COMMENTS OF
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

BEFORE THE
NATIONAL MEDIATION BOARD
ON
REPRESENTATION DISPUTES PROPOSED RULES
DOCKET NO. C-7034
FOR THE NATIONAL MEDIATION BOARD'S PUBLIC HEARING

The Transport Workers Union of America, AFL-CIO ("TWU") respectfully submits its comments in response to the Board's Notice of Proposed Rulemaking ("NPRM") regarding the Board's proposed changes in its regulations to conform its regulations to the amendments to the Railway Labor Act made by the Federal Aviation Administration Modernization and Reform Act of 2012.

TWU recognizes that as a result of the recent amendments it is necessary for the Board to modify some of its regulations concerning applications by organizations or individuals to be certified as representatives of crafts/classes. In particular it is necessary for the Board to modify its regulations regarding the required showing of interest for representation elections when an effort is made to become a certified representative of a craft/class, or to replace an existing representative for a craft/class. It is also necessary to change the regulations concerning run-off elections. To that extent, TWU believes that the proposed changes to the Board's regulations described

in its May 15, 2012 NPRM, as corrected on June 7, 2012, are consistent with the recent amendments to the RLA and are appropriate changes to conform with the statute as amended. In response to the Board's request for comments on whether the recent amendments necessitate changes to the manner in which the Board deals with the impact, if any, of financial transactions such as mergers and acquisitions on representation of pre-transaction crafts/classes, TWU submits that no changes are necessary or appropriate as a result of the FAA Modernization and Reform Act.

TWU endorses and adopts the Comments filed by the Transportation Trades Department of the AFL-CIO ("TTD") and adopts those Comments on its own behalf. TWU agrees with TTD that the Board's proposed changes to Sections 1206.1, 1206.2, 1206.5 and 1206.8 are generally consistent with the statute as amended by the FAA Modernization and Reform Act, but that they should be modified as suggested by TTD.

In particular, TWU agrees that the proposed change to Section 1206.5 to require that those who seek to intervene when an application is made to become a certified representative should be required to produce the same showing of interest as the applicant. By regulation, the Board has required that an application to become a certified representative be supported by a showing of interest of 35% of the employees in a craft/class, and that intervenors similarly produce a 35% showing of interest.

New Section 2 Twelfth now requires that an application to become a certified representative be supported by a showing of interest of not less than 50% of the employees in a craft/class in order for the Board to authorize an election or otherwise certify a representative for a craft/class. It would be incongruous for the Board to require an applicant to produce a showing of interest by an applicants of not less than 50% , but to allow an intervenor to seek certification with less than the same level of interest now that Congress has mandated a showing of interest of not less than 50%. TWU also notes that the Board has always required the same showing of interest for applicants seeking certification as representative of a craft/class and intervenors who seek certification to represent the same craft/class--historically 35%. As the statute now mandates a showing of interest of not less than 50%, it is entirely proper and consistent with Board practice for the Board to similarly adjust the showing of interest requirement for intervenors; and it would be inappropriate and inconsistent with Board practice for the Board to allow intervernors who seek certification to piggyback on an applicant's 50% showing of interest but produce only a 35% showing of interest on their own behalf.

TWU also specifically concurs in the TTD's position in response to the Board's request for comments as to whether new requirements in Section 2 Twelfth apply to the Board's handling of the effects of mergers, acquisitions and similar financial

transactions on pre-transaction representation of crafts/classes of the involved carriers. TWU agrees that the new requirements in Section 2 Twelfth do not apply to the Board's handling of such matters, that the Board's Merger Procedures do not have to be changed because of enactment of Section 2 Twelfth, and that the Board's Merger Procedures should be adopted as Regulations of the Board as described by TTD.

Section 2 Twelfth is titled "Showing of Interest for representation elections" and it applies when the Board "receives an application requesting that an organization or individual be certified as the representative of any craft or class of employees". By its plain terms, Section 2 Twelfth applies when an organization or individual seeks to be certified as a representative, but not to the issue of whether an organization or individual already certified as a representative of employees in a craft/class shall continue as representative of those employees after a merger, acquisition or similar transaction.

