

**Testimony Of**

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**Before the**

**Committee on Transportation and Infrastructure**

**National Mediation Board Oversight of Elections**  
**for Union Representation**

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On behalf of the 55,000 women and men at 20 airlines represented by the Association of Flight Attendants – CWA (AFA-CWA), I want to thank you for holding this important hearing today. I especially want to thank Chairman Oberstar and Representative Costello for making the time for this hearing during a very busy and constrained Congressional calendar. Today’s hearing is, in a way, historic in that in our memory this is the first hearing to be held on the policies and practices of the National Mediation Board (NMB) and its oversight of representation elections. In our opinion, this hearing is long overdue and now is the time for a spotlight to be focused on the NMB, especially this current NMB, when it comes to the fundamental and legal right of all workers to join a union without interference from either their employer or the government agency tasked with overseeing the election process

This hearing is especially timely and very much needed considering the pending merger between Northwest and Delta Airlines, and the future of the collective bargaining rights for the vast majority of its employees. The outcome of this merger could result in the new Delta Air Lines becoming the largest domestic airline and arguably the world’s largest carrier, that is, with one exception, a non-union and anti-union airline. Delta management has made it clear through interaction with AFA flight attendant leaders from Northwest Airlines that they will do whatever it takes to prevent the flight attendants of the “New Delta” from having the protection a union and a collective bargaining agreement provides.

Meanwhile, the current NMB has shown that it is willing to turn a blind eye towards egregious union busting behavior by airline management, making union recognition more difficult in this merger and placing more roadblocks on the already tilted playing field against the Delta employees and their ability to form a union.

When Congress enacted the National Labor Relations Act (NLRA) and Railway Labor Act (RLA), these laws were originally designed and intended to protect workers and to promote the national policy declared by Congress to “encourage unionization and collective bargaining.” Decades of undermining by corporate interests and the lack of strong enforcement of those rights and outright hostility from the National Labor Relations Board (NLRB) and the NMB have only led to an erosion of those rights even though the national labor policy created by Congress to encourage unionization and collective bargaining has not legitimately been changed. In addition to the unchecked and aggressive tactics carried out by certain corporate interests, barriers to the free choice of workers to vote for union representation include significant hurdles established by agency practice. In many ways these barriers are even more pronounced for workers covered under the RLA than workers covered by the National Labor Relations Act (NLRA).

First, the rules established by the NMB through its practices and procedures create a fundamental disadvantage for workers under its auspices in their attempts to unionize. The most blatant example is the NMB’s majority participation rule. Under rules practiced by the NMB, for a representation election under the Railway Labor Act to

be valid, 50%+1 of all eligible voters must cast a ballot, or in other words, must participate in the election. For example, if 49.9% of workers cast a ballot in the election and the union secures 99% of those votes, the NMB rules that election is not certified and the union loses because .01% of additional voters did not cast a ballot. Another way to view it is that all eligible voters immediately start out as a “No” vote on the question of union representation. In order to be considered a “Yes” vote, an employee must cast a ballot. Anyone that does not participate in the election is, in the eyes of the NMB, voting against union representation. This is strikingly different than the rules established by the NLRB where a simple majority of those voting determines the outcome, and has led, for example, Delta management to openly encourage their flight attendants to tear up their ballot instructions and to not vote.

Representation elections conducted by the NMB pursuant to the RLA are unlike any other election in the free world in that winning requires that a majority of all **eligible** voters must cast a ballot. Every other election in every other context, including union representation elections under the NLRB, requires a simple majority of the votes **cast** to determine a winner. The clear effect of this rule is to reduce the number of elections, and particularly to reduce the chance of a union victory. As an example, had this rule not existed, AFA would have won both of the two previous elections at Delta with over 98% of the votes for AFA-CWA in the first election and over 99% in the second election.

Nothing in the RLA requires the voting rules that are practiced today, particularly when a comparison is made with the language of the NLRA, where elections are decided by a simple majority of the votes cast by those taking part in the election.

