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

The Honorable Harry Hoglander
Member, National Mediation Board
1301 K Street, NW, Ste. 250
Washington, DC 20005

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

Re: Representation Procedures, Docket No. C-7034

Dear Chairman Puchala and Members Hoglander and Dougherty:

The National Right to Work Legal Defense Foundation submits the following comments regarding the National Mediation Board's proposed rules that were published at 77 Fed. Reg. 28,536 (May 15, 2012). The rules changes were proposed in response to the Federal Aviation Administration Modernization and Reform Act of 2012. The Foundation believes that certain changes to the proposed rules are necessary at this time.

I. INTEREST OF THE FOUNDATION

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees. The Foundation's attorneys regularly represent individual employees in litigation challenging the abuses of compulsory unionism arrangements and advise employees about their rights concerning the imposition of union monopoly bargaining in their workplaces.

Since its founding in 1968, the Foundation has provided free legal assistance in virtually all of the United States Supreme Court cases involving employees' right to refrain from joining or

supporting a labor organization as a condition of employment, some of which arose under the Railway Labor Act. *E.g.*, *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998) (RLA); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (RLA); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Many of the most prominent lower court cases concerning the Railway Labor Act and National Mediation Board over the past forty years also have been brought by railway or airline employees through the Foundation's litigation program, including *Shea v. IAM*, 154 F.3d 508 (5th Cir. 1998); *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991); *Klemens v. Air Line Pilots Ass'n*, 736 F.2d 491 (9th Cir. 1984); *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983); and *Masiello v. US Airways*, 113 F. Supp. 2d 870 (W.D.N.C. 2000).

Thus, the Foundation is uniquely qualified to comment on the proposed rule changes.

II. NEW HIRES SHOULD BE ELIGIBLE TO VOTE IN RUN-OFFS

Section 1206.1 of the proposed rules limits those eligible to vote in run-off elections to employees who voted in the first election, unless their employment relationship was terminated or they left the bargaining unit. This is an erroneous and unfair standard. Some run-off elections may be conducted many months or longer after the initial election. In the meantime, many new employees may be hired by the employer. It is unfair to lump those new hires into a potential bargaining unit where they may eventually be forced to pay dues and fees to a union, but not allow them to vote in the first place on whether they want that union as their representative.

The Board should adopt a standard like that used by the NLRB, which is that any employee who is on the employer's payroll for the payroll period preceding the election is eligible to vote. NLRB Casehandling Manual § 11312.1; *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994); *Excelsior Underwear*, 156 NLRB 1236 (1966). This standard should be applied to both the initial NMB election and any run-off election. It is unfair, discriminatory and possibly even unconstitutional to force employees (in this case, new hires on the payroll) into a union collective, depriving them of the right to negotiate their own terms and conditions of employment, but not allow them any right to vote on the matter.

III. THE PROPOSED RULE CHANGES DO NOT FIX A FUNDAMENTAL PROBLEM WITH THE BOARD'S ELECTION PROCESSES

In addition to making changes to its rules required by the Federal Aviation Administration Modernization and Reform Act of 2012, the Board should fix a major problem that fundamentally impairs employee rights under the Railway Labor Act, depriving them of the rights and safeguards afforded to all other private sector workers and most public sector workers. That is, the Board should provide an explicit decertification procedure, as exists in nearly every other sector of labor relations in the United States today, so that employees not satisfied with the union representative imposed upon them have a way of easily removing that union.

The National Labor Relations Act, 29 U.S.C. § 159, and most state labor statutes provide for a decertification option. The National Mediation Board should implement the Railway Labor Act's mandate as explicated in *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), and establish procedures for the decertification of unions. If the Board takes seriously the Act's stated policy of freedom of association, it must also foster the freedom of non-representation and the right to decertify an unwanted union. *See* 45 U.S.C. §§ 151a, 152, Fourth; *Russell*, 714 F.2d at 1343-46.

