O

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.

OUR FILE NUMBER
600,000-003

WRITER'S DIRECT DIAL
(213) 430-6005

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

January 8, 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: Motion for Disqualification of Members Hoglander and Puchala in Docket No. C-6964

Dear Chairman Dougherty and Members Hoglander and Puchala:

I am writing on behalf of the Air Transport Association of America, Inc. ("ATA") to formally request that Members Harry Hoglander and Linda Puchala disqualify themselves in Docket Number C-6964.[1] In that proceeding, the National Mediation Board ("NMB or the "Board") is set to consider its November 3, 2009, notice of proposed rulemaking ("NPRM"), 74 Fed. Reg. 56750, which calls for abandoning the Board's 75 year-old "majority" voting rule—a rule that has become part of the fabric of the Railway Labor Act.

[1] ATA is the principal trade and service organization of the U.S. scheduled airline industry. The members of the association 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. Associate members are: Air Canada; Air Jamaica; and Mexicana. American Airlines, Continental Airlines, Southwest Airlines, United Airlines, UPS Airlines and US Airways do not join in this motion.

ATA recognizes that this is an extraordinary request and does not make it lightly. But as explained more fully below, the available facts give the appearance that Members Hoglander and Puchala have prejudged the specific issues raised in Docket No. C-6964. Under these circumstances, extraordinary action is necessary and appropriate to maintain public confidence in the Board's neutrality and ability to fulfill its responsibilities. For these reasons, they should not participate in this proceeding.

The Administrative Procedure Act ("APA") requires agency decision-makers to consider "all relevant matter presented" in a rulemaking proceeding. 5 U.S.C. § 553(c). Accordingly, the APA and the Due Process Clause of the 5th Amendment to the U.S. Constitution requires agency decision-makers to maintain an open mind and not prejudge the outcome of a rulemaking proceeding. If agency decision-makers are unable to maintain an open mind in order to fully and fairly consider public input that conflicts with the decision-makers' views, such closed mind may be cause to disqualify the decision-makers.

The duty of an agency member with a closed mind to disqualify himself or herself is well established. The APA and the Due Process Clause provide that an agency member must be "disqualified from rulemaking" whenever the agency member "has an unalterably closed mind on matters critical to the disposition of the proceeding," and is shown to be "unwilling or unable to consider rationally argument that [the proposed rule] is unnecessary." *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979); *see also C&W Fish Co. v. Fox*, 931 F.2d 1556, 1664-65 (D.C. Cir. 1991); *Lead Industries Assoc. v. EPA*, 647 F.2d 1130, 1179-80 (D.C. Cir. 1980).[2] While an agency member need not disqualify herself merely because she is familiar with or has opinions about an issue, disqualification is mandated when the facts show that the agency member has predetermined the issue. *Nat'l Advertisers*, 627 F.2d at 1170.

The disqualification duty applies with special force to Members of the NMB, given that Congress was particularly concerned that the NMB maintain a posture of neutrality vis-à-vis carriers and labor organizations in order to effectively perform its critical mediation function. *See US Airways v. NMB*, 177 F.3d 985, 989 n.2 (D.C. Cir. 1999) (noting "Congress's careful measures to preserve the neutrality and prestige of the NMB"); *Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655, 669 (D.C. Cir. 1994) (recognizing the "importance of maintaining Board's neutrality" and noting that "significant concern was expressed during passage of 1926 Act that Board be able to maintain the confidence of both labor and management" (citation and internal quotation marks omitted)); 29 C.F.R. § 1208.3(a) (stating, in regard to maintaining confidentiality of information provided to NMB, that "[p]ublic policy and the successful effectuation of the NMB's mission require that Board members and the employees of the NMB maintain a reputation for impartiality and integrity."); *cf. Nat'l Advertisers*, 627 F.2d at 1166 (indicating that the applicable disqualification standard depends on the "structure and purposes"

[2] Although the TTD letter of September 2, 2009, suggests that the Board's Representation Manual is "not subject to the Administrative Procedure Act," *see* Appendix B (Letter from TTD to Chairman Dougherty and Members Hoglander and Puchala (Sept. 2, 2009)), the NMB's rulemaking is in fact reviewable under the APA (as well as the Railway Labor Act) for both statutory and constitutional error. *See Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655, 672 (D.C. Cir. 1994); *cf. US Airways v. NMB*, 177 F.3d 985, 989 n.2 (D.C. Cir. 1999).

of the agency's statutory authority). It is critical for the Board to avoid "giv[ing] the appearance that [it] has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves," *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), and its Members therefore should recuse themselves from proceedings in which their actions give even the appearance of prejudgment.

