NMB Open Meeting of December 7, 2009

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Claude Sullivan
Ford & Harrison LLC

Statement of Claude Sullivan to the National Mediation Board
December 7-8, 2009, Docket C-6964

My name is Claude Sullivan. I have practiced before the National Mediation Board since 1968. I have known and worked with all of the 24 Board members who have served on the Board since that date.

I am opposed to the proposal to change the Board's 75 year old majority union voting rule because I believe to do so is unlawful and unwise. I will file written comments by the end of the sixty-day comment period fully addressing my reasons for opposing the proposed change.

Today I only want to address what I strongly feel is wrong about the process you have chosen to use.

Never in my career has the Board followed a process like the one you are now using when the issue is to fundamentally change one of the Railway Labor Act's voting rules. As you know, this is not the first time the Board has dealt with a suggestion for change in its longstanding voting rule. I believe there have been four other occasions. On each of those occasions, all members of the Board have declined to change the rule. One of the most respected Boards in the history of the RLA - George Ives, David Stowe and Bob Harris - stated that the Board did not have authority to change the rule and only Congress could do so. Other Boards have simply refused to make the change.

In the past when the Board has determined that comments on suggested changes in voting rule would be helpful, it has authorized a full blown evidentiary hearing with a hearing officer. The participants were allowed to call and cross-examine sworn witnesses, make arguments and file briefs. We now call that type of hearing a "Chamber of Commerce" hearing. In 1985, the identical issues were before the Board – a union proposal for a minority union voting rule and a decertification procedure proposed by the Chamber of Commerce. The contrast between what the Board did then and what you are now doing is striking and inexplicable. Rather than use the process the Board used in the past, this Board has ignored the Chamber of Commerce request for the adoption of a decertification rule and has published a proposal that almost copies verbatim the TTD application.

By adopting this new process, you have clearly antagonized and alienated one side, the carriers, and rewarded the other side, the labor organizations who propose the rule change. This flawed process coupled with other recent events at the Board lead to only one sad conclusion - that this Board has pre-determined the outcome of the proposed rule. This conclusion is at odds with any notion that the Board is being open-minded and neutral, something it has worked diligently over many decades to ensure.

The other recent events I refer to include:

1) the intentional and unjustified delay in the IAM and AFA elections at Delta;
2) the Board's role in the withdrawal of the IAM and AFA applications for elections at Delta;
3) the Board's role in leading the IAM and AFA to believe that the voting rule will be changed and that the unions should re-file their applications for elections at Delta under the new rule;
4) the manner in which the NPRM was prepared without the input or knowledge of the Chairman of the Board; and
5) the blatant attempt to prevent the Chairman from publishing a well reasoned dissent to the NPRM.

This is not what the Board is supposed to do and it is shocking and sad to see what is going on. The Board is widening the gulf between carriers and labor organizations which is directly contrary to what the Board members have sought to do in the past. It is also directly contrary to what the Board members have promised the Congress and the public they would do. Without exception, all members of the Board today have said at various times that before any major change would be considered in the Railway Labor Act voting procedures, the Board would seek a consensus among the carriers and labor organizations. It is obvious from what you will hear today and read in the comments that will be filed before the end of the sixty-day comment period that consensus can never be reached on this vital issue if you continue to follow the process you have selected and if the result is predetermined.

Hopefully, it is not too late to cure the problem that the Board has created. As a first step, I would suggest that the Board withdraw the NPRM.

I urge you to reconsider before you completely and irrevocably undermine the public trust in the Board to fulfill its mission. Thank you for allowing me to speak.

Janette Rook
Association of Flight Attendants

November 20, 2009

Elizabeth Dougherty, Chair
Harry Hoglander, Member
Linda Puchala, Member
National Mediation Board
1301 K Street NW, Ste 250
Washington, DC 20005

RE: Proposed NMB Rule Change For Union Representation Elections - Docket No. C-6964

Chairman Dougherty and Members Hoglander and Puchala; thank you for the opportunity to offer my comments in support of the proposed National Mediation Board rule change for union representation elections in the rail and airline industries.

I have been a flight attendant for eleven years at Northwest Airlines, now for Delta Air Lines, and I also have the honor of serving Northwest Airlines flight attendants as Master Executive Council President, Association of Flight Attendants-CWA. After reviewing much of the rationale that supports this rule change, I strongly agree with the solid, logical reasons for the change given by Board members Hoglander and Puchala.

On behalf of tens of thousands of active and retired Northwest Airlines flight attendants, I respectfully request that the Board consider the high stakes and risk that we would be subject to if current voting procedures are applied to our upcoming election at Delta Air Lines. Thousands of workers and retirees risk losing the basic rights and protections that we have sacrificed and fought for over decades. This merger represents an extraordinary challenge for us - after over sixty years as a legally recognized partner in our airline's merger history, we are now confronted with the very real possibility of losing our contract, our union and our collective bargaining rights in a merger designed solely by Delta Air Lines executives.

2009 marks the 62nd anniversary of collective bargaining rights for Northwest Airlines Flight Attendants. On September 19th, 1947, Northwest Airlines and the Air Line Stewards and Stewardesses Association (the predecessor to AFA) signed our first legally binding contract – a tradition that has endured for over half a century. Many provisions contained in that first contract have survived through decades in an often volatile airline industry.

While it's true a majority of flight attendants have managed to join unions over the past 75 years under the onerous and atypical voting rules of the NMB, there are some very good reasons why we had to surmount all obstacles to attain our right to a legal contract. We are exempt from many of the rights and protections provided by American labor laws, with most of the oversight for cabin crew provided by the Federal Aviation Administration (FAA) and a limited number of Federal Air Regulations (FARs). For example; flight attendants do not enjoy the full rights provided by the 1938 Fair Labor

Standards Act (FLSA), we have very limited to no coverage under the Occupational Safety and Health Administration (OSHA), and since its inception we have been denied the access that all other full time American workers have enjoyed under the Family Medical Leave Act.

Flight attendants still lack many of the basic worker protections provided to most Americans under federal laws, and that makes a union contract a necessity. Due to a lot of hard work, guts, and sacrifice, Northwest flight attendants have filled those gaps in labor laws for flight attendants through collective bargaining and unionism. Our collective bargaining agreements have done what labor laws have not for our profession – they have created decent standards for flight attendant pay, rest, work rules, and provided job security. The progress we achieved together has helped us make a short-term job into a career.

Speaking to you today, 62 years after Northwest Airlines flight attendants first gained a seat at the negotiations table; I feel the weight of responsibility for the future of our career. As flight attendants at the world's largest airline, we will set the standard for our industry. As part of an unbroken line of unionists at Northwest Airlines, we recognize a solemn commitment to uphold the achievements made by thousands of flight attendants who have come before us, and to honor our promises to them in retirement. Our merger with Delta Air Lines brings exciting opportunities, but we risk losing what we often considered inalienable rights – our legal contract and legal voice at work. With so much hanging in the balance in a single vote, we deserve the fairest voting method possible for that momentous occasion.

As worker's rights activist Mother Jones once said, "*Injustice boils in men's hearts as does steel in its cauldron, ready to pour forth, white hot, in the fullness of time*". Now is that time and I proudly stand with air and rail workers across the country to request this change in the outmoded NMB voting rules, which would right an injustice that has simply been endured by workers in our industries for a great many years. At Delta Air Lines, we have high hopes that our election will be at the forefront of a progressive step forward for the working men and women in our country.

I applaud the Board's proposal to amend its rules to make voting for representation in the transportation industry more democratic, with the majority of those voting deciding the outcome. I thank you for taking up this important matter, and for the chance to share my comments regarding NMB Docket No C-6964.

Thank you,

Janette Rook

Janette Rook, President
Northwest Airlines Master Executive Council
Association of Flight Attendants-CWA

Douglas Hall
Regional Airline Association

COMMENTS OF REGIONAL AIRLINE ASSOCIATION
REGARDING NATIONAL MEDIAITON BOARD
PROPOSED RULE CHANGE
November 20, 2009

My name is Douglas Hall, and I am appearing here today on behalf of the Regional Airline Association. As the Board is well-aware, the regional airlines play a vital role in the country's airline industry. Regional airlines operate more than half of the nation's commercial schedule, and about 40 percent of the U.S. commercial passenger fleet, transporting some 160 million passengers annually to over 600 communities across the country, most of which depend on regional airlines to provide their only scheduled service. Founded in 1975, RAA provides a wide array of services for regional airlines, and is comprised of 32 member airlines and 280 associate members, representing the key decision makers of this vital sector of the commercial aviation industry.

Regional airlines appear frequently before the Board, and are more likely than most national carriers to be the subject of union organizing drives. Thus, our members have a keen interest in the manner in which the Board conducts its elections.

In light of the number of interested parties here today, we will keep our presentation brief. We fully intend to file comments with the Board setting forth in more detail our position on the proposed rule change.

RAA strongly opposes the contemplated change to the Board's voting rule for the following reasons:

--The contemplated rule further erodes the majority support requirement that is the lynchpin of the RLA. Already under Board rules, a representative who has less than majority support may be certified so long as a majority of the employees vote in the election. Under the contemplated change, a majority of the employees need not even vote for a union to be certified.

--As the Board has previously noted, "a union without majority support cannot be as effective in negotiations as a union selected by a process which assures that a majority of employees desire representation." A union which cannot even get the majority of the employees to vote in the election is unlikely to be able to get majority support to ratify a contract.

--Such deterioration in the negotiations process will only lead to instability in management-labor relations and disruptions to commerce, the very things the RLA seeks to avoid.

--It is simply inaccurate to say that the current rule has been a hindrance to organization. Employees covered by the RLA are more likely to be represented by a union than those covered by the NLRA.

--It is also inaccurate to say that the NMB's traditional rule is undemocratic. By not voting in an election, employees are saying that they do not wish to be represented. Forcing them to vote in order to remain unrepresented is what is undemocratic. Employees should not have to do anything in order to communicate that they wish to maintain the status quo (whether the status quo is being union free or being represented). It is those who wish to change the status quo (whether by organizing an unrepresented group or raiding another union) that have the burden to prove that they have majority support.

--It is a false analogy to compare union representation elections where employees are unrepresented to political elections. In a union election, the employees are deciding whether or not to be represented. Only after the majority have decided that they want union representation by voting in the election, is the union who garnered a majority of the votes certified. In a political election, by contrast, the question is not whether the electorate will be represented. That decision has already been made. The only question is the identity of the representative. A political election is akin to a union run-off election where a majority of the employees have decided they want union representation, but the vote is equally split between two unions. At that point, the NMB's voting rule is no different from the rule used in the political process – the representative who garners a majority of the vote is certified.

--In rejecting prior requests to change its voting rules and adopt yes/no ballots, the Board has noted that those seeking a change to its long-standing rules "bear a heavy burden" and has "cited a long-standing policy of amending its rules only when required by statute or essential to the administration of the RLA." Indeed, when the Carter administration Board composed of George Ives, Bob Harris and David Stowe considered a request to change the voting rule in 1978, they stated that such a change would have to come from Congress.

The NMB's current rule, requiring that a majority of a craft or class vote for representation of some sort before a union will be certified has worked – and worked well – for 75 years. It has worked well for unions, as railroads and airlines are among the most heavily organized private sector industries in the country. It has worked well for airline and railroad employees, as they have been able to obtain representation when a majority of their fellow employees want that, and to avoid having representation forced upon them when not supported by a majority. And it has worked well for the nation, as it has brought stability to airline and railroad labor-management relationships and minimized disruptions to interstate commerce, just as Congress intended in enacting the RLA. No compelling reason exists now to change this long and successful history.

Kate Brofenbrenner
Cornell University

Prepared Statement for the National Mediation Board Open Meeting
Re: RLA Rulemaking Docket No. C 6964
By Dr. Kate Bronfenbrenner
Director of Labor Education Research
Cornell School of Industrial and Labor Relations
December 7, 2009

I would like to thank the National Mediation Board for this opportunity to submit my comments regarding the proposed amendment to the Railway Labor Act (RLA) to allow the majority of valid ballots cast in RLA elections to determine the craft or class representative.

For the last twenty years, I have conducted a series of in-depth national studies which examine union and employer behavior and public policy in public and private-sector certification election campaigns. This research has served a major role in informing discussions on labor law reform and the impact of trade and investment policy on wages and employment. [1] This last year I completed the first and only comprehensive study of organizing under the Railway Labor Act, NLRB, and the public sector. Because we collected in-depth data on employer and union tactics, election background, and company and unit characteristics, these data provide important insight into how and why the rule change you are considering will have such significant implications for workers covered under the RLA.[2] For, as our data will clearly show, without this rule

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[1]See Kate Bronfenbrenner. "No Holds Barred: The Intensification of Employer Opposition to Organizing," Economic Policy Institute Working Paper no. 235, 2009; "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing" Commissioned Research Paper and Supplement to *The U.S. Trade Deficit: Causes, Consequences and Recommendations for Action*, Washington, D.C.: U.S. Trade Deficit Review Commission, November, 2000; "The Effect of Plant Closings and the Threat of Plant Closings on Worker Rights to Organize" Supplement to *Plant Closings and Workers Rights: A Report to the Council of Ministers by the Secretariat of the Commission for Labor Cooperation*, Dallas, TX, Bernan Press: June, 1997; *Organizing to Win: New Research on Union Strategies*, Editor (with Sheldon Friedman, Richard Hurd, Rudy Oswald, and Ron Seeber), Ithaca, N.Y.: ILR Press, January, 1998; "Employer Behavior in Certification Elections and First Contracts: Implications for Labor Law Reform" in Sheldon Friedman, Richard Hurd, Rudy Oswald, and Ronald Seeber, eds., *Restoring the Promise of American Labor Law.* Ithaca NY: ILR Press, 1994, pp. 75-89; Kate Bronfenbrenner and Tom Juravich. "The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Comparison," Economic Policy Institute Working Paper No. 113, 1995; and (with Tom Juravich) *Union Organizing in the Public Sector: An Analysis of State and Local Elections*, Ithaca, New York: ILR Press, 1995.

[2] Data for this study was collected from a sample of all 94 certification elections and card check campaigns supervised by the NMB which occurred in units with fifty or more eligible voters between January 1, 1999 and

change, voter suppression will continue to interfere with the laboratory conditions the NMB is supposed to provide workers voting under the RLA, and those voting under RLA will be denied their full democratic right to choose whether they want union representation.

Current RLA certification process is contrary to US democratic traditions
The current RLA certification process stands alone among all union and other voting procedures in this country in both the public and private sectors. Unlike any other election process, if you don't vote, or are unable to vote, or even were not aware there was a vote, you are assumed to have voted no. The union must win 50 percent plus one of eligible voters in the craft or class (including those on furlough who may be impossible to reach) rather than 50 percent plus one of those who cast valid ballots.

The US is a country where the majority vote standard of 50 percent plus one has a unique history, value, and tradition. We have majority vote in our legislative system rather than a parliament, and we have exclusive representation under our labor laws rather than minority unionism. Fifty-percent plus one is a concept that everyone understands whether it be for elections or card check it is the bar that has to be reached in order to win an election or win certification. It is one where every individual's vote matters because if just one person doesn't make it to the polls or does not sign a card the outcome could be just 50 percent or a tie, which in most cases means the union loses. Every vote counts.

In elections where the voting standard is 50 percent plus one of votes cast the goal of both sides is to get the highest turnout possible. Thus under the NLRB, turnout averages quite high, at 88 percent, with the union working hard to get every single union supporter to the polls or to remember to mail their ballot in, while the employer does the same with no votes.

However, the nature of RLA voting rules causes something very different and inherently undemocratic to occur. While unions still focus their efforts on getting yes votes to the polls, the employer efforts shift to suppressing voter turnout—either by confusing voters about the election procedure or by getting voters to destroy their ballots.

December 31, 2003. Using a combination of in-depth surveys with lead organizers; personal interviews; on-line research, and the collection of primary documents such as union and employer campaign documents, election interference charges and NMB and court determinations, and copies of first contracts, we compiled detailed information on the election background, company characteristics, employer and union tactics, unit background, and election outcome for these cases. The surveys were conducted via phone, mail, on-line, and email with a response rate of 59 percent. For a more in-depth discussion of our method see "No Holds Barred," Bronfenbrenner 2009. My primary research assistants for the RLA study were Austin Zwick and Troy Pasulka.

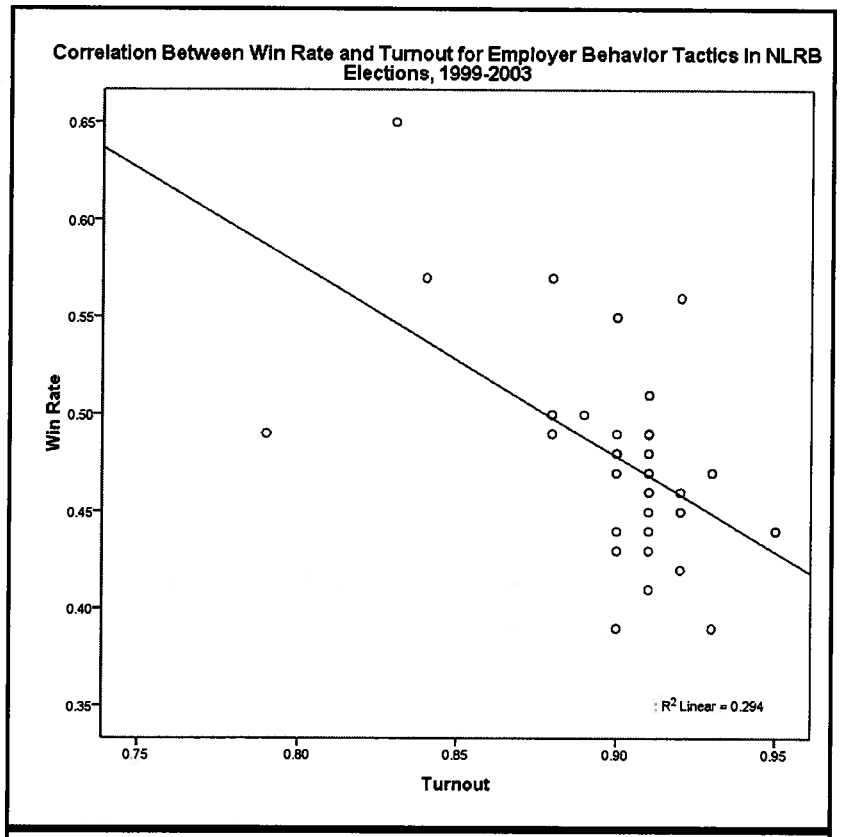
Employer voter suppression under the RLA