The RLA language on determining representation rights says this about majority status:

“**Sec. 2 Fourth...**Employees shall have the right to organize and bargain collectively through representatives of their own choosing. *The majority of any craft or class of employees* shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. (Emphasis Added).”

The NLRA, by comparison, says this about majority status for purposes of representation rights:

“**Sec 9...**Representatives designated or selected for the purposes of collective bargaining by *the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment...” (Emphasis Added).

The anomaly comes in the interpretation that has been given to the two laws. Under the RLA, “...*the majority of any craft or class of employees...*” has been interpreted by the NMB to require that a majority of the workers in a given craft or class

must cast a vote or the election is not certified. Under the NLRA, very similar language, “*the majority of the employees in a unit...*” has been interpreted to be satisfied by a simple majority of the votes cast in a representation election. Virtually identical statutory language, yet very different interpretations and applications. This interpretation and application results in far fewer election victories for workers under the RLA, even when the union receives virtually every vote cast by the workers.

Essentially, a worker under the RLA is presumed by the NMB to cast a “NO” vote if she or he does not participate, for whatever reason. This presumption flies directly in the face of the national labor policy set by Congress of *fostering* unionization and collective bargaining; and, it is not based on explicit statutory language that requires this interpretation, as we have seen by the comparison with the virtually identical language of the NLRA.

Another significant hurdle for workers covered by the RLA that is not present for workers under the NLRA is lack of access to a list of employees’ names and addresses in a bargaining unit slated for a representation election. This so-called “Excelsior List” puts the union and the employer on equal footing in communicating with the workforce. This list is taken for granted in industries covered by the NLRA, but has been made taboo for RLA-covered workers because of actions by the NMB.

In contrast to the practice under the NLRA, which requires employers to furnish a list of employee home addresses to unions as a matter of course, the NMB does not

require employers to do so unless the NMB has first found the employer to have contaminated the 'laboratory conditions' necessary for a fair election. This is at odds with the fact that the NMB consistently has held that an employer has a far more limited role than unions in election campaigns. By allowing the employer to use the lists while not requiring home address lists to be furnished to the unions, the employer is essentially licensed to dominate the process and withhold vital information from the union. It is the union's burden to prove sufficient interest in an election by submitting cards to the NMB showing such interest. Once the union provides quantifiable and verifiable employee interest in joining a union, the NMB conducts a review of the union-submitted employee signed cards and does or does not declare an election. This threshold, if met by the union and approved by the NMB, should be sufficient for the union to gain access to an employer's list of those employees the union seeks to represent. However, NMB practice severely limits access to accurate employee address and other information lists. This is another example of an inherent disadvantage for unions during representation elections. It should be no surprise that when the union is furnished with the address list the employees are far more successful in their attempts to organize.

While these rules established by the NMB have made it difficult for workers to organize under the RLA, recent unprecedented actions and decisions made by this NMB have made an already difficult task even more challenging. And the NMB has turned a blind eye towards aggressive anti-union behavior by employers, allowing them to engage in activities that run contrary to the intent of the RLA as established by Congress. A

recent and revealing example of this would be the NMB's practices and decisions during the two representation elections of the Delta flight attendants in 2001 and 2008.

In 2001, AFA-CWA filed for a representation election at Delta with union authorization cards from over 50% of the flight attendants. Leading up to and during the voting period Delta engaged in an intense anti-union campaign that involved intimidation of union supporters and the establishment of a "pseudo, union-like" group. At the end of the election period, less than 50% of the Delta flight attendants participated in the election, so the election was not certified, even though over 98% of those casting votes wanted a union and selected AFA as that union. Immediately after the election, AFA filed interference charges against Delta management with the NMB. After months of investigation, the NMB eventually ruled that the Board was "troubled" by Delta management's conduct during the election but that a remedy was not necessary. Board Member Harry Hoglander filed a very rare dissent in that case stating:

"In my view, Delta's actions, viewed in the totality of the circumstances, tainted the laboratory conditions required for a fair election. I cannot comprehend how my colleagues could reach another conclusion on the evidence presented. I would order a re-run election in this case. That is our statutory obligation."

