BEFORE THE
NATIONAL MEDIATION BOARD
WASHINGTON, DC

In the matter of:	:	
	:	
Notice of Proposed Rulemaking	:	
Representation Procedures and	:	**RIN 3140-ZA01**
Rulemaking Authority	:	**DOCKET NO. C-7034**
	:	

AIRLINES FOR AMERICA and REGIONAL AIRLINE ASSOCIATION
JOINT COMMENTS

Airlines for America[1] ("A4A") and the Regional Airline Association ("RAA")[2] appreciate the opportunity to comment on the National Mediation Board's ("NMB" or "Board") proposed changes to its Representation Manual. 77 Fed. Reg. 28536 (May 15, 2012) and 77 Fed. Reg. 33701 (June 7, 2012) (the "NPRM"). The proposed changes relate to the amendments to the Railway Labor Act ("RLA") in the Federal Aviation Administration Modernization and Reform Act of 2012 ("2012 Act").

The 2012 Act established that a union or individual's application to represent a craft or class of employees must be supported by a showing of interest from at least 50% of the employees. In connection with the NPRM, the NMB has invited comments regarding the effect of that amendment on the Board's policies and practices with respect to representation disputes in mergers.

A4A is the principal trade and service organization of the U.S. scheduled airline industry. It is the nation's oldest and largest airline trade association. RAA represents North American regional airlines that collectively operate 13,000 daily flights, representing over 50% of the nation's commercial schedule. A4A and RAA's member airlines have extensive experience in representation elections under the RLA, including representation elections arising as a result of mergers. Notably:

[1] A4A airline members are: Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; South west Airlines Co.; United Continental Holdings.; United Parcel Service Co; and US Airways, Inc. Air Canada is an A4A associate member. ABX Air, Inc.; Allegiant Air, LLC; Global Air Holdings; NetJets, Inc.; and Virgin America participate in A4A's Labor and Employment Council and join in these comments.

[2] RAA airline members are: Aerolitoral; Air Wisconsin Airlines Corp.; AirNet Systems Inc.; American Eagle Airlines; Cape Air; Chautauqua Airlines; CommutAir; Compass Airlines; Empire Airlines; Era Aviation; ExpressJet; GoJet; Grand Canyon Airlines/Scenic; Great Lakes Aviation; Horizon Air; Island Air; Jazz Air; Mesaba Aviation; New England Airlines; Piedmont Airlines; Pinnacle Airlines, Inc.; PSA Airlines; Republic Airlines; Seaborne Airlines; Shuttle America; Silver Airways; SkyWest Airlines, Inc.; and Trans States Airlines.

- Most A4A and several RAA member airlines are the product of prior mergers and acquisitions (in some instances, multiple mergers). Since the enactment of the Airline Deregulation Act in 1978, there have been over 45 separate mergers and asset acquisitions that helped form the current member airlines of A4A and RAA.
- Airlines employ over 500,000 workers who are subject to the Railway Labor Act.
- Over the past four years, over 148,000 airline employees have been eligible to vote in NMB ordered representation elections. Of those 148,000 potential voters, approximately 118,000 – roughly **80%** - were in elections resulting from mergers.

Thus, A4A and RAA member air carriers have both: (i) extensive experience with NMB ordered representation elections, including those held in merger settings, and (ii) a strong interest in ensuring that the congressional mandate of a 50% showing of interest is applied to all representation elections.

THE AMENDMENT

From 1934 until 2012, Congress left the NMB with broad discretion to determine how best to implement its authority under Section 2, Ninth regarding disputes as to the identity of representatives. The Board was responsible for deciding whether and how to conduct investigations when representation applications were filed. However, in the 2012 Act, Congress amended the RLA to mandate that all applications to represent a group of employees must be supported by a 50% showing of interest. The text of section 1003 of the 2012 Act provides in pertinent part:

> Section 3. Bargaining Representative Certification.
>
> Section 2 of the Railway Labor Act (45 U.S.C. 152) is amended by adding at the end the following:
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> "Twelfth. Showing of interest for representation elections. The Mediation Board, upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Mediation Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class."