Disqualification is appropriate here. Publicly available facts give the appearance that Members Hoglander and Puchala have predetermined the issues raised by the November 3 NPRM. In light of these facts, the APA and due process require Members Hoglander and Puchala to disqualify themselves from Docket No. C-6964, and, in any event, they should do so as a matter of their discretion.

First, Members Hoglander and Puchala published the November 3 NPRM by means of an internal process, detailed in a letter from Chairman Dougherty to certain Senators, which was not deliberative and did not involve consultation with Chairman Dougherty. *See* Appendix A (Letter from Chairman Dougherty to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009)). The facts set forth in Chairman Dougherty's letter describe actions that strongly suggest Members Hoglander and Puchala have predetermined the issues raised by the November 3 NPRM. Based on those facts, there is little reason to believe that the ATA's views—or the views of any other person or organization concerned about the Board's neutrality—will be accorded any serious consideration.

Second, Members Hoglander and Puchala rejected ATA's request to provide an open, adequate process to consider whether to promulgate an NPRM or what issues an NPRM should address. Given that the NPRM was promulgated in response to a barebones two-page letter from the Transportation Trades Department, AFL-CIO ("TTD") that was devoid of analysis, *see* Appendix B ((Letter from TTD (Sept. 2, 2009)), and given the sweeping and radical nature of the proposed rule change,[3] the Board should have established a robust public comment process—which the ATA expressly requested in a September 10, 2009 letter to the Board, *see* Appendix C, at pp. 3-5 (Letter from ATA to Chairman Dougherty and Members Hoglander and Puchala (Sept. 10, 2009)). But the NPRM did not respond to the ATA's request for a full and open review process. The NPRM provided nothing more than a 60-day period for written comment. It did not provide for a public hearing of any kind, much less the kind of thorough evidentiary hearing that would be expected before effecting such a fundamental change in Board practice. *See* 74

[3] Indeed, the proposed rule would represent such a fundamental shift in Board practice that, in 1978, during the Carter Administration, the Board (Chairman George S. Ives, and Members Robert O. Harris and David H. Stowe) stated that only Congress could make the change: "[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." Minutes to National Mediation Board Meeting, at 78-15 (June 7, 1978). Consistent with this understanding, the Board has rejected proposals to switch to a "minority rule" voting process, as now requested by the TTD, in at least four prior decisions. *See, e.g.*, *Delta Air Lines, Inc*, 35 N.M.B. 129 (2008); *Chamber of Commerce of the United States*, 14 N.M.B. 347, 362 (1987) (*quoting* Sixteenth Annual Report of the Board (1950)).

Fed. Reg. 56750-52. While the Board did separately schedule a one-day "meeting," that is an inadequate substitute for the taking of testimony under oath and the cross-examination of witnesses.

These inadequate procedures are a dramatic departure from the Board's past practice. The Board last considered changing its election rules in 1985-1987. As part of its review process at that time, the Board conducted a full evidentiary hearing which lasted nine days, designated a hearing officer, and allowed for appealable rulings on procedural matters prior to the hearing, as well as pre-hearing briefs and motions to dismiss and post-hearing briefs. *In re Chamber of Commerce of the United States*, 14 N.M.B. 347, 348-49 (1987). Over twenty years later, in 2008, the Board confirmed that if it were to reconsider changing its election rules, it would utilize the same process that it used in the *Chamber of Commerce* proceeding. *See Delta Air Lines, Inc*, 35 N.M.B. 129, 132 (2008). The Board emphasized, without dissent, that it "would not make such a sweeping change without first engaging in a complete and open administrative process to consider the matter." *Id.* Members Hoglander and Puchala did not acknowledge in their NPRM this dramatic departure from prior Board procedures. This change in procedures has prevented full consideration of all issues relevant to the subject matter of the NPRM, will further prevent full and fair consideration of the NPRM, and also prevents interested parties from asking questions that would further reveal the Board majority's predetermination of the issues.

