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.

November 20, 2009

OUR FILE NUMBER
600,000-003

WRITER'S DIRECT DIAL
(213) 430-6005

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

VIA ELECTRONIC MAIL AND COURIER

Mary Johnson
General Counsel
National Mediation Board
1301 K Street, N.W.
Suite 250-East
Washington, DC 20005
legal@nmb.gov

Re: ***Air Transport Association's Full Written Statement for the December 7, 2009 Meeting in Docket No. C-6964***

Ms. Johnson:

Please find enclosed a copy of a full written statement, which I wish to present on behalf of the Air Transport Association, Inc., at the December 7, 2009 meeting with the National Mediation Board and its staff.

Sincerely,

Bob Siegel

Robert Siegel
of O'MELVENY & MYERS LLP

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

December 7, 2009 Statement
Robert Siegel, of O'Melveny & Myers LLP
On Behalf of the Air Transport Association of America, Inc.

I am Bob Siegel, and I am appearing on behalf of the Air Transport Association, which is the principal trade and service organization of the major scheduled air carriers in the United States.[*]

In recognition of the unusually limited nature of this meeting, I will not present an extended discussion of the ATA's views. A more complete statement of those views will be contained in the formal written comments that we intend to submit on January 4, 2010. My remarks here will be limited to a discussion of the manifest inadequacies in the Board's process for issuing the November 3 Notice of Proposed Rulemaking (the "NPRM"); the wholly deficient process that the Board has put in place for its consideration of the NPRM; the Board's dramatic and unexplained departures from prior practice; and the absence of any adequate justification for abandoning the majority rule that the Board has used successfully for over seven decades and reaffirmed as recently as last year. These facts demonstrate that the Board majority has reached a predetermined position on the issues raised in Docket Number C-6964, and thus call into serious doubt the bona fides of this notice-and-comment process.

First, the Board majority's publication of the November 3 NPRM was the result of an extraordinarily inadequate and manifestly improper internal process. Indeed, the process was so remarkably deficient that it compelled the Board's own Chairman to send a letter to Senators detailing the deficiencies. *See* Appendix A (Letter from Chairman Dougherty to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009)). As Chairman Dougherty explained in her letter, there was a "complete absence of any principled process." Members Hoglander and Puchala aggressively excluded the Chairman from internal deliberations, refused to share drafts of the NPRM with her, gave the Chairman no information about the timing of the planned publication of their NPRM, and effectively operated as a two-person Board.

[*] 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. Continental Airlines, Inc., and American Airlines, Inc., do not participate in this statement.

Members Hoglander and Puchala not only excluded the Chairman from their internal deliberations, they sought to prevent the Chairman from publicly expressing her disagreement with their NPRM once she learned of it. Members Hoglander and Puchala initially gave the Chairman only 90 minutes to consider the NPRM prior to its publication (although this artificial deadline was ultimately extended to slightly more than a day). They also initially told the Chairman that she would not even be allowed to publish a dissent in the Federal Register, then later told her that she could do so but only if a dissent could be completed in 90 minutes. When the Chairman provided her draft dissent, Members Hoglander and Puchala censored it—ordering the Chairman to remove portions of her dissent as a prerequisite to publication. As the Chairman later observed in her letter to the Senators, Members Hoglander and Puchala were in an "obvious rush to put out a proposed rule," and their hastiness and efforts to silence official criticism of the NPRM "give[] the impression that the Board has prejudged the issue." Appendix A, at 2.

These extraordinary facts have severely damaged the Board's hard-earned and long-standing reputation as an impartial and honest broker—a neutrality that both Congress and the Supreme Court have recognized is critical to the Board's ability to effectively perform its mediation and other functions. These facts also demonstrate that Members Hoglander and Puchala have irreversibly prejudged the issues raised by their November 3 NPRM, and that this putative notice-and-comment process will be meaningless.

To put it bluntly: If Members Hoglander and Puchala were willing to exclude, stifle and even censor the dissenting views of their own colleague, there is little if any reason to believe that the ATA's views—or, for that matter, the views of any other person or organization concerned about the Board's neutrality—will be accorded any greater consideration or respect.

Second, the ATA is deeply troubled by the Board majority's unexplained and unjustifiable refusal to provide an adequate process for consideration of the November 3 NPRM. On September 10th of this year, after the TTD had requested that the Board abandon its 75 year-old majority rule, the ATA sent the Board a letter requesting that "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*" in the late 1980s. Appendix B, at 2 (Letter from ATA to Chairman Dougherty and Members Hoglander and Puchala (Sept. 10, 2009)); *In re Chamber of Commerce of the United States*, 14 N.M.B. 347, 360 (1987). In the

Chamber of Commerce proceeding, 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. After that careful and exhaustive examination, the Board reaffirmed its longstanding majority rule.

The ATA's request for *Chamber of Commerce* procedures was hardly excessive. Just last year, in a proceeding involving Delta Air Lines and the Association of Flight Attendants, the Board unanimously recognized that the *Chamber of Commerce* process is not just appropriate—it is ***necessary*** for a fair and meaningful review of any proposal to abandon the Board's 75 year-old majority rule. The Board stated, in unequivocal terms, that it "would not make such a fundamental change without utilizing a process similar to the one employed in *Chamber of Commerce*." *Delta Air Lines*, 35 N.M.B. 129, 132 (1998). In fact, the Board thought this point was so important that it repeated it in the very next paragraph of its decision: it "would not make such a sweeping change without first engaging in a ***complete and open*** administrative process to consider the matter." *Id.* (emphasis added).

