

When Unions Refuse To Take “No” for an Answer

The Growth of Unionization by Regulation

By Barbara Comstock

Summary: In November 2010, Delta Air Lines Flight Attendants voted against unionization. This was the third time that the employees have defeated the Association of Flight Attendants (AFA) in the past decade. Yet the union continues to challenge the votes and the will of the Delta employees and insists on holding up the integration of the merged company (Delta Air Lines and Northwest merged in 2008). If they can't get a union by the voting process, the unions are demonstrating that they will use their political muscle to push for unionization by regulation and bureaucratic fiat.

In 2002 and 2008 union elections, the Association of Flight Attendants (AFA) stood to add 13,000 dues-paying members to their organization. They lost those elections. In 2010 they tried again, and there was much more at stake. By this time, non-union Delta Airlines had merged with union Northwest Airlines. By calling for the election, AFA stood not only to gain those 13,000 new members, but if the union lost, it would have to relinquish 7,000 pre-merger Northwest flight attendants that it had represented.

Last November, the union lost the election. The result: Those 7,000 dues paying members no longer pay approximately \$50 a month to the union, and thus, millions of dollars are now absent from AFA coffers.

Given this huge loss of dues-paying members, the union now seeks back door help from the Obama Administration to force



Delta workers hold an anti-union rally in Atlanta, GA

unionization on the flight attendants by using an obscure government board to overturn the votes and the will of the employees and order a new election. We are essentially living in a world where the unions are saying, “It’s not over until we say it’s over.” Such undemocratic action deserves the serious investigation and review of our elected officials in Congress.

The National Mediation Board: Union Cheerleader & Enforcer

The National Mediation Board (NMB) is a government entity that most of us have never heard of that oversees union elections for airlines and railroads. Last fall, the NMB issued a rule change on how union elections are held for airlines and

railroads, which it clearly hoped would tilt the elections in favor of the union. The rule change was directly requested by the AFL-CIO in a private letter to the Board in September 2009.

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The new rule permits a majority of those who vote in a union election, rather than the majority of the workforce in an airline or railroad union, to determine whether or not a class or craft will be represented by a union. The new rule is a significant change from the previous one, which was in effect for nearly 80 years – from the Franklin D. Roosevelt Administration to the present. That rule required a majority of the entire class or craft to support union representation in order for a union to be certified. The new rule now means that of a workforce of 20,000, if only 5000 employees vote and 2501 vote for a union, those 2501 employees would determine the election outcome for the 20,000 employees.

Even with this significant change to how elections are conducted, the labor movement again failed to win the November 2010 union election involving flight attendants, as well as a number of other Delta union elections. Yet, despite the win, the right to say “no” to a union is still in the hands of the Board that has already fixed the rules in favor of the unions. This certainly doesn’t inspire confidence that the votes of the rank and file will be respected.

The AFA has filed a multitude of groundless interference charges against Delta, which could likely and unnecessarily lead to another vote – the third since 2008. Delta flight attendants, including those from pre-merger Northwest Airlines continually express

they’re exhaustion and eagerness to move forward, without being forced into a union and being forced to pay union dues.

Crying Foul

In a pre-Christmas filing to the National Mediation Board, Delta Air Lines responded to the various interference allegations of the AFA union, demonstrating the frivolous nature of the union claims. The misguided claims outlined in the filing are detailed below. They demonstrate the roadmap by which unions refuse to accept “no” for an answer and try to find ways to impose unionization by regulation and to intimidate and harass those who dare refuse unionization.

The AFA union made complaints about Delta’s communications with employees during the run-up to the union election, even though they were constitutionally protected speech: see *Gissel Packing Co. v. NLRB*, 395 U.S. 575 1969; *US Airways, Inc. v. NMB*, 177 F. 3d 985 (D.C. Cir. 1999). *Gissel* teaches that an employer is free to communicate to its employees any of its general views about unionism or any 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). In *US Airways, Inc.* the court cited the principle that: “[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.”

The AFA complains that during the union campaign, the employer circulated too high a volume of campaign materials. Too much speech? Where might one find that in our Constitution? Would the Obama Administration or members of Congress care to apply that standard to their own elections? The mere volume of campaign materials cannot constitute interference, and in this case Delta thought it necessary to respond to attacks and misinformation by AFA. For example, AFA erroneously claims that the National Mediation Board is entitled to order a re-run of the election even if the Board determines that Delta made no coercive, threatening, or

intimidating statements to employees. The AFA says the Board can re-run an election solely on the asserted fact that Delta spoke too much, even if what Delta said was entirely lawful. This is simply not the law.

The attempt to restrict the volume of employer speech is a very real threat. It also is offensive to the very purpose of the First Amendment and is inconsistent with strict scrutiny analysis according to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). Even if the Board applied this anti-free speech approach, the AFA union’s own campaign was of unprecedented dimensions and their communications far exceeded Delta’s.

The AFA does not allege that a single one of its supporters was subjected to any form of discipline or adverse action by Delta through these communications. As Delta pointed out in its brief to the National Mediation Board: “AFA’s own evidence confirms that Delta permitted AFA’s supporters to engage in extensive advocacy activities in Delta’s crew lounges – far more than had been permitted at Northwest [which was unionized] – where Delta’s In-Flight supervisors work, and those managers properly administered Delta’s non-discriminatory Advocacy Policy.” Not surprisingly, the AFA does not even attempt to challenge the terms of Delta’s Advocacy Policy. In fact the National Mediation Board found this same policy unobjectionable in 2002 when the union challenged it following that failed union election. Furthermore, there has not been any evidence presented to support the union’s allegation that Delta engaged in monitoring of voting activity or misuse of technology. Delta has provided sworn statements that there was no such monitoring and the unions have not contested these sworn declarations.

The AFA Plays Rough

The AFA union itself engaged in an unrelenting and coercive campaign designed to scare and intimidate Delta flight attendants. First, the AFA had twice as many communications with employees as Delta: According

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to its filing, Delta had 215 separate communications from January 1, 2009 through November 3, 2010 (Delta made no communications in 2008). The AFA made 402 separate communications from June, 2008 through November 3, 2010. In 2009 alone, there were 187 AFA communications vs. 85 from Delta, and in 2010 there were 184 AFA communications vs. 130 from Delta.

The AFA union campaign included both print and electronic communications: There were two AFA branded websites (nwaafa.org and deltaafa.com which included a web log and videos); a website operated by AFA representatives and supporters called "Average Joe" produced e-mail newsletters; there were periodic "Join Together" newsletters and other information featured on pages and postings on social network media, including Facebook.

Throughout the union campaign, the AFA union continually solicited on behalf of the union and distributed literature at crew lounges throughout Delta's flight attendant bases. AFA also held rallies across the country. AFA hosted dozens of campaign events starting a year before the run-up to the election. AFA also held flight attendant mixers, informational gatherings, happy hours, open houses and town halls in various locations where Delta has operations, including Atlanta, Seattle, Cincinnati, Texas, Detroit and California. This was a full-fledged all-out campaign that operated freely with massive communications to all employees.

AFA also conducted "volunteer days" and "airport visibility" events throughout the Delta system with Delta's cooperation. AFA engaged in informational leafleting or

picketing at various airports, including Minneapolis – St. Paul, New York, JFK, Detroit and Memphis.

AFA regularly conducted rallies at the entrance to Delta's Atlanta employees' parking lot, where it attempted to stop cars entering and leaving the parking lot. It also engaged in campaign phone banking – with the AFA placing calls to home and cell phone numbers as early as August 2009 to contact flight attendants at home and on their personal cell phones. Flight attendants were advised that the only way to stop what became harassing, unsolicited calls was to divulge whether and how they had voted.

The AFA's extensive campaign activities also included the spreading of unfounded rumors through a "whisper campaign." For

example, Al Corry, an AFA organizer in the AFA's 2008 campaign, circulated a rumor on Facebook that a senior Delta executive made trips to Manila to make arrangements for hiring and bringing to Atlanta for training 250 foreign flight attendants. This was simply untrue. The AFA also activated a sophisticated tracking system to let flight attendants know that AFA would track, determine and disclose how flight attendants voted.

The AFA also freely used a high volume of paid union leave time for flight attendant supporters to conduct its campaign. In contrast, they gave no paid leave to opponents of the union. Delta granted thousands of hours of union business leave to AFA representatives. They were compensated by the AFA during this leave. However, those flight attendants who opposed AFA did not get paid leave and were not compensated for their time or expenses. Those employees who opposed the union did so on their own dime and on their own time.

Other false attacks employed by the AFA outlined in the Delta filing: AFA repeatedly warned that without an AFA contract, flight attendant seniority would be at risk, Delta would outsource jobs, and would change pay, benefits and work rules.

The AFA also conducted an unrelenting attack on Delta management, repeatedly attacking Delta CEO Richard Anderson and Delta President Ed Bastian, falsely accusing them of insider trading, of padding their "stock options and expense accounts," and comparing them to the leaders of "financial services" companies who took generous bonuses. AFA organizers and supporters published an electronic flyer where the face of Richard Anderson was transformed into the face of a devil, with flames shooting from the image. AFA falsely accused Michael Campbell, Delta's Executive Vice President of Labor Relations and Human Resources of lying in connection with a National Mediation Board filing.

AFA also created the fear that employees might be disciplined and discharged, and it alleged that attendants would face arbitrary actions. These had no basis in fact. AFA

appeared to focus its nastiest attacks on flight attendants who joined "No Way AFA" – a flight attendants group for those who opposed the union. AFA organizers produced a video that portrayed a Delta flight attendant who was a member of the No Way AFA group as a Nazi leader. The video also depicted CEO Richard Anderson as Hitler.

When union opponents held a December 8 rally in Washington, D.C., the AFA's General Counsel, Ed Gilmartin, gave "the finger" to the Delta attendants and made crude gestures at them.

AFA took advantage of Delta's liberal advocacy policies which allowed the union to conduct open discussions but not coercion or harassment. The union was able to engage in daily solicitation and advocacy.

The Union Monitoring Program

The AFA set up an elaborate voting monitoring system to track and target flight attendants, including interrogating them about how they had voted or would vote. In the crew lounges, AFA representatives aggressively solicited such information and recorded it on lists which were attached to clipboards and then made available for other flight attendants to review. Sometimes this was done in crew lounges; at other times it was done at layover hotels or even on-board aircraft.

Many flight attendants whom AFA could not reach in person received phone calls in which an AFA representative asked them to disclose how flight attendants had voted. If these flight attendants refused to disclose how they had voted or indicated they had not voted, the AFA representative would ask them to commit to vote for AFA. Several flight attendants who complained to Delta also told Delta that they told AFA supporters that they had voted "yes," just to get the AFA to leave them alone.

Delta received multiple complaints from attendants who said they had been coerced by AFA to tell them how they voted. They said there was retaliation if they voted "no".

One union opponent found an "anti-union scum" sticker put on his/her hotel room door. The union even harassed attendants on foreign trips.

After the vote count, flight attendants who opposed the union asked for a process where they could submit information about the union's interference. Over 4000 statements were submitted.

When it comes to claims of election interference and employee harassment, the union should take a look in the mirror. The AFA, which continues to insist on rerunning elections that it loses, engaged in a thorough and extensive campaign according to rules it designed to win. Yet the union lost. And now AFA says, in effect, it's not over until we say it is over.

Under the current operating rules of the National Mediation Board, when the Board finds "interference" it can disregard the results of the recently-concluded elections and call for another election. The AFA filed interference claims against Delta after it lost elections among pre-merger Delta flight attendants in 2002 and 2008, and those claims were dismissed in both elections. The AFA's current claims of interference largely mimic those dismissed in 2002 and 2008.

