BEFORE THE

NATIONAL MEDIATION BOARD

WASHINGTON, D.C.

REPRESENTATION ELECTION PROCEDURE

DOCKET No. C-6964

COMMENTS OF THE CARGO AIRLINE ASSOCIATION

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January 4, 2010

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I. INTRODUCTION

The Cargo Airline Association (the "Association" or "CAA") respectfully submits the following comments for consideration in response to the Proposed Rule, Docket No. C-6964 (the "proposed rule" or "rule"), published by the National Mediation Board ("NMB" or "Board") in the Federal Register on November 3, 2009. 74 Fed. Reg. 56750 (Nov. 3, 2009).[1] With the issuance of this rule, the Board proposes to change its long-standing history and policy of certifying union representatives based on a majority of eligible voters to a new process where a union is certified based on a majority of votes cast.

The Association and its members are adamantly opposed to the rule proposed by the Board. The proposed rule violates the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA") on both substantive and procedural grounds. This is a fundamental change in existing policy with no adequate justification. It threatens employee

[1] The CAA is the nationwide trade organization representing major all-cargo air carriers. U.S. All-cargo air carrier members include, ABX Air, Atlas Air, Inc., Capital Cargo, DHL Express, FedEx Express, Kalitta Air and UPS Airlines.

rights and industry stability. CAA firmly believes the proposed rule is legally deficient and counter to public policy.

II. THE PROPOSED RULE IS BAD PUBLIC POLICY

A primary purpose of the Railway Labor Act ("RLA") is to avoid interruptions to the free flow of commerce. For over 75 years, the RLA has served that purpose well while at the same time balancing the competing interests of organized labor and management groups. The voting rule that is the subject of this proposed rulemaking is one of the reasons the RLA has been so successful. For a host of practical reasons, labor relations are seldom stable in situations where a newly-certified union is supported by only a minority of the employees it represents. In those situations, management must attempt to negotiate collective bargaining agreements amidst the constant concern that the union might not be able to deliver on its commitments, no matter how well-intentioned it may be. Meanwhile, unions are forced to focus their attention on achieving immediate improvements in support. Neither dynamic fosters labor stability. Neither dynamic fosters competitive U.S. airlines.

The NMB's longstanding voting rule is critical to national economic policy because it guards against the instability described above. By requiring a would-be representative to garner the active support of more than 50% of a craft or class of employees, the current voting rule helps to ensure that unions certified by the Board are truly accepted by their membership. This, in turn, promotes stable labor relations and, on a broader scale, reliable transportation.

Efficient and reliable transportation infrastructure has always been recognized as a pillar of a healthy U.S. economy. That has never been more important than now. First, our struggling economy needs fewer barriers to stability, