campaign-related material and articles on Union bulletin boards so long as they were professional, non-inflammatory, and did not make personal attacks on Delta executives or other employees.

After the FAA issued the single operating certificate on December 31, 2009, Delta developed and published an advocacy policy for the merged airline which took effect in early February 2010. That policy was significantly more liberal than the PMNW advocacy policy. Under the new policy, active employees in the location at which they worked could, among other things, advocate and distribute materials supporting or opposing union representation in non-work and non-operations areas, such as lounges and break rooms, during non-working time provided that it was not unprofessional, offensive, or inflammatory. DX 200. In addition, buttons and other items including caps, shirts, jackets, or other clothing that expressed support for or opposition to the union were permitted to be worn or displayed in non-work and non-

³⁹ The CBA specifically provided for union bulletin boards at Company facilities, but the contract *expressly* limited postings to notices of recreational and social affairs, internal union elections and the results thereof, and union meetings and appointments. All other distributions and postings were expressly prohibited. DX 2 (R. Ohm Dec.)¶ 4; DX 111.

operational areas and on non-working time, provided that it was not unprofessional, offensive, or inflammatory. *Id.*

Thus, while the rules applicable to campaign activities varied between the two pre-merger carriers, that fact does not breach laboratory conditions. The Board has previously recognized that the rules applicable at various stations need not be identical so long as the union is not “denied access at any station or on a system-wide basis.” *American Airlines*, 26 NMB 412, 452 (1999) (no violation where “the degree of [union] access . . . varied from station to station”; “the precise rules governing access varied from station to station”; “while employees were prohibited from distributing literature in certain work areas at every location, they were permitted to do so in others.”). Here, where the restriction about which IAM now complains was a feature of its own pre-merger understanding with NWA, there is no basis to argue that the temporary; limited restrictions at issue constitute a violation.

4. Delta Did Not “Lie” to Employees About IAM’s Dues Increases.

During the campaign, Delta informed its employees that IAM had twice increased its dues for PMNW employees without giving prior notice to the affected employees. IAM now bristles at the assertion — claims that this is a “lie” — but Delta’s communication was truthful and IAM provides no evidence to substantiate its contrary assertion.⁴⁰

Indeed, the evidence IAM submits proves that Delta was correct. IAM argues that because dues increases are approved “through [member] delegates to the IAM Convention,” IAM Brief at 35, Northwest’s rank-and-file employees simply *had* to know what their delegates

⁴⁰ IAM’s complaint that a Delta flyer about job creation is equally baseless. IAM Brief at 35; IAM Ex. 186. IAM had clearly made job security, and the threat that Delta would eliminate jobs, a major theme of its campaign. Delta was clearly entitled to respond by pointing out that Delta was in fact adding jobs, not taking them away.

had done — that “constructive notice” suffices. But Delta was *correct* when it told its employees that the dues were raised “without any official notification *to its members*”; indeed, that is precisely what the allegedly offending exhibit IAM submits says. To show that Delta’s statement was a “lie,” IAM relies exclusively on two newsletters from Local Lodge 1833 in Minneapolis. These documents plainly did not provide “advance notice.” Local Lodge 1833’s January/February 2009 Newsletter (IAM Fleet Ex. 178) — which the union claims constituted *advance* notice of the 2009 rate increase — states that as “of January 2009, the new dues structure increase *has been* put into effect.” *Id.* at p. 3 (emphasis added). These are the key words: “has been,” as in past tense, and thus no *advance* notice.⁴¹ Similarly, the January/February 2010 edition, which looked *back* on the holiday season and the year just concluded (*id.* at p.1) provided *after-the-fact* notice of the dues that had *already* become effective on January 1.

More fundamentally, even if the members of Local Lodge 1833 in Minneapolis received notice in those newsletters, and even if the notice had been *in advance* of the dues taking effect, it would not have provided notice to the thousands of other IAM-represented employees at other locations who are not part of Local 1833 in Minneapolis. In sum, IAM offers no evidence to support its feigned “offense” at Delta’s statements.

⁴¹ In fact, the newsletter makes it clear that the Local Lodge had been counting on a special “dispensation” from the January, 2009/1/09 dues increase based on International assurances and only learned to its dismay that the request for dispensation had been denied when they got a letter dated December 2, 2009. There is no evidence of any communication on this topic to the Local Lodge’s members about this decision in December.

5. IAM's Claims of Surveillance Are Both Unfounded and Legally Insufficient.

IAM alleges that Delta supervisors were “conspicuously” present in Delta’s work facilities when IAM representatives were present. But Delta supervisors were also “conspicuously” present there long *before* the election period and, during the campaign, at times when IAM representatives were *not* present. That is their job. DX 1 (G. West Dec.) ¶ 7.

These are the facts: (1) IAM’s activists engaged in campaign activities in Delta facilities almost continuously throughout the election period;⁴² (2) Delta’s supervisors work, and have their offices in or near, those facilities; and (3) supervisors are responsible for being available to address questions and concerns raised by employees.⁴³ Delta’s supervisors are *routinely* in or near break rooms, participating during employee briefings, interacting with employees as part of their management duties, conducting Delta-sponsored events, or taking their own breaks. The presence of managers and supervisors in non-work areas does not even arguably amount to interference.⁴⁴

Nor are these allegations strengthened by IAM’s conclusory assertions that a supervisor might have stared at union organizers or at employees who were speaking with them. *See America West Airlines*, 30 NMB 310, 324 (2003) (supervisors’ “dirty looks” and “one-on-one encounters” insufficient to support finding of interference); *American Trans Air, Inc.*, 28 NMB

⁴² *See, e.g.*, DX 5 (M. Carson Vaughn Dec.) ¶¶ 5, 9-11, 14, 19.

⁴³ *See* DX 6 (A. Bowman Dec.) ¶¶ 4-5.

⁴⁴ “[W]here organizations [have] asserted that the laboratory conditions were tainted due to increased supervisory presence, the Board has found insufficient evidence of interference. In *Delta*, the Board stated ‘it is not unusual for carrier management to increase their presence in ... crew lounges during particular time periods to ensure compliance with carrier policies.’” *America West Airlines*, 30 NMB 310, 340 (2003), *quoting Delta Air Lines, Inc.*, 30 NMB 102, 117 (2002). *See also Aeromexico*, 28 NMB 309 (2001); *American Trans Air*, 28 NMB 163 (2000); *American Airlines*, 26 NMB 412 (1999).

163, 176, 180 (2000) (supervisor’s interaction with employees and IAM representative in smoking area does not support finding of interference); *Aeromexico*, 28 NMB 309, 335 (2001) (despite union allegation that managers heightened their presence in hallways and break rooms “the weight of relevant, material evidence does not support the conclusion that Aeromexico engaged in or even created an impression of engaging in [surveillance].”).⁴⁵ The presence of supervisors in or near employee areas is no evidence of surveillance or harassment.

6. IAM’s Allegations of Isolated One-On-One Conversations Do Not Invalidate an Election Among 15,000 Voters.

Individual incidents of claimed misconduct interfere with the requisite “laboratory conditions” only when they combine to reveal a calculated employer campaign to interfere with employee choice. *American Airlines, Inc.*, 26 NMB 412, 452 (1999); *Continental Airlines*, 21 NMB 229, 251 (1994). Thus, for allegations to support a finding of interference by the Board, there must have been a “systematic carrier effort” to undermine employee free choice. *Delta Air Lines, Inc.*, 30 NMB 102, 141 (2002); *Northwest Airlines, Inc.*, 19 NMB 94 (1991) (in the absence of a “pattern” of misconduct, finding no violation based on “isolated incidents”).⁴⁶

⁴⁵ *Accord Monfort, Inc. v. NLRB*, 1994 WL 121150 (magistrate’s findings), *adopted*, 29 F.3d 525 (10th Cir. 1994) (rejecting allegation that employer’s encouragement of supervisors to eat in cafeteria constituted interference: “[Neither] the presence of an increased number of supervisors or their activities in the cafeteria could reasonably be considered intimidating, harassing, or otherwise violative . . . NLRB has failed to sustain its burden . . . that the supervisors in the lunchroom were engaging in surveillance of prounion activities, or that their presence could have reasonably created the impression of such surveillance”). Under the National Labor Relations Act, “[i]t is firmly established that management officials may observe public union activity, particularly where such activity occurs on company premises, without violating [the NLRA], unless [those] officials do something ‘out of the ordinary.’” *NLRB v. Southern Md. Hosp. Ctr.*, 916 F.2d 932, 938 (4th Cir. 1990) (quoting *Metal Indus., Inc.*, 251 NLRB 1523 (1980)); *accord Local Joint Executive Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) and *Albertson’s Inc. v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998).

⁴⁶ *See also Delta Air Lines*, 35 NMB 271, 290 (2008) (“The Board has not found interference based on ‘isolated incidents.’”); *Express Airlines I*, 28 NMB 431, 451 (2001) (“isolated”

(continued...)

The Board’s long-understood “systemic carrier effort” standard takes on particular importance in the context of this historic proceeding. This case stems from one of the largest elections in the Board’s history.⁴⁷ The election involved more than 15,000 passenger service employees who work at airports and reservations centers throughout the United States, managed by more than 1000 managers. That means literally *millions* of possible employee-manager interactions. DX 230. And millions of opportunities for individual managers to say — or be alleged to have said — something not fully appropriate, *i.e.*, the very definition of “isolated” incidents.

Thus, IAM’s claims must be assessed in view of the enormous scale of the election. In a small craft or class, the array of highly individualized allegations IAM submits might be sufficient to raise a claim worthy of investigation. Here, even if every one of these interactions occurred precisely as IAM alleges (which they did not), and even if the substantive law supported IAM’s claim that the conduct they allege is impermissible (which it does not), there is simply no basis for a conclusion that this minuscule number of events, spread across a workforce this immense and a campaign this extensive, constitutes the sort of “systematic” effort to undermine employee free choice necessary for the Board to order a re-run election. Rather —

(...continued)

incidents do not taint laboratory conditions); *Petroleum Helicopters*, 26 NMB 13, 36-37 (1998) (obstruction of election notice and certain meetings were isolated and did not taint laboratory conditions); *Express One Int’l*, 25 NMB 420, 427 (1998) (improper electronic messages are isolated incidents and did not justify setting aside an election).