Despite the lack of any credible record of interference in the union election, the AFA has requested unprecedented "remedies" in order to essentially impose unionization by regulation since it can't win a union vote even after dictating a change in the election rules. Quite simply, the AFA's interests have always been about the AFA and not the will of the majority of the employees. The AFA has manipulated the representation process from the beginning. And now Delta employees are at the mercy of two unelected bureaucrats at the National Mediation Board – two bureaucrats who fixed the rules in the first place!

The AFA has an utter disregard for the will of the flight attendants. The National Mediation Board has proven that it is not a neutral arbiter in these matters. The 94

percent of the flight attendants who voted and produced a clear majority rejecting the AFA union have been ignored. Any remedies that favor the AFA would be an endorsement of the AFA's tactics.

If the Board wanted to focus on real inappropriate actions consistent with its precedents, it would focus on the aggressive, massive fear tactics of the AFA. Yet there is legitimate concern that the Board will abuse its power and entertain the AFA's requests. In addition to rerunning the election, the "remedies" requested by AFA include the provision of home address lists for employees. This invasion of privacy rights is totally unwarranted given the liberal access that AFA union members have to the Delta flight attendants because of Delta's liberal advocacy policy. Delta has understandably asked that if the Board distributes home addresses, employees should be given the option to opt-out and retain the right to privacy. The majority of the flight attendants have voted "no" to having the AFA represent them, and many of them have been subjected to harassment and disrespect by the very organization that now wants their personal information.

A Heavy Hand Stirs Grassroots Opposition

A grassroots group "No Way AFA" has formed to picket the international headquarters of AFA and meet with elected officials in Washington to make its views known. It is unfortunate that even though a majority has rejected AFA representation - with a high voter turnout of 94 percent - AFA does not respect the choice of the majority, and further delays flight attendants from moving forward with the full integration of Delta with Northwest.

In a bizarre twist, the AFA is even citing as interference the fact that there was a high voter turnout! In the brave new world of forced unionization, unions oppose employees exercising their right to vote if it doesn't turn out in their favor. It is profoundly insulting to in effect be told by the union and by the government that unless

you vote for a union, you don't understand what is going on and hence your voices will not be respected.

The grassroots opposition of flight attendants to the AFA campaign was a simple display of worker independence. They said "No" to this union - not once, but three times. What part of "No" don't the unions understand? Is it only pro-union voters whose rights are respected? "No Way AFA" is made up of flight attendants who oppose the union as well as some who voted for the union but protest this lack of respect for the election outcome. They came to Washington on their days off to demand that after rejecting AFA in three separate secret ballot votes over the past few years, AFA should respect the November 2010 election results. The union should refrain from any further attempts to harass flight attendants and disrupt the smooth assimilation of former Northwest Airlines Flight Attendants into the existing Delta Air Lines Flight Attendant system.

Basically "No Way AFA" told the union and Congress - Let our people go! It is beyond time for AFA to quit posturing, listen to its members and allow Delta to take care of its flight attendants, something that Delta has done for decades without union input.

Not only have the flight attendants at Delta rejected unionization, but eight other employee groups at Delta Air Lines have also rejected union representation. And all of this has occurred despite a stacked deck of new rules. Yet the NMB that stacked the deck now controls their fate if Congress doesn't step in and investigate what is becoming a reality of forced unionization by regulation.

These union tactics will further delay integration of the Delta and Northwest airlines workgroups. They prevent the company from aligning pay, benefits and work-rules for those employees, and they prevent pre-merger Northwest employees from receiving pay comparable to their Delta colleagues and other benefits of the merger (they currently make less than their Delta colleagues.) The NMB ruling sets a terrible precedent for any currently-unrepresented workforce whose

majority desires to maintain a direct relationship with its management.