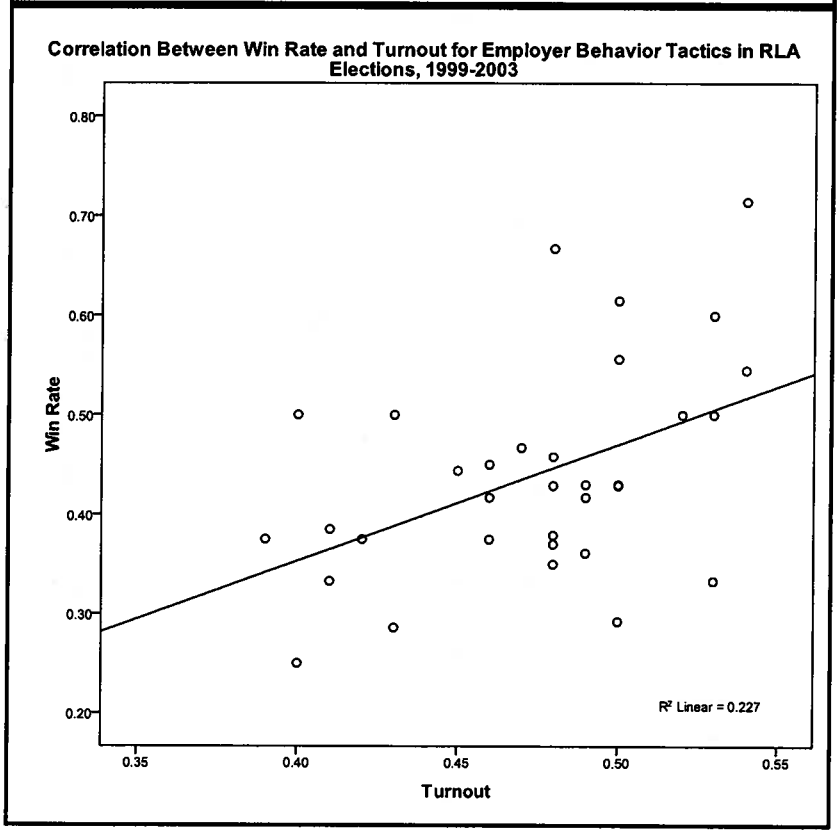
As described in Table 1 in the Appendix, employer suppression takes many forms under the RLA, including making positive changes in personnel, wages and working conditions so as to make a union seem less necessary; making it more difficult to organize or vote through transferring workers, initiating layoffs, and threatening bankruptcy; and suppressing the vote either through urging workers to tear up their ballots or providing misleading information about election procedures. This is all separate and beyond the majority of campaigns where the employer intimidates, threatens, harasses, coerces, and retaliates against union supporters to try to dissuade them from voting for the union.

When examined in isolation each of these individual tactics may appear to not have a significant impact on election turnout or outcome. But these tactics are not used in isolation. Close to half of the RLA campaigns in our sample used five or more anti-union tactics and 27 percent used ten or more. Although this is slightly less aggressive than employer opposition under the NLRB, voter suppression and coercion tactics done under the NMB voting standard carry even greater weight because every vote not cast can have a much greater impact where the bar it takes to win is set so much higher.

To illustrate this point further, the charts on the following page offer a comparison, with results from our RLA sample on the bottom and our NLRB sample on the top. The findings show the correlation between between union win rates and election turnout for all employer tactics that occurred in at least 10 percent of elections in the sample.[3] RLA elections have a positive statistically significant correlation between turnout and win rates, with win rates increasing as voter turnout increases. In contrast, NLRB elections have a negative statistically significant correlation, with union win rates decreasing as voter turnout increases. The slope of employer tactics follows the same direction as win rates suggesting that for RLA campaigns, increases in voter suppression tactics are associated with lower turnout and lower win rates, while for NLRB elections, more aggressive and coercive employer tactics are associated with higher turnout and and lower win rates.

[3] Each different tactic used is represented by a circle. R2 was .0294 for NLRB and .227 for RLA. Both were significant at a .01 level in a two tailed test. For details on NLRB tactics see "No Holds Barred" Bronfenbrenner 2009


Correlation Between Win Rate and Turnout for Employer Behavior Tactics in NLRB Elections, 1999-2003
Win Rate
0.65
0.60
0.55
0.50
0.45
0.40
0.35
R² Linear = 0.294
0.75
0.80
0.85
0.90
0.95
Turnout


Correlation Between Win Rate and Turnout for Employer Behavior Tactics in RLA Elections, 1999-2003
Win Rate
0.80
0.70
0.60
0.50
0.40
0.30
0.20
R² Linear = 0.227
0.35
0.40
0.45
0.50
0.55
Turnout

The different anti-union strategies utilized by employers in elections supervised by the NLRB and the NMB are a direct result of the requirement to have a minimum of 50 percent plus one of votes cast in RLA elections versus 50 percent of eligible voters in NLRB elections. Perhaps most disturbing of all is that the single most effective strategy being used by employers to suppress union votes is legal—namely campaigns urging voters to destroy their ballots. It is also pervasive. We found that employers used this tactic with at least one or more voters in 67 percent of our sample. Ripping up ballots is a perfect example of just how undemocratic the current RLA process is. Because once that ballot has been torn up it represents a no vote even if the voter changes his or her mind. In the same vein ardent union supporters cannot stop their vote from counting as a no vote if because of misinformation they do not send in their ballot on time.

I believe our data conclusively show that as long as the current rules remain in place voter suppression will continue to interfere with the laboratory conditions that the RLA is supposed to maintain to give workers a chance to choose whether they want union representation free from interference and intimidation. Current policy does not accurately measure the union choices of workers under the RLA.

Thank you for your consideration of this important issue. I am happy to provide you more information and data if you have any further questions or concerns.

Dr. Kate Bronfenbrenner
Director of Labor Education Research
Cornell School of Labor and Industrial Relations
Ithaca, NY 14853

Appendix

Table 1: Summary of findings on employer behavior under the RLA

	Percent or mean of elections	Win rate when tactic used	Turnout
All Campaigns	1.00	.44	.49
Employer mounted a campaign against the union	.85	.37	.48
Hired management consultant	.66	.36	.49
Positive Changes			
Granted unscheduled raises	.13	.29	.43
Made positive personnel changes	.16	.44	.45
Made promises of improvement	.26	.29	.46
Used bribes and special favors	.11	.50	.43
Established employee involvement program	.11	.50	.52
Impeding organizing			
Discharged union activists	.15	.38	.46
Laid off bargaining unit members	.11	.67	.48
Assisted anti-union committee	.22	.42	.49
Attempted to infiltrate organizing committee	.16	.44	.53
Distributed union promise coupon books	.09	.20	.41
Distributed pay stubs with dues deducted	.26	.36	.50
Voter Suppression			
Urged workers to tear up ballots or misled workers on voting procedures	.67	.43	.41
Coercion, Intimidation, Harassment, and Retaliation			
Held captive audience meetings	.51	.43	.48
Threatened to file for bankruptcy	.07	.67	.54
Threats of plant closing	.33	.50	.52
Alteration in benefits or working conditions	.16	.56	.50
Other harassment and discipline of activists	.18	.60	.53
Brought police into the workplace	.11	.33	.41

Keith Borman
American Short Line and Regional Railroad Association

RICHARD F. TIMMONS

PRESIDENT

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November 20, 2009

The Honorable Elizabeth Dougherty
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VIA Electronic Mail to legal@nmb.gov

RE: Docket No. C-6964

Dear Chairman Dougherty, Board Member Hoglander, and Board Member Puchala:

The purpose of this letter is to respond initially to the National Mediation Board's (the "Board") proposed rule change published in the Federal Register, Vol. 74, No. 211, on Tuesday, November 3, 2009. The members of the American Short Line and Regional Railroad Association (ASLRRA) have concerns about the Board's proposed changes to the long-standing procedure for recognizing a union for railroad and airline workforces within the jurisdiction of the Board as governed by the Railway Labor Act and, accordingly, are opposed to the proposed rule change.

The American Short Line and Regional Railroad Association is a trade association representing the interests of its more than 400 short line and regional

railroad members in legislative and regulatory matters. The Association's members are located throughout the United States. Short line and regional railroads are an important and growing part of the railroad industry, with short lines operating 30 percent of the nation's total route mileage and handling one in four rail cars traveling on the national railroad network. Most short line and regional railroads also interact and interchange freight and cargo with the larger Class I railroads throughout the country, making our members an integral part of the national railway system.

