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BY E-MAIL – legal@nmb.gov
and at Presentation on June 19, 2012

The Honorable Linda Puchala
Chairman
National Mediation Board
1301 K Street, NW
Suite 250E
Washington, DC 20005

The Honorable Elizabeth Dougherty
Member
National Mediation Board
1301 K Street, NW
Suite 250E
Washington, DC 20005

The Honorable Harry Hoglander
Member
National Mediation Board
1301 K Street, NW
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Washington, DC 20005

Re: Docket Number C-7034
Proposed rule with request for comments
Comments of the Aircraft Mechanics Fraternal Association (AMFA)
Hearing Date – June 19, 2012
Hearing Location – Margaret A. Browning Hearing Room (Room 11000), National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570

Dear Chairman Puchala and Members Dougherty and Hoglander:

These comments are submitted by the Aircraft Mechanics Fraternal Association ("AMFA") in response to the initial May 15, 2012 Federal Register Notice regarding the National Mediation Board's proposed rule with request for comments regarding the Board's Representation Procedures and Rulemaking Authority as well as the May 22, 2012 Federal Register Notice of Public Hearing and the June 7, 2012 Federal Register correction in the above-referenced docket number. In developing its response, AMFA considered the Board's invitation to commenters to address not only the specific questions raised by the Board, but also "any other matters they consider relevant to the changes wrought by the amended statutory language." 77 Fed. Reg. 28536 (May 15, 2012).

The Board's proposal must be evaluated in the extortionate political context in which it arose. The Board's proposed rule changes are, for the most part, the result of an ugly legislative compromise that required the advocates of working Americans to accept the creation of new obstacles to collective representation in order to preserve the basic democratic right that the issue of unionization be determined by a majority of votes cast.

For decades, the NMB demanded from airline and railroad industry employees that they obtain the vote of a majority of eligible voters, rather than a majority of votes cast, in order to enjoy collective bargaining. This daunting obstacle to unionization was applied to the employees of no other private industry. Indeed, at no level of government do we permit the outcome of an election to be determined by non-voters.

The NMB recognized that democracy demands that elections be decided by those who actually cast their ballots and that abstention must be accepted – as it is in any other American political context – as signifying neutrality and a willingness to abide by the votes of those who affirmatively exercise their franchise. The Board appropriately determined that it was well past time to cease the practice of allowing a government agency to "substitute its opinion for that of the employee and register the lack of a vote as a 'no' vote." 74 Fed. Reg. 56750, 56752 (November 3, 2009).

By final rule published in the Federal Register on May 11, 2010, the Board took this modest step in the advancement of basic democratic rights. This modest step, however, resulted in a massive political backlash by anti-worker elements seeking to restore the RLA's discriminatory organizing standards via litigation and legislation. Ultimately, in order to preserve the right of a majority of voting employees to decide their fate, advocates of working Americans were required to yield a pound of flesh in the form of new obstacles. The Board is now compelled to implement these new obstacles pursuant to amendments to the Railway Labor Act ("RLA"), which were made as part of the Federal Aviation Administration Modernization and Reform Act of 2012 (the "FAA Reauthorization"). Nonetheless, while acting under this compulsion, the

Board should exercise whatever discretion it retains to mitigate the anti-democratic impact of this Faustian bargain.

Showing of Interest

Prior to the FAA Reauthorization, employees governed by the RLA were required to muster a showing of interest of 35% of their craft or class in order to enjoy the opportunity of a democratic election. 29 C.F.R. § 1206.2. This showing of interest standard imposed a heavier burden on airline and railroad employees than all other private sector employees, who need only satisfy a 30% showing of interest standard. 29 C.F.R. § 101.27.

Nevertheless, the FAA Reauthorization amended the RLA to impose a still heavier burden on airline and railroad employees by withholding the right to a democratic election unless "the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class." There is no rational explanation for this further aggravation of the discriminatory standards applied to the workers in these two industries; rather, the amendment is the product of raw political power.

While the proposed revised wording of § 1206.2 is consistent with the wording of the newly enacted RLA language on the showing of interest required for applications received for representation, the proposed revised wording of § 1206.5, regarding the showing of interest required for an intervenor, is not. Furthermore, the extension of the 50% standard to intervenors would needlessly damage the democratic aspirations of American workers.

Once the 50% threshold has been satisfied, a union election will be held. The compressed time schedule applicable to intervenors would make satisfaction of the 50% requirement nearly impossible. Moreover, the application of a 50% standard to multiple unions would prevent any intervenor participation unless employees, on short notice, sign more than one authorization. In short, the extension of the uniquely onerous discriminatory standard to intervenor unions serves no purpose other than to limit democratic choice. Since the 50% showing of interest for an applicant under the RLA does not compel application of this percentage to an intervenor's showing of interest, and the NMB's obligation to promote democratic choice would be enhanced by a lower intervenor standard, the Board should continue its current practice and maintain the showing of interest for an intervenor at 35%. In addition, the same rationale is applicable to the Board's merger provisions regarding intervenors, whose showing of interest percentage should likewise remain at its current 35%.

Absent express language in the RLA to the contrary, the Board should not pursue a policy of according inferior organizing rights to workers in the airline and railroad industries.

Run-Off Elections

The amendment to the RLA concerning run-off elections likewise serves to undermine the democratic aspirations of working Americans. The new RLA run-off election rule states in relevant part that "[i]n any such election for which there are 3 or more options (including the option of not being represented by any labor organization) on the ballot and no such option receives a majority of the valid votes cast, the Mediation Board shall arrange for a second election between the options receiving the largest and the second largest number of votes."

The NMB's prior rule, which placed a higher value on workers' democratic choices, allowed the aggregation of votes for purposes of a run-off election for representation purposes so that, if the majority of employees favored collective representation, the top two union organizations in the initial election would compete in any run-off election.

The new rule's adverse impact on democratic choice is illustrated by the following example:

If an initial election results in 30% for no representation, 29% for Union A, 28% for Union B, and 13% for Union C, then the run-off would have to be between union A and the no representation option notwithstanding a vote in favor of collective representation of 70%. The more logical approach would be one that allowed voters for Union C the right to choose between two unions rather than between Union A and no representation.

Giving carriers a second opportunity to conduct scorched earth anti-union campaigns after a majority of voting employees has asserted its collective will for representation is not democracy in action. The term run-off election is a disturbing misnomer when the actual effect is to limit voter choice. While recognizing that the Board must give effect to the language in the newly enacted RLA, as discussed below, the Board should give consideration as to how to offset the necessary increase in aggressive, anti-union activity.

Other Discriminatory RLA Organizing Standards

Wholly aside from the "votes cast" issue that the Board has addressed (albeit with retaliatory consequences discussed above), workers governed by the RLA must contend with a number of other discriminatory obstacles to collective bargaining, which employees in other private industries are not required to overcome, including:

- Limiting organization to carrier-wide bargaining units;

- Limiting organization to bargaining units (crafts or classes) as defined by the NMB instead of bargaining units that are responsive to the interests of workers as they define them; and,

- The absence of any administrative agency process that affords an employee protection from retaliation for engaging in organizing activity.

This last issue is of particular concern and has been substantially aggravated by the recent RLA amendments. As distinguished from the role of the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), an individual employee in the railroad or airline industry has no government agency that will assist him in resisting discrimination, discipline or termination in retaliation for union organizing activity. The existing statutory framework leaves these employees to their own devices to vindicate their rights, at their own expense, in federal court. As a practical matter, the prohibitive cost of litigation means that, for the most part, the organizing rights of employees can be violated by their employers with impunity. Indeed, the Board's current remedial authority is generally limited to a post-election determination to conduct a re-run election without any consideration of the losses suffered by individual employees.

The newly enacted RLA amendments substantially aggravate this inequitable situation. The imposition of a 50% showing of interest threshold will increase the necessity, and duration, of employee exposure to retaliatory actions without a realistic remedy.

It is well past time for the NMB to replicate the NLRB remedial procedures available to employees who suffer violations of their rights under sections 7, 8(a)(1), and 8(a)(3) of the NLRA so that the right of airline and railroad employees to organize for collective bargaining exists in fact, not just in theory.

Thank you for your consideration of AMFA's comments.

Sincerely,

Lee Seham