The new Congress should exercise its oversight duties; looking at how the threat of forced unionization by regulation imposed by obscure government agencies would be a good place to start.

BARBARA COMSTOCK is former Counsel for the House Committee on Oversight & Government Reform and founder of Comstock Strategies, where she works with advocacy groups and companies on labor and union related issues.

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**Terrence Scanlon
President**

LaborNotes

Michelle Rhee, former Washington D.C. schools chancellor, has formed a new school reform advocacy group called **StudentsFirst**. Among her proposals for a more effective educational system, Rhee suggests “treating teachers like professionals” by realizing that teacher “compensation, staffing decisions and professional development should be based on teachers’ effectiveness, not on their seniority.” This frontal assault on tenure called forth a swift response from Rhee’s old nemeses in the teachers unions. **Randi Weingarten**, president of the **American Federation of Teachers** released a statement saying in part, “Michelle Rhee’s agenda presents a false choice: support students or support teachers. The fact is that neither can succeed unless both are supported.” *Labor Notes* has searched in vain among Rhee’s writings and public statements for sentiments expressing the wish that teachers not be supported. What is radical and unacceptable to the AFT seems to be Rhee’s contention that the support given teachers *be commensurate with their effectiveness at their job*. You know, like everyone else.

The **American Postal Workers Union** (APWU), one of the nation’s largest postal unions representing some 200,000 workers, is continuing negotiations with the **United States Postal Service** (USPS) to secure a new deal (the previous contract expired last November). Among the sticking points in the talks: the process of “excessing” whereby a postal employee may be relocated depending on the needs of its employer based, for example, on shifting mail volume. APWU President **Cliff Guffey** wants such relocations eliminated. That the union would make such demands when the Postal Service can barely afford employees at all - the USPS posted (no pun intended) an astonishing and record \$8.5 billion in losses last fiscal year – is the definition of chutzpah.

Former White House Chief of Staff **Rahm Emanuel** may be running for mayor of Chicago, but he is evidently not running for Mr. Popularity among the unions. First there is his support of **Performance Counts**, a bill working its way through the Illinois state legislature which would curtail teachers’ right to strike. “As we have [rules against strikes] for police and firefighters, I would have it for teachers because they provide an essential service,” Emanuel is quoted saying in the *Chicago Sun-Times*. Then there was the **Chicago Federation of Labor** meeting where, as **Edward McClelland** writes on NBCChicago.com, Emanuel “reportedly told union leaders it may be necessary to reduce the pensions of current city employees.” Well, as Emanuel once famously said, you never want a serious crisis to go to waste, and America’s public pension system is nothing if not a serious crisis.

Not that unions want you to know it. In Florida, where Gov. **Rick Scott** has declared the state’s \$122 billion retirement system “a ticking fiscal time bomb,” **Rich Templin**, Florida **AFL-CIO** legislative and political director, is defending union pensions and blasting what he calls the “myths” that they are underfunded or that they place undue fiscal burdens on states and localities. “We can’t find any verifiable information to indicate that those claims are true, that those claims are anything other than political rhetoric and ideological posturing,” says Templin. Hopefully the fingers-in-the-ears approach taken by Templin and other union leaders will protect their eardrums when the fiscal time bomb eventually goes off.

December saw a slight drop in unemployment to 9.4 percent. Unfortunately, 14.5 million Americans are still unemployed; 6.4 million have been unemployed for six months or longer. Unemployment has been higher than 9 percent for 20 consecutive months. Among the consequences of this bleak, long-term jobs picture has been depressed wages for many of those who do find work. As **Sudeep Reddy** notes in the *Wall Street Journal*: “To an extent rarely seen in recessions since the Great Depression, wages for a swath of the labor force this time have taken a sharp and swift fall,” as people find themselves having to take part time work to survive, or accept positions far below their skill-level and accustomed pay grade. **Till von Wachter**, labor economist at **Columbia University**, concurs: “The deeper the recession, the lower the wage you’re going to get in the next job and the lower the quality of your next job.”