The ASLRRA believes that the current disputes and proposals are driven primarily by mergers and unionization efforts in industries other than freight rail transportation. These large disputes involving tens of thousands of workers and the mergers of Fortune 500 companies tower over the comparatively small short line and regional freight railroads. At the same time, changes made at the behest of one group of workers in one industry have the ability to impact the rights and economic well-being of workers in unrelated industries such as rail. It is in that context of concern that the following comments are framed.

Relations between the ASLRRA and the numerous unions representing employees on short line railroads have experienced a positive renaissance over the past decade. Organized labor and management will always have points of contention. However, the overall relationship has been positive and cooperative on issues ranging from the reform of the railroad retirement system to federal assistance to preserve light density rail lines, and several issues in between.

The vast majority of small railroads began business by acquiring the money losing branch lines of larger and very heavily unionized Class I railroads. Short line and regional railroads are very small companies with an average of 35 employees (and a median of 9 employees), and annual average revenues below $5 million. Until recently, these railroads almost universally began operations as non-union companies.

Despite the very small average workforce size of these railroads, unions on short line and regional railroads have successfully expanded to represent over 65% of all non-management employees in the industry and 85% of railroads with more than 50 employees have union representation. Given this remarkable level of union representation achieved in 30 years from a baseline near zero, it is difficult to argue that the election process is tilted against unions by the current election procedure rules. To the contrary, the union election process under the current rules has led to a remarkable level of unionization in the short line and regional railroad industry. Moreover, inasmuch as there is no process to decertify a union under the RLA, either under the current regime or under the NMB majority's proposed rule, it is highly unlikely that unions will lose any of their substantial market share in the short line and regional railroad industry segment.

There is merit to the factual contention that labor elections outside of the railroad and airline industries are determined under different rules. But the mere fact that the rules are different should not be the end of the analysis. Deeper analysis must ask *why* the rules are different. Freight rail transportation is critical to supplying the food we eat, the timber that builds our roofs, the power that lights our homes, and the chemicals that treat our water. Freight rail is critical to the economy today, just as it was in 1934. The role that railroad companies play at the cornerstone of our economy has, over time, demanded stricter economic, legal, and safety regulation than other industries, which are governed by the NLRA. Likewise, the use of Presidential Emergency Boards to mitigate the broader economic impact of labor disputes and the current election procedures requiring majority rule in union elections imposes a higher standard on labor in the rail industry precisely because rail touches every segment of the economy. Higher standards make sense in an environment where Congress has a long history of setting higher standards for common carriers in order to protect the public good. In short, in an industry in which the making and maintenance of agreements between management and labor is a crucial national concern, so should be the degree of certainty of employee majority support for their chosen collective bargaining representative.

Congress recognized, and the NMB has repeatedly affirmed, that the workforces and employers covered by the Railway Labor Act are different, and that those critical differences justify the higher standards for determining a majority. The RLA is unambiguous in its edict that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class..." 45 U.S.C. 152, Fourth. It is our position that the right of determination belongs to the majority of the class or craft, not simply a majority of those who choose to vote. It is our view that any proposed rule that results in this change is a material alteration of the RLA's express language and that only Congress can implement that change through the legislative process.

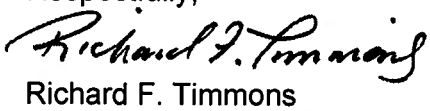
The emotion surrounding this issue among airlines and unions targeting airline employees for membership does not change the fact that unions have met with tremendous success on small freight railroads under the current rules. Despite labor's organizing success, the Board has determined that this issue must be revisited. The ASLRRA urges the Board to consider in the instant rulemaking process the incorporation of complimentary and related issues such as a "no union" ballot option, and a de-certification process that would mirror changes in the certification process.

Such a decertification process would be absolutely necessary if the Board goes forward with its proposed course to ease the process for union certification. Remember that certification under the RLA is permanent, unlike certification under the NLRA, which can be challenged at regular intervals by the employees subject to union representation.

To be clear, the ASLRRA does not believe that any change to the existing union election procedures is warranted or necessary; however, in the event that the Board determines to go forward in the absence of necessity, there must be additional changes to the process to minimize the likelihood of tilting the union certification process unfairly in favor of organized labor – at the expense of carriers and many of their employees.

In summary, the ASLRRA and its members across the nation are opposed to changing 75 years of election policy under the RLA The ASLRRA's membership would no doubt be the unintended casualties of a policy change that appears to be aimed at one or more major air carriers. The Board's one-size-fits-all proposal stands to have a disproportionate impact on the smallest set of employers covered by the RLA, America's smallest railroads who can least stand to risk labor disruption. We urge the Board to reconsider its proposed rule change and to maintain the current and long-standing election procedures until such time as the Congress seeks to address the matter through its legislative processes.

Respectfully,



Richard F. Timmons

Roger Briton
Airline Services Council of Nat'l Air
Transportation Assc.

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REMARKS ON BEHALF OF AIRLINE SERVICES COUNCIL OF NATIONAL AIR TRANSPORTATION ASSOCIATION

RE: DOCKET NO. C-6964

Good morning, Chairman Dougherty, Member Hoglander, Member Puchala, and staff of the NMB. My name is Roger Briton. I am a member of the firm of Jackson Lewis LLP and am appearing today on behalf of the Airline Services Council of the National Air Transportation Association ("ASC"). ASC counts among its members many airline service companies that are a critical component of the air transportation system. On an outsource basis, ASC members perform many functions traditionally and historically performed by airline employees, among them a variety of ground and passenger handling services. In prior determinations of the Board, several ASC members have been held to be "derivative" carriers subject to the Railway Labor Act. As such, this segment of the aviation industry has a significant interest in the rule change now being contemplated by the Board as well as in maintaining stability in the representation and negotiation arenas in which they operate.

We welcome this opportunity to express some of our views in this forum. We anticipate expanding on this presentation and filing comments pursuant to the Board's Notice of Proposed Rulemaking. We also appreciate the opportunity to hear the views of the various constituencies in the industries covered by the RLA and are hopeful that the Board will carefully evaluate all views before taking any actions to disturb longstanding practices and procedures under the Act.

OVERVIEW

By way of brief overview, we note that the RLA has been a remarkably resilient and effective tool in promoting the Act's fundamental purposes. In that connection, we note that the first among the general purposes identified in Section 1a of the Act is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." As the Board has repeatedly recognized, its consistent policies in administering and implementing the requirements of the Act have proven very effective in supporting this primary statutory purpose. On behalf of ASC, however, we are concerned that the Board's proposed change to the balloting and vote counting rules potentially fosters precisely the instability that the Act abhors. We also are concerned that what appears to be a "rush to judgment" will not address many issues which we believe are critical to maintaining stability in these industries. In that connection, we view it as essential that all segments of all covered industries clearly understand fully all the ground rules which will apply in future representation disputes.

The Board's election rules are long established and have not changed, except incrementally, for many years. The "sea change" proposed in the NPRM calls into question the continued vitality of other board rules and procedures, as well. The full scope of these changes

should be identified at one time and opened for comment among all segments of all covered industries. Changes should not be made without the full participation of all constituencies and only in an orderly, carefully considered process. We are concerned that the proposal to change the form of ballot and method of ballot counting is but the beginning of a cascade of changes, all of which we submit are unnecessary and ill-conceived. In any event, a piecemeal approach to change at best will cause uncertainty, and at worst may lead to instability.

CONCERNS OVER THE PROPOSED RULE CHANGE

The Board has consistently held that its procedures should not be changed unless "mandated by law," or required by "essential ... administrative necessity." There has been no showing whatever of this type of necessity. Moreover, the means by which this has been undertaken—at the very least giving the appearance of pre-judgment—calls into question the integrity of the process.

Procedure aside, we are concerned that the proposed change will lead to certification of minority representatives. This will foster instability in contract negotiations and, very likely in carrier operations themselves, resulting in an increase in interruptions to commerce. Under the proposed rule, a small number of voters may determine the result of an election. With low "ballot box turnout," an organization lacking the affirmative support of a majority of the craft or class may be charged with negotiating a collective bargaining agreement on behalf of numerous individuals who do not support its representative status. Experience in recent years has reflected the difficulty in getting collective bargaining agreements ratified, even where airline employee representatives are certified under traditional majority rules. Those

difficulties can only be exacerbated where representatives are supported only by a minority. The potential for more disruption is obvious.

There are other flaws. For instance, the Board has not addressed how the rule change will affect multi-union elections. Consider the following scenario: An incumbent union (A) is being challenged by another organization (B). Of the 100 employees casting ballots, 20 vote for union A, 45 vote for union B, and 35 vote for no union. Under the Board's existing rules, if the 65 votes for union representation constitute a majority of eligible voters, union B would be certified. Under the proposed rule, however, union B does not have a majority of votes cast. What then? In this situation, the NLRB would conduct a rerun election with the two highest vote-getters (here, union B and no union), but it is entirely unclear how this Board would deal with it. One thing is clear: where only the ballots cast by actual voters count, there would be no reason to aggregate the votes gathered by the unions A and B. At the very least, this issue should be addressed during any rulemaking on the proposed change.

The proposed rule change also creates uncertainty with regard to remedies in the event of election interference. The ballot form and vote counting methodology under consideration by the Board appears to be the same as the ballot form and procedure long known as the "Laker ballot," which has been used, for many years, as a remedy in cases of carrier election interference. If the "Laker ballot" now becomes the "new norm," then the Board must carefully consider the range of potential remedies available in the event of election interference. Will the "Key ballot," now used only in egregious cases, become S.O.P. for interference cases? Under what circumstances will bargaining orders be available in interference cases? Once the door opens to certification of a minority representative, the possibility of election interference by

unions increases. The Board needs to consider rules governing union election conduct and remedies in the event of union interference if it goes down this path.

The foregoing are only some of the issues spawned by the NPRM. There are many others. The Board should carefully and deliberately identify, evaluate and respond to these original issues, before changing an election procedure so fundamental.

OTHER ISSUES TO BE CONSIDERED

If the Board is committed to undertaking an overhaul of long-standing rules, procedures and practices, its failure to do so on a global basis can only serve to heighten uncertainty for all of the Board's constituencies. We note, for instance, that the NPRM does not address an IBT proposal for the provision of lists of eligible voters' names and addresses ("Excelsior" lists). Is this proposal still "on the table?" If so, shouldn't it be subject to comment by all constituencies? The same applies to the proposal by the Chamber of Commerce to establish a clear and simple decertification process. These are significant issues which the Board should not simply leave in limbo

If the Board is seriously considering overhauling its rules, one cannot ignore the impact it will have on critical standards that the Board has consistently and historically applied. For instance, the Board has long recognized the propriety of system-wide crafts or classes. This no doubt facilitates stability and the avoidance of interruptions to commerce. As part of this proceeding, the Board should confirm the continued vitality of system-wide representation. Similarly, the Board should confirm that the current showing of interest requirements are not subject to change. If alternative procedures for certification, such as "card checks," are even being given thought, the Board owes it to all constituencies to air the issue thoroughly and

carefully before moving in this direction. At present, card check as a basis for certification has been applied only in the most egregious employer election interference cases. If there is any consideration being given to expanding this process, that change deserves rigorous review and analysis.

These are just some of the issues raising concerns over instability. If other changes are contemplated by the Board or any of the Board's constituencies, they should be laid on the table and vetted as a whole, not piecemeal or seriatum. Speaking on behalf of ASC, no change is needed and any overhaul is unnecessary and ill considered. That having been said, what is most critical is that all constituencies understand all of the rules going forward.

CONCLUSION

We appreciate the opportunity to present these views and to hear the views of others. We strongly believe that the Board's system of administering the representation features of the Act have been consistently, carefully and properly applied for the last 75 years. While we recognize that review with a fresh eye is worthwhile, from time to time, a comprehensive review requires that all relevant issues be open to comment and that the views of all industry segments be encouraged and carefully considered. Ultimately, if any changes are made, they should enhance—not destabilize—the fundamental purposes of the RLA.

Thank you.

Roger. H. Briton

Donald Maliniak
Littler Mendelson P.C.

This written statement accompanies the comments to be presented on December 7, 2009 by Donald Maliniak of Littler Mendelson, P.C.[1] in response to the National Mediation Board's (NMB or Board) proposal to change the method of voting in representation disputes under the Railway Labor Act (RLA). These comments do not represent the firm's complete submissions in this matter. Currently, Littler Mendelson has a Freedom of Information Act (FOIA) request pending before the Board which, as of this writing, has yet to be substantively answered. Moreover, Littler wishes to reserve its right to file additional comments in conjunction with the NMB's Notice of Proposed Rulemaking (NPRM) of November 3, 2009, and following the substantive response it receives from its FOIA request.

Earlier this month, two out of the three members of the NMB announced the intention to abandon the Board's current and longstanding representational election process in favor of one that would provide a yes/no ballot with legal certification granted to a labor representative garnering the majority of ballots cast in a representation election. In reaching its decision, the Board's majority offered three reasons in support of this remarkable change. The Board stated that this change (1) furthered "the statutory goals of the Railway Labor Act (RLA)"; (2) would provide a more reliable measure/indicator of employee sentiment in representation disputes; and (3) would provide employees with clear choices in representation matters.

Carrier concerns over this departure range from the legality of the change under the RLA as well as the Administrative Procedure Act, but also the precedent, if lawful, of setting in motion a pendulum upsetting the stable approach to representation disputes at an agency charged with guarding labor-management stability in the nation's air and rail transportation infrastructure. Notwithstanding these other serious concerns, this preliminary submission focuses on the proposed rule's destabilizing effect on the immediate and longer-term future of labor relations in the industry and its undermining of the core principles underlying the RLA.

1. Changing to a yes/no ballot undermines the RLA's statutory goals.

Congress enacted the RLA to: (1) avoid interruptions to commerce and common carrier operations; (2) guard employees' freedom to join a labor organization; (3) preserve independence of carriers and employees in the matter of self-organization; (4) provide for prompt and orderly settlement of disputes concerning pay and working conditions; and (5) provide for the prompt and orderly settlement of disputes growing out of grievances or the interpretation agreements. *See* 45 U.S.C. § 151a ("General Purposes")

The Board's current voting procedure has been in place for 75 years, and has served the NMB and express purposes of Congress well. The current procedure considers and accounts for *all* the eligible voters in the craft or class by counting votes of those who affirmatively indicate a desire for legal representation by a third party and counting those who do not vote for third party representation. Under the current election process those who do not vote for representation are

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[1] Donald Maliniak is a member of the Transportation Industry Practice Group of Littler Mendelson, P.C., the nation's largest law firm dedicated exclusively to the representation of employers in labor, employment, and benefits matters. The views expressed in this submission are the views of the Transportation Industry Practice Group and do not necessarily purport to be the views of any individual air or rail carrier client represented by Littler Mendelson.

treated as wishing to maintain their status quo, i.e., to remain unrepresented. If the majority (50%+1) of the eligible voters in a craft or class express a desire for third party representation, the representative receiving the largest number of votes is certified as their legal representative.

By requiring that the majority of eligible voters affirmatively demonstrate their desire for third party representation, the Board supports the RLA's broader statutory framework as follows:

- First, the election of a third party representative at the required level of participation (50%/+1) quells any meaningful debate about the respect to be afforded the choice of the craft or class. Even dissenting members within the same craft or class cannot quarrel with majority rule.

- Second, once concluded in favor of third party representation, this election process encourages both the employees and their representative to work cohesively toward negotiating, making and maintaining agreements with the carrier. With the majority of the whole supporting third party representation, the election validates the efforts of the chosen representative on behalf of the craft or class going forward. The message is simple and clear: when a true and definite majority of the eligible voters have supported third party representation, this spurs parties to get on board to make things work.

- Third, election by a true majority of eligible voters highlights to the carrier the need to deal responsibly with the elected labor representative.

- Finally, negotiations conducted under the RLA are so unlike those under the NLRA that a different representation selection process is justified. Most often, RLA negotiations cover a craft or class that is dispersed in multiple geographic locations, each with its own set of concerns. These concerns must then be assimilated or reconciled into a single negotiations strategy and unified agreement. The tension created by trying to harmonize multiple locations with multiple needs and agendas underscores the need for a strong base of support for the legal representative, which can only be achieved by a showing of true majority support within the craft or class.

The NMB's proposed changes provide legal certification on the basis of a union receiving merely the majority of those across an entire system who choose to vote in the election. It creates a construct in which a small minority of voters could determine the long-term future of the entire craft or class.

The contrast between the proposed change and the current election process could not be more vivid. One system stands on the idea that certification can be had merely when the number of voting supporters for a union, regardless of size or participation rate, eclipses their voting opponents. The other election system mandates that to effect a change in the status quo, the majority of the newly formed union constituency must stand up, be counted and vote to quell any future arguments about the legitimacy of the legal representative and the will of the true majority. Based on the articulated purposes of the RLA, it is obvious which election paradigm makes the more compelling case for industry stability and strength in making and maintaining agreements and resolving future disputes.

A newly certified representative needs the assurance and confidence that the majority of the craft or class support its goals and efforts. How else can it be expected to make and maintain agreements with the carrier or resolve disputes on their behalf? Only the current election process promotes a solid environment of stability, reliability and uninterrupted service by railroad and airlines that is so critical to the well-being of the economy. By enacting the RLA, Congress recognized the characteristics and public policy considerations unique to the railroad and airline industry as opposed to other industries. That distinction remains no less valid today than it did 75 years ago.

2. The current election process is more consistent with core democratic principles.

Today's Board majority explains that "[t]here are many reasons individuals do not vote in elections. Nonvoting can be a conscious choice and assigning those who choose not to vote a role in determining the outcome of an election is a type of compulsory voting, not practiced in our democratic system." *See* 74 Fed. Reg. 56752 (November 3, 2009). The Board majority's comparison to publicly held democratic elections would have greater validity if general elections and representation disputes operated alike with respect to their force, effect, and permanence. Yet, they do not.

In a public election, the prevailing candidate serves for a definite, relatively brief term. When that term ends, the representative returns to private life or runs for re-election, facing the voters anew. For the voter or non-voter in a public election, the decision to vote or sit on the sideline has a transitory quality inasmuch as the vote or the non-vote lasts only as long as the next election cycle. Under the RLA, there is a relative permanence in the outcome of the election. Once elected, the "candidate" labor organization faces no term limits and does not have to contend with future election cycles. In short, the union remains in place indefinitely.