Despite the Board's unequivocal past statements, the Board majority has refused to provide *Chamber of Commerce* procedures for reviewing the November 3 NPRM. Instead, the Board majority established a stripped-down process that comes nowhere close to being "complete" or "open." In stark contrast to the procedures the Board followed in the *Chamber of Commerce* proceedings, the November 3 NPRM itself provides for nothing more than a 60-day period for written comment. And neither the NPRM nor today's "meeting" provides for an evidentiary hearing of any kind—there is no testimony under oath, no cross-examination of witnesses, and none of the other procedural safeguards that impartial Board members would have wanted to put in place before considering such a fundamental change in the Board's long-standing practice.

Yet the Board majority has completely ignored the ATA's September 10 letter, and has not even acknowledged—let alone explained—its dramatic departure from prior Board procedures. The only plausible explanation for this change in procedures is that the Board majority is unwilling to hear evidence that would stand in the way of their predetermined decision to change the Board's majority rule ballot.

Indeed, the inadequate procedures mandated by the Board majority not only prevent full consideration of the NPRM, they also prevent interested parties from asking the questions that would further reveal the Board majority's bias and

predetermination of the issues. And there are a number of important questions the ATA would have asked witnesses testifying under oath in a *Chamber of Commerce* proceeding regarding their communications with Board Members about the issuance of the NPRM and related matters.

Third, the ATA is deeply troubled by the various other ways in which the Board majority has dramatically departed from prior Board practice. For instance, the Board majority has 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. 347, 360 (1987). 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 its NPRM, the Board majority does not even acknowledge this substantive standard for changes to the NMB's rules, further conveying that the Board majority will do what is necessary to effectuate its predetermined position.

Moreover, 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 re Petition of the Chamber of Commerce of the United States Requesting the Amendment of Board Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 12 N.M.B. 326 (1985). This time, the Board majority included with the NPRM a full legal argument attempting to justify the proposed rule and rebut the preliminary objections set forth in the ATA's letter of September 10, 2009. These actions reinforce the conclusion that the Board majority has already predetermined the issues raised in its NPRM.

Finally, the Board majority 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 re Petition of the Int'l Brotherhood of Teamsters Requesting the Amendment of Board Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 13 N.M.B. 1 (1985). This time, the Board majority has decided to consider the TTD's request for a voting change in isolation, without even acknowledging there is a pending request for consideration of a direct process for decertification. *See* 74 Fed. Reg. 56750-01, at 56754 (Nov. 3, 2009). As Chairman Dougherty has explained, given their interrelationship, these two

issues "must be considered together." *Id*. The Board majority's decision to unduly narrow the Board's consideration of issues appears designed to ensure that the TTD's requested voting rule change is adopted swiftly and to convey that only changes favorable to labor organizations will be considered by the Board.

Fourth, there is simply no basis for the proposed rule change. The Board has successfully employed the majority rule since President Franklin D. Roosevelt's first term in office, and it has undeniably become part of the fabric of the Railway Labor Act. The Board has reaffirmed the majority rule on at least four prior occasions, the rule has twice passed muster at the Supreme Court, and there has been no relevant change in circumstances that would warrant such a radical departure from longstanding practice. In light of these indisputable facts, it would be impossible for the Board to articulate any legally sufficient reasons for abandoning the majority rule.

Indeed, the Board recognized as much in 1978, during the Carter Administration, when it recognized 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." Minutes to National Mediation Board Meeting, at 78-15 (June 7, 1978).

Both the TTD's request and the Board majority's November 3 NPRM argue that the proposed rule change is justified by a need to align Railway Labor Act representation elections with the rules governing elections for public office. This argument is both frivolous and misleading: Under current Board rules, a direct decertification option similar to the process under the National Labor Relations Act is not available and it is virtually impossible for employees in a large group to return to non-union status even if the majority strongly wishes to do so. As a practical matter, an RLA union that prevails in a representation election may never have to stand for re-election. Thus, the unions cannot honestly be compared to elected public officials, who have fixed terms of office and must run for reelection. Accordingly, if the Board were serious about the need to align representation elections with general democratic principles, it would now also be considering the need for a robust decertification procedure. The fact that Members Hoglander and Puchala have ignored that request makes clear that they are not interested in neutrally aligning the Board's rules with general democratic practices.

* * *

The Board majority's extraordinarily deficient and manifestly improper actions may well lead to the unjustifiable abandonment of the Board's 75 year-old majority rule. But that will not be a victory for the TTD or any particular union: If a union is elected even though it lacks true majority support, it will be incapable of representing the interests of employees it purports to count as members. Nor will it be a victory for organized labor generally: The Board's dramatic and unexplained abandonment of its prior procedural and substantive standards in order to push through an ill-advised rule change in a manifestly-politicized manner simply means that once the political winds change, and the Board's composition changes with them, organized labor will pay the price—not only will the majority rule likely be restored, but a straightforward decertification procedure and other rules unfavorable to labor organizations may be easily put in place. And it is certainly no victory for employees, who will face the real prospect of being tied to unions they do not support.

But it is clear who the losers will be: not just unions, carriers, and employees, but also the Board itself—which will have jettisoned its hard-earned reputation as an honest broker and disinterested referee, and thus will have jettisoned its ability to insure the labor relations stability that Congress intended it to provide.

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.

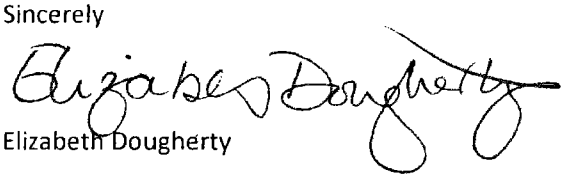
Under normal circumstances, I would have preferred not to discuss Board process so publicly. However, in light of the complete absence of any principled process or consideration of my role as an equal Member of the Board, I feel compelled to bring these issues to your attention. I am also troubled by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

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