As the Board well knows, it is extremely difficult for RLA-covered employees to remove a union once it is certified as their monopoly bargaining agent. This is particularly true under the RLA scheme, which generally results in large nationwide bargaining units in which employees' ability to communicate with each other and exchange ideas (or circulate petitions) is difficult. This difficulty is compounded by this Board's refusal to establish a formal process for decertification, despite the Fifth Circuit's holding in *Russell v. NMB* that the RLA requires this Board to process applications for an election to terminate a union's monopoly bargaining privilege. 714 F.2d at 1346. The Board betrays the RLA's intent and employees' right to freely choose or reject a union by ignoring the federal court's admonition and the many prior requests that it establish a formal decertification procedure.

If a worker accepts a job as a mechanic for a private sector trucking company and he and his fellow employees are unhappy with the "representational services" provided to them by the incumbent union, there is a straightforward process for them to terminate that union's unwanted services. 29 CFR §§ 101.17-101.21 (2011). Such decertifications are common under the National Labor Relations Act. But if the same worker were to accept a job as a

mechanic for an airline, he and his fellow employees would likely be stuck with "representation" by, and the payment of forced dues to, a union they opposed.

Establishing a fair procedure for decertification is critical. It is the lack of a decertification process that puts the National Mediation Board most out of line with labor law in other sectors. The Board should implement the Railway Labor Act's mandate as explicated in *Russell* and establish procedures for the decertification of monopoly bargaining agents. The Board's previous failure to do so should be remedied, because the Act's stated policy of freedom of association includes, of necessity, the freedom of non-representation and the freedom to decertify an unwanted union. *See* 45 U.S.C. §§ 151a, 152, Fourth; *Russell*, 714 F.2d at 1343-46.

IV. THE FIFTY-PERCENT SHOWING OF INTEREST THRESHOLD SHOULD APPLY IN MERGER SITUATIONS

Section 2, Twelfth, of the Federal Aviation Administration Modernization and Reform Act of 2012 requires a showing of interest of fifty percent of employees of a potential craft or class before a union may demand an election to become the sole representative (and require payment for such "representation") of the entire craft or class.

Nothing in the language of the Reform Act suggests that this new standard does not apply when a union seeks to represent a new craft or class created by a merger. A merger will nearly always create new crafts or classes by combining employees of the merged companies. A union previously representing a craft or class in one company does not have an inherent right to represent a newly formed craft or class of employees of both former companies that the merger creates. Therefore, the fifty percent threshold must apply.

Furthermore, the United States District Court for the Northern District of Texas recently ruled that Section 2, Twelfth, of the 2012 Act must be construed exactly as it is written, to require a fifty percent showing of interest without exception. *American Airlines, Inc. v. NMB*, 2012 WL 2368469 (N.D. Tex. June 22, 2012). The court held that the fifty percent threshold should apply even to representation petitions submitted before the effective date of the Act, so long as the Board ordered the election after the Act's effective date. The court stated that "the plain language of Section 2, Twelfth, of the 2012 Act indicates that the Board cannot direct an election until it has determined that a fifty-percent showing of interest has been made." *Id.* at *1.

Applying the previous thirty-five percent threshold to a petition submitted prior to the 2012 Act's effective date would be a much narrower exception to that Act's plain language

than would be applying the thirty-five percent threshold to a new craft or class a merger creates. If allowing the election at issue in the *American Airlines* case is an example of the Board acting in excess of its authority as the court held, then certainly applying the thirty-five percent threshold in merger situations likewise is prohibited.

Moreover, using a different showing-of-interest threshold for classes and crafts created by mergers would be simply unfair and serve only to ease union organizing. For instance, if a union represented a craft or class of 50 employees in a small regional airline, and that regional airline merged with a large international airline that had a similar class of 500 unrepresented employees, the regional airline union could obtain a representation election among the merged class of 550 employees by gaining a thirty-five percent showing of interest of 193 employees. Yet, if the same union attempted to organize the craft or class at the international airline without a merger, it would have to obtain a larger fifty percent showing of interest of 250 employees to obtain an election. There is no justification for giving unions such an organizing advantage when a merger occurs.

Applying a different showing-of-interest standard in merger situations simply results in arbitrarily disparate treatment of otherwise similar employees covered by the Act. It also allows unions to unfairly "game the system" in merger situations. *American Airlines* demonstrates convincingly that Congress has not granted the Board authority to use such an unfair and unbalanced showing-of-interest standard in merger situations.

Thank you for your consideration of these views.

Respectfully submitted,

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