⁴⁷ Indeed, the recent elections at Delta reportedly combined to form the largest at a private-sector company since the 1941 election among more than 70,000 plant workers at Ford Motor Co. See M. Estrel, *Delta Fleet service employees Reject Union*, available at <http://online.wsj.com/article/SB10001424052748703506904575592622828568924.html> (last visited 1/23/2011).

even accepting what IAM says at face value for purposes of argument — these interactions could amount to no more than the sort of “isolated incidents” for which no Board action is warranted.

As it has in every other union election at Delta, the Company took measures to ensure that all of its leaders were trained on the legal rules governing their conduct and interactions with passenger service employees during the period of laboratory conditions.⁴⁸ DX 6 (A. Bowman Dec.) ¶ 3. Delta also made certain that its managers and frontline employees were aware of Delta’s Advocacy Policy.⁴⁹ DX 200.

Delta’s election campaign was conventional and respectful — in contrast to IAM’s actions, which violated employee privacy, used scurrilous rumors, falsehoods, and invective, and mounted a systematic campaign of pressure against those who would not assure IAM that they had voted pro-union.

IAM’s allegations in this case are limited in kind as well as number. Election misconduct can take many forms, but IAM alleges none of the most pernicious kinds of misconduct. For example, although IAM supporters were present in multiple Delta facilities around the county every day during the campaign, engaging in highly visible election activities, IAM does not

⁴⁸ Delta repeated its prior training for managers and supervisors to ensure that they understood what was and was not permitted during the election (the so-called “TIPS” rules – no Threats, no Interrogation, no Promises and no Surveillance.). DX 6 (A. Bowman Dec.) ¶ 5.

⁴⁹ Under Delta’s Advocacy Policy: (1) whether they support or oppose a union, employees have the right to communicate their views and to solicit support during non-work time and in non-work areas, provided they also respect the rights of those who do not wish to be subject to such activities; (2) all employees, whether they support or oppose a union, are subject to the same rules and guidelines regarding solicitation and advocacy activities on Delta property; and (3) all Company rules and policies must be applied in a non-discriminatory manner. DX 6 (A. Bowman Dec.) ¶¶ 4-5. Delta leaders were instructed to enforce Delta’s rules on distribution of literature and other materials and to remove any such materials left unattended in break rooms in violation of Delta’s guidelines. *Id.* Several of IAM’s own Declarations confirm that Delta leaders enforced this policy in an evenhanded manner.

allege that Delta took *any* form of disciplinary action against *any* employee related to union organizing conduct. And while IAM claims that Delta supervisors engaged in “intimidating” one-on-one conversations, when the *substance* of those interactions is examined, the claim is exposed as baseless.

F. Delta Did Not Enhance Its Ready Reserve Program in Order to Influence the Election

IAM intimates that Delta made changes to its Ready Reserve system in the Spring of 2010 in an effort to curry favor with the Ready Reserves and thereby influence this election. *See* IAM Brief at 23. IAM offers no evidentiary support, however, for this far-fetched argument, and therefore fails to satisfy the requirement of Section 17.0 of the Board’s Representation Manual that all allegations must be supported by “substantial evidence.”

In fact, as set forth in the Declaration of Robert Kight, DX 3 ¶¶ 15-18, the increase in maximum annual hours for Ready Reserves was merely the latest of a series of enhancements designed both to meet Delta’s operational needs and make the program attractive for recruiting purposes. The increased maximum had been sought for some time by ACS management, but opposed by Mr. Kight for complicated reasons relating to the tax qualified status of certain Delta benefit plans under the Internal Revenue Code. *Id.* ¶ 17. A post-merger analysis by Delta confirmed that the Northwest merger had changed the ratio of front line employees to higher paid employees and thereby reduced the risks that had motivated Mr. Kight’s objections to a higher maximum. *Id.* ¶ 18. It was that analysis, rather than this election, which influenced the timing of Delta’s increase to the maximum hours for Ready Reserves. *Id.* Mr. Kight testifies that this representation election was never discussed as a factor in Delta’s decision-making process on the Ready Reserve maximum hours. *Id.*

G. Delta Did Not “Undermine” IAM by Making Changes to Its Payroll Periods at LGA and JFK.

IAM argues that Delta interfered with laboratory conditions by announcing plans to align its payroll periods for employees at New York’s LaGuardia and Kennedy Airports with the bi-weekly payroll periods Delta was adopting in the interest of uniformity following the Northwest merger. IAM Brief at 27-28. IAM’s argument is puzzling, because its innuendo makes the payroll change appear (1) to be limited to JFK and LGA, but, as set forth in detail in the Declaration of Robert Kight, DX 3 ¶¶ 19-24, Delta in fact transitioned thousands of IAM-represented employees at other locations to a new bi-weekly payroll without objection from IAM, *id.* ¶ 21; and (2) Delta has a longstanding waiver from the New York statute which Delta relied upon, *id.* ¶ 22; and (3) when IAM objected, New York State agreed with IAM and Delta yielded, meaning that IAM’s position prevailed. *Id.* ¶ 23. In this context, it is hard to see how IAM was even arguably “undermined” by this sequence of events.