SUMMARY OF POSITION:

In the sections below, we outline in detail the reasons why the NMB should conclude that the showing of interest mandate in the 2012 Act applies to representation elections arising from mergers. In summary, we will demonstrate that:

- The text of the 2012 Act unequivocally covers applications in *all* representation elections. The title of the new Section 2, Twelfth is: "Showing of interest for representation elections." Contrary to some commenters' assertions that the amendment does not

encompass representation elections arising from mergers, neither the title nor the text of the new provision contains an exception for representation elections following a merger.

- The 2012 Act ended the Board's discretionary authority to establish showings of interest by unions, and mandated that the NMB require a 50% showing by union applicants in all representation elections. The 50% showing of interest is a "jurisdictional" requirement that an applicant must satisfy whenever it seeks to be certified as a representative.
- Representation matters related to a merger are simply a subcategory of all representation disputes, and therefore governed by Section 2, Twelfth. Investigations and elections conducted under the Board's Merger Procedures require applications and showings of interest, as do all other representation matters.
- As noted above, 80% of the airline workers eligible to vote in recent NMB ordered elections have been in elections held following the merger of carriers. Adopting the commenters' proposed reading of the Section 2, Twelfth - to exclude merger related elections - would moot the amendment for many, if not most, forthcoming elections. Their reading would have effectively removed the overwhelming majority of eligible employees from Section 2, Twelfth, if it had been in effect during those years. Had Congress intended to limit the scope of the amendment, it could have clearly and explicitly done so…but it did not.
- The union commenters' reliance on floor remarks by one senator seeking to limit the scope of the amendment is misplaced. A colloquy among a small number of members of one party in one house of Congress regarding the interpretation of a statutory provision that they criticized – with no member of the other party even participating – is of no relevance, and cannot trump the plain language of a statute.
- Unions filing as "intervenors" in representation elections must also satisfy the same 50% showing of interest. The text of Section 2, Twelfth, does not contain any exception for intervenors.
- The Board should expand the scope of its rulemaking proposal and use this opportunity to reexamine current representation rule 19.7. First promulgated in 2001, rule 19.7 states: "Existing certifications remain in effect until the NMB issues a new certification or dismissal." Some incumbent unions have relied upon rule 19.7 to improperly assert that they have a right to represent for an indefinite period a "minority" subgroup of employees from a former carrier after the merger has been concluded. This position is directly contrary to the RLA requirement – now reinforced by Section 2, Twelfth – that the majority of a craft or class has the right to determine who shall represent the craft or class on a "system wide" basis.

SECTION 2, TWELFTH COVERS ALL REPRESENTATION APLLICATIONS and ELECTIONS, INCLUDING MERGER RELATED DISPUTES

In the preamble to the NPRM, the NMB recites that "(t)he amended language is *silent* with regard to mergers." 77 Fed. Reg. 28537 (emphasis supplied). The absence of a specific reference to "mergers" in the amendment, however, does not suggest that Congress failed to address merger-related representation matters. To the contrary, Congress had no need to specify that the amendment covered merger-related representation applications since applications following the merger of carriers are simply one subcategory of representation applications. Specifying

"merger-related applications" would have been redundant since they are, by definition, representation applications.

By way of analogy, Lake Erie is one of the Great Lakes. Congressional statutes addressing navigation rights on the "Great Lakes" would inherently cover all five lakes. Congress would not need to mention Lake Erie, by name, in the text of a statute on the Great Lakes, as Lake Erie is subsumed within the larger term: The Great Lakes. Similarly, when Congress addressed representation applications in Section 2, Twelfth, it was, per se, encompassing representation applications resulting from mergers.

The only motivation for Congress to have specifically referenced "mergers" in the 2012 Act would have been if Congress had wanted to carve out merger-related representation applications or otherwise make those applications subject to a standard other than the 50% showing-of-interest requirement. But Congress did not exempt post-merger applications from the new 50% standard. Consequently, since Section 2, Twelfth does not create an exception for merger-related applications, there is only one plausible interpretation of the 2012 Act. Representation applications arising from a merger must be supported by the same 50% showing of interest that Congress has mandated as a jurisdictional prerequisite for all NMB representation elections.

Moreover, carving out "merger-related elections" would have been much more than just a "minor" exception to the amendment. To the contrary, merger-related elections are far and away the biggest subcategory of representation elections that the Board has conducted in recent years. As noted above, during the past 4 years, approximately 80% of the eligible voters in airline representation contests have been involved in elections conducted following mergers. Unions can proffer no rationale why Congress would have mandated – for the first time in over 75 years – a showing of interest requirement in representation elections, and then exempted the largest category of representation elections from that requirement.

