Congress of the United States
Washington, DC 20515

August 6, 2012

The Honorable Harry R. Hoglander
Chairman
National Mediation Board
1301 K St. NW
Washington, DC 20005

Re: RIN 3140-ZA01, Request for Comments on Representation Procedures

Dear Chairman Hoglander and Members of the Board:

Thank you for inviting comment on your proposed rules implementing the FAA Authorization bill's amendments to the Railway Labor Act (RLA). You expressly solicited input on section 1003 of the FAA bill, which addressed the showing of interest required to trigger a union election under the RLA. Specifically, you asked whether section 1003 alters the Board's current showing-of-interest requirement in the unique situation where a unionized carrier merges with another carrier and the union seeks to represent the merged carrier's employees. 77 FR 28536 at 28537 (May 15, 2012).

As members of the 112th Congress, we possess a keen interest in ensuring that regulations issued pursuant to a law we passed are consistent with legislative language and intent. We now point out that the plain language and legislative history of section 1003, along with basic common sense, demonstrate that the provision has no impact on the Board's current showing of interest requirement for mergers. This amendment to the RLA merely establishes the showing of interest required where a union newly seeks to represent a workplace, rather than in the distinct situation where an organized workplace merges with another workplace.

By Its Plain Language, Section 1003 Does Not Encompass Mergers

Section 1003 provides that "upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees," the Board shall ascertain that there is a 50 percent showing of interest prior to conducting an election. Pub. L. No. 112-95 § 1003, 126 Stat. 11, 147 (2012). But under current Board procedures, which define the types of "applications" a union or employee may file, the representation process following a merger is triggered not by the certification application referenced in the amendment, but by "an application … seeking a NMB determination that a single transportation system exists." NMB

Representation Manual § 19.4. If it is determined that the merger resulted in a "single transportation system," the representation process is triggered automatically – no further application for certification need be submitted by a union. *Id.* at § 19.6.

Plainly, under current Board procedures, merger applications have unique characteristics and unique terminology identifies them. By our choice of legislative language, Congress specified that section 1003 affected only proceedings stemming from traditional non-merger representation applications, and did not alter existing guidelines for showing of interest in merger proceedings.

Excluding Mergers Comports With Long-Standing and Sound Board Policy

Congress enacted section 1003 against the backdrop of the Board's long-standing policy of treating representation questions arising from mergers as *sui generis*. The Board, pursuant to its recognized broad authority to establish representation procedures, explicitly distinguishes its merger procedures from its general representation rules, which are found in the Code of Federal Regulations. Section 19.6 of the Board's representation manual provides that "[t]he rules regarding percentage of valid authorizations in NMB Rule §1206.2 … do[es] not apply to applications filed [with respect to a merger]." And so, even though a formal Board rule, 29 CFR § 1206.2, requires signed authorization cards to initiate a typical election, in the case of mergers a union can provide evidence that an employee is currently represented by the union to satisfy its showing of interest.

Mergers impact pre-existing bargaining relationships and the stability of labor relations, implicating public policy concerns that are distinct from initial representation petitions. Naturally, an election should be easier to trigger in the merger setting because it fosters workplace stability to allow workers who have been represented by a union – perhaps for decades – the opportunity to have a vote on whether a newly merged workplace will continue to have union representation. Stripping workers of their union without a vote will contribute to strife and discord in the workplace, which undermines the prompt and orderly resolution of disputes, a central purpose of the RLA.

Consider the situation in a tripartite merger, where each entity is represented by a different union, but no single union could command the 50 percent required showing of interest. Here, the entire merged entity would be denied an automatic vote on union representation in spite of a long history of employees enjoying collective bargaining rights. As this illustrates, applying the 35 percent rule in the merger context thwarts the RLA's professed goal of supporting "self-organization" by denying an election even when common sense dictates that employees should receive one. 45 U.S.C. § 151a.

Legislative History of Section 1003 Explicitly Disavows Inclusion of Mergers

If the plain language leaves any doubt, the legislative history clearly illuminates Congressional intent here. During the debate on final passage of the FAA bill, Majority Leader Reid, along

with Senator Rockefeller, the FAA bill's Senate sponsor, and Senator Harkin, the Chairman of the Senate Committee with jurisdiction over the Board, engaged in a colloquy concerning the bill's reach. *See Disabled in Action of Metro. New York v. Hammons,* 202 F.3d 110, 124 (2d Cir. 2000) (noting that "the conference committee report, committee reports, sponsor/floor manager statement and floor and hearing colloquy" are the most "authoritative and reliable materials of legislative history").

Senator Reid remarked that the bill "is not intended to apply to the unique situation in mergers." 158 Cong. Rec. S341 (2012). Senator Reid went on to point out that the bill applies to "all applications for representation elections," but not to a "petition [to determine] whether a merger … has altered existing representation structure as a result of a creation of a single transportation system." *Id.* The language of section 1003 confirms Senator Reid's statement: it does not invoke the terminology used to describe the particular applications used in a merger context, which involve an initial determination of whether there is a single transportation system.

Senator Reid also indicated congressional cognizance of the troubling policy that would result if section 1003 were applied to mergers: "employees could lose their representation simply by merging with a slightly larger unit without even having the opportunity to vote." *Id.*

Conclusion

Section 1003 does not alter the NMB's current, eminently sensible procedure regarding showing of interest for mergers. Consistent with the legislative language and our clear intent, we urge you to leave the current merger procedure in place. Thank you for the opportunity to comment on this important issue.

Sincerely,

Harry Reid
United States Senator

Tom Harkin
United States Senator

John D. Rockefeller IV
United States Senator