In addition, the Northwest-IAM agreement gave the Company the right to set bi-weekly payroll periods.⁵⁰ Nothing Delta did in connection with the payroll transition was motivated by or related to the IAM representation election. Indeed, when Delta’s decisions were made in mid-2009, the Company had no idea whether or when there would be one or more IAM representation elections.⁵¹

⁵⁰ The contract provided that: “Regular paydays shall be established for each station on the basis of biweekly payment of compensation, except as it may be changed to a more frequent method, and to comply with state law.” DX 137.

⁵¹ At a minimum, Delta had a non-frivolous basis in the agreement for making this change. Under *Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n*, 491 U.S. 299 (1989) (“*Conrail*”), the existence of an arguable contractual justification for its actions enables a carrier to act, and prevents a union’s objections from creating a “major” dispute out of a “minor” dispute which the Railway Labor Act reserves to arbitration.

For its claim that Delta's efforts to harmonize its pay practices had the effect of undermining the Union in the eyes of employees, IAM cites only one case, *Stillwater Central R.R.*, 33 NMB 100 (2006). In that case, the Board found interference based on a broad array of pernicious carrier conduct. Even with respect to the "undermining" issue, the facts of *Stillwater*, however, could hardly be more different from the present case. In *Stillwater*, upon learning that a union was attempting to organize its workers, the employer canvassed its employees to determine any grievances they might have *with the specific intent* of making those changes to neuter the union's campaign.⁵² IAM offers no evidence of either similar behavior, or similar intent, by Delta. Delta's actions with respect to the relative handful of New York employees at issue were taken (a) to harmonize the payroll process applied to similarly situated employees across the country; (b) pursuant to a waiver previously issued by the New York state government; and (c) pursuant to contractual language which was permissive on its face. The fact that IAM later succeeded in convincing the State to withdraw its prior authorization with respect to this handful of employees does not turn Delta's good faith actions into interference, or change the Company's well-founded and lawful rationale for making the change.

H. Delta Did Not Hire New Employees to Undermine the IAM.

Delta hired new Reservations employees at several of its Reservations Centers in 2010. DX 7(A. Ausband Dec.) ¶ 14. All of those new hires were hired as non-contract

⁵² In *Stillwater*, the NMB found "The Carrier's intent, in guaranteeing employees 40 hours a week [and making numerous other changes to the terms of employment] was to influence employees and convey the idea that the union was unnecessary. The Board has found such deliberate conduct intended to influence employees in their selection of a representative to be contrary to Section 2, Ninth of the RLA The Board finds that *Stillwater's* [deliberate] changes to working conditions and promises of future changes tainted the laboratory conditions. *Id.* at 139-40 (emphasis added).

employees of Delta Air Lines, Inc. *Id.* IAM now argues that Delta “demonstrated that it would not work with the union” when Delta failed to place the new hire employees at the Sioux City Res Center under the pre-merger NWA-IAM agreement. By the time of the hiring, however, there was no Northwest Airlines; the FAA had issued a single operating certificate and Northwest Airlines no longer existed either as an air carrier or as a corporation. Thus, when Delta hired additional reservations agents starting in early 2010, it could not hire those employees as employees of Northwest, which no longer existed. Since the employees had never worked for Northwest, Delta would have had no basis for placing them under the Northwest-IAM agreement, and could have faced some legal risk by doing so—in effect forcing Delta employees to pay dues to IAM, since IAM had not been certified to represent Delta employees.⁵³ Delta’s decisions on these points had nothing at all to do with a representation election. We are not aware of any legal or contractual provision that prohibited Delta from hiring new Delta employees at any location. Delta’s hiring of new employees in the ordinary course of business can hardly amount to interference with laboratory conditions.

IV. IAM’S VARIOUS “INCIDENT REPORTS” ARE UNFOUNDED

To support its interference charges, IAM submits a widely disparate collection of highly individualized, but frequently vague, accounts of interactions between specific employees and specific managers, often unnamed. Where there is sufficient information to enable an investigation, Delta submits detailed declarations in response to most of those “incident reports” and will not lengthen this brief with a point-by-point rebuttal here. There are some broad categories of allegations, however, which warrant brief further response.

⁵³ Nor can the IAM validly claim that there should not have been a “mixed” workforce of PMDL and PMNW res agents in the same facility; at that time Delta had already re-located the PMNW Tampa Res center to the premises of the PMDL Res Center.

A. A Carrier Is Not Responsible For The Conduct of Non-Management Employees.

Many of the alleged “incidents” alleged by IAM Declarants — even if they happened precisely as alleged — are irrelevant to the Board’s inquiry because they did not involve management employees. Delta is not responsible for the actions of non-management officials unless it is shown that management was complicit or failed to address an ongoing situation brought to its attention. *See Delta Air Lines*, 35 NMB 271, 278, 292 (2008). The law in this area has not changed. *See Piedmont Airlines*, 31 NMB 257, 268, 281 (2004) (finding “insufficient evidence offered by the [union] to support the allegation that [the carrier] removed or condoned the removal of [union] literature from the CLT break room” where a supervisor “reported that other employees, not Piedmont managers, had removed the literature”).

B. Conclusory Allegations With No Factual Details Do Not Constitute Substantial Evidence.

As listed on Delta’s cross-reference chart (DX 10), eight of IAM’s Declarations contain only conclusory allegations which do not state any facts which Delta, or the Board, could use as the basis for either a response or an investigation. For example, the declarant in IAM Exhibit 143 states, “we believe the company is trying to stop us from representing our members by whatever means necessary – glares, threats [and] other forms of intimidation.” Additionally, the declarant in IAM Exhibit 174 alleges, “Delta is very good at playing with people’s minds. I have seen it first hand since being in their break room and working with them. I have heard stories and they are true.”

Section 17.0 of the Representation Manual makes explicit that “[a]llegations of election interference not sufficiently supported by substantive evidence will not provide a basis for further investigation and will be dismissed.” *Air Logistics of Alaska*, 27 NMB 570 (2000); *see*

also *Delta Air Lines, Inc.*, 35 NMB 260 (2008) (“allegations must both be supported by substantive evidence and allege actions or communications that, if true, constitute interference”; dismissing claim in the absence of such evidence); *Northwest Airlines, Inc.*, 14 NMB 49 (1986) (dismissing claim of interference; Board “did not ignore ‘substantial’ evidence of carrier interference, rather, the Board was persuaded by the lack of such evidence”).

C. Many Of The Reports Do Not Even Allege Improper Conduct

A significant number of the “incidents” alleged in IAM’s Declarations did not involve “interference,” even if the allegations are taken at face value. *See* IAM Exs. 15, 19, 20, 32, 39, 42, 50, 54a, 68, 145, 201, 202. For example, the declarant in IAM Ex. 32 complained that Delta included in the text of a “Delta Daily” e-mail a “paragraph titled ‘Boeing Plant Workers Decertify IAM as their Union.’” The declarant in IAM Ex. 202 includes an e-mail to IAM that states: “I did vote Union, however, Delta out numbered, please do not challenge the vote, let us have our money and our bonuses, we deserve them.” As explained elsewhere in this brief, statements such as these are protected speech under the First Amendment.⁵⁴

V. IAM’S REQUESTED REMEDIES ARE UNPRECEDENTED AND UNFOUNDED

Since before the merger was completed in October, 2008, IAM’s interests have always been about IAM and not the will of the majority. IAM has manipulated the representation process from the beginning. IAM:

- Delayed filing to resolve representation for almost a year after the merger;
- Finally filed to resolve representation in August, 2009 – but not for all groups;
- Requested the voting rules be changed;

⁵⁴ *See, e.g.*, IAM Ex. 32.

- Suddenly withdrew its application to resolve representation for fleet service employees in October 2009, just before the NMB announced it proposed to change the rules;
- After the rules were changed, filed again to resolve representation in July, 2010 (and even then, not for Office and Clerical employees);
- After being rejected by the voters in every election, now seeks yet more changes to the voting rules.

It is now clear that IAM does not respect the will of Delta employees, but rather will continue to press the Board for changes to the voting rules until they get the results they want, notwithstanding that more than 80% of the employees voted and the majority clearly rejected IAM representation.

Equally important, in view of IAM's massive, relentless and disrespectful tactics, if there are to be any "remedies," they must apply equally and forcefully to IAM. Any remedies that favor IAM would be an endorsement of IAM's tactics. If any remedies are to be applied, they should be applied against IAM. Such a remedy would send the message to unions that they may not violate the Board's standards with impunity, as IAM believes it is entitled to do.

Under these circumstances, Delta is reluctant even to address the remedy issues raised by IAM, because doing so might be mistaken as conceding that IAM's allegations have even arguable merit. Nonetheless, Delta feels compelled to respond so that the Board will know that silence on remedy issues does not constitute acquiescence. Moreover, if the Board were ever inclined to grant any of IAM's unprecedented requests, Delta would request the opportunity for further argument regarding the Board's authority to do so.

A. The Board Reserves Special Remedies for Egregious Cases of Deliberate Interference Far Beyond What IAM Has Even Alleged, Much Less Proved.