A review of the existing provisions of the NMB's rules also demonstrates that representation disputes arising from mergers are just one variation of representation disputes:

- The Board rules regarding Merger Procedures (Rule 19.0) appear in the Representation Manual.
- The NMB requires that anyone filing an application under the Merger Procedures use the same application form as for all other representation disputes: Form NMB-1- Application for Investigation of a Representation Dispute.
- In Rule 19.2, entitled Authority, the Board cites Section 2, Ninth as the source of its authority to handle merger related representation matters stating in relevant part: "Pursuant to Section 2, Ninth, the NMB, upon an Application, has the authority to resolve representation disputes arising from a merger…" Thus, the Board's authority to handle mergers arises from the same statutory source as its authority to handle all other representation matters.
- Rule 19.4 is entitled Initiation of Procedure for Determination of a Single Transportation System and states that: "Any organization or individual may file an application, supported by evidence of representation or a showing of interest (See Section 19.601-2) seeking a NMB determination that a single transportation system exists."

- In turn, Rule 19.601, Showing of interest on the Single Transportation System, provides that: "Incumbent organizations or individuals on the affected carrier(s) must submit evidence of representation or a showing of interest from at least thirty-five (35) percent of the employees in the craft or class. This evidence includes, but is not limited to, a seniority list, dues check-off list, a current collective bargaining agreement or a certification, or other indicia of current representation."
- And finally, Rule 19.603 concludes with: "Applications that do not meet the showing of interest requirements will be dismissed."

In short, the NMB's own rules demonstrate that merger-related elections have always been treated as simply one subcategory of representation disputes. Prior to the passage of Section 2, Twelfth, a union seeking a representation determination under the Board's Rule 19 Merger Procedures had to file the same application and make the same 35% showing of interest as required in other representation determinations. The only relevant distinction is that the Merger Procedures are even more accommodating in enabling the union to meet the showing of interest standard, in that the union can provide evidence other than authorization cards. However, the percentage requirement has always been the same.

In light of (a) the unequivocal language of Section 2, Twelfth, (b) the absence of any exception for mergers, (c) the reality that excluding merger-related elections would effectively gut the amendment, and (d) the fact that the Merger Procedures in the Board's Representation Manual require that an application be supported by a showing of interest, A4A submits that all merger-related applications must be subject to the 50% showing of interest standard.

ISOLATED COMMENTS IN THE CONGRESSIONAL RECORDS CANNOT CREATE A "MERGER" EXCEPTION TO SECTION 2, TWELFTH

In their prepared statements before the NMB at the June 19th public hearing on the NPRM, both the International Association of Machinists and the Association of Flight Attendants-CWA asserted that a colloquy among a small number of Senators demonstrated that Congress did not intend that Section 2, Twelfth apply to merger-related representation elections. More specifically, the unions rely on statements made by Senator Majority Leader Harry Reid (D-NV) on the floor of the Senate on February 6, 2012.

In his floor statements regarding Section 2, Twelfth, Senator Reid initially acknowledged that the new 50% showing of interest would govern *all elections*:

> "One of these changes would modify the agency rules governing the showing of interest that is a precursor to a representation election for either a new certification or a change in certification. We modified that standard to require a 50 percent showing of interest for *all elections*....A 50 percent showing of interest will insure that elections only occur when there is sufficient and substantial indication of employee support." *See* 158 Cong. Rec. S329, 340-41 (daily ed. Feb. 6, 2012) (colloquy among Senators Tom Harkin (D-IA), Jay Rockefeller (D-WV) and Harry Reid) (emphasis supplied).

Having correctly described the broad scope of the amendment, Senator Reid then inexplicably added:

> "And I would also like to explain that it is not intended to apply to the ***unique*** situation in mergers." Id. at S329, 341. (emphasis supplied).

Next, after reciting a second time that the "text of the amendments apply to ***all applications for representation elections***…" (emphasis supplied), Senator Reid again added a conflicting statement:

> "the entirely different circumstance where a labor organization or employees petition the National Mediation Board for a determination as to whether a merger or other transaction has altered the ***representational*** structure as a result of a creation of a single transportation system." Id. at S.329, 341 (emphasis supplied).