Third, Members Hoglander and Puchala have significantly departed from prior practice in a number of other ways. They have abandoned, without explanation, the Board's longstanding substantive standard for making material changes to its rules. The Board previously announced that it would materially change its rules only when a proposed change is shown to be "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. Following that standard would place an insurmountable obstacle in the path of the proposed rule change, because that standard cannot possibly be satisfied here. In the NPRM, Members Hoglander and Puchala neither acknowledge this substantive standard nor attempt to meet it.

The form of the November 3 NPRM is itself a sharp departure from the Board's earlier approach to this issue. The last time the Board considered changing its voting rules, it issued a neutral invitation for participation and comment. *See In the Matter of the Petition of the Chamber of Commerce of the United States Requesting the Amendment of the Board Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 12 N.M.B. 326 (Sept. 12, 1985) (Notice of Hearing). This time, Members Hoglander and Puchala not only indicated their intent to adopt the proposed rule, but sought to justify the change by attempting to refute the preliminary objections. These actions reinforce the conclusion that Members Hoglander and Puchala have predetermined the issues raised in their NPRM.

Members Hoglander and Puchala further departed from the Board's prior practice by insisting on "consider[ing] the TTD petition in a vacuum." 74 Fed. Reg. 56750-01, at 56754 (Nov. 3, 2009) (Chairman Dougherty, dissenting). When the Board last considered the same proposed voting rule change, it simultaneously considered a proposal to adopt a formal

decertification procedure. *See In the Matter of the Petition of the Int'l Brotherhood of Teamsters Requested the Amendment of the Board Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 13 N.M.B. 1 (Oct. 1, 1985) (Notice of Consolidation). This time, Members Hoglander and Puchala have decided to consider the TTD's request for a voting change in isolation, without acknowledging there is a pending request for consideration of a process for decertification. *See* 74 Fed. Reg. 56750-01, at 56754 (Nov. 3, 2009). Chairman Dougherty was understandably "surprised" by the decision of Members Hoglander and Puchala to "ignore[]" the request for a direct decertification process and instead to address "only the TTD's request." *Id.* That is because, as she explained, the TTD's proposed voting rule "necessitates some sort of decertification mechanism or else it deprives employees of the right to be unrepresented," and thus the voting rule and decertification proposals must be considered together. *Id.* Members Hoglander and Puchala's decision unduly narrows the Board's consideration of issues.

Fourth, the timing of the proposed rule change in relation to the Delta elections gives the appearance that the Board majority had a predetermined intent to change the voting process in order to affect those elections. After the TTD sought this rule change, the Board continued to process representation applications and schedule elections under the current rules. It even processed an International Association of Machinists ("IAM") representation application for a single carrier finding at Delta for a small craft or class. *See Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 88 (Dec. 22, 2009) (finding that Delta and Northwest constitute a single transportation system for the craft or class of Flight Simulator Technicians). It failed, however, to move forward on Association of Flight Attendants ("AFA") and IAM representation applications that were filed for the larger crafts or classes at Delta, without offering persuasive reasons for the delay. As the Chairman stated in her letter to the Senators, 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* Appendix A, at p. 2 (Letter from Chairman Dougherty (Nov. 2, 2009)). At least one union official has betrayed her recognition of the connection between the Rule change and the Delta election. Pat Friend—the International President of the AFA—boasted that with "really an outstanding effort" and "lots of help within the labor movement and within the Obama administration," the AFA was able to place Board Member Puchala at the Board "before this election between the Northwest and the Delta flight attendants took place."[4]

* * *

To be clear: The ATA's request for disqualification is limited to the specific issues involved in Docket No. C-6964. ATA respects the dedication and efforts of members Hoglander and Puchala and we do not otherwise question their ability to carry out their responsibilities. But the available evidence gives the appearance that Members Hoglander and Puchala have prejudged the issues involved in Docket No. C-6964. Based on these facts, the ATA respectfully requests that Members Hoglander and Puchala disqualify themselves from Docket C-6964.

---

[4] Quoted from *The Union Edge* (Orig. Broadcast August 25, 2009).

and Puchala and we do not otherwise question their ability to carry out their responsibilities. But the available evidence gives the appearance that Members Hoglander and Puchala have prejudged the issues involved in Docket No. C-6964. Based on these facts, the ATA respectfully requests that Members Hoglander and Puchala disqualify themselves from Docket C-6964.