The Board's standard remedy for interference with laboratory conditions is a re-run election using the same procedures used in the first election. *Cape Air (Hyannis Air Service,*

Inc.), 37 NMB 35, 59 (2009). The Board has, on occasion, granted a special form of ballot as a remedy for particularly “egregious” employer interference with laboratory conditions, such as “deliberate interference” including carrier collection of ballots, *Laker Airways, Ltd.*, 8 NMB 236, 253 (1981) (“the most egregious violations of employee rights in memory”),⁵⁵ or overt interrogation about union support and intimidation of union supporters. *Sky Valet*, 23 NMB 276, 300 (1996).⁵⁶ Even if there were evidence to support IAM’s allegations – and no such evidence is present here, as explained above — IAM does not come close even to alleging the sort of activity that has warranted special voting procedures in prior Board cases. Indeed, the allegations here (even if proven) pale in comparison to those in other cases. *Pinnacle Airlines, Corp.*, 30 NMB 186, 225 (2003) (dismissal of union activists during the election period and the appearance of surveillance of employees attending union meetings not sufficient to warrant *Laker* ballot; re-run used standard voting procedures).⁵⁷ Indeed, the only misconduct that fits the

⁵⁵ In *Laker*, the Board used a “yes” or “no” ballot as a remedy in a re-run election when, during the first election, the carrier had provided employees with stamped envelopes with their paychecks and encouraged employees to use these envelopes to turn their ballots in *to the carrier*. *Id.* at 248. *Laker* collected “almost three-quarters of the ballots mailed by the Board” and supervisors kept track of which of their employees had ballots. *Id.* at 249, 254.

⁵⁶ Supervisors at *Sky Valet* “repeatedly asked employees whether they signed an authorization card and told employees that they knew who signed authorization cards and that those individuals who signed authorization cards would be discharged.” 23 NMB 300 (1996). Supervisors then followed through with their threats by terminating several individuals after they signed authorization cards. *Id.* Additionally, the carrier gave one employee who had signed an authorization card “more assignments than he could complete during an eight hour day” and “[r]ather than paying [him] overtime, the carrier asked him to ‘punch out’ and to complete his work without pay.” *Id.* at 301.

⁵⁷ See also *America West Airlines, Inc.*, 25 NMB 127 (1997); (carrier interrogated employees during the election period); *Pinnacle Airlines Corp.*, 30 NMB 186 (2003) (carrier dismissed two union activists during the election period and created the appearance of surveillance of employees attending union meetings); *Stillwater Central R.R.*, 33 NMB 100 (2006) (carrier conducted coercive mandatory one-on-one meetings); *Mercy Air Serv.*, 29 NMB 55 (2001) (carrier announced changes in wages and benefits after application was filed); *American Trans Air, Inc.*, 28 NMB 163, 181-82 (2000); *Horizon Airlines*. 24 NMB 458 (1997).

Board's precedents is the aggressive, massive, fear and smear tactics by IAM. And in view of the Board's just implemented new voting rules, a re-run with a third set of rules would create so much more voter confusion that the true preference of the employees would be impossible to measure.

B. IAM's Request for a Paper Ballot Re-Run Election Is an Affront to the Board.

IAM argues that the Board should abandon telephone and internet voting and return to the paper ballot. Such a remedy, of course, would be an admission by the Board, in effect, of a lack of confidence in the integrity and security of the telephone and internet voting process that has been in effect for eight years. IAM offers no compelling reason, indeed, no reason at all, why the Board should take such an extraordinary step backwards. IAM offers no evidence whatsoever that the security of the Board's encrypted voting website has been compromised. After touting the objective of greater voter participation, IAM now seeks to turn back the clock — to make it harder and more cumbersome for employees to vote.

Since it began running TEV elections in 2002, the Board has never ordered that a re-run election be done by paper ballot. In *Pinnacle Airlines Corp.*, 30 NMB 254 (2003), the union asked the Board to reconsider its decision to order a re-run election using TEV; the union sought a re-run election using a *Key* or *Laker* ballot and an on-site election. The Board refused to do so:

Due to the Board's limited resources, and the logistics involved in deviating from the Board's standard balloting procedures and the fact that there are multiple stations involved, running a ballot box election would substantially delay the resolution of this matter. The RLA provides for the prompt settlement of representation disputes. 45 U.S.C. § 152, Ninth. Therefore, the public interest weighs against granting the Motion for Reconsideration and delaying resolution of this matter further.

Id. at 261. This rationale applies with even greater force here.

C. The Other “Remedies” IAM Seeks Would Be Unprecedented and Entirely Unwarranted, Even If Its Accusations Had Factual and Legal Support

In addition to the mail ballot, IAM’s “wish list” of requested remedies asks this Board to create an entirely new set of rules to assist IAM in its organizing campaign. IAM asks that the Board order Delta to allow IAM representatives — not Delta employees, but IAM’s professional staff organizers, (1) to hold unmonitored meetings on Delta’s property; (2) to solicit employees in person, one-on-one on Delta property; (3) to post pro-IAM materials on the bulletin boards and on the walls of the workplace; (4) unrestricted access to distribute the materials in the break room; (5) to address the employees during Team Meetings to promote the union; (6) to host a page on DeltaNet to promote IAM without any control by Delta; (7) access to the home addresses *and* email addresses of all of the eligible voters (“*Excelsior*” lists). As a second choice to a paper ballot, IAM asks that the Board give it all of the items above, *and* preclude employees from voting on Delta-issued telephones and computers, even if employees find doing so the most convenient and satisfactory method to use.

1. IAM Has Had Unprecedented Access to the Carrier’s Premises and Employees.

It is readily apparent that almost every one of the steps proposed by IAM has the purpose and effect of increasing IAM’s access to Delta’s employees. That is especially ironic in this case, because IAM has made no showing at all that it has been denied access to the Delta workforce.