Senator Reid concluded by seeking to justify the unsupported exclusion of merger-related representation matters with the incorrect assertion that:

> "Otherwise, employees could lose their representation rights…without even having the opportunity to vote, which is unacceptable." Id. at S329, 341.

A4A and RAA submit that Senator Reid's remarks – on their face – merit little consideration. When read in full, the Senator's remarks are internally inconsistent and contain incorrect factual assertions. More specifically:

- Senator Reid twice acknowledged that the amendment covers ***all*** representation elections and applications, consistent with the clear and unambiguous language of the amendment.
- He acknowledged that the Board's merger procedures are intended to address changes in "***representational***" structures.
- His characterization of representation elections arising from mergers as "unique" is impossible to reconcile with the reality that over 80% of the airline employees involved in recent NMB representation elections were involved in post-merger elections, facts that Congress is deemed to have understood when it adopted the amendment.

Finally, the Senator's assertion that the new congressional mandate of a 50% showing of interest could cause some employees to lose the representation of their incumbent union without an election is without foundation. So long as the incumbent union can garner a 50% showing of interest – by obtaining, where necessary, authorization cards to supplement the number of employees that it previously represented – there will be a representation election.[3] Nothing on the face of the amendment will deny any employee an election. Only the ***failure of an applicant***

[3] Contrary to the assertions of some unions that meeting the 50% showing of interest in a merger-related dispute is burdensome, it should be noted that meeting the 50% showing actually requires far less of an incumbent union in a merger setting than it does of a union seeking to organize an unrepresented group. In non-merger elections, the union must start from scratch and obtain authorization cards from at least 50% of the employees. In a merger setting, the incumbent union has a big head start since part – or all – of the 50% showing of interest can be met simply by producing the seniority list or other indicia of representation. *See* discussion of Rule 19.601 above.

to garner support for an election from at least 50% of the employees can prevent an election. And this outcome, as Senator Reid himself acknowledged in the colloquy, is consistent with the intent of the congressional authors: "A 50 percent showing of interest will insure that elections only occur when there is sufficient and substantial indication of employee support." *See* 158 Cong. Rec. S329, 340-41 (daily ed. Feb. 6, 2012)

In any event, regardless of how one reads these statements, one of the cardinal rules of statutory construction is that "courts must presume that a legislature says in a statute what it means, and means in a statute what is says there." *Conn. Nat'l Bank v Germain,* 503 U.S. 249 (1992). Section 2, Twelfth clearly meets this standard as it is (i) titled "Showing of interest for representation elections," (ii) mandates a 50% showing of interest for all applications, and (iii) contains no exception for merger-related applications. All of which compels the conclusion that merger-related representation disputes are covered by the amendment.

The union commenters' reliance on the remarks of one Senator cannot override the clear directive of the amendment. On multiple occasions, the Supreme Court has found that isolated comments in the congressional record are not a reliable indicator of overall congressional intent and cannot override the plain meaning of the statute. As stated in *Chrysler Corp v. Brown*, 441 U.S. 281, 311 (1979): "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *See also Bath Iron Works Corp. v. Director, Office of Workers' Comp. Program,* 506 U.S. 153, 166 (1993) ("[W]e give no weight to a single reference by a single Senator during floor debate in the Senate.")

The cautionary directives of *Chrysler* and *Bath Iron Works* are even more compelling where – as in the instant situation - the congressional remarks come from only one side of the aisle. In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Supreme Court found that "partisan statements [in the legislative history]…cannot plausibly be read as reflecting any general agreement [by Congress]." Id. at 262. That is precisely what occurred here. The remarks in question were part of a colloquy among only a small number of Democrats without any indication that Republicans were even aware of the statements.

Accordingly, Senator Reid's statements do not override the clear and unambiguous text of Section 2, Twelfth, which plainly covers *all* representation applications.

INTERVENOR UNIONS MUST SATISFY THE 50% SHOWING OF INTEREST

Under the current 29 C.F.R. section 1206.5 of the NMB rules, a union or individual seeking to file as intervenor in any representation dispute need only produce authorization cards from 35% of the employees. In the NPRM, the NMB has proposed raising the required showing of interest for intervenors to 50%.

A4A and RAA would endorse this change as consistent with the text of Section 2, Twelfth.

