

Representing BUEs in NTSB Interviews

Welcome to LR Chronicles #18. In the last edition of the LR Chronicles, we discussed representing BUEs in security and compliance investigations. This edition will focus on representing employees during an interview conducted by the National Transportation Safety Board (NTSB). This is a very different type of a meeting with management than other types of meetings such as formal discussions (LR Chronicles #6), Weingarten meetings (LR Chronicles #7), and security investigations (LR Chronicles #17). There are two main reasons why this type of meeting is different:

- We are dealing with a third party entity that is separate and distinct from the FAA; and
- The NATCA representative has a more limited role in representing employees during an NTSB interview.

As such, we must ensure that we comply with the rules and regulations of the NTSB.

Although an interview of an employee by the NTSB meets the definition of a Weingarten meeting, it is a different type of meeting than that of the traditional Weingarten, which would normally be conducted by FAA management. Article 6, Section 1 of our CBA covers our authority to represent employees in NTSB interviews. Article 6, Section 1 **states "When it is known in advance that the subject of a meeting is to discuss or investigate a disciplinary, or potential disciplinary situation, the employee shall be so notified of the subject matter in advance. The employee shall also be notified of his/her right to be accompanied by a Union representative if he/she so desires, and shall be given a reasonable opportunity both to obtain such representation, and confer confidentially with the representative before the beginning of the meeting. If during the course of a meeting it becomes apparent for the first time that discipline or potential discipline could arise, the Agency shall stop the meeting and inform the employee of his/her right to representation if he/she so desires, and provide a reasonable opportunity to both obtain representation and confer confidentially before proceeding with the meeting, if requested. The Union retains the right to determine its representatives in accordance with Article 2 of this Agreement.**

This Section applies to meetings conducted by all Management representatives, including DOT/FAA security agents, EEO investigators and agents of the Inspector General. The above provisions shall apply to meetings conducted by the National Transportation Safety Board (NTSB) to the extent the provisions are consistent with NTSB regulations and procedures. Additional representational rights in operational error/deviation situations are covered in Article 64 of this Agreement. As you can see, NATCA is bound by the regulations and procedures that are promulgated by the NTSB.

As we all know, the only reason an employee would be subject to an interview by the NTSB, would be in relation to an aircraft accident or incident. It is the job of the NTSB to investigate and determine the probable cause of any such accident or incident. Additionally, and as with any other Weingarten meeting, the law as contained in 5 USC 7114(a)(2)(B), still applies. As such, the employee must reasonably believe that disciplinary action may result **and** the employee must request such Union representation. In the NTSB process, the employee will actually undergo two (2) separate and distinct interviews. The first interview will be with representatives from the FAA. This is known as the "pre-interview," meaning that the FAA is going to attempt to "prepare" the employee for what can be expected in the actual NTSB interview. The FAA will have a minimum of three (3) representatives at the "pre-interview:"

- A representative from ATO-T (Terminal) and/or ATO-E (Enroute), depending on which organization is involved. In some instances, it could be both organizations;
- A representative from ATO-S (Safety); and
- An attorney from the FAA's Office of General Counsel

Any or all of these FAA representatives may ask the employee questions.

The Pre-Interview:

As stated above, the FAA will interview the employee prior to the actual NTSB interview. The FAA will actually make an honest attempt to prepare the employee for the NTSB interview. They will formulate and ask questions of the employee that they think and assume will be asked by the NTSB. This pre-interview is conducted on the employee's duty time and the FAA is responsible for altering the schedule of both the employee as well as the NATCA representative in order for both of them to appear in a duty status.

The pre-interview as stated above also meets the definition of a formal discussion as outlined in 5 USC 7114(a)(2)(A) and Article 6, Section 3 of our CBA. As such, the Union as a whole is entitled to be notified of this meeting separately and distinctly from that of the employee. The Union then has a right to designate a Union representative to be present if it chooses. (Please refer to LR Chronicles #6 for an in-depth explanation of a formal discussion).

The first thing that will happen in the "pre-interview" is that the FAA's attorney will explain to the employee and the NATCA representative the reason for that attorney being present at the meeting. The first issue that the FAA's attorney will explain is that the employee is entitled to have a representative present at both the pre-interview as well as the actual NTSB interview. Although the FAA would like for the employee to have the FAA's attorney in the NTSB interview, NATCA remains the "exclusive representative" and as such, NATCA has the right to act as the employee's representative. ***Please remember this is a very important issue. The FAA attorney is there ONLY to represent the FAA and will ONLY have the interests of the FAA in their actions.*** The second issue that the FAA's attorney will explain is the fact that they are there representing the FAA both with the NTSB as well as any potential future litigation that may arise as a result of the accident or incident.

During the pre-interview with the FAA, all rights afforded to NATCA under the definition of a formal discussion, and the employee regarding Weingarten meetings apply. (Please refer to LR Chronicles number 6 & 7).