In early 2008, AFA filed again for a representation election of the Delta flight attendants with signed authorization cards from well over 50% of the flight attendants seeking union representation. Delta again engaged in an aggressive, unprecedented

campaign of voter suppression, mounting an intense campaign that encouraged all Delta flight attendants to destroy their voting instructions and related information that had been mailed to flight attendants from the NMB. The campaign, entitled “Give it a Rip. Don’t Click. Don’t Dial” was designed to take advantage of the NMB’s voting rules and keep the participation of the Delta flight attendants in the campaign below the 50% + 1 threshold.

I have included our interference charges, filed with the NMB against Delta management, as a supplement to my testimony.

I have also provided extensive written testimony in several recent Congressional hearings, including today’s hearing, on the unprecedented Delta anti-union campaign so I will not go into all the details of the campaign. In the end, Delta management was successful in that less than 50% of the individuals listed on the eligibility list participated in the election even though 99% of participating flight attendants voted for AFA.

Several decisions and rulings made by the NMB prior to the start of the voting period and during the voting period, which is established by the NMB, facilitated this inability to reach the established participation threshold among eligible voters. First, in an effort to prevent undue interference in this second election, and since Delta’s anti-union behavior and intent was clear from previous elections and public statements, AFA requested that the NMB conduct the election using a simple Yes/No Ballot. Under this procedure, those Delta flight attendants wanting union representation would vote “Yes”.

Those that did not want union representation would vote “No” and a majority of the votes cast would determine the outcome. The ability to choose such a balloting procedure is well within the NMB’s discretion and has been used in the past. Instead, the NMB claimed that they were unable to change their established policy, even though they had just deviated from long-standing policy in a recent election involving the Compass Airlines flight attendants.

Illegal expansion of list: Keeping in mind that under NMB procedures, all voters start out as a “No” vote unless they proactively participate in the election, AFA-CWA wanted to make sure that the eligibility list of voters contained names of voters that were actually inclined to participate as bona fide members of the craft and class. Delta management on the other hand was determined to put as many names as possible on the eligibility list, especially with individuals who would not vote or had no interest in participating in the election. Inclusion of such voters would make it harder for those desiring union representation to reach the 50% + 1 participation threshold. In this election, the NMB allowed Delta to place a number of names on the eligibility list from those that clearly had no interest in voting in this representation election. This effort by Delta management increased the number that was required by the union supporters to reach the 50% + 1 participation rate.

Included on the list of eligible voters submitted by Delta management were furloughed flight attendants whose “employer-employee” relationship was tenuous at best and whose expectation of return to Delta as a flight attendant was highly unlikely.

Some of these individuals had been on a furlough since November of 2001, clearly not intending to return to employment with Delta as a flight attendant. Also making it clear that Delta itself did not intend for these furloughed flight attendants to return, the company began hiring new flight attendants, rather than calling furloughed flight attendants back to service. Clearly, with no intention of returning to Delta, the many furloughed flight attendants on the eligibility list would most certainly not participate in a union representation election. This NMB ruled to allow for their names to remain on the eligible voter list.

On March 18<sup>th</sup>, just one month after AFA filed for a representation election for the Delta flight attendants, Delta management announced an “early out” incentive package for employees, including flight attendants. If an employee met certain requirements, they would be entitled to leave the company and still retain some benefits. Eventually 821 flight attendants chose to take this “early out” program. Since these individuals would be leaving employment with the company in the immediate future, they did not have a clear stake in the outcome of the representation election and many most likely did not participate in the vote. The NMB allowed their names to remain on the eligible voter list during the election.