THE NMB SHOULD REEXAMINE MERGER PROCEDURES RULE 19.7 REGARDING STATUS OF REPRESENTATION CERTIFICATIONS

In 2001, over the objection of both airline and rail management, the Board adopted Representation Manual Rule 19.602 – now Rule 19.7 - which provides for survival of existing certifications after a merger until the Board issues a new certification or a dismissal. Rule 19.7 reads:

> Status of Representation Certifications
> Existing certifications remain in effect until the NMB issues a new certification or dismissal.

In the pending NPRM, the NMB did not propose changes to or seek comments on Rule 19.7. However, unlike other provisions of the Representation Manual which are predominantly procedural, Rule 19.7 is substantive in nature. It pre-determines the effect of mergers on existing certifications in a way that is contrary to a basic precept of the Railway Labor Act. To the extent that Rule 19.7 permits a union to remain as the representative of a "minority" faction of a larger system-wide craft or class on a merged airline, Rule 19.7 is directly contrary to long-standing interpretations of the RLA.

Specifically, Section 2, Fourth and Ninth – as now reinforced by Section 2, Twelfth - require that the majority of a craft or class has the right to determine who shall represent the craft or class on a *system-wide basis.* Both Section 2, Fourth and Ninth speak in terms of a *single* representative:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class …" (§ 2 Fourth); "[when a union is certified by the NMB] "the carrier shall treat with the representative of the craft or class for purposes of [the Act]" (§ 2 Ninth).

As stated in 1934 by U.S. Transportation Commissioner Joseph Eastman, the primary drafter of Section 2, Fourth and Ninth:

> "[M]y understanding of the way in which the words 'craft' or 'class' have been defined in the past, is that they would cover the entire service of any particular carrier. That is…it would be *all of the employees of the carrier*, no matter in what shop they were located, who did that particular kind of work." [4] (emphasis supplied).

Similarly, since the enactment of Section 2, Ninth of the RLA, the Board has consistently held that it can certify representatives only for an entire craft or class of employees on single transportation system. *See e.g.,* LSG Lufthansa Services, 25 NMB 96, 1098 (1997); Seaboard System Railroad-Clinchfield Line, 11 NMB 217, 224 (1984), Pennsylvania R.R., 1 NMB 467, 470 (1937). If a carrier to which a craft or class certification applies ceases to exist as a result of merger into a larger or different single transportation system, the certification should no longer have any application; and the merged carrier is obligated to treat with the organization that represents a majority of the members of each craft or class; not with the organizations that were certified as the representatives of a smaller craft or class that no longer constitutes a majority.

[4] *Hearings Before the House. Comm. on Interstate and Foreign Commerce on H.R. 7560,* 73d Cong., 2d Sess. 44 (1934).

Unfortunately, current Rule 19.7 has been cited by incumbent, minority unions as grounds for claiming that their representation survives a merger and the disappearance of the carrier to which it applied even after the merged carriers have become a single transportation system. These unions have asserted that their certifications continue indefinitely, until and unless that or another organization sees fit to invoke the Board's jurisdiction under the merger rules and the Board issues a new certification or a dismissal. Thus, in situations in which representation differs on the merging carriers and the labor organization(s) involved are content not to invoke the Board's jurisdiction, a union certified to represent what has become a minority fraction of a system-wide craft or class could insist on representing that part of the craft or class indefinitely, no matter how relatively small the group it represents may be.

Permitting "minority" unions to represent a small fragment of a post-merger craft or class is not only detrimental to obtaining the synergies and improved operational efficiencies of the merger, it is also a violation of the RLA directive that a union cannot serve as a representative of employees unless it demonstrates that it has a majority on a "system wide basis."

Accordingly, in light of the enactment of Section 2, Twelfth – which once again reaffirms congressional intent that a union have support of at least 50% of the employees – A4A urges that the Board reexamine Rule 19.7 and invite public comment.

Conclusion

A4A and RAA submit that the text of Section 2, Twelfth is unequivocal and accordingly the new 50% showing of interest should be applied to all representation disputes arising out of mergers or other corporate transactions. In addition, A4A and RAA urge that the NMB seek public comments on revoking Rule 19.7 in light of the enactment of Section 2, Twelfth.

We would be happy to discuss our comments or answer any questions.

Respectfully submitted,

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