This is the time for the NATCA representative to take full and complete advantage of the rights that apply including, but not limited to:

- Ensure the rights of the Union are protected (protect the box)
- Ensure the rights of the employee are protected
- To prevent the employee from "digging a hole" or making inconsistent statements
- To take notes
- To be proactive
- To speak
- To advise and counsel the employee
- To bear witness to the proceeding
- To ask clarifying questions
- To provide clarifying answers
- To raise extenuating circumstances
- To give the employee advice on how to answer a question
- To temporarily stop the meeting in order to have a confidential conversation with the employee (as long as it does not "unreasonably delay" the meeting)

That being said, a Union representative may not:

- Disrupt the meeting
- Answer a question for the employee
- Insist on taping the meeting
- Unreasonably delay the meeting

Believe it or not, the FAA may actually do a good job of preparing both the employee and the NATCA representative for the actual NTSB interview. The FAA will actually ask most of the same questions that will be asked by the NTSB. This is the time to ensure that the employee feels as comfortable as possible. It is also the time for the NATCA representative to follow the guidance as stated above.

It is highly recommended that the NATCA representative conduct a very thorough one-on-one with the employee prior to the pre-interview as well as after the pre-interview and prior to the NTSB interview. This will ensure the employee feels as comfortable as possible. In addition, taking a break to confer before the NTSB interview will ensure that the employee and the NATCA representative follow all of the guidance in this document as well as LR Chronicles number 17. Before the pre-interview, the NATCA representative should ask to review the material germane to the employee that will be involved, introduced, or utilized during the NTSB interview. This will allow you to discuss the material, and prepare the employee for the questions and preparation that will follow.

Also, the NATCA representative still needs to be on the lookout for the following types of questions:

- Compound
- Asked and Answered
- Outside the realm/scope of the investigation

In addition to the questions aimed at the employee, the NATCA representative should be on guard for questions that would involve another person. The questions may come in a form that asks the employee to speculate on the actions or intentions of another person. They should be prepared for these questions, and the NATCA Representative should intervene by stating that the question calls for speculation. The employee should only be responsible for answering questions for which they have direct knowledge. You should counsel the employee in your preparation to hesitate before answering any question. This will allow the NATCA representative the opportunity to interject. If forced or pressed to answer, the employee should respond "I have no direct knowledge of that."

Please refer to LR Chronicle number 17 for an explanation of each type of question and how to identify each type of question.

The NATCA representative should ask the interviewer to rephrase any type of question meeting these criteria.

The NTSB Interview:

As with the pre-interview, the NTSB interview is also scheduled on the employee's duty time. As such, the FAA is responsible for altering the schedule of both the employee as well as the NATCA representative in order for both of them to appear in a duty status.

The NTSB will not be the only entity that is present during this NTSB interview. The FAA will have a representative as part of the panel and will also be allowed to ask questions of the employee. Additionally, if NATCA is granted "party status" to an investigation, we will also have a representative present. NATCA is granted "party status" in virtually all NTSB investigations that directly involve the actions of Air Traffic Controllers. As a holder of "party status" the NATCA representative will also be allowed to ask questions of the employee being interviewed. It must be remembered here that although the NATCA representative on the NTSB panel is NATCA, their main function and priority is to assist the NTSB in arriving at a probable cause finding for the accident or incident. The NATCA representative on the NTSB panel is NOT there to represent the employee. That is why the employee is allowed to have another NATCA representative.

The conduct of both the NATCA representative and the employee who is being interviewed is no different than in any other Weingarten meeting. To refresh your memory from my LR Chronicles number 17:

The representative must tell the employee certain things to prepare them to conduct themselves during the interview. These include, but are not limited to:

- Conduct yourself at all times in a professional manner
- Always tell the truth
- Do not embellish on any answer. If the answer can be stated in a yes or no fashion, this must be done
- If the employee cannot remember the ONLY answer is "I do not recall" do NOT make things up and do NOT "think" you remember
- Be humble

Regarding how the employee should answer any and all questions in the pre-interview or the NTSB interview, it is of the utmost importance for the employee to absolutely follow the guidance as contained in LR Chronicle number 17. Here is that guidance:

As mentioned above when "prepping" the employee, the employee must be:

- Truthful, honest and forthright in answering any question
- Short answers...yes, no, I do not recall
- No embellishing on any answer

- Do not speculate in answering any question; (If you do not firmly know the answer to a question, then your answer should be "I do not recall" or "I do not remember")
- Conduct yourselves in a professional and humble manner at all times

The representative should feel free to take breaks during the interview as needed. Always ask the investigator permission first to take a "comfort break."

As mentioned before, the employee needs to be briefed on how to answer questions and conduct themselves by the NATCA representative prior to the pre-interview and again prior to the NTSB interview. If the NATCA representative is not comfortable on how the employee answered a particular question in the pre-interview, the NATCA representative needs to make the employee aware of this problem PRIOR to the NTSB interview in a one-on-one conversation.

It is very important for the NATCA representative to take very copious notes during an NTSB interview, including the pre-interview. This should include, but not be limited to writing down:

- Who asked a question;
- The full question verbatim; and
- The employee's answer verbatim.

In an NTSB interview, there is a lot of "down-time." This means that there are several and/or long periods, during the interview, of total silence. The reason is because all of the members of the NTSB panel are writing down the employee's answer to their questions. The NATCA representative needs to use this "down-time" to also write down the employee's answers. It is absolutely imperative for the employee to be briefed that they should NOT fill this silence with talking.

Lastly, it is highly recommended that should an employee and/or the Union be notified that an employee is to be interviewed by the FAA and/or the NTSB; the facility representative should immediately notify the Ham or Mike Hull immediately. The NATCA national office has attorney's that are experts in the NTSB process and we, at the regional level can contact them for their advice and counsel or even to ask them to actually represent the employee.

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