In fact, the record in this matter demonstrates beyond doubt that IAM has had extraordinary access during this election campaign. As an incumbent representative, IAM already had home addresses for PMNW employees, almost one-third of the eligible voters, before their campaign even began. As an incumbent, IAM had contractual access to administer

and enforce the IAM agreements with Northwest, including union bulletin boards on which IAM was *permitted* by Delta to post campaign materials, despite contractual restrictions to which IAM had previously agreed.⁵⁸ Delta approved IAM requests for union business leave far in excess of what IAM had historically requested. DX 2 (R. Ohm Dec.) ¶¶ 6-7. In addition, Delta provided free, positive-space travel privileges on the combined Delta route system to numerous IAM officials traveling, which they often used for campaign purposes. DX 2 (R. Ohm Dec.) ¶ 10.

Apart from its incumbent status, IAM's campaign activities make clear that they also somehow were able to gain access to home addresses, personal telephone numbers and personal e-mail addresses for PMDL employees. IAM representatives, including their International President, Transportation Division Chair, and District Lodge Chair, asked for and were given access to Delta's premises in October and November, 2010, above and beyond what was provided for in the collective bargaining agreement. DX 5 (M. Carson Vaughn Dec.) ¶ 24. Indeed, IAM V.P. Robert Roach was scheduled for an additional day of visits to Delta's Atlanta facilities, but he failed to show up. DX 5 (M. Carson-Vaughn Dec.) ¶ 24(C). Moreover, other IAM representatives, including representatives of IAM's National Pension Plan, were granted access to Delta facilities — even though there is no even arguable claim of legal right for such access by third parties. DX 5 (M. Carson Vaughn Dec.) ¶ 24(C). Beyond that, IAM representatives solicited Delta employees at work, on the concourses, in airport trains and parking lots, at bus stops, and at home — even after being told they were not welcome. DX 5 (M. Carson Vaughn Dec.) ¶¶ 6, 20(D). Thus, while IAM might like to claim that limited access

⁵⁸ And in any case, courts have rejected access to bulletin boards as a remedy where “[n]o unique problem of access has been shown,” *see United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 632-33 (D.C. Cir. 1981) (discussing cases, and quoting *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292, 305 (2d Cir. 1967)); this occurred, for example, in a case involving 71 employees being unlawfully discharged for union activity. *See J. P. Stevens & Co.*, 380 F.2d at 305.

was the reason for their loss at the ballot box, the record confirms otherwise. Indeed, the exceptionally high participation rate in this election confirms that Delta's employees heard the messages, they simply rejected what IAM was offering.

2. Granting IAM's Request for an *Excelsior* List Would Be Unprecedented and Would Violate Employees' Privacy.

The NMB has repeatedly rejected union requests that the Board violate employees' privacy rights and require a carrier to produce to the union a home address list for employees who are eligible to vote in an election. *Union Pacific R.R. Co.*, 15 NMB 247, 253 (1988) ("It is the Board's longstanding policy not to provide organizations with employee address lists.") (internal citations omitted); *USAir Shuttle*, 20 NMB 162, 177 (1993) (union "has not demonstrated that its lack of home addresses constitutes election interference" and "had significant access to all employees currently working on the property."⁵⁹ Similarly here, IAM certainly had access to personal information for directly contacting the PMNW employees, and was given unprecedented access to pre-merger Delta employees through the implementation of a very liberal Delta Advocacy Policy.

IAM claims that such a list is appropriate in this case to "restore the balance of communications." IAM Brief at 40. Nothing could be farther from the truth. First, nothing in the RLA or the First Amendment permits, much less requires, the Board to "balance" the communications by labor and management in an election. Moreover, as reflected by the Declarations of Michele Carson Vaughn and Amy Schwarber, and supporting exhibits, IAM's campaign at Delta was far more extensive than Delta's. In addition to the huge quantity of

⁵⁹ See also *Re: Mesaba Aviation, Inc.*, 27 NMB 533, 535-36 (2000) (refusing to grant IAM's request for "a re-run election with an employee home address list provided to the Organization.").

printed and electronic IAM campaign materials, prior to and during the election period IAM had daily presence in Delta's facilities. IAM did not suffer from limited access in this case — the extraordinary, 80% participation rate confirms that the vast majority of eligible voters was made aware of their options in the election and exercised their free choice.

Moreover, so far as Delta has been able to determine, the Board has *never* ordered an employer to provide a union with personal employee email addresses. In refusing to countenance such an unprecedented invasion of personal privacy, the National Labor Relations Board has noted

[the] multitude of unanswered and difficult questions . . . regarding the potential ramifications, for both employers and employees, of requiring employers to furnish employee e-mail addresses. For example, what costs might be imposed on an employer if a union were able to send e-mails to employees' workplace e-mail addresses? What if electronic mailings were sufficiently voluminous to impair an employer's ability to conduct business electronically? What becomes of an employer's right not to furnish a forum, on its (virtual) property, for a third party to express its views? . . . Could employers continue existing e-mail monitoring programs without engaging in unlawful surveillance? Are employee privacy rights at stake? Plainly, the Board's expertise does not encompass the rapidly expanding universe of information technology, and persons who know much more than we do about these matters will likely raise additional issues that we cannot even formulate without guidance. All of these issues should be fully briefed and considered before the Board departs from longstanding, well-understood precedent.