In contrast to the situation addressed by Section 2 Twelfth, the Merger Procedures apply when there already is a certified representative for a craft/class on a carrier, that carrier is involved in a financial transaction with another carrier, the employees in the craft/class of the other carrier are represented by another organization or are unrepresented, and the transaction may change the nature of the transportation system. In those situations there is no effort by an organization to

become certified as a representative for the craft or class. The organization, organizations, individual, or individuals representing a craft/class on one or more of the pre-transaction carriers is, or are, already certified as a representative or as representatives of the craft/class.

Additionally, the questions before the Board in merger and acquisition cases are whether the transaction has altered the nature of the transportation system, and whether such a change requires a Board investigation as to the representation of the craft/class. An investigation under the Merger Procedures is not one in response to an application by an organization or individual to become a representative; rather the investigation is to determine whether the transaction has changed the nature of the transportation system for representation purposes. Simply put, because a representation investigation in the context of a merger or acquisition involving organizations/individuals already certified as representatives of employees of the pre-merger/acquisition carriers, is not an investigation in response to an application to be certified as a representative, Section 2 Twelfth is inapplicable to such investigations.[1]

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[1] The letter submitted by House Transportation and Infrastructure Committee Chairman Mica and several other Members of the House misses this fundamental point. Section 2 Twelfth as written speaks to applications by organizations or individuals to be certified as representatives, not to investigations as to the effects of financial transactions on existing representation. Of course the non-contemporaneous views of several Members of Congress as to proper interpretation of a statute are due no more weight than an interpretation offered by anyone else. And the letter's expression of the intent of those who signed it is not supported by any floor debate or committee report; nor is it supported by a record developed in hearings. In any event, because the question posed by the Board concerns what the statute actually says, not what some Members of Congress may have

Furthermore, the Board's Merger Procedures and its decisions explaining the basis for representation investigations in merger/acquisition cases state that the investigations determine whether a transaction has created a new single transportation system. But, under the RLA, creation of a new single system or single carrier would not necessitate an investigation into representation of a craft/class of the involved carrier or carriers. The decision to investigate representation after a merger or acquisition is not compelled by any statutory mandate; and the requirement for system-wide representation is not stated in any provision of the RLA. The only reason for an investigation in such a situation is the Board's policy and practice of requiring system-wide representation.

As the Board is well aware, the Board has no authority to initiate a representation proceeding on application of a carrier or on its own initiative. *Railway Labor Executives' Ass'n. v. NMB*, 29 F. 3d 655 (D.C. Cir. 1994). The DC Circuit expressly held *en banc* that the Board was in gross violation of the RLA and acted blatantly in excess of its statutory authority by initiating representation proceedings in the absence of a union or employee application. *Id. at* 664, 669. An investigation of representation as a result of a merger or acquisition is therefore an investigation in

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intended, because the language actually used in the statute does not apply to investigations of the effects of financial transactions on existing representation, and given the arguments presented herein and in TTD's comments, the Board should not adopt the interpretation of Section 2 Twelfth set forth in the letter of the Chairman Mica and several other Members.

response to carrier action- a financial transaction initiated by the carrier or carriers that may change the nature of the transportation system-- not an investigation in response to an organization or individual seeking to become a certified representative. TWU submits that if the Board were to apply the standards in Section 2 Twelfth to merger/acquisition cases where there is no application to become a certified representative, where that would bar a pre-transaction representative of less than 50% but more than 35% of the combined craft/class on the new system from continuing as representative of the craft/class, the Board would authorize, indeed compel, a change in representation based on carrier and/or Board action, contrary to *RLEA v. NMB*, without any statutory support in Section 2 Twelfth or any other part of the Act. For these reasons, and for the reasons stated in TTD's comments, TWU respectfully submits that the Board should conclude that enactment of the FAA Modernization and Reform Act does not require application of Section 2 Twelfth to investigations in merger/acquisition cases and does not support application of Section 2 Twelfth in such cases.

TWU further submits that while there is no need for the Board to change its Merger Procedures because of the creation of Section 2 Twelfth, it is time for the Board to codify the Merger Procedures in its regulations, rather than merely keeping them in the Representation Manual. TWU therefor concurs in the suggestion by TTD

that the Merger Procedures be formally adopted in the Board's regulations.

Finally, TWU concurs in the proposals made for refinement of the Board's regulations related to representation cases that are described in Section III of TTD's comments.

Respectfully submitted,

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