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Airline and Railroad Labor and Employment Law

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**Recent Developments in NMB Election Interference Cases and Employee
Committees**

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I. WHAT DOES THE NATIONAL MEDIATION BOARD'S "ELECTION INTERFERENCE" STANDARD REQUIRE?

Section 2, Ninth of the Railway Labor Act charges the National Mediation Board ("NMB" or "Board") with the responsibility to conduct representation elections "in such a manner as shall insure the choice of representatives . . . without interference, influence or coercion exercised by the carrier."

To ensure that it fulfills its mandate to conduct elections untainted by carrier interference, the Board applies the "laboratory conditions" standard to the elections it supervises. This standard requires that, under the "totality of the circumstances," sterile conditions, without contamination by carrier coercion, be maintained from the time the carrier becomes aware of the union's organizing drive until the election ballots have been counted. *Continental Airlines*, 21 NMB 229 (1994).

On this latter point regarding timing, the Board has repeatedly held that "laboratory conditions must be maintained from the date the carrier becomes aware of the organizing drive." *Aeromexico*, 28 NMB 309, 336 (2001) (citing cases). Nonetheless, in *Delta Air Lines*, 30 NMB 102, 113 (2002), the Board ruled that laboratory conditions attached only for one year before the labor organization involved filed its representation application with the Board (even though the carrier had been aware of organizing activity for years before that). The Board explained that the union "could have sought the judicial relief available under Section [2,] Third and Fourth, but failed to do so." *Id.* The Board accepted the carrier's contention that "a requirement that a carrier make no changes in working conditions where there is continuous organizing for several years is not feasible." *Id.* However, the Board rejected Delta's argument that laboratory conditions should commence with the filing of the application because "the standard advocated by Delta would provide carriers with a virtually unrestricted opportunity to influence employees' free choice . . . while organizing is taking place." *Id.*

The Board has stressed that the "laboratory conditions" test in representation election cases focuses on whether employees' rights to choose representation free of coercion or influence was protected, rather than upon whether the carrier violated the law:

[The Board employs its laboratory conditions test] to provide an election environment in which eligible voters [are] able to make their decision regarding representation with sufficient insulation from interference, influence or coercion by the carrier. This factual conclusion does not constitute or imply any determination that the carrier committed illegal acts, but rather, that the factual circumstances in these cases were materially detrimental to the employees' freedom of choice under Section 2, Ninth of the Act.

Evergreen International Airlines, 20 NMB 675, 714 (1993).

II. WHEN WILL EMPLOYEE COMMITTEES BE FOUND TO CONSTITUTE ELECTION INTERFERENCE?

The Board has found that, under some circumstances, carriers have used "employee committees" as an instrument with which to unfairly interfere with, influence or coerce employee free choice during the laboratory conditions period. In such situations, if the carrier's activities taint laboratory conditions, the Board will order a rerun election. These decisions find judicial and legislative support in the 1934 amendments to the Railway Labor Act that modified Section 2, Third and added Section 2, Fourth in order to ensure that employees and unions would "be free from employer influence and control." *House Comm. On Interstate Commerce, To Amend the Railway Labor Act of May 20, 1926*, H.R. Rep. No. 1944 (1934). "The unions claimed that the carriers interfered with the employees' freedom of choice of representatives by creating company unions Congress amended Section 2, Third to reinforce the prohibitions against interference with the choice of representative." *IAM v. Street*, 367 U.S. 740, 759 (1961). As the court held in *Barthelmy v. Air Line Pilots Association*, 897 F.2d 999, 1015 (9th Cir. 1990), "[F]ormation of company-dominated unions [was] the illegal purpose which Congress sought to prevent in enacting the statute." In several decisions prior to *US Airways*, 24 NMB 354 (1997), the Board found that carriers disturbed the laboratory conditions necessary for a fair election by coercively manipulating employee committees.

A. Cases Prior to *US Airways* Involving the Coercive Manipulation of Employee Committees

1. *Metroflight*, 18 NMB 532 (1991): This case arose after the Board ordered an election upon the merger of two carriers, one unionized and the other non-unionized. While the election was pending, management officials of the newly merged carrier encouraged employees to form employee committees to discuss workplace issues and conditions of employment. The officials then met with one of the committees during the election period to discuss conditions of employment. Reviewing these facts, the Board held that: