AIR TRANSPORT ASSOCIATION

- David A. Berg
  Vice President, General Counsel and Secretary

January 4, 2010

VIA EMAIL AND COURIER

The Honorable Elizabeth Dougherty
Chairman, National Mediation Board
1301 K Street, NW; Suite 250
Washington, D.C. 20005

The Honorable Harry Hoglander
Member, National Mediation Board
1301 K Street, NW; Suite 250
Washington, D.C. 20005

The Honorable Linda Puchala
Member, National Mediation Board
1301 K Street, NW; Suite 250
Washington, D.C. 20005

Re: Notice of Proposed Rulemaking in Docket No. C-6964

Dear Chairman Dougherty and Members Hoglander and Puchala:

The Air Transport Association of America, Inc. ("ATA") and the Airline Industrial Relations Conference ("AIRCON") submit the following comments on behalf of their members in response to the Notice of Proposed Rulemaking in Docket No. C-6964, 74 Fed. Reg. 56750 (Nov. 3, 2009) (the "NPRM"). In the NPRM, the National Mediation Board (the "Board") has proposed to abandon its 75-year-old "majority" voting rule—a rule that has become part of the fabric of the Railway Labor Act and the Board's published regulations. The rule change would provide for certification of representatives based on a majority of votes cast, as opposed to a majority of eligible voters.

ATA and AIRCON appreciate this opportunity to present their views. ATA is the principal trade association representing U.S. scheduled airlines.[1] AIRCON is a voluntary association of passenger and air cargo carriers.[2] AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry. ATA and AIRCON members and their affiliates account for more than 90% of passenger and cargo traffic on U.S airlines and more than 300,000 full time equivalent industry positions. ATA and AIRCON members are highly organized, and employees have successfully utilized the Board's long-standing voting procedures, with roughly 50% of the industry workforce represented by organized labor.[3]

ATA and AIRCON are opposed to the proposed rule change on policy and legal grounds, and believe the procedures the Board has employed in this rulemaking are legally deficient. In particular, we request that the Board reject the proposed rule change for the following reasons:

First, the proposed rule change would be arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). As the Board has recognized in the past, the Board's "majority rule" is essential to promoting important public policy goals that make up the underpinnings of the Railway Labor Act ("RLA"). And there are no compelling legitimate justifications for abandoning the "majority rule"—a rule which has been successfully employed in representation elections for more than seven decades.

Moreover, as the Board has recognized in prior proceedings, the procedures necessary to ensure full and fair consideration of the issues addressed by the proposed rule are those used in *In re Chamber of Commerce of the United States*, 14 N.M.B. 347 (1987), in which all interested parties were afforded the opportunity, *inter alia*, to provide evidence and cross-examine

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[1] ATA members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation.; Hawaiian Airlines; JetBlue Airways Corp.; Midwest Airlines; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. Southwest Airlines Co.'s position, which is neutral on the proposed rule change, is separately stated in its comments filed with the Board on December 28, 2009.

[2] AIRCON's current members include: ABX Air, Inc., AirTran Airways, Alaska Airlines, Inc., American Airlines, Inc., ASTAR Air Cargo, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., FedEx Express, Frontier Airlines, Inc., Hawaiian Airlines, Inc., JetBlue Airways, NetJets Aviation, Southwest Airlines, United Airlines, United Parcel Service, US Airways, Virgin America, and World Airways.

[3] Barry T. Hirsh, Wage Determination in the U.S. Airline Industry: Union Power under Product Market Constraints, at 1 (Oct. 2006) (explaining that "[t]he percentage of workers who are union members in the air transportation industry was . . . 49.4% in 2005," and noting that "private sector union density economy-wide" was a mere 7.8%), *available at* http://www2.gsu.edu/~ecobth/IZA_Airline_dp2384.pdf; *see also* http://www.unionstats.com (compiling union statistics by industry).

witnesses under oath. It would be arbitrary and capricious to make the proposed rule change without employing the complete and open administrative process followed in *Chamber of Commerce* to consider the matter. That is especially true because publicly available facts have created the appearance that the Majority Members of the Board have predetermined the issues.

Second, the Board should not strain to find justifications for the proposed rule change, because it lacks the authority to abandon the "majority rule" voting procedure absent Congressional amendment of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq*. Indeed, the Board has previously recognized this lack of authority.

Each of these points is discussed in greater detail below.

I. Abandoning The "Majority Rule" Would Be Arbitrary And Capricious

The NPRM proposes sweeping changes to the Board's representation election rules. In particular, it calls for abandoning the "majority rule" that has long been integral to labor relations under the RLA. Because there is no legitimate justification for such a dramatic departure from longstanding practice, because the Board has failed to provide a complete and open administrative process to consider the proposal, and because the Majority Members appear to have predetermined the issues, the proposed rule change would be arbitrary and capricious under the APA.

A. Under The APA, The Board's Rulemaking Must Be Neutral And Rational.

It is well-settled that the Board's rulemaking is subject to review under the APA. *See, e.g., Railway Labor Executives' Ass'n ("RLEA") v. National Mediation Bd.*, 29 F.3d 655, 672 (D.C. Cir. 1994) (majority and concurring opinions agreeing that the Board's issuance of "rules" is subject to judicial review under the APA); *accord US Airways, Inc. v. National Mediation Bd.*, 177 F.3d 985, 989 n.1 (D.C. Cir. 1999). Accordingly, the Board's rulemaking must comport with the APA's "scheme of reasoned decision making," *Allentown Mack Sales and Servs., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (emphasis added; citation omitted), which mandates that final agency action shall be "h[e]ld unlawful and set aside" where it is, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

Under the arbitrary-and-capricious standard of review, courts are required to carefully scrutinize the agency's reasons for adopting a policy or for changing an existing one. *See, e.g., Motor Vehicle Manufacturer's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (carefully scrutinizing Reagan's NHTSA's decision to revoke a passive-restraint requirement adopted by Carter's NHTSA, and concluding that the Reagan agency's reasoning was deficient). And, as Justice Kennedy recently explained in a controlling concurring opinion, an agency must cogently and rationally explain why it is changing or revoking a policy: "The question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority." *FCC v. Fox Television Stations, Inc.*, 556 U.S. ____,

129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Allentown Mack*, 522 U.S. at 374. Moreover, since it is the "duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation," an agency "cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Id.* at 1824.

B. There Is No Neutral And Rational Justification For The Proposed Rule Change.

Abandonment of the Board's "majority rule" ballot would fail to satisfy the APA's requirements of neutral and rational decisionmaking, because there is no legitimate justification for such a rule change. The "majority rule" has been employed for over seven decades, and it animates a key policy underlying the RLA. Not surprisingly, it has been employed with great success. Less than two years ago, the Board unanimously reiterated its "firm conviction" in the principle that "its duty under Section 2, Ninth, 'can be more readily fulfilled and stable relations maintained by a requirement that a majority of eligible employees cast valid ballots . . . .'" *Delta Air Lines, Inc.*, 35 N.M.B. at 131-32 (2008) (quoting Sixteenth Annual Report of the Board (1950)). As the Board has explained, "[o]ne need look no further than to the area of potential strikes to conclude that certification based upon majority participation promotes harmonious labor relations. 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." *In re Chamber of Commerce of the United States*, 14 N.M.B. at 362-63.

The Board has denied at least four prior requests to abandon the "majority rule" (and has done so as recently as 2008), *see, e.g.*, *Delta Air Lines, Inc*, 35 N.M.B. 129; *Chamber of Commerce*, 14 N.M.B. at 362, and the "majority rule" has been vindicated by the Supreme Court, *see Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965). Moreover, the Board has repeatedly held that it would not abandon its majority rule absent "compelling reasons" to do so, 14 N.M.B. at 362, such as evidence that the rule change is "mandated by the [RLA] or essential to the Board's administration of representation matters," *id.* at 360. *See also Delta Air Lines, Inc.*, 35 N.M.B. at 131-32 (unanimously holding that "[t]he level of proof required to convince the Board the changes proposed are essential, then, is quite high, and has not been met."); *id.* at 132 ("AFA offers no substantive evidence or other compelling circumstances that the changes it seeks are essential. Rather, the Union relies largely on policy considerations previously submitted to and rejected by the Board.").

This high standard for rule changes cannot be met here. The NPRM alludes to four justifications for the proposal, and each is wholly deficient.

First, the NPRM asserts that the maintenance of "stable labor relations," to which the majority rule is essential, is "more directly related to the Board's mediation function than to its representation function." *See* 74 Fed. Reg. 56750, 56751. In so doing, the Board majority attempts to downplay this important policy reason why the Board has long adhered to the

"majority rule." But the NPRM's assertion misses the point of this RLA policy objective. Regardless of whether workplace stability is "more directly related" to mediation or to representation, one thing is clear: the Board must work to promote stable labor relations in *both* capacities. *See, e.g.*, 45 U.S.C. § 151a (noting the RLA's "general purpose[]" of "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein"). And stability has, if anything, become a *more* compelling concern in light of the increased consolidation in the airline industry in the recent past. Thus, the Board cannot neutrally or rationally justify its proposed rule change by asserting that stability is no longer a relevant concern in certifying the employees' representative. Indeed, the stability of labor relations is inextricably intertwined with the process and outcome of representation elections.

Second, the NPRM vaguely asserts that the majority rule "was adopted in a much earlier era, under circumstances that differ markedly from those prevailing today." 74 Fed. Reg. 56750, 56752. The NPRM thus seeks to convert the majority rule's longstanding and successful 75-year history—which the Board has always found, in light of the RLA's overriding interest in stability, to be a strong justification *in favor* of the rule—into a reason for abandoning it. *See, e.g.*, *In re Chamber of Commerce of the United States*, 14 N.M.B. at 362 (citing failure to "provide[] the Board with compelling reasons to change practices [then] in effect for over fifty years"). As noted above, the Board has reaffirmed the majority rule as recently as 2008, *see Delta Air Lines, Inc.*, 35 N.M.B. 129, 131-132 (2008), and there have been no material changes in the past two years that dictate a different conclusion today. In any event, the Board cannot reasonably claim to have found material changed circumstances without first completing the thorough and open administrative process utilized in *In re Chamber of Commerce of the United States* to scrutinize any potentially relevant factual assertions—which, as noted *infra* at Section I.C., it has declined to do.

Third, the NPRM observes that the current ballot allows "no opportunity for an employee to vote 'no' or cast a ballot against representation," and suggests that the majority rule must be discarded in order to "encourage employee participation in workplace matters." 74 Fed. Reg. 56750, 56752. But the available data makes clear that, under the majority rule, employees in RLA-covered industries have voted in elections and voted for unionization when they wished to do so. As Chairman Dougherty noted in her dissent to the NPRM, "the percentage of rail and air employees who are union members is dramatically higher than in other industries, and the percentage of air and rail employees participating in elections has increased by almost 20% over the last decade." *Id.* at 56753. The NPRM provides no contrary data to support its premise that employee participation in workplace matters is lacking in the airline and rail industries.

Fourth, and finally, at the heart of the proposed rule is the contention that the current election process is somehow less than democratic. The NPRM invokes general election principles, noting that "[i]n political elections, those who do not vote acquiesce to the will of those who choose to participate," and that "few if any democratic elections are conducted" using a majority rule. 74 Fed. Reg. 56750, 56752. This argument is misplaced and unpersuasive. Unlike political elections, where elected officials must stand for contested election on a regular basis and the electorate has the opportunity to vote their representative out of office using the

identical process as was used to vote in the incumbent, a union is all but certified indefinitely. Under current Board rules, a direct decertification option similar to the process under the National Labor Relations Act is not available, and, given the Board's showing-of-interest rules, as a practical matter it is virtually impossible for employees in a large craft or class to have the option to vote to return to non-union status even if the majority strongly wishes to do so. Thus, as a practical matter, an RLA union that initially prevails in a representation election may never have to stand for reelection. Given this state of affairs, RLA unions cannot legitimately be compared to elected public officials, who have fixed terms of office and must run for reelection. The two are simply not analogous. Moreover, even though specifically requested by the U.S. Chamber of Commerce and ATA, the Board has implicitly declined to consider the parallel need for an express and meaningful decertification procedure.[4]

C. The Process Used For Consideration Of The NPRM Is Inadequate.

Even if the Board were able to identify legitimate justifications for the proposed rule change, it would be arbitrary and capricious for the Board to abandon its 75-year-old "majority rule" without first providing an open and complete administrative process for considering the proposal. Prior decisions and statements by the Board have clearly underscored its commitment and obligation to provide a robust, fair, and even-handed procedure through which all interested parties could air their concerns and a determination could be made that appeared to be, and in fact was, objective. The limited procedure set out in the NPRM, and the one-day "meeting" held by the Board on December 7, 2009, fall far short of such a process—or even of satisfying the Board's own prior commitments.

The NPRM only provided for a 60-day period for written comment. *See* 74 Fed. Reg. 56750-52. It did not provide for a public hearing of any kind, much less the kind of thorough evidentiary hearing that should occur before effecting such a fundamental change in

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[4] The Board historically has recognized the close relationship between the "minority rule" ballot and decertification, and the wisdom for the two issues to be addressed in tandem. Accordingly, when the Board last considered the same proposed voting rule change on an industry-wide basis, it simultaneously considered a proposal to adopt a formal decertification procedure. *See In re Int'l Brotherhood of Teamsters*, 13 N.M.B. 1 (notice of consolidation). In the NPRM, however, the Majority Members departed from the Board's prior practice by "consider[ing] the TTD petition in a vacuum," and without acknowledging that there is a pending request [by the U.S. Chamber of Commerce and the ATA] for consideration of an express process for decertification. *See* 74 Fed. Reg. 56750-01, 56754 (Chairman Dougherty, dissenting).

It would not be merely imprudent for the Board to abandon the "majority rule" while failing contemporaneously to adopt a straightforward decertification process. It would also violate the RLA, because an election process that would allow a union to be elected with minority support, but require a greater level of support for employees to disassociate themselves from a union, would impermissibly discriminate against employees' "option of rejecting collective representation." *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees ("ABNE")*, 380 U.S. 650, 669 n.5 (1965).

long-standing Board practice. The Board's one-day "meeting" on December 7, 2009 was an inadequate substitute for the taking of testimony under oath and the cross-examination of witnesses. The "meeting" was not limited to an articulation of policy-based arguments by various stakeholders affected by the NPRM. Rather, several persons spoke to alleged facts of potential relevance to the issues under consideration, and one speaker even offered what purported to be expert testimony. *See, e.g.,* Transcript of Proceedings dated Dec. 7, 2009, at 147-55, 185-97 (attached hereto as Exhibit A). The Board cannot rely on such informal and untested factual assertions and satisfy the APA. To consider facts relevant to the NPRM, the witnesses should have provided testimony under oath and been subject to cross-examination. The "expert" witness, Ms. Kate Bronfenbrenner, prior to being allowed to testify, should have been qualified, and thereafter been subject to cross-examination; additionally, there should have been an opportunity for the presentation of rebuttal expert testimony.

These inadequate procedures have not only prevented full and fair consideration of the NPRM, they have also prevented interested parties from asking questions about the flawed process and why it was put in place. And there are a number of important questions the ATA and AIRCON would have asked witnesses testifying under oath regarding their communications with Board Members about the issuance of the NPRM and related matters.

The inadequacy of the current procedures is underscored by the dramatic divergence between these procedures and the Board's past practice in similar cases. For example, in connection with a 1985 request by the International Brotherhood of Teamsters that was essentially identical to the Transportation Trades Department's ("TTD's") recent request, the Board instructed that there should be "a full, evidentiary hearing with witnesses subject to cross-examination as *the most appropriate method of gathering the information and evidence it will need*" to decide whether to even propose formal amendments to its election rules. *In re Chamber of Commerce of the United States*, 13 N.M.B. 90, 94 (1986) (emphasis added). At that time, there were pre-hearing opening and response briefs, evidentiary hearings, and post-hearing briefs. The evidentiary hearings did not begin until approximately six months after the Board had received the proposals to amend its ballot and other rules, the hearings did not end until about 14 months after the proposals had been submitted, and the post-hearing briefing was not completed until about 18 months after the original proposals. The Board did not issue its decision until July 24, 1987—almost two years after the original proposals were filed. Such a comprehensive and deliberate procedure was the appropriate approach in light of the magnitude of the Teamsters' proposal—i.e., to overturn voting rules which had been in place since the 1930s, and which indisputably had become part of the fabric of the RLA as well as the Board's own published regulations. *See* 29 C.F.R. § 1206.4(b)(1) (representation application will not be entertained for a period of one year after an election was previously conducted where less than a majority of eligible voters participated).

The Board more recently recognized the same principle in a case involving the Association of Flight Attendants-CWA (the "AFA") and Delta Air Lines. *See Delta Air Lines, Inc.*, 35 N.M.B. 129 (2008). In that case, a unanimous Board rejected a similar request to change the voting rules—with reasoning directly applicable to the TTD's current request:

> "AFA has failed to provide sufficient justification for changing the decision in Chamber of Commerce above, and, in any event, *the Board would not make such a fundamental change without utilizing a process similar to the one employed in Chamber of Commerce, above*. [¶] In this case, AFA's arguments are applicable to every representation application filed with the Board. A change in the balloting procedures in this matter would necessitate a permanent deviation from over 70 years of Board practice. The Board is not inclined to make the requested changes, and, in any event, *would not make such a sweeping change without first engaging in a complete and open administrative process to consider the matter*." *Id.* at 132 (all emphasis added).

The Board, thus, is already on record as to the procedure that must be followed before it can adopt the TTD's request: namely, "a complete and open administrative process" that is "similar to the one employed in *Chamber of Commerce*." Notwithstanding the holding from *Delta Air Lines* less than two years ago, the Board effectively denied, without explanation, the ATA's request for a *Chamber of Commerce* procedure in this docket. *See* Letter from ATA to Chairman Dougherty and Members Hoglander and Puchala (Sept. 10, 2009), at pp. 3-5 (attached hereto as Exhibit B). The process followed in this rulemaking does not come close to what is required under the Board's own precedents or under the Administrative Procedure Act.

D. The Majority Members' Apparent Predetermination Of The Issues Further Underscores That The Proposed Rule Change Would Be Arbitrary And Capricious.

In addition, various publicly available facts give rise to the very real appearance that the Majority Members have predetermined the issues raised by the NPRM. These facts establish additional grounds for determining that it would be arbitrary, capricious or otherwise not in accordance with law for the Board to abandon its "majority rule."

The facts giving rise to the appearance that the Board majority does not have an open mind and has predetermined the issues are as follows:

First, the Majority Members published the NPRM by means of an internal process, detailed in a letter from Chairman Dougherty to certain Senators, which inappropriately excluded Chairman Dougherty. *See* Letter from Chairman Dougherty to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009) (attached hereto as Exhibit C). The facts set forth in Chairman Dougherty's letter describe actions that indicate the Majority Members were unwilling to consider views and arguments inconsistent with their own and had reached a conclusion to adopt the proposed rule.

Second, the Majority Members rejected ATA's request that the Board provide an open and adequate process, consistent with the procedures employed in *In re Chamber of Commerce*

of the United States, 14 N.M.B. 347 (1987), to consider whether the Board should promulgate an NPRM and what issues any such NPRM should address. *See* Exhibit B, at pp. 3-5.

Third, without explanation, the Majority Members declined to abide by prior Board determinations concerning material changes to its rules and the appropriate issues to consider with respect to this election issue. The Board has previously announced that it would materially change its rules only when a proposed change was "*mandated by* the [Railway Labor] Act or essential to the Board's administration of representation matters," *In re Chamber of Commerce of the United States*, 14 N.M.B. at 360 (emphasis added), a standard that the NPRM does not even acknowledge—let alone attempt to meet.

Fourth, in sharp contrast to the Board's earlier approach to this issue, the NPRM announces and defends a particular outcome as opposed to issuing a neutral invitation for participation and comment. *Cf. In re Chamber of Commerce*, 12 N.M.B. 326 (1985) (notice of hearing). And the NPRM further departed from the Board's prior practice by "consider[ing] the TTD petition in a vacuum," 74 Fed. Reg. 56750-01, at 56754 (Chairman Dougherty, dissenting), whereas, when the Board last considered the same proposed voting rule change on a plenary basis, it simultaneously considered a pending request to adopt a formal decertification procedure. *See In re Int'l Brotherhood of Teamsters*, 13 N.M.B. 1 (1985) (notice of consolidation).

Fifth, the timing of the proposed rule change appears to have an unmistakable relationship with the on-going organizing campaign at Delta/Northwest. This gives the impression of not only prejudging, but also seeking to implement the prejudgment so as to affect then-pending or imminent representation elections. This interpretation of events is corroborated by publicly available information. For example, after the TTD sought this rule change, the Board for the most part continued to process representation applications and schedule elections under the current rules.[5] It failed, however, to move forward on the representation applications that had been filed by the Association of Flight Attendants-CWA ("AFA") and the International Association of Machinists ("IAM") at Delta/Northwest, even though those applications had been filed as far back as July 27, 2009, and August 13, 2009, respectively, and further failed to offer any persuasive reasons for the delay. As Chairman Dougherty stated in her letter, this sequence of events "contribute[s] to the growing perception that the majority is attempting to push through a controversial election rule change to influence the outcome of several very large and important representation cases currently pending at the Board." *See* Exhibit C, at p. 2. Indeed, at least one

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[5] *See, e.g.*, *In re North American Airlines*, 37 N.M.B. 79 (Dec. 3, 2009) (certifying the results of an election that was requested on September 22, 2009); *In re Port Authority Trans-Hudson Corp.*, 37 N.M.B. 75 (Dec. 1, 2009) (certifying the results of an election that was requested on July 14, 2009); *In re Compass Airlines*, 37 N.M.B. 63 (Nov. 19, 2009) (certifying the results of an election that was requested on September 22, 2009); *In re Liberty Helicopters, Inc.*, 37 N.M.B. 33 (Nov. 13, 2009) (certifying the results of an election that was requested on September 3, 2009); *In re Chicago, Ft. Wayne & Eastern R.R.*, 37 N.M.B. 23 (Nov. 4, 2009) (certifying the results of an election that was requested on September 2, 2009); *In re USA 3000 Airlines*, 37 N.M.B. 1 (Oct. 7, 2009) (certifying the results of an election that was requested on August 7, 2009).

union, the AFA, boasted about its efforts (and those of other unions) to effect change "before this election between the Northwest and the Delta flight attendants took place."[6]

II. The Board Lacks Jurisdiction To Abandon The "Majority Rule" Voting Procedure.

Although there is no legitimate justification for the proposed rule change, the Board should decline to abandon its "majority rule" even if it were to conclude otherwise, because such a rule change would exceed the Board's statutory authority.

Although Section 2, Ninth, of the Railway Labor Act generally grants the Board broad discretion in its handling of representation disputes, that discretion is necessarily circumscribed by the provisions of Section 2, Fourth. And Section 2, Fourth, "require[s]" that "a majority" of a craft of class be ensured "the right to determine who shall be the representative of the group or, indeed, whether they have any representation at all." *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 670 (1965). The Board lacks jurisdiction to disregard the voting rule, which it has previously recognized to be the most effective means of discerning a majority's intent. *See, e.g.*, *Delta Air Lines, Inc.*, 35 N.M.B. 129, 131-132 (2008); *In re Chamber of Commerce of the United States*, 14 N.M.B. at 362-63 (1987).

Indeed, the Board has explicitly recognized that it lacks jurisdiction to discard the "majority rule." In 1978, the Board (Chairman George S. Ives, and Members Robert O. Harris and David H. Stowe) directly admitted that Congressional action would be necessary to change the voting process used in representation elections. The Board unanimously concluded that: "In view of the unchanged forty-year history of balloting in elections held under the Railway Labor Act, the Board is of the view that it does not have the authority to administratively change the form of the ballot used in representation disputes. Rather, such a change if appropriate should be made by the Congress." *See* Minutes of Session of the National Mediation Board, June 7, 1978 (attached as Exhibit D); *also found at* 43 Fed. Reg. 25529. Nothing relevant has changed since this well-reasoned statement—except that the then 40-year policy of "majority rule" has matured further into a 70-year policy, lending even more weight to the Board's 1978 decision.

Accordingly, any change to the Board's "majority rule" would first require a change in the RLA, which is within the exclusive province of Congress. The proposed rule change must be rejected for this reason alone.

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In sum, ATA and AIRCON request that the Board reject the proposed rule change because: (1) there is no legitimate and neutral justification for the proposal as required by the APA; (2) the Board has effectively denied ATA's and the Chamber of Commerce's request for a complete and open *Chamber of Commerce* administrative process for considering the proposal as

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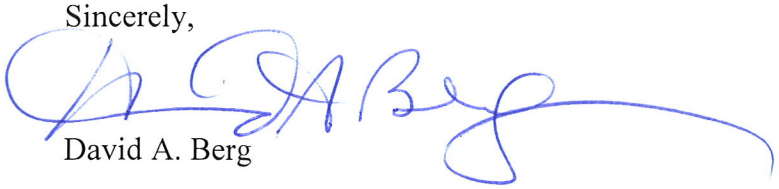
[6] Quoted from *The Union Edge* (Orig. Broadcast August 25, 2008).

mandated by the Board's own precedents and thus the APA; (3) the Majority Members appear to have predetermined the issues in contravention of the APA; and (4) the Board lacks jurisdiction to adopt the proposed rule change.

We appreciate the opportunity to provide comments on the Board's proposed rule change. Please do not hesitate to contact me at (202) 626-4234 or Robert Siegel of O'Melveny & Myers LLP at (213) 430-6005, or Robert J. DeLucia at 202-861-7552.

Sincerely,



David A. Berg

cc: James C. May
President and Chief Executive Officer, ATA

Robert J. DeLucia
Vice President & General Counsel, AIRCON

Attachments

EXHIBIT A

MS. JOHNSON: Thank you. Ms. Brofenbrenner.

MS. BROFENBRENNER: Thank you. Thank you, Chair Dougherty, Members Puchala and Hoglander.

For the last 20 years, I've conducted a series of in-depth national studies which examine union behavior and public policy in the public and private sectors in certification election campaigns. This research is performed in major role and informing discussions in labor law reform. This last year, I conducted the first ever in-depth comprehensive academic study in organizing under the Railway Labor Act. This data provides important insights into how and why the rule change you're considering will have significant implications for workers covered under the RLA. For as our data will clearly show, without this rule change, voter suppression will continue to interfere with the laboratory

conditions, the end of the use supposed to provide workers covered under the RLA. And those voting under the RLA will be denied their full democratic right to choose whether they want union representation.

The current RLA certification process stands alone among 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 you unable to vote, or even were not aware there was a vote, you were 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 U.S. is a country where the majority vote standard of 50 percent plus one has a unique history, value and tradition. They have

a majority of vote in our legislative system, rather than a Parliament of exclusive representation under our labor laws, rather than a minority unionism.

Fifty percent plus one is a concept that everyone understands. 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 counts and matters. If just one person doesn't make it to the polls or does not sign a card, the outcome would be -- could be a 50 percent or tie, which means the union loses. Every vote counts.

With a voting standard as the majority of votes cast, the goal of both sides is to get the highest turnout possible. Contrary to what the opponents of this change have said today, changing the standard would not mean a minority unionism. We know, from both NLRB data and public sector data, when you have majority of

votes cast, turnout is extremely high. It averages 88 percent under the NLRB and between 88 and 90 percent in most public sector units, including those spread across entire states.

Union work is very hard to get every single yes vote out. The employer works hard -- very hard to get every no vote out under the NLRB standard. However, the nature of RLA voting rules causing something very different and inherently un-democratic to occur.

While unions still focus their efforts on getting yes votes to the polls, the employer efforts just to suppressing voter turnout, either by confusing voters about an election procedure or by getting voters to destroy their ballots. This found in a table that I've submitted to you, employer suppression takes many forms, including making positive changes in personnel wages and working conditions so as to make the union seem less necessary,

making it more difficult to organize by transferring workers, layoffs, and threatening bankruptcy, and by urging workers to tear up their ballots or providing misleading information about elects and procedures. This is all in addition to the majority of campaigns where employers intimidate, threaten, harass, coerce, and retaliating against union supporters to get them -- to keep them from voting for the union.

Well, examined in isolation, each of these individual tactics may appear not to have a significant impact on election turnout or outcome. But these tactics are not used in isolation. Close to half the RLA campaigns in our samples use five or more anti-union tactics and 27 percent use ten or more.

Although this is slightly less aggressive than employer opposition under the NLRB, voter suppression or coercion tactics done under the NMB carry even greater weight because

every vote not cast can have a greater impact or a bar takes to win is set so much higher. To illustrate this point, we provide you charts which show the correlation between unionism rates and election turn-out for all employer tactics that occurred in at least 10 percent of the NLRB and RLA samples.

RLA elections have a positively, statistically significant correlation between turnout and win rates, with win rates increasing as voter turnout increases.

In contrast, NLRB elections have a negatively statistically significant correlation, with the unionism rights decreasing as voter turnout increases. The slump of employer turnout employer tactics follows the same directions as win rate, suggesting 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 lower win rate. The different anti-union strategies used by employers in elections supervised by the NLRB and NMB are a direct result of the different voter standard in the two types of laws.

Most disturbing of all, is that the single most effective strategy used by employers under the RLA to suppress union votes is legal, namely, urging voters to destroy their ballots or not dialing in their votes. It is also pervasive. We find employers use this tactic with at least one or more voters in 67 percent of our sample. Yes, this is not a Delta issue. Sixty-seven percent of campaigns. This means that it's happening in the overall majority of campaigns involving the overwhelming majority of employers.

Because that ballot has been torn up, it represents a no vote, even if the voter

changes his or her mind, and the same thing, ardent union supporters can stop their vote from counting as a no vote because of misinformation, they did not send in their ballot on time.

Opponents would have you believe that nothing else changed in the system since 60 years ago, and that there's no reason to change it. But, our research has shown that there is something new happening. There is something that has happened. Employer behavior has changed recently. The reason that you hear this cry for a change is because workers under the RLA feel the increase in employer opposition. They feel the change in tactics. They feel that suddenly that no votes have made the process much more un-democratic. They feel the need for change.

Back when it was investigated under the Carter Administration, it was a different time. Now, the time has come where it matters significantly. 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 maintain to give workers a chance to choose what they want, 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 with more data if you need it.

Thank you.

MS. JOHNSON: Thank you. Mr. Borman?

MR. BORMAN: Good afternoon. My name is Keith Borman. I'm the Vice President and General Counsel of the American Short Line and Regional Railroad Association.

Members of the American Short Line and Regional Railroad Association have concerns

present these views and we appreciate the opportunity to hear the views of others. 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 Act. Thank you.

MS. JOHNSON: Thank you. Mr. -- I'm not sure how to pronounce it -- Boehm. Boehm.

MR. BOEHM: My name is David Boehm. I'm a pilot with SkyWest Airlines -- that's OK. I'd like to thank the Board and Madame Chairman for allowing me to speak. I'll go and preface my comments with some other people. I'm not a lawyer. I don't have any labor training background. I'm simply a pilot with SkyWest Airlines.

I'm here to express my support for the NPRM as published and I'm here to tell you a story today about the SkyWest pilots and an organizing drive that we held two years ago.

So, in 2007, the SkyWest pilots attempted to organize under the RLA. I'll just tell you the outcome, we lost. We lost by actually a large margin. Only 911 votes out of 2600 pilots that we had at the time at SkyWest voted for representation and I want to talk a little bit about the SkyWest pilot group at the time and the SkyWest pilot group now.

I think that there's a significance of size when you're talking about organizing a labor group this large. SkyWest pilots today remain the largest unrepresented pilot group in the country. Right now, we number about 2800. The second largest airline pilot group would be JetBlue, and they're unrepresented still.

If you remember, pilots were probably

one of the first groups to organize under the RLA. I think it's more significant for a pilot to decide if they want to be represented than other labor groups because there's so much additional -- I'm really nervous, sorry. There are so many more things that a pilot has to go through when deciding that he wants to be represented, than other labor groups. We are very highly regulated with regards to the FAA. When we're choosing a labor group, we're not only choosing somebody to negotiate our pay rates and work rules, but also somebody to represent us if something goes wrong; somebody to be there for us in our corner if something goes wrong with the airplane, if we have an accident, if we get sick, so many different options.

The union drive that the SkyWest pilots held was the largest pilot union drive at least in the last ten years. I went back through the NMB records, as far back as you go. So, the

significance of size, I think, is a big deal. Smaller pilot groups, probably a lot easier to organize because you would probably know most of -- if you're dealing with a pilot group of 50 to 100 pilots, you're probably going to know most of the people. We have 2800 pilots at SkyWest. There is no way I know maybe even 10 percent of them and I've been with the company five years. So, a little bit more discussion on the state of the SkyWest pilots in 2007.

In 2007, the airline industry was rapidly expanding, SkyWest was hiring large number of pilots, new pilots, every month. Most of those pilots or many of those pilots, it was their first airline career. They had never been in the airline business before. They had never been in an industry as highly unionized as the airline industry before.

In November 2007, when the vote was held, over 40 percent of SkyWest pilots had been

with the company less than two years. And again, many were fresh out of college, many were fresh out of aviation trade school, many it was their first professional aviation career, many before that, they were flight instructors or they held different odd college jobs and when you're a pilot in the airline industry and you get hired in an airline, it's key that you choose very well which airline you're going to work for, if you're associated with the union and not screwing up. Not getting fired, not having anything go wrong with your career. Pretty much get one shot at it. So, the fact -- some of the factors affecting the outcome of the vote, which directly relate to how the voting rules are currently, I think are important.

So out of the again 2600 pilots, 911 voted for the union. That means 1700 were not heard from. They voted no, or they did not vote, or we don't know what they thought. So I tried

to -- from our exit interviews, from some of these pilots, we tried to categorize the pilots that did not vote into several categories about why they didn't vote. So, we put them into four different categories.

One, obviously they did not want representation. Of those 1700 pilots, there was a certain percentage that did not want to have a union. That's valid. We don't know what that percentage is.

The second category was, considering these pilots were new and in our company we're all at-will employees, but we still had a probationary process. Many of the pilots were still on their first year. You're on probation on your first year at SkyWest. So, there was a fear of reprisal. There was a certain sense of intimidation from management and this was directed at the probationary pilots. Again, we don't know what percentage affected them not to

vote, but there was that factor.

The third, and I think this is probably the largest, was the lack of knowledge and education with respect to union representation. I have no union background. I have no labor relations background. And I can just imagine that the demographic of a pilot right out of college, 23, 24, 25 years old, when they're trying to learn to fly a brand new five or $10 million dollar jet with passengers in the back, they're also trying to learn about the Railway Labor Act and what the National Mediation Board is, and they got this letter in the mail from, we think it's a government agency, but it says the NMB, and they want me to call a phone number to v -- we don't really know how many people thought that that was, maybe a company that the company hired to conduct or vote or they just didn't know who you guys were, what the RLA was. In fact, they probably didn't even know

what ALPA was, what a union meant, or what it truly meant to be represented as an airline pilot.

I think that was a large percentage and if they were to defer what they thought if they wanted to represented or not, to the more senior pilots or senior people in the company, I think that's a valid thing for them to think. I don't know enough about this, I'll let the guy that's been here 15, 20 years to decide if it's right or not, and I think that's valid.

And the fourth category affecting the outcome was true indifference or apathy. There were pilots that just did not care. If we unionized, fine. If we were not unionized, fine. I don't want to be involved with it. I'll go along with whatever the majority says, that's fine. So, those are the four categories.

And again, everybody else has said this today, we don't know of the 1700 pilots that

did not vote, what percentage fell in all those categories. So, I just don't think it's valid to assume that 100 percent of the pilots that did not vote would not support union representation and that's what we're assuming under the current voting rules.

Okay, so if the rules changed obviously it would encourage more participation in a representation-election process. We've said that several times today. The current -- the companies current encourage employees not to participate in the election process, effectively taking no votes. The rule change would move these efforts into an all out campaign, to participate in the election from both the company and the labor sides. It would effectively eliminate disinterested and uninformed employees from the process. Currently, there is no way to abstain from voting. If you want to literally take your vote out of the process, there's not

way to do that. At least, give the employees an opportunity to say, I don't want to be involved in the process; please don't make my opinion count, and this rule would change that.

Now I have one counter-argument that several people have argued today, that the rule change would cause instability in airline relations. You'd be able to flip-flop. You'd be able to have a union or a different union by a very small majority of the people. I actually think that's -- the opposite will happen. One thing that came out of us not winning was we weren't sure what the rest of the pilots, these 1700 pilots that we didn't hear from, were really thought, going into those four categories I just talked about. If we had a decisive way for people to vote yes or vote no, it would be a clear indication. If 60 percent of our pilots voted no, they do not want a union, that's fine. And I think even some people that voted yes would

go along with that and stand behind them. But by not hearing from them, you just simply don't know. And I think that any process where you actually have to choose a yes or a no or if there is an abstain option you would get more support rallied behind it.

I wanted to take just one or two minutes and talk about one other topic, that isn't directly related to that. The Board references in the NPRM the dissolution of company sponsored unions in the 1930's and 1940's, and while most of them have been abolished with reform labor practices, I think, I think my company is one modern example of having company unions or company unionism still in play.

Our company has established several employee committees, several of which behave and function like a union. These committees are funded by the company and to some extent, influenced by the company. Work role manuals are

produced and signed by the company, and representative elect it into office by these employee committees. Looks like, functions like, acts like a union.

I think this rule change will serve to eliminate this small round of company-sponsored unions if that's, in fact, what this is. There's a confusion that's been created, at least in my company, with large, unrepresentative employees by having these company-sponsored committees in existence. And that is, by itself, a deterrent for employees to be involved with a full union, if they have something that looks, walks and acts like a union, why do you want to pay for one yourself? It's a valid point.

I think this rule would help with that and I think this rule would also help bring the last round of these companies -- this company unionism and end it.

I think that's it. Thank you for your time.

MS. JOHNSON: Thank you. Mr. Maliniak.

MR. MALINIAK: Good afternoon, and thank you for allowing Litmer Mendelson's Transportation Industry Practice Group to address you today. I should add that we're here and we're not billing a single person for the time of our appearance today.

My name is Don Maliniak and I am speaking on behalf of the group. We have already filed some preliminary comments with the Board and we are also likely to be supplementing our comments further in January.

Like others here, we share legal concerns about the exact nature of the deliberative process that went into the Board's announcement. However, in the end, we decided to first inquire into the elements of the process

EXHIBIT B

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O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH
NEW YORK

400 South Hope Street
Los Angeles, California 90071-2899

TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
www.omm.com

SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

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WRITER'S DIRECT DIAL
(213) 430-6005

VIA FACSIMILE AND COURIER

WRITER'S E-MAIL ADDRESS
rsiegel@omm.com

The Honorable Elizabeth Dougherty
Chairman, National Mediation Board
1301 K Street, NW; Suite 250
Washington, D.C. 20005

The Honorable Harry Hoglander
Member, National Mediation Board
1301 K Street, NW; Suite 250
Washington, D.C. 20005

The Honorable Linda Puchala
Member, National Mediation Board
1301 K Street, NW; Suite 250
Washington, D.C. 20005

Re: Airline Industry Preliminary Response to Unions' Request for Fundamental Change to Majority Rule Voting Process

Dear Chairman Dougherty and Members Hoglander and Puchala:

I am writing on behalf of the Air Transport Association of America, Inc. ("ATA")[1] in response to the September 2, 2009 request by the Transportation Trades Department, AFL-CIO ("TTD") that the National Mediation Board ("NMB or "Board") fundamentally change the "majority rule" voting process which has been in effect for 75 years. The Board has rejected proposals to switch to a "minority rule" voting process, as requested by the TTD, in at least four

[1] ATA is the principal trade and service organization of the major scheduled air carriers in the United States. ATA member airlines' labor relations are governed by the Railway Labor Act. ATA Members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Midwest Airlines, Inc.; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. ATA Associate Members are: Air Canada; Air Jamaica, Ltd.; and Mexicana.

prior decisions, including most recently in April 2008 in response to a request from the Association of Flight Attendants-CWA, a member of TTD.

Under the "majority rule," a majority of the members of a craft or class must affirmatively vote in favor of union representation, whereas under the "minority rule" requested by the TTD, a minority of the members of a craft or class could select a representative. The Board has previously determined that this requested new voting process would be a "substantive" and "fundamental" change to the NMB's voting procedure that is neither "mandated by the [Railway Labor] Act" nor "essential to the Board's administration of representation matters." *Delta Air Lines, Inc*, 35 N.M.B. 129 (2008); *Chamber of Commerce of the United States*, 14 N.M.B. 347 (1987).

The ATA is firmly opposed to the requested change, for reasons that it will set forth in detail in the appropriate forum and according to the appropriate process. To say it directly and in summary manner here -- there have been absolutely no material changed circumstances since the Board decided in 1987 and in 2008, in the cases cited above, that the unions had not met their "high" burden of proof to show "compelling reasons" in favor of a change to this long-standing voting process. Certainly, the reason stated publicly by the general counsel of the Association of Flight Attendants -- that "the composition of the Board has changed" under the Obama administration -- is not sufficient, and in fact is plainly arbitrary and capricious. History shows the wisdom of the Board's conclusion over the past 75 years that "majority rule" is the correct voting procedure to effectuate the purposes of the Railway Labor Act ("RLA"). This process has been utilized since 1934 in over 1,850 elections, and in those elections a union was successful more than 65% of the time. This process has not fluctuated with changes in the Board's composition or the political party occupying the White House. It would be entirely inappropriate for the current Board to do so now.

The ATA is writing today to stress two preliminary points that are of compelling importance as the Board begins to review the TTD's request. First, absent Congressional action, the NMB lacks authority to change the long-standing "majority rule" voting process under the RLA. Second, if the Board were to consider exercising jurisdiction over the TTD's request, it should not do so without engaging in the briefing and hearing process employed by the Board when it considered this very same issue in *Chamber of Commerce of the United States*.

The Board Lacks Authority to Grant the TTD's Request

On the first point, in 1978, during the Carter Administration, the Board (Chairman George S. Ives, and Members Robert O. Harris and David H. Stowe) could not have stated it any more directly and bluntly -- Congressional action would be necessary to change the voting process used in representation elections. In so doing, the Board held that "[i]n view of the unchanged forty-year history of balloting in elections held under the Railway Labor Act, the Board is of the view that it does not have the authority to administratively change the form of the ballot used in representation disputes. Rather, such a change if appropriate should be made by the Congress." 43 Fed. Reg. 25529.

This Board decision was based on sound statutory and policy grounds. The Board's long-standing voting process is predicated on the NMB's obligation under Section 2, Ninth, to protect the right under Section 2, Fourth, of a "majority" of a craft or class to select a representative (if any). The Board has long held a "firm conviction that its duty under Section 2, Ninth, 'can more readily be fulfilled and stable relations maintained by a requirement that a majority of eligible employees cast valid ballots . . . .'" *In re Chamber of Commerce of the United States*, 14 N.M.B. at 362 (*quoting* Sixteenth Annual Report of the Board (1950)). The Board also has long recognized that the "majority rule" underpins a fundamental objective of the RLA: "One need look no further than to the area of potential strikes to conclude that certification based upon majority participation promotes harmonious labor relations. 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." *Id.*[2]

Any change to the NMB's voting process would, thus, necessarily first require a change in the provisions of the RLA, which is within the exclusive province of Congress. This, of course, is the same conclusion that the Board itself previously reached and entered into the public record. Under these circumstances, any decision by the Board, without prior Congressional action, to replace the long-standing "majority rule" with a "minority rule" would exceed the Board's jurisdiction and constitute a "gross violation" of the RLA. *See, generally, Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655 (D.C. Cir. 1994) (en banc).

The Board Should Not Consider the Requested Change Without Using the *Chamber of Commerce* Procedures

On the second point, if the Board believes that it may have the authority to change the voting rules under the RLA in response to the TTD's request, it should in no event do so without following the comprehensive procedures that were utilized by the Board when it last considered a union's request to change the voting rules across the airline and railroad industries. *In re Chamber of Commerce of the United States*, 14 N.M.B. 347 (1987). One of the contested procedural issues was whether there should be evidentiary hearings. *Id.* at 347-348. The Board answered that question in the affirmative, "viewing a full, evidentiary hearing with witnesses subject to cross-examination as the most appropriate method of gathering the information and evidence it will need [to decide whether to propose formal amendments to its rules]." *In re Chamber of Commerce of the United States*, 13 N.M.B. 90, 94 (1986). The Board conducted extensive evidentiary hearings and accepted post-hearing briefs. 14 N.M.B. at 348-349. Such a comprehensive procedure was the appropriate approach in light of the magnitude of the IBT's proposal -- i.e., to overturn voting rules which had been in place since the 1930s and which

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[2] Although not acknowledged in the TTD's petition, adoption of a "minority rule," along the lines used by the National Labor Relations Board, would inevitably and necessarily require other changes to the NMB's election procedures -- including the addition of a "No Union" box on the NMB's ballot as well as a formal decertification procedure.

indisputably had become part of the fabric of the RLA, as well as the Board's published regulations.[3]

The Board recently recognized as much in a case involving the Association of Flight Attendants and Delta Air Lines. *Delta Air Lines, Inc.*, 35 N.M.B. 129 (2008). In that case, in a unanimous decision, the Board rejected a similar request from the AFA to change the voting rules. The Board's reasoning is directly applicable to the TTD's request:

> "AFA has failed to provide sufficient justification for changing the decision in *Chamber of Commerce above*, and, in any event, ***the Board would not make such a fundamental change without utilizing a process similar to the one employed in Chamber of Commerce, above.*** [¶] In this case, AFA's arguments are applicable to every representation application filed with the Board. A change in the balloting procedures in this matter would necessitate a permanent deviation from over 70 years of Board practice. The Board is not inclined to make the requested changes, and, in any event, ***would not make such a sweeping change without first engaging in a complete and open administrative process to consider the matter.***" *Id.* at 132 (all emphasis added).

The Board, thus, is already on the record as to the procedure that should be followed if the Board decides to consider the TTD's request: namely, "a complete and open administrative process" that is "similar to the one employed in *Chamber of Commerce*." At a minimum, the necessary procedure includes a meaningful opportunity for all participants to present testimony and cross-examine witnesses during an evidentiary hearing as well as to present written argument prior to and after the evidentiary hearing.[4]

Conclusion

The Board has gotten it right over the years. The value of majority-supported unions is as compelling today as it was when the RLA voting process was established by the Board 75 years ago. Any consideration of changing the long-standing voting rules under the RLA should be for the exclusive province of Congress. If, however, the Board were ever to consider such a

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[3] The Board's published regulations incorporate the Board's long-standing practice of dismissing docketed applications where less than a majority of eligible voters participate in an election. *See* 29 C.F.R. § 1206.4(b)(1).

[4] Alternatively, the Board may wish to consider appointing some form of committee, comprised of representatives of both organizations and carriers, to study the issues raised by the TTD's petition and to make findings and recommendations concerning the same. Two such bodies were established in the 1990s, the Dunlop Commission and the Airline Industry Labor-Management Committee, to gain the consensus of interested parties regarding possible changes to the RLA and the NMB's procedures. Neither recommended any changes to the voting rules.

sweeping change, it should do so only through a thoughtful and deliberate process -- not a rush to judgment.

Sincerely,

Bob Siegel

Robert A. Siegel
of O'MELVENY & MYERS LLP

cc: James C. May
President and Chief Executive Officer, ATA

EXHIBIT C

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

OFFICE OF THE CHAIRMAN
(202)692-5000

November 2, 2009

The Honorable Mitch McConnell
United States Senate
Washington, D.C. 20510

The Honorable Michael Enzi
United States Senate
Washington, D.C. 20510

The Honorable Johnny Isakson
United States Senate
Washington, D.C. 20510

The Honorable Orin Hatch
United States Senate
Washington, D.C. 20510

The Honorable Pat Roberts
United States Senate
Washington, D.C. 20510

The Honorable Lamar Alexander
United States Senate
Washington, D.C. 20510

The Honorable Tom Coburn
United States Senate
Washington, D.C. 20510

The Honorable Richard Burr
United States Senate
Washington, D.C. 20510

The Honorable Judd Gregg
United States Senate
Washington, D.C. 20510

Dear Senators:

Thank you for your letter of October 8, 2009 regarding a request from the Transportation Trades Department of the AFL-CIO (TTD) that the National Mediation Board (NMB or Board) alter its voting procedures. I share your concern about the TTD request, and I believe the only proper course of action should have been for the Board to have full comment on the TTD request – together with related issues such as decertification procedures, Excelsior list, and others – before making any proposals. A majority of the Board has chosen instead to propose to change our election rules in the manner requested by the TTD. The proposed rule is available for public inspection today at the Federal Register. I have dissented from this proposal, and the substantive reasons for my disagreement are discussed in my dissent.

In addition to my substantive concerns, I dissented because I believe the process by which the proposed rule was drafted and issued was flawed. The proposal was completed without my input or participation, and I was excluded from any discussions regarding the timing of the proposed rule. As I do not believe the Board should be making this proposal without first hearing comment on all related issues (including decertification), it was not a surprise that I was not included in the initial crafting of the proposed rule. However, I should have, at a minimum, (1) been given drafts along the way for consideration and comment; (2) been included in discussions regarding the timing of the proposal; and (3) been given ample time to review a draft and prepare a dissent if necessary. Instead, on Wednesday, October 28 at 11 am, my colleagues informed me that they had prepared a "final" version of the proposed rule and

intended to send it to the Federal Register that day. They initially told me I had one and a half hours to consider their proposed rule. They also told me that I would not be permitted to publish a dissent in the Federal Register and would have to air any disagreement some other way. Publication of my dissent is not prohibited by any agency policy, and their decision to forbid it in this particular case was arbitrary and ad hoc. After several requests from me, they agreed to give me an additional twenty-four hours – until noon on Thursday, October 29 -- to review and determine my position on the rule. They continued to insist that I would not be permitted to publish my dissent. The next day, an hour and a half before my "deadline," I informed my colleagues that I intended to dissent and again asked for more time to digest the rule and draft my dissent. My request for more time was rejected. I was then told I would be permitted to publish my dissent, but only if I could have it completed by the noon deadline – an hour and a half from the time of the conversation. The dissent I originally submitted included a discussion of these process flaws as one of the reasons for my dissent. I was told by my colleagues that if I did not remove the discussion of the process flaws from my dissent, they would not consent to its publication in the Federal Register. I have attached to this letter the full dissent I originally submitted.

Under normal circumstances, I would have preferred not to discuss Board process so publicly. However, in light of the complete absence of any principled process or consideration of my role as an equal Member of the Board, I feel compelled to bring these issues to your attention. I am also troubled by my colleagues' attempt to prevent me from raising these concerns as a part of my published dissent.

This sort of exclusionary behavior is not the way the Board has conducted itself previously during my tenure. In my past experience, Board Members who wished to dissent from a proposed decision have been given a role in the substantive and procedural discussions related to the decision and ample time to prepare their dissent. I believe this is the better way to conduct agency business.

I also query – why the rush to publish the proposed rule? The election rule in question has been in place for 75 years; why not wait one more day in the interest of ensuring a fair rulemaking process and accommodating the reasonable request of a colleague. Such an obvious rush to put out a proposed rule gives the impression that the Board has prejudged this issue, and it will contribute to the growing perception that the majority is attempting to push through a controversial election rule change to influence the outcome of several very large and important representation cases currently pending at the Board.

Thank you for your interest in this matter.

Sincerely

Elizabeth Dougherty

Elizabeth Dougherty

EXHIBIT D

MINUTES OF SESSION OF THE NATIONAL MEDIATION BOARD

WASHINGTON, D.C.

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Regular Meeting
June 7, 1978

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The Board met in executive session at 2:00 p.m., Wednesday, June 7, 1978, for the purpose of considering the following agenda published pursuant to NMB Rules Sec. 1209.08.

Present:
Chairman Ives
Member Stowe
Member Harris
Exec. Sec. Quinn
Spe. Asst. Buel

AGENCY HOLDING THE MEETING: National Mediation Board

TIME AND DATE: 2:00 p.m., Wednesday, June 7, 1978

PLACE: Board Hearing Room, 8th Floor, 1425 K Street, N.W., Washington, D.C.

STATUS: Open

MATTERS TO BE CONSIDERED:

1) Ratification of Board actions taken by notation voting during the month of May, 1978.

2) Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

CONTACT PERSON FOR MORE INFORMATION: Mr. Rowland K. Quinn, Jr., Executive Secretary or Mr. E. B. Meredith, Staff Mediation Director; Tel: (202) 523-5920.

(Date of Notice: May 23, 1978)

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AGENCY HOLDING THE MEETING: National Mediation Board

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 43 F.R. 22517

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 2:00 p.m.; Wednesday, June 7, 1978.

CHANGES IN THE MEETING: Addition to matters to be considered - Determination that the Board does not have the authority to administratively change the form of the ballot used in NMB representation investigations.

SUPPLEMENTARY INFORMATION: Chairman Ives and Board Members Stowe and Harris have determined by recorded vote that Agency business required this change and that no earlier announcement of such change was possible.

(Date of Notice: June 8, 1978)

****

The Board ratified actions taken by notation voting during the month of May, 1978.

Mr. Harris initiated a discussion relative to congressional inquiries in reference to petitions for change in the ballot used in representation disputes. The members expressed the opinion that in light of over 40 years of past practice, it is not appropriate to administratively change its existing rules without some indication from Congress.

The following motion by Board Member Harris was adopted by unanimous vote:

"In view of the unchanged forty-year history of balloting in elections held under the Railway Labor Act, the Board is of the view that it does not have the authority to administratively change the form of the ballot used in representation disputes. Rather, such a change if appropriate should be made by the Congress. If such legislation were to be introduced, the Board would be willing to appear before appropriate legislative Committees of Congress in order to present its views with respect to such legislation."

There being no further business the meeting was adjourned at 2:15 p.m.

Executive Secretary

APPROVED:

Chairman