



**U.S. House of Representatives**  
**Committee on Transportation and Infrastructure**

Washington, DC 20515

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September 23, 2008

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**SUMMARY OF SUBJECT MATTER**

**TO:** Members of the Committee on Transportation and Infrastructure

**FROM:** Subcommittee on Aviation Staff

**SUBJECT:** Hearing on "National Mediation Board Oversight of Elections for Union Representation"

**PURPOSE OF HEARING**

The Full Committee will meet on Wednesday, September 24 at 2:00 p.m. in room 2167 Rayburn House Office Building to receive testimony regarding the National Mediation Board's ("NMB") oversight of elections for union representation.

**BACKGROUND**

The National Mediation Board was established in 1934 by an act of Congress as an independent Federal agency charged with overseeing labor-management relations in the aviation and rail industries. The NMB administers the specific terms of the Railway Labor Act ("RLA") governing the representation of workers and mediation and arbitration of collective bargaining and other disputes.

The purposes of the RLA, as set out in statute, are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; and (5) to provide for the prompt and orderly settlement of all disputes growing

out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.”<sup>1</sup>

The NMB is composed of three Board Members, one of whom serves as the Chairman, who are appointed by the President and confirmed by the Senate for three-year terms. The current Board Members are: Read Van de Water (Chairman), Elizabeth Dougherty, and Harry Hoglander.

### **National Mediation Board Representation Procedures**

The RLA affirms the rights of workers in the rail and aviation industries to elect to be represented by a labor organization and to bargain collectively. The NMB investigates and resolves representation disputes in the air and rail industries. Employees of these industries are under different rules than workers in other private industries, who are covered by the National Labor Relations Act (“NLRA”) and settle their disputes and arbitrate their grievances before the National Labor Relations Board (“NLRB”).

The NMB has specific rules and procedures for awarding representation rights under the RLA. These rules, established and published by the NMB, are set forth in the Board’s Representation Manual. These rules are not codified regulations and serve more as general procedural guidance.<sup>2</sup>

A union seeking to represent workers at a rail or air carrier must first collect cards signed by employees stating that they want to be represented by the organization. Each employee must sign and submit his or her own card. A union must collect valid cards from a majority (50 percent plus one) of employees in a craft or class at a carrier in order for the NMB to call for an election, if those workers are already represented by another union. If that craft or class at the carrier is unrepresented at the time of the card collection, the union must produce cards from 35 percent of employees and submit them to the NMB as part of an application for representation by the union.

Upon receipt of an application for representation, the NMB begins an “investigation” to determine the employees in a given craft or class eligible to vote in the election. The carrier submits a list of all employees who have an “employee-employer relationship” as of the last day of the last payroll before the application for representation was received.<sup>3</sup> This becomes the list of voters eligible to vote in the election (“eligibility list”).

The development of an exact list of eligible employees is an important part of the process, because an RLA election, as administered by NMB rules, is only valid if a majority (50 percent plus one) of eligible employees participates in the election and votes in favor of representation. Every employee on the eligibility list is counted as a “no” vote (against representation) unless he or she submits a ballot voting “yes”. Therefore, if a majority of employees do not vote, it is not possible

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<sup>1</sup> 45 U.S.C. 151a

<sup>2</sup> National Mediation Board, Representation Manual (Sept. 14, 2007). The cover of the Manual states: “This Manual provides general procedural guidance to the National Mediation Board’s staff with respect to the processing of representation cases before the NMB...The provisions of this Manual are neither obligatory upon the Members of the Board nor do they constitute the exclusive procedure for the NMB’s investigation of representation matters pursuant to the Railway Labor Act”.

<sup>3</sup> The NMB Representation Manual contains further details on the eligibility list determination process and the ability for a union to challenge names on the list. See <http://www.nmb.gov/representation/representation-manual.pdf>

for a union to “win” the election, even if all employees voting choose representation. This differs from the rules applicable to workers governed by the NLRA, where a majority of the votes received determines the outcome of the election. However, this has been the policy of the NMB since its inception in 1934.

If a union receives 50 percent plus one of the vote in favor of representation, the election is certified by the NMB. If a majority of eligible workers does not vote in favor, the NMB dismisses the application for representation.

A union may request the NMB to investigate if it believes there has been interference by the carrier in an election. Section 2, Fourth, of the RLA prohibits carrier interference and states that: “No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . .” A carrier may also ask the NMB to investigate if it believes there has been interference with employees’ right to choose or not choose representation on the part of a union in an election.

According to NMB’s Representation Manual, the Board will only investigate allegations of interference after the outcome of the election has been determined, except in extraordinary circumstances. In an investigation, the NMB looks to see if the alleged interference caused “laboratory conditions” to be tainted. Laboratory conditions are the hypothetical conditions that would exist in a representation election without the interference. A request for an investigation must provide sufficient evidence with supported documentation that laboratory conditions were tainted.<sup>4</sup>

### **Association of Flight Attendants-CWA Campaign at Delta Airlines**

The Association of Flight Attendants-CWA (“AFA-CWA”) is a labor union representing over 55,000 flight attendants at 20 airlines. AFA-CWA has attempted two organizing campaigns at Delta Airlines. In 2001, AFA<sup>5</sup> filed for representation of flight attendants, but the election was not certified because less than 50 percent of Delta flight attendants participated in the election. Immediately after the election, AFA filed a motion for a determination of interference by Delta management with the NMB, based on allegations that during the voting period Delta engaged in an “anti-union campaign”. The NMB investigated but ultimately the Board concluded that it could not find that “the level of carrier activity rises to a level requiring further investigation of employee choice of representative”. The ruling noted, however, that “there were isolated incidents of inappropriate conduct on the part of certain supervisors” and stated that “the Board is troubled by the number of reported incidents of ‘surveillance’”.<sup>6</sup> Member Hoglander filed a dissent in the case and in his statement indicated his support for a re-run of the election.