And, finally, through sleuthing by AFA-CWA union supporters at Delta (keeping in mind that they do not have access to their own seniority list) dozens of names were put on the eligibility list by Delta management of employees who had already terminated their employment with Delta. Only when challenged by AFA-CWA, did Delta admit that

several flight attendants on the list were no longer employees of Delta. The integrity of the voting process must be maintained and is in doubt when an employer can stack the list arbitrarily.

**Unilateral change in the election dates:** On March 24, 2008, the NMB issued a notice establishing that an election among the Delta flight attendants would take place and that the voting period would run from April 23<sup>rd</sup> until June 3<sup>rd</sup>. After AFA-CWA had notified all its supporters, publicized the dates via electronic communication and produced and mailed printed materials, the NMB announced on April 3<sup>rd</sup> that it was, without consultation with AFA-CWA, unilaterally changing the election dates. I have provided a copy of the Winter 2008 edition of *Flightlog*, AFA-CWA's newsletter that was mailed to all AFA-CWA members including over 11,700 Delta flight attendants which listed the original NMB voting dates. Instead of the voting period ending and ballot count to be completed on June 3<sup>rd</sup>, the NMB announced that the final day would now be May 28<sup>th</sup>. AFA-CWA protested the unilateral decision arguing:

...unlike many employee craft or classes in the airline industry, flight attendants do not report to discreet work locations during the regular business hours. Rather, the 13,000 Delta flight attendants are based at 13 regular domiciles, dozens of additional "satellite" locations, and the majority actually commute to the their domiciles from other cities. In other words, Delta flight attendants are literally dispersed around the world at any given time. As a result, AFA-CWA is forced to focus its limited resources on reaching as many of these dispersed flight

attendants as possible within the election period. Clearly, a longer time period gives AFA-CWA the ability to reach most of the potential voters, while a shortened one does not.

The Board's decision is even more disturbing when it is compared to the election period established for the 46 flight attendants eligible to vote at Compass Airlines. In that election, the voting information was mailed out on December 17, 2007, and the vote count was on January 29, 2008. In other words, the 46 Compass flight attendants serving a small, domestic regional airline had over six weeks to vote. Here, on the other hand, in an election for an employee group that is over 300 times larger, where there is an extensive international route structure, and where, unlike Compass, flight attendants are on furlough, the flight attendants have one week *less* in which to vote. Where is the rationale for this decision?

The NMB eventually sent a letter, reiterating without explanation or rationale that the election dates would remain April 23, 2008 – May 28, 2008.

**Damaged NMB Ballot Envelopes:** Soon after the NMB began mailing balloting information, AFA-CWA received word from Delta flight attendants that the envelopes containing their personalized balloting information were either damaged, opened, or stuck to another voter's balloting information. As a result, several voters made clear that they did not trust the integrity of the voting process and would not be casting ballots.

AFA-CWA believes that this defective mailing error on the part of the NMB led to some voters not participating in the election.

**Requests for Duplicate Voting Information:** When requesting duplicate balloting information because of inadvertently throwing the ballots away or loss of the information, the NMB requires that the request be received in writing even though the balloting process itself is electronic/telephonic. Several weeks into the balloting process, Delta flight attendants began to make requests for duplicate voting information. As the May 28 ballot count loomed closer, AFA-CWA received increased complaints from flight attendants who had mailed requests for duplicates, but were still waiting for a response from the NMB. As of May 27<sup>th</sup>, AFA-CWA had collected the names of 58 flight attendants who had requested duplicate voting information but had not yet received it from the NMB.

**Deceased flight attendant on eligibility list:** AFA-CWA discovered a deceased flight attendant on the eligibility list and requested that her name be removed. As the request was received by the NMB less than the seven calendar days they require for removing a name, and even though Delta had failed to timely notify the NMB of her death, the NMB ruled that death is not an “extraordinary circumstance” that would warrant removing her name from the eligibility list.

Another example of the NMB decisions that have created a difficult organizing environment and of the NMB’s willingness to randomly apply and interpret their policies

in favor of management was amply demonstrated in the representation election of the Compass flight attendants. This case demonstrated the NMB's willingness to deviate from their past practice, policy and the Representation Manual. However, it was done to address the concerns of the employer in this case, and directly against the interests of the employees seeking union representation and a binding labor contract.

Upon its emergence from bankruptcy, Northwest Airlines established Compass Airlines as a wholly owned, subsidiary airline to handle some of its regional flying. AFA-CWA began an organizing campaign amongst the flight attendants and filed for a representation election on August 22<sup>nd</sup>, 2007, with almost 100% of the flight attendants signing cards for an election. The NMB Representation Manual states that in order to determine which employees are eligible to participate in the election, the cut-off date is the last day of the payroll period ending before the day the NMB received the application for an election.

Compass Airlines filed with the NMB to stop the election from taking place claiming it was a "start-up" airline and had ambitious growth plans over the next several years. Since they claimed that there would be more flight attendants hired in the months and years to come, holding an election now would not be "fair" despite long-established rules otherwise.

A full four months after AFA-CWA petitioned for an election, the NMB finally set election dates. This delay in scheduling an election is unprecedented for

representation elections and only makes sense if one considers that the delay worked in Compass' favor. The NMB finally ruled that the election would go forward but that the cutoff for inclusion of employees eligible to participate in the election would be moved forward to November 1, 2007, over 2 months since the original filing for the election. This decision was a profound deviation from long standing NMB policy and their representation manual, the exact sort of deviation that they have claimed is not possible when the union has sought recourse. In its decision, the NMB forcefully defended its right to ignore its own well-established procedures for conducting a representation election. The NMB stated:

Although the Board's Manual sets forth procedural guidelines for the investigation of eligibility issues including the cut-off date, **the provisions of the Manual are neither binding on the Board nor the exclusive procedures for the NMB's investigation of representation matters.** The courts have recognized that the Manual is "not a compilation of regularly promulgated rules and regulations having the force and effect of law." **Thus, the NMB has the discretion under the RLA to establish rules for...eligibility to vote in an election and to deviate from these rules in the face of unusual or extraordinary circumstances.** (Emphasis Added)

This NMB has made clear that an employee's death does not constitute an "extraordinary circumstance" to have them removed as a "No" vote during a representation election. And this NMB has stated that a history of aggressive anti-union

behavior by an employer does not constitute an “extraordinary circumstance” to help facilitate unionization and collective bargaining as intended by Congress. But the NMB had no problem considering it is an “extraordinary circumstance” when the employer announced that they have a business plan to grow and expand and hope to have in the future more employees than currently on the payroll.

So, as AFA-CWA has learned firsthand in these cases, the rules and requirements of the NMB in organizing campaigns are difficult. But the practices and decisions of this NMB have often made it even more difficult, and were exclusively favor of the employer.

Given all of the obstacles mentioned in the Delta campaign, AFA-CWA took extreme measures and filed carrier interference charges during the 2008 representation election. The Board noted in early May, 2008 that, “..Because the Board does not find extraordinary circumstances that would require Board action at this time, any allegations regarding conduct during the election period will be addressed, if appropriate, at the end of the voting period consistent with the Board’s usual practice.”

Almost five months have passed and the NMB has still not bothered to notify AFA-CWA if the Board will even investigate the charges of interference. If it suits the Board, the majority of Board members will continue to delay scheduling elections, change election timelines and delay responding to carrier interference charges. This type of arrogance should not be tolerated.

While all of these actions have received various levels of attention and outrage, the most recent example of overreach by this NMB was its recent attempt to change its Representation Manual in airline merger situations. The proposed changes, coming as Delta and Northwest prepare to merge and throwing the future of the collective bargaining rights of tens of thousands of employees into doubt were suspicious at best and raised many questions. I want to thank the many members of Congress that weighed in with the NMB to express their opposition, and indeed outrage, concerning these changes. Fortunately, the NMB has withdrawn those proposed changes after receiving overwhelmingly negative comments, but the question still remains as to why the NMB was attempting these changes at this time.

There were a number of problematic changes proposed, by the NMB; however, Section 19.701 was especially egregious. Section 19.701 sought to change the procedures the Board uses to expand union certification after a merger occurs.

Under current NMB rules, the Board uses a “comparability” standard to determine representation rights in the context of a merger. As this is understood, if a unionized group of workers from one carrier is larger and “not comparable” in size to the group of workers who perform the same work at the other carrier in a merger, the former group’s union is automatically certified to represent the new combined employee group without an election.

Proposed section 19.701 stated that when a union represents a craft or class of workers at one carrier, but no representation exists at the other, the Board will exercise its discretion and extend certification only where there is “more than a substantial majority, as determined by the Board.” Under this new language, the threshold for extending certification is ‘more than a substantial majority’ and the Board determines at their whim what this percentage is. This is an ambiguous standard that has never been used and would grant the NMB unprecedented discretion to extend or deny certification to unions involved in mergers.

Section 19.701 also states that authorization cards may not be used to extend union certification. Currently NMB policies allow a union to extend certification through authorization cards or voluntary recognition, if the carrier consents. The Board later attempted to clarify this language; however, the revision was ambiguous and failed to clearly articulate the NMB’s *current* policy.

Finally, the Board ignored multiple requests to schedule a public hearing and extend the comment period to October 15<sup>th</sup>, 2008. The Board is charged with administering labor-management relations in a fair and balanced manner and ensuring that the right of workers to freely choose union representation is protected. However, the proposed rule would have made it harder for workers to retain and achieve collective bargaining rights. There was simply no policy justification for the Board to implement these changes and no valid reason to deny a public hearing and extension of the comment period.

One other policy of the NMB deserves greater investigation and research. The NMB current policy is that in order to cast a vote, the voter must do so via the internet or over the phone. Voters do not have an opportunity to participate using a paper ballot. Recently, AFA-CWA conducted an internal audit of our voting procedures to determine voter participation in our internal elections. Our internal investigation found a 15 percent gap in participation in those elections using only an internet and phone voting process versus those that relied on a paper ballot. Those that utilized the paper ballots that were mailed back had a 15 percent greater participation rate than those that used the internet and phone method. It deserves investigation to determine if using a purely internet and phone based system of voting results in a decrease of voter participation in the election, especially when the NMB elections are based entirely on turnout and voter participation.

Lastly, I would like to raise the possible conflict of interest that exists with the current Chair of the NMB, Read Van Der Water. Chair Van Der Water is a former employee of Northwest Airlines, having served as their lobbyist for a number of years. Having her serving on the board at a time that many of the decisions impact her former employer potentially raises a conflict of interest. I for one find it interesting that in the two cases that AFA-CWA has had decided before the board that raise the most serious issues, were those directly involving Northwest Airlines – the Delta representation election and Compass Airlines. I hope the members of this Committee will ask Ms. Van Der Water about any possible contact that she may have had with her former employer, with Delta, or surrogates for her former employer or for Delta.

As you can see, it is difficult for any union to organize workers in the current environment of anti-union hostility from employers, especially when doing so under the onerous requirements established by the NMB. However, the decisions and actions of the NMB in these two Delta elections and others have made the difficult environment even more challenging, giving the appearance of sanctioning the anti-union animus of Delta Air Lines. Congress should keep a vigilant watch over this NMB and send a clear message that the NMB can no longer be a party in corporate America's efforts to usurp the stated policy and precedent of Congress to "encourage unionization and collective bargaining." Currently, Delta, the country's most anti-union airline, is poised to become the largest airline in this country and possibly the world.

The actions on behalf of Delta by the NMB jeopardizes over 60 years of collective bargaining history of the Northwest Airlines flight attendants. Should Delta management succeed, with the assistance of the NMB, in eliminating a flight attendant union, the Northwest Airlines collective bargaining agreement would no longer be in effect. It is important for you to send this message. We will have a difficult struggle fighting this corporate giant, and we hope that the NMB does not once again push the scales in the employers direction.