Another important distinction between elections pursuant to the RLA and public elections is that in the latter case, it is almost always necessary that the vote lead to a definite outcome. The contested office must be filled for government to function. As such, allowing a majority of those who vote to determine the outcome of a public election is a practical accommodation for the need for continuity in government. This is not the case in a representation dispute under the RLA. If the union cannot muster a sufficient demonstration of support, the unrepresented status quo remains.

These elections also differ because their goals are different. A core RLA principle is the maintenance of the status quo absent agreement and consensus on change. Congress articulated a specific desire to maintain stability in the covered industries, appropriately recognizing the benefits of a stable state over a state of constant flux. Consistent with this recognition, it is absolutely appropriate that much should be required to move off the existing status quo and into a new one.

Moreover, the existing election process under the RLA appropriately recognizes the need for stability both before and after the election takes place. That is why selection as the legal representative of employees in a craft or class election brings immense and immediate security to the elected union. For example, the RLA has no formal method for decertifying a legal representative. In most cases, a craft or class that does not like representation by a third party

has but one meaningful option: select other third party representation. Even then, the electorate must first show the Board that 50% of the eligible craft or class is interested in a challenged election before that election can be had. Going back to an unrepresented state is not a meaningful option.

Recognizing that the certification of a legal representative may very well be the one and only election the craft or class members ever experience, the current election procedures more effectively ensure that the true desires of the majority of the craft or class regarding third party representation are respected. The Board knows all too well that one affirmative expression of voter desires may be the only one ever afforded unless the voters decide for the time being to remain unrepresented. Thus, the existing approach requires that there be a minimal election participation rate before any third party is certified, or the unrepresented status quo continues unless and until another representation dispute.

The history of the Board practice and the strength of the current election process under the RLA reside not in how the election process treats the non-voter, but rather how the process compels the voters for third party representation to stand up and show that the majority of the total eligible craft or class truly wants third party representation. That is the key to supporting the broader purposes of the RLA, and it should not be eschewed in favor of the proposed election process absent a demonstrated need to fix a serious problem.

3. Elimination of the minimal participation rate under the new procedure fuels instability.

By requiring that a majority of eligible voters in the craft or class demonstrate their desire for third party representation, the NMB has functionally established a minimum electorate participation rate of 50% +1.

In contrast, the proposed election process sets no minimum electorate participation rate to become legally represented by a third party. As such, it allows for certification in the following case: if only 10 employees in a craft or class of 1000 choose to participate in a representation election, and 6 vote for representation and 4 against it, the union becomes the legal and relatively permanent representative of the craft or class.

The proposed change in the election process does not mean that a larger "yes" vote count will take place, only that the active "no" vote will increase. By eliminating any minimal participation rate and lowering the threshold for selection, third party representation becomes easier. At the same time, that third party representative is likely to be less stable and cohesive than it is today.

Under the proposed change, a close yes/no representation vote with a significant population of undecided non-participants will dilute the union's ability to act and persuade. Infighting or dissension within the union may result in less trust, less latitude and less discretion to negotiate on behalf of the craft or class. Should this occur, the making and maintaining of agreements and resolving of disputes under the RLA may prove considerably more difficult or more protracted than it has been in the past. More difficult and more protracted negotiations mean an increase in the probability of disruptions prior to lawful self-help and an increase in the

duration of periods of self-help despite the best efforts and control the NMB exerts over the process.

The Board takes great pride, as it should, in being able to bring the parties together and to have them act responsibly at the negotiations table. If, however, the new election process causes contract negotiations to be extended further than they would otherwise because third party representatives cannot muster enough credibility with their own constituents to make or maintain agreements, then the larger mandates of the RLA will have been compromised.

The notion that the power of the Board to hold the parties in mediation indefinitely can cure whatever instability may be spawned by the new election process is worrisome. Labor history is replete with examples of employees taking out their "frustrations" about the pace or progress of collective bargaining negotiations on the carrier and the public that relies upon that carrier for travel or movement of goods. "Working to the rules," sick-outs, and slow-downs during turbulent negotiation periods have been visited upon many a carrier well before any onset of legal self-help. Sometimes these illegal "frustration fires" have been fanned by the legal representative, sometimes not. In either event, a weak union or one torn apart by dissension does nothing to promote stability, whether the parties are in or out of negotiations.

4. The Board's stated attempt to provide employees with clear choices in representation matters assumes that there is more confusion among the RLA electorate than really exists.

For an eligible member of a craft or class who supports third party representation in an RLA election, the rules have always been straight forward and easy to understand. Whether by paper or electronic ballot, employees wishing to vote for third party representation make a check on the ballot next to the union's name or write-in another labor organization's name in the space provided. Clearly, there is no confusion. The rules and process are simple and clear.

To the extent that any real confusion exists, it is in the RLA's treatment and rationale behind categorizing non-votes as "no" votes. Yet, any carrier involved in a representation matter can communicate with employees to ensure that they know how to vote "no" if that is their desire. The NMB also explains the election process to employees by providing sample ballots and voting instructions.

It has been reported that over the past 75 years, over 1,850 NMB elections have been conducted using the current election process. During that period, unions have prevailed at a rate of 65%; success many would assert much higher than the union "win rate" under the NLRA. It would appear that the notion of providing employees with clearer choices in representation matters is more of a solution in search of a problem rather than the reverse.

5. The Board's initiative to change the election process raises more questions regarding the proposed new election process.

Some of the questions raised under the proposed changes follow below.

If indeed the Board's proposed changes "will not affect the showing of interest requirements as set forth in 29 CFR 1206.2" (page 8), does that mean that showing of interest

cards executed by employees prior to the change in the election process will still be considered valid notwithstanding the fact that theses cards may have been procured and executed by employees who assumed that the election process was different from the one they may actually undergo? Could employees withdraw their showing of interest cards because the election process has now changed? Is the Board prepared to insist that elections conducted under the new model be supported by showing of interest cards executed after any changes in the election process take effect?

Changing the way the vote takes place after an employee has signed an authorization card would effectively result in the equivalent of a misrepresentation of Board processes, at least from the perspective of the employees in the craft or class who signed authorization cards under the old set of assumptions. The only reliable way to guarantee integrity in card-signing and elections under the new rule would be to require that any showing of interest in support of a vote under the new rules consist solely of signatures gathered after the new rule is fully implemented.

How are the employees in unrepresented classes and crafts at carriers to be educated by the Board about these new election procedures?

Failure by the Board to educate employees about any fundamental election changes may cause some employees in the craft or class to conclude mistakenly that their non-participation in the election process remains the way to vote "no" in an election – particularly at carriers where prior elections were held. Their misunderstanding of the procedure, grounded in generations of working under the current system, would lead their true choice in an election to be disregarded when, in fact, they wanted to vote no.

Has the Board prepared materials for carriers and unions regarding any new or different consequences, penalties, and/or processes to address inappropriate behavior in an election campaign and during a showing of interest effort?

Does the failure of the Board to address or include any decertification process in RLA elections mean that any change in that area is not to be effected? And is the Board planning to inform potential electorates at carriers that there is no formal decertification process available to them if they choose to be represented in a yes/no ballot?

There has been a recent pattern by some labor organizations to withdraw their petitions for an election under the current election rules, with the expressed intent to refile them if the rules change. What election bar rules are the Board planning to articulate in such instances?

Samuel Berry
Self

When I ran for student council in College, it was a completely different ball game, different from running in high school. The election was no longer a, "popularity contest." It wasn't about how many people you knew or how many people thought you were cool. It was reality, me against my opponent, running for Secretary of Treasurer. I remember how hard I worked to win, I did everything I can! I was at different buildings on campus each day getting know everyone, spreading my purpose, handing out literature and of course, educating.

Election Day wasn't stressful for me at all! I knew I won, I knew all my hard work paid off, I was excited to start serving! The decision was only a couple hours away and my patients were running out!

This was it, the envelope was handed off and my name was seconds away from being called.

"The Elected Secretary of Treasurer is….. Travis Day!"

Now, my name is Samuel Berry, Far from Travis Day. My heart dropped immediately but at that point, I took a deep breath, kept my head up and shook Travis's hand in pride. Come to find out, I lost by 3 votes. I kept a smile on my face knowing that I lost fair and square. I did everything I can to win but apparently, I didn't try hard enough. Democracy took place right in front of my face and I couldn't be more proud of our system.

What about the people who chose not to vote that day? The people who were opposed to both of us, who forgot to vote or wasn't reached to, or who simply didn't feel like taking the time to get out to vote? I sure wouldn't have wanted those people to decide my election outcome. Who's outcome would be decided in that method? To me, it would have definitely not been justified.

The Union election process under the Transportation Trades Department that has been put in place over 75 years ago to many, is not justifiable. The fact that if I forget to vote, procrastinate, not be able to be reached because I'm on furlough or took a slip leave, makes me automatically counted as a no vote, is in fact unjustifiable. Yes, many unions have resulted with the 75 year old voting rules but at the same time, many workers have been denied the right to representation due to the same rules.