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<sup>4</sup> Allegations must state a prima facie case that laboratory conditions were tainted and be supported by substantive evidence. See NMB Representation Manual, 17.0

<sup>5</sup> The union in 2001 was the Association of Flight Attendants, prior to its merger with the Communication Workers of America (CWA).

<sup>6</sup> National Mediation Board, 30 NMB No. 18, Case No. R-6838

On February 14, 2008, AFA-CWA again applied for representation of flight attendants at Delta Airlines with cards from over 50 percent of eligible voters. On April 1, 2008, AFA-CWA requested that the election be held using a simple yes/no ballot, which would be a departure from the usual process requiring a majority of eligible employees to vote in favor of representation. On April 15, 2008, NMB denied this request. Balloting for the election was conducted between April 23 and May 28, 2008. AFA-CWA received 5,253 votes in favor of representation from among 13,380 eligible voters (39 percent).

On June 6, 2008, AFA-CWA filed a motion for a determination of interference by Delta management with the NMB, based on the arguments outlined below. On June 20, 2008, Delta Airlines filed a response to AFA-CWA's motion, countering the union's claims. The case is still pending, and NMB has yet to issue a determination on the interference allegations. At this stage of the process, NMB is not being asked to make a final determination on whether there was unlawful interference. NMB must first issue a decision whether or not to conduct an investigation to establish a record of what actually occurred. NMB rules require that the request for an investigation must make a prima facie case of interference provide sufficient evidence with supported documentation. If the Board decides to conduct an investigation, on the basis of the factual record, NMB then determines whether there is unlawful interference.

In its motion, AFA-CWA asserted that Delta interfered with its employees' designation of a representative in violation of the Railway Labor Act by: conducting a "pervasive and comprehensive anti-AFA communications campaign that was intended to overwhelm the flight attendants' ability to choose a representative freely"; harassing, interrogating, and placing employees who supported the campaign under surveillance; and conferring benefits on flight attendants during the election. AFA also questioned a three percent pay increase Delta announced for all employees, including flight attendants, during the balloting period on May 2, 2008.

Delta, in its response, filed sworn affidavits denying these allegations and cited that a carrier has a constitutional right to communicate with its employees about its views on representation; that AFA does not have sufficient evidence to show interference or coercion by Delta; and that no AFA supporters were subjected to discipline or one-on-one interrogation by Delta. In its response, Delta also asserted that it has repeatedly voiced its commitment to free choice and that it gave AFA-CWA access to crew lounges throughout the election period.

The motion filed by AFA-CWA for a determination of interference addresses issues regarding the NMB's process and the degree of discretion NMB may exercise in applying its rules on representation elections. The first set of issues relates to the development of the list of employees eligible to vote in the election. NMB ruled to allow Delta to include flight attendants who have been furloughed for less than five years to remain on the eligibility list. This is consistent with NMB's past rulings and its guidance under Section 9.204 of the Representation Manual, which states that furloughed employees are eligible to vote if they retain an employee-employer relationship and have a reasonable expectation of returning to work. AFA-CWA challenged the NMB's decision to allow these 931 furloughed flight attendants to remain on the list, because Delta hired new flight attendants at other locations while retaining flight attendants on furlough elsewhere.

NMB also permitted flight attendants who were current Delta employees at the time of the election, but elected to leave the company and retain some benefits, by participating in an "early out" program to remain on the eligibility list. There were 821 flight attendants who chose this

option, but were allowed to remain on the list as current Delta employees even though they would be leaving employment with the company in the very near future. Finally, the day before the election, Delta informed the NMB that a flight attendant on the list was deceased, and notified the NMB. The Board ruled that since the request was received less than the seven calendar days required for removing a name and without required documentation, the individual would remain on the list.

The NMB also changed the date of the end of the election. On March 24, 2008, the NMB issued a notice establishing that an election among Delta flight attendants would take place and that the voting period would run from April 23 to June 3, 2008. Approximately one week later, on April 3, 2008, the NMB announced that the voting period would end and the ballot count would be completed on May 28, 2008. According to the NMB, typical air carrier elections last for three to five weeks. The length of the Delta election was five weeks.

**WITNESSES**

**The Honorable Read C. Van de Water**  
Chairman  
National Mediation Board

*Accompanied by:*

**The Honorable Elizabeth Dougherty**  
Member of the Board  
National Mediation Board

**The Honorable Harry R. Hoglander**  
Member of the Board  
National Mediation Board

**Ms. Patricia A. Friend**  
International President  
Association of Flight Attendants-CWA, AFL-CIO