Trustees of Columbia Univ. in the City of New York, 350 N.L.R.B. 574, 576 (2007). IAM addresses none of these questions. Nor does it offer even the simplest explanation for its request beyond the bare desire to have the information. No basis exists for such a far-reaching, unprecedented change to Board practice on this record.

3. Permitting Employees To Opt-Out Would Be Essential.

In the event that the Board was to give serious (and, in Delta's view, unwarranted) consideration to IAM's request to violate Delta employees' privacy by requiring the disclosure of home or email addresses, the Board should condition disclosure on the ability of individual Delta employees to opt-out, to have the right to protect their own privacy by declining to permit their addresses to be given to IAM. An overwhelming majority of the passenger service employees have voted "No" to having IAM represent them, and many of them have been subjected to harassment and disrespect by the very organization that now wants their personal information. DX 5 (M. Carson Vaughn Dec.) ¶¶ 20-21, 36; DX 8 (A. Schwarber Dec.) ¶¶ 4, 6-7, 9. The Supreme Court has recognized employees' privacy rights in their home addresses — even in a situation where the union actually represented the employees from whom it sought addresses. *See U.S. Dep't. of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 501 (1994) (“[w]hatever the reason that these employees have chosen not to become members of the union or to provide the union with their addresses...it is clear that they have some nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure.”).

4. IAM's Professional Organizers Are Not Entitled to Access to Delta's Private Property or Its Computer Systems.

On January 13, IAM filed in the present matter a memorandum from the NLRB's Acting General Counsel discussing the circumstances in which the NLRB might seek unconventional remedies in election misconduct cases. The Acting General Counsel, of course, was writing about a different statute, was not guided by the NMB's own extensive history and precedent on these remedial questions, and thus the memorandum is of little utility here. But even if the memorandum was otherwise instructive, the Acting General Counsel outlined remedies to be

sought when necessary “to assist the employees in hearing the union’s message,” or to “insulate[] [employees] from discriminatory reprisal,” and where the employer has already been found to have “committed serious” unfair labor practices, such as discharge of union supporters. *See* NLRB Mem. GC 11-01, at p. 8, 10 (Dec. 20, 2010) (attached to IAM’s Jan. 13, 2011 Suppl. Br.) (internal citations omitted).

None of these circumstances applies here. There can be no non-frivolous claim that IAM’s massive campaign was ineffective in communicating “the union’s message.” Not even IAM claims that there was a single instance of “discriminatory reprisal.” And even if the Board had the authority to find a carrier guilty of unfair labor practice violations, there is no evidence here to support such a conclusion.

Moreover, there is no basis in labor law — NLRA or RLA — for IAM’s request that the Board to compel Delta to open its private property to the union’s paid organizers and officials so that they can campaign. It is a longstanding principle of federal labor law that union officials and employees have no right to campaign on the employer’s property. In balancing the employee’s right to organize with the employer’s constitutional property rights, the courts have routinely said that while the *employees* are entitled — within reason — to campaign on the employer’s property, the union’s paid organizers are not. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538-39 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956); *United Food and Commercial Workers, AFL-CIO, Local No. 880 v. NLRB*, 74 F.3d 292, 293-95 (D.C. Cir. 1996) (citing *Lechmere*).

Even as a remedy for proven unfair labor practices, the case cited by the Acting General Counsel in his memorandum, *Heck’s, Inc.*, 191 NLRB 886 (1971), for giving union organizers access to employees applies only where “alternative means of access are clearly unavailable or

have been tried and found wanting.” *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 633 (D.C. Cir. 1981) (quoting *Heck’s*, 191 NLRB at 887 (internal citations omitted)). Otherwise, “[i]n a series of cases, direct union access to company property as a remedial measure has been denied [by the NLRB] because alternative means existed by which the union could communicate with employees.” *United Steelworkers*, 646 F.2d at 633 (citing *Greenfield Mfg. Co.*, 199 NLRB 756, 757 n.7 (1972) (denying a union request for access to property as a remedial measure, stating “[i]n our view, the record does not justify the application of this species of extraordinary relief because viable alternative means for the Union’s organizational access to employees appear to be at hand.”)).

VI. CONCLUSION

For all the aforesaid reasons, IAM's Motion does not even establish a prima facie case.

Therefore, the NMB should dismiss IAM's Motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "N.D. Mollen", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2011, a true and correct copy of the foregoing Delta Air Lines Response IAM's Charges of Carrier Interference regarding Passenger Service Employees was electronically filed via the NMB's e-filing inbox at OLA-efile@nmb.gov and hard copies of the attachments sent by courier to:

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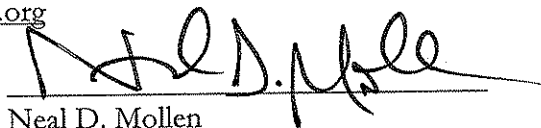
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