I'm young, I'm 23 years old, I've only been working for Northwest Airlines for a little over 2 years now. I'm also smart enough to know what is going to be best for me, my future, and my career. I want the fairest election known to the people, by the people, for the people. We live in a Democracy, the United States of America. Just like voting from proposals to presidents, we have a Democratic Ballot and we deserve that right when voting for a legally binding contract at work. In 75 years, change has been imminent in this country. We would not be where we are now without change!

If we are granted our request for a Democratic Ballot and no representation results in this election then fine, DEMOCRACY HAS SPOKEN AND THE MAJORITY WINS!

This country would not be what it is now without our 1st amendment, without its people and above all, WITHOUT ITS'REFORM!!!

Thank you for listening.

STATEMENT OF BETH M.GRAHAM, FLIGHT ATTENDANT
DELTA AIR LINES, INC.
BEFORE THE NATIONAL MEDIATION BOARD OPEN MEETING

DOCKET C - 6964

DECEMBER 7, 2009

STATEMENT OF BETH M.GRAHAM, FLIGHT ATTENDANT
DELTA AIR LINES, INC.
BEFORE THE NATIONAL MEDIATION BOARD OPEN MEETING
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DECEMBER 7, 2009

INTRODUCTION

Madame Chairman and members of the National Mediation Board, I want to thank you for providing me with the opportunity to address the Board about a topic that is critical to my future as a 24 year flight attendant of Delta Air Lines. October 29, 2009 marked the one year anniversary of the merger of Delta and Northwest which created the world's largest airline.

Over the past year, we have worked very hard to ensure the success of the merger. The momentum during the merger integration and the benefits of gaining the new routes has exceeded my expectations. It has been very exciting meeting my fellow flight attendants around the world.

Delta employees have worked too hard to have the major distraction of unresolved representation keep us from reaping the benefits of all of our hard work.
Unresolved representation also keeps employees from shared benefits, including pay and work rules.

To now, have the National Mediation Board intervene and attempt to turnover 75 years of labor law to influence the voting rules and process is a disservice to the hardworking employees of Delta.

Delta has an 80 year history of a cooperative work environment which has been evident in Delta's previous combinations during my career with Western, PanAm and now with Northwest. We are anxious to work side by side with our fellow flight attendants. Delta employees are ready to move forward and work together side by side without barriers. Until the union representation is resolved, we continue to work separately. Most flight attendants soon will be qualified to fly on all aircraft of both pre-merger airlines. However, I will not be able to fly on the same aircraft with my pre-merger Northwest colleagues or work under the same pay and work rules until representation is resolved.

The delay is unfair to Delta flight attendants especially when the National Mediation Board has allowed union elections to occur under the current voting rules as most recently at the election of Compass Airlines flight attendants. The election request occurred after the request was filed with my employee work group at Delta.

I ask the questions of you today, should Delta flight attendants be governed by a different election process simply by virtue of the size of our company? If so, then I respectfully ask to also be granted a change in the process to decertify a union.

While I do not expect you to answer me today, I do ask that you take these matters into consideration as a decision is reached in the outcome of this process.

CONCLUSION

In closing, I believe that the right to vote is a basic right without which all others are meaningless. As part of that right, I want a voting process that is fair and without influence of a changing political climate.

I respectfully request that Delta employees have the ability to exercise that right to vote using the process that has withstood scrutiny and the test of time for 75 years. I, as a flight attendant of Delta Air Lines want the opportunity to move forward and give each of my fellow colleagues control over our own destiny.

Delta pilots, mechanics and dispatchers completed the representation process and have completed benefit, seniority and work rule integration. I would like the opportunity to do the same with my fellow flight attendants.

Delta founder CE Woolman stated "No one individual can create an airline. An airline is a team. Members of the Delta team have put the meaning in our slogan of Service and Hospitality from the Heart through teamwork."

I am ready to move forward as a flight attendant to work side by side with my fellow flight attendants without the distraction of union representation which keeps us from working as a team to provide Service and Hospitality from the Heart through teamwork!

Thank you for your time.

Raymond LaJeunesse
National Right to Work Legal Defense
Foundation, Inc.

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
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WRITTEN STATEMENT OF RAYMOND J. LAJEUNESSE, JR.,
VICE PRESIDENT & LEGAL DIRECTOR,
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,
CONCERNING
THE NATIONAL MEDIATION BOARD'S CONTROVERSIAL PROPOSAL TO REVISE ITS RULES FOR DETERMINING MONOPOLY BARGAINING REPRESENTATIVES UNDER THE RAILWAY LABOR ACT

Hearing Set for December 7, 2009
Docket Number C-6964

Chairman Dougherty and Members Hoglander and Puchala:

The National Right to Work Legal Defense Foundation opposes the National Mediation Board's proposal, announced on November, 3, 2009, to change its voting procedures for imposition on workers of union "exclusive representatives" under the Railway Labor Act, procedures that the Board has utilized for more than seventy years.

In short, the majority of the Board has acceded to the AFL-CIO Transportation Trades Division's request that the NMB discard 75-year-old procedures and implement new procedures intended to maximize unionization of workers in the railway and airline industries.

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violations of their Right to Work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states. Since its founding in 1968, the Foundation has provided free legal assistance in 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 RLA. *E.g.*, *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 lower federal court cases brought in the Foundation's litigation program for employees have directly concerned the RLA or the NMB's procedures, including *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983); *Masiello v. US Airways*, 113 F. Supp. 2d 870 (W.D.N.C. 2000); *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991); and *Klemens v. Air Line Pilots Ass'n*, 736 F.2d 491 (9th Cir. 1984).

Because the Foundation's attorneys regularly represent individual employees in litigation challenging the abuses of compulsory unionism arrangements and advise employees about their rights in proceedings involving the imposition of union monopoly bargaining in their workplaces, the Foundation is uniquely qualified to comment on the AFL-CIO's proposal for an extraordinary change in the NMB's long-standing election procedures.

No employee should be subjected to the "representation" of union officials whom they have not *individually* chosen to represent themselves. The NMB's current election rules at least ensure that unions receive the extraordinary power of "exclusive representation" only when a true majority of all employees in a given bargaining unit actually desires such representation.

Requiring a showing of true majority support is appropriate given the unbridled and often abused privileges inherent in the exclusive representation regime imposed

by, and enforced under, the RLA, such as the powers to: a) dictate the terms and conditions of employment for even unwilling nonmembers; and, b) force an employee's discharge for nonpayment of compulsory union dues, even in Right to Work states.

It is particularly inappropriate for exclusive representation to be imposed in the railway and airline industries by a mere majority of employees voting in an election for three reasons.

First, the nationwide nature of RLA units makes it extremely difficult for employees opposed to unionization, located around the country in numerous different facilities, to organize against a union's well-funded and professionally orchestrated campaign to win the monopoly bargaining privilege.

Second, the burden of demonstrating majority status would be unfairly and improperly reduced significantly for the union hierarchy seeking the new privilege, while new burdens would be placed on the targeted employees who may wish to remain union free. Under the proposed radical change, employees who are not union activists, who have expressed absolutely no interest in unionization whatsoever, and whose jobs frequently require traveling or work at odd hours, would suddenly be forced to take *affirmative action* by showing up and voting against the union. Otherwise, their silence on the matter would suddenly lower the threshold for imposition of union monopoly bargaining upon them.

Third, it is extremely difficult for employees to remove a union once it is certified as their exclusive bargaining agent, particularly because the NMB has not established a formal process for decertification, despite the United States Court of Appeals for the Fifth Circuit's holding in *Russell v. NMB* that the RLA requires the Board to process

applications for elections to terminate a union's monopoly bargaining privilege.714 F.2d at 1346.

Accordingly, the Board should reconsider and reject the AFL-CIO's attempt to game the system for union organizers. The NMB has previously, indeed as recently as 2008, considered and rejected the AFL-CIO's proposed change, and should do so again. Changes in the partisan political climate in Washington do not warrant radical changes in the NMB's time-tested election procedures, which are more consistent with the RLA's "statutory mandate to allow employees their right to full and free expression of their choice regarding collective representation, including the right to reject collective representation." *Id.* at 1341.

Indeed, if the Board is to make any change in its "exclusive representation" certification rules, it should implement the mandate of the RLA as explicated in *Russell* and establish procedures for the decertification of unions. The Board's previous failure to do so should be remedied because the RLA'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.

Finally, the Foundation again strongly urges the Board to reject the proposed amendment of its rules as an unwarranted diminution of the rights and choices of individual railway and airline employees.

Thank you for your consideration of these views.

John Murphy
International Brotherhood of Teamsters

STATEMENT BY JOHN F. MURPHY, INTERNATIONAL VICE-PRESIDENT AND DIRECTOR, TEAMSTERS RAIL CONFERENCE ON BEHALF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Madame Chairman and Members of the Board, on behalf of the more than 120,000 men and women represented by the International Brotherhood of Teamsters who work under the Railway Labor Act in the air and rail industries, I speak today in support of the rulemaking proposed by the Board.