Respectfully,

Robert A. Siegel
of O'MELVENY & MYERS LLP
Counsel for Air Transport Association of America, Inc.

cc: David A. Berg
Vice President, General Counsel and Secretary,
Air Transport Association of America, Inc.

APPENDIX A

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.

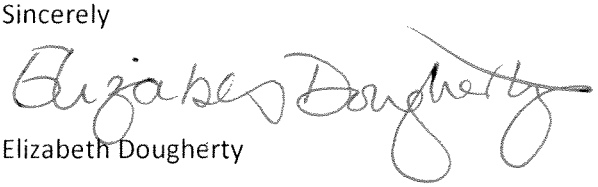
Under normal circumstances, I would have preferred not to discuss Board process so publicly. However, in light of the complete absence of any principled process or consideration of my role as an equal Member of the Board, I feel compelled to bring these issues to your attention. I am also troubled by 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

Chairman Dougherty dissented from the action of the Board majority in approving this proposed rule. Her reasons for dissenting are set forth below.

I dissent from the proposed rulemaking for several reasons. Our current election rules have a long history and are supported by important policy reasons. I do not believe there is any evidence or legal analysis currently before the Board to support making the change proposed by my colleagues. Serious questions exist about the Board's statutory authority to make the rule change and its ability to articulate a rationale for change that complies with the Administrative Procedures Act. Moreover, I believe the process by which this rule was drafted is flawed. Perhaps most importantly, the proposed rule makes no reference to other requests the Board has received to consider decertification and Excelsior list issues. For these and the following reasons, I believe it is, at a minimum, premature to propose a rule change of this magnitude, and a more prudent course of action would be for the Board not to prejudge this issue, but rather to give all interested parties an opportunity to comment on the request made by the Transportation Trades Division of the AFL-CIO (TTD), together with subsequent requests regarding decertification and other issues, before making any proposals.

The rule in question has been applied consistently for 75 years – including by Boards appointed by Presidents Roosevelt, Truman, Johnson, Carter, and Clinton. Making this change would be an unprecedented event in the history of the NMB, which has always followed a policy of making major rule changes with consensus and only when required by statutory amendments or essential to reduce administrative burdens on the agency. Chamber of Commerce of the United States, 14 NMB 347, 356 (1987). Regardless of the composition of the Board or the inhabitant of the White House, this independent agency has never been in the business of making controversial, one-sided rule changes at the behest of only labor or management.

No one, including my colleagues, has suggested that the Railway Labor Act mandates the change in the proposed rule or that the rule change is necessary to reduce administrative burdens on the Agency. In fact, a serious question exists as to whether the NMB even has the statutory authority to make this reversal. A Board appointed by President Carter unanimously decided that 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 and that such a change, if appropriate, should be made by Congress. [1]

I also believe that my colleagues have not articulated a rationale for this rule change as required by the Administrative Procedures Act. With this notice of proposed rulemaking, my colleagues seek to radically depart from long-standing, consistently applied administrative practices. Under the Administrative Procedure Act, a change in such a long-standing policy must be supported by a strong rationale. While administrative agencies are not bound by prior policy, there is a duty to explain adequately "departures

---

[1] In addition, the only court ever to rule specifically on the question of whether the Board has the authority to certify a representative where less than a majority of the eligible voters participates in an election found that it did not. Virginian Railways Co. v. Sys. Fed'n, 11 F. Supp. 621, 625 (E.D. Va 1935). That ruling was not appealed and no court has ever specifically held that the Board has this authority.

from agency norms." Pre-Fab Transit Co. v. Interstate Commerce Comm'n, 595 F.2d 384, 387 (7th Cir. 1979). A change in the majority voting rule must be based on more than the preferences of the current Board. "An agency's view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . [I]f it wishes to depart from its prior policies, it must explain the reasons for its departure. " Panhandle E. Pipeline Co. v. Fed. Energy Regulatory Comm'n, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (internal citations omitted). "Conclusory statements" and "conjecture cannot substitute for a reasoned explanation" for such a change in precedent. Graphic Comm. Int'l Union v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490, 1494 (D.C. Cir.

There is nothing in the proposed rule to support changing this long-standing Board tradition. The Board has repeatedly articulated important policy reasons for our current majority voting rule – including our duty to maintain stability in the air and rail industries. 16 NMB ANN. REP. 20 (1950); Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). This duty stems directly from our statutory mandate to "avoid interruption to commerce or the operation of any rail or air carrier." Id. The Majority attempts to ignore this important statutory mandate by claiming that only our mediation function is relevant to keeping stability in the air and rail industries. This argument has no merit. The statute does not limit our mandate to only mediation, and it is disingenuous to suggest that our representation function does not play an important role in carrying out our duty to maintain stability in these industries. Moreover, the Board has repeatedly in the past raised this policy issue in conjunction with our representation function. 16 NMB ANN. REP. 20 (1950); Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). As the Board stated in 1987, "[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." Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). Assuring that a representative certified by the NMB enjoys true majority support is even more important given that union certifications under the RLA must cover an entire transportation system[2] -- often over enormously wide geographic areas with large numbers of people. I also note that there is no process for decertifying a union under the Railway Labor Act. These unique aspects of the RLA do not exist under the National Labor Relations Act or elsewhere, and they render irrelevant comparisons between the RLA and other election procedures.[3]

---

[2] It is well settled that the Board applies the term "craft or class" under the RLA on a system-wide basis. Delta Air Lines Global Servs., 28 NMB 456, 460 (2001); American Eagle Airlines, 28 NMB 371, 381 (2001); American Airlines, 19 NMB 113, 126 (1991); America West Airlines, Inc., 16 NMB 135, 141 (1989); Houston Belt & Terminal Railway, 2 NMB 226 (1952).

[3] As the Supreme Court has long recognized, "that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Railroad Trainmen v. Jacksonville Terminal Co., 394 US 369, 383 (1969).

The only other rationale offered by my colleagues is changed circumstances and an increasingly participatory workforce. I fail to see how these changes, if true, support changing a 75-year-old practice based on important statutory mandates that have not changed. Moreover, any arguments that changed labor relations support changing our election practices are definitively rebutted by the facts: 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.

The Majority has not articulated a sufficient rationale for making the change. Moreover, the request from the Transportation Trades Division of the AFL-CIO that prompted this rule change was made in an informal, two-page letter with no legal analysis, no mention of changed conditions, and no discussion of our statutory authority. In light of these facts, the Board's history, and the lack of support for the change, I don't see how the Board could propose a rule change this controversial and divisive without the benefit of a full briefing from all interested parties.

I also dissent because I am concerned about the timing of the Majority's proposal. The Board recently established a bi-partisan, labor-management committee (which we are calling Dunlop II) to examine the RLA and the NMB and recommend changes. The committee has not yet delivered its report. In my view, it would be premature and irresponsible for the Board to propose any change to one of its most long-standing procedures before this committee has made its report.

Moreover, the Board has received requests to begin representation proceedings involving close to 40,000 employees at two major airlines – the largest group of elections in the history of the NMB. I believe it is harmful to the reputation and credibility of the Board for it to take a position in favor of a change to our election rules during these elections, which the Majority does by proposing this change. As I have previously stated, I believe the more impartial and responsible approach would be to seek comment on the TTD's request, together with other related issues, so that we could have the benefit of a full briefing on all the issues before without making proposals in favor of the change.

I also dissent because the Majority's proposed rule does not request comment on several related issues that have been raised by our constituents in connection with the TTD's request. I believe firmly that the Board should not consider the TTD petition in a vacuum. Several parties have requested that we consider a decertification procedure, noting that a minority voting rule necessitates some sort of decertification mechanism or else it deprives employees of the right to be unrepresented. We have also received a request to consider providing Excelsior lists to unions. And there are also other areas of our representation policy and procedures that would be implicated by a change in voting rules. For example, we currently require a union seeking to challenge an incumbent union to submit authorization cards from more than 50% of eligible voters. If we were to change our voting rules to permit fewer than 50% of eligible voters to select a representative, we must contemporaneously consider whether we should still require a greater than 50% showing of authorization cards to challenge an incumbent union. In order in order to be fair to all interested parties, I believe that Board must consider all of these issues together, and I am surprised that my colleagues have ignored these other requests and are addressing

only the TDD's request. I encourage interested parties to submit comments addressing these other issues.

Finally, I dissent because I believe that the process by which this rule was drafted is flawed. The rule was drafted without my input or participation. I was notified of the existence of a final proposed rule at 11:30 am on October 28, and I was given only 24 hours to review the rule and draft a dissent. I believe this sort of rushed, exclusionary rulemaking does not produce the best results for the agency, and I believe a better way of conducting business would be to have a comment period on all the relevant proposals before taking a position, review those comments together, and craft a decision collaboratively.

Chairman Elizabeth Dougherty.

APPENDIX B

TTD A BOLD VOICE FOR TRANSPORTATION WORKERS

September 2, 2009

VIA FAX AND COURIER

The Honorable Elizabeth Dougherty
Chairman
National Mediation Board
1301 K Street, NW
Suite 250
Washington, DC 20005

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

The Honorable Linda Puchala
Member
National Mediation Board
1301 K Street, NW
Suite 250
Washington, DC 20005

Re: Revisions to Representation Manual

Dear Chairman Dougherty and Members Hoglander and Puchala:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), and its 32 affiliated unions[1], we are writing to request that the National Mediation Board ("Board" or NMB) amend its Representation Manual to allow employees to more effectively exercise their statutory right to designate bargaining representatives under the Railway Labor Act ("the Act" or RLA). Specifically, we are asking the Board to change its election procedures to allow employees to choose union representation when a majority of those voting express support for a union as opposed to treating all workers who did not vote as "no" votes for purposes of representation. For reasons stated below, this requested change is consistent with the statute and is urgently needed to ensure that the representation duties of the Board are carried out in a fair and just manner.

[1] Attached is a complete list of TTD affiliated unions.

The unions that belong to the TTD represent hundreds of thousands of employees working in all segments of transportation, including the airline and railroad industries. In theory, these workers all enjoy the right to bargain collectively through freely chosen representatives, whether they are covered by the RLA, the National Labor Relations Act (NLRA), or other labor relations laws. In practice, however, those workers subject to the RLA are uniquely and substantially disadvantaged whenever they attempt to choose union representation in an NMB-conducted election.

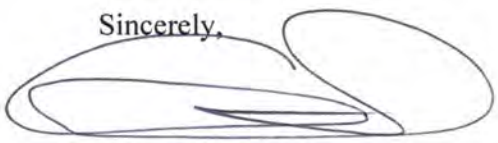
Specifically, when secret ballot elections are conducted under the NLRA, the affected employees win collective bargaining representation based on a majority of valid votes cast. This is the fundamental principle followed in fair and democratic elections for political office throughout this country. By contrast, workers seeking union representation in NMB elections are denied the representative they want if a majority of the unit does not vote in the election. Even when 100 percent of the voters choose a union, workers are denied their bargaining representative unless an *absolute majority* of eligible voters cast votes for representation. No where in American democracy – other than during a union election in the airline and railroad industry – does an eligible voter wishing to sit out an election have his or her silence tabulated as a *NO* vote by virtue of non-participation. Permitting such a veto-by-silence or inaction obviously sabotages the expressed will of the voting majority and creates a perverse incentive for vote-suppression efforts by employers.

This peculiar NMB practice is not required by the RLA (indeed, the relevant provisions of the RLA and the NLRA use substantially the same language). And the NMB's policy is clearly inconsistent with the longstanding, widely accepted understanding of a democratic election process in the public arena. Accordingly, we respectfully ask the NMB to revise its Representation Manual to provide for certification of the representative designated by a majority of valid votes cast in an NMB election, in conformity with the accepted standard for fair and democratic elections.

Although the procedural guidance and policies set forth in the NMB Representation Manual are not subject to the Administrative Procedure Act, we recognize that the Board has followed a practice of inviting and considering written comments from the public regarding proposed changes. We believe such an approach is appropriate in this matter and would therefore urge the Board to expeditiously release a proposal consistent with our recommendations and seek the views of interested parties and stakeholders.

We look forward to the opportunity to provide further input in support of these proposed changes. Thank you for your consideration of our views.

Sincerely,



Edward Wytkind
President

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)
United Transportation Union (UTU)

April 2009

APPENDIX C

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.

September 10, 2009

OUR FILE NUMBER
600,000-003

WRITER'S DIRECT DIAL
(213) 430-6005

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

VIA FACSIMILE 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: 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

---

[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

---

[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