As you know, IBT General President James P. Hoffa wrote to the members of the Board on October 9, 2009 asking the Board to issue a proposed rule changing its current ballot procedures to enable a simple majority of voters to determine the outcome of representation elections conducted by the Board.

On November 3, 2009, the Board issued a Notice of Proposed Rulemaking that, if made final, will bring the Board into the mainstream of election procedures used in all other labor regulatory systems in our country. This new rule will also conform the Board's ballot rules to the democratic standard used throughout our society.

The Board's proposed rule will fulfill the fundamental purpose of the Act to facilitate the employees' free choice of representative. And it will ensure stability

in labor relations and interstate commerce through collective bargaining between the freely-chosen representatives of employees and their carriers.

The Board's current ballot rule originated before the adoption of Section 2, Ninth out of the predecessor Board of Mediation's experiences under the 1926 Act with the company union phenomenon in the railroad industry. While the rail industry was overwhelmingly organized at the time the RLA was initially adopted in 1926, that "representation" did not, in fact, fully reflect the free choice of employees. Rather, in numerous instances, carriers effectively imposed "representatives" on their employees by fostering employee associations on their systems that purported to represent the employees and then extending recognition to those associations, while denying recognition to the national standard rail unions. Carrier promotion of company unions, and their refusal to deal with the standard rail brotherhoods, undermined the purposes of the RLA to avoid the interruption of interstate commerce by creating a system of collective bargaining between freely-designated representatives.

Congress responded to the evil of company unionism by passing the 1934 amendments to the Act, including Section 2, Fourth, which established the employees' right to freely designate their representative, and Section 2, Ninth

which gave the Board administrative powers to resolve representation disputes and established the current system of exclusive representation within each craft or class.

To resolve the representation disputes between the national standard rail unions and the company-promoted unions, the NMB sought to adopt procedures that would ensure the employees' representational choices were vindicated. Drawing on the earlier experience of the Board of Mediation, the NMB adopted a standard that required a majority of all employees to vote in favor of representation. Given that the overwhelming number of representation elections were contests between rival representatives, this standard was easily met. The rule strengthened the hand of the NMB and the standard rail unions selected to represent employees by compelling carriers to abandon support for company unions by the threat of operational shutdown by a majority of their employees if the carriers denied the employees' true representational choices.

The early history of the 1934 amendments shows they were highly effective in eliminating the Company union problem. By the late1940's and early 1950's, company unions were gone.

The Board's ballot rule did not change with the end of company unionism. In 1948, the Board chose to retain its established ballot rule with only a terse statement that, in its opinion, the rule helped the Board to maintain stable labor relations and avoid disruptions of interstate commerce. The only data cited by the Board tended to show that in only a miniscule number of cases had employees not achieved representation due to the lack of majority participation in the election and even those later achieved representation. The Board then concluded that its form of ballot did not negatively impact employees' ability to select representatives of their choice. In the decades since that 1948 statement, the Board has not reexamined these conclusions to determine whether its ballot rule may now inhibit employees' ability to achieve representation; nor has it provided more than a cursory justification for the current ballot rule.

Yet, the Board could not have foreseen at that time the dramatic changes that occurred thirty years later in the air and rail industries through deregulation and various market events made possible by that deregulation. Those developments have only reinforced the need for this long-overdue reevaluation of the form of ballot used by the Board.

The deregulation of the airline industry in 1978, for example, brought massive upheaval to employee representation in the industry. Long-standing carriers, with decades of representational history, such as Braniff, Eastern Air Lines, Pan American and Trans World Airways disappeared through economic failure due to the competition unleashed by deregulation. An increase in merger activity permitted by deregulation-induced changes in the business environment led to the end of other carriers such as National, PSA, Western Airways, Piedmont and Allegheny. Also, dozens of airlines started and failed in the post-Deregulation Act era. These events ended long-standing labor/management relationships—many established by voluntary recognition.

The industry changed further through the 1990's and in the first decade of this century with the rise of regional airlines and low-cost carriers, the dramatic increase in outsourcing and the reduction in the size of major airline networks following 2001. Legacy airline employee crafts shrank substantially, resulting in large numbers of furloughees within those crafts that then created unprecedented challenges to the Board's procedures for ensuring accurate electorates.

The railroad industry experienced a similar deregulatory upheaval following passage of the Staggers Act in 1980. New policies established by the former

Interstate Commerce Commission ("ICC") and its successor, the Surface Transportation Board ("STB"), encouraged unionized trunk carriers to spin off branch lines to "non-carriers" which would become short-line operators. Today, there are over 450 members of the American Short Line and Regional Railroad Association and most of those carriers were created after 1980. The affected employees who remained on the short lines after the sale found their existing union representation and collectively bargained rates of pay and rules eliminated. Many of these employees became embittered with railroad companies, railroad unions and the entire regulatory process. The Board's representation process could not adequately adjust to this new reality of sudden de-unionization and associated loss of collectively-bargained working standards, with the present ballot rule being a primary impediment to the restoration of collective bargaining.

The Board conducted an evidentiary proceeding in 1987 upon a petition by the IBT for a change in the form of ballot. That proceeding developed an extensive record before the Board that showed the current form of ballot discouraged voter participation by making the employees susceptible to suggestion their participation would become known, encouraged ballot destruction campaigns by carriers, converted ballot errors into "no" votes, failed to account for the substantial increase in sophisticated antiunion campaigns by carriers, and imposed

on employees who desired representation the severe obstacle of overcoming apathy and nonparticipation among the electorate as well as voters actively opposed to unionization. The record of that proceeding showed the result of these factors was a notable decline in the level of unionization among employees under the RLA. Despite this extensive record, however, the Board's 1987 decision was shallow and did no more than deny the petition on the ground that the petitioners had failed to carry a purported heavy burden of proof to support the proposed change. The 1987 decision deserves little consideration here because of its lack of reasoning and the absence of any "burden of proof" in rulemaking proceedings.

The Board's proposed rule will properly address the changes in the representational dynamic in the air and rail industries that have occurred over recent decades. A simple majority rule allows those employees who wish to express their right to designate a representative the ability to do so without having their representational choice frustrated by nonparticipants in the electorate. The fact is that in any election there is a portion of the electorate that fails, whether by apathy, procedural failure in the balloting process or personal situation, to exercise the right of free choice. The proposed rule will empower the active and engaged employees in the representational process. That will strengthen both the Act's purpose of ensuring a free representational choice by employees and its goal of

avoiding disruption of interstate commerce through collective bargaining among chosen representatives.

The Board's current ballot rule imposes an undue burden on employees in exercising their right to designate a representative because they must not only overcome those who may oppose representation, but even more difficult, those members of the electorate who will not participate regardless of the efforts of the organization to engage them. This reality of nonparticipation means that employees must attain a super-majority of voters in order to vindicate their choice of representative. By contrast, carriers need only persuade a minority of engaged voters to not vote and may then rely on apathy within the electorate to defeat their employees' organizational aspirations. That turns the purposes of the RLA on their head.

The notion that imposing a greater burden on employees' representational choice somehow strengthens representatives and leads to more stable labor relations is simply illogical. To the contrary, the super-majority rule encourages raiding among organizations because the chance of electoral success is greater with more than one representative on the ballot than in pursuing nonunion groups. This creates upheaval among represented crafts and continued nonrepresentation among

other employees. This is plainly contrary to the RLA's design to foster stability through collective bargaining between freely-selected representatives of employees and carriers.

No empirical data is presented to support the super-majority rule. We believe that, in fact, the data will support the Board's proposed rule as the best instrument for encouraging voter participation and vindicating employee choice, as well as achieving stability in collective bargaining.

The Board clearly has authority under the Act to implement the proposed rule. Section 2, Ninth authorizes the Board to use the methods that it deems appropriate for determining the employees' choice of representative free of carrier interference. It is "carrier interference", not some abstract notion of what a majority means, that is the focus of Congress' concern in Section 2, Ninth. This broad discretion of the Board to conduct its investigation has long been recognized by the Supreme Court and determined to include the form of ballot used by the Board.

Suggestions that the NMB lacks authority to adopt the proposed rule are simply without merit as the Supreme Court concluded in Non-Contract Employees that Sections 2, Fourth and 2, Ninth allow the Board to use a simple majority ballot that permits a "no union" vote.

Similarly, the claim that the super-majority rule somehow bears a presumption of favor merely because of its age is an empty phrase—unsupported by reasoning or data. Since the end of company unionism, the Board has never articulated a reasonable basis for its super-majority rule. A rule dictating a form of ballot designed to address the old problem of rival employee representatives in an industry with a decades-old history of unionization was and is ill-suited to address the new labor realities created by a substantially different economic and regulatory environment.

The aspirations for representation of thousands of employees at various carriers in the rail and air industries, including Continental Airlines, have been frustrated by the Board's super-majority rule. Those employees, at Continental and elsewhere, now see a real opportunity to express their representational choice under a rule designed to vindicate that choice and encourage participation. On behalf of the IBT, its members and the many thousands of employees who desire

IBT representation, I urge the Board to adopt its proposed rule and initiate an important improvement to fulfill the Board's responsibilities to ensure the free choice of employees to select representation under the RLA.

Thank you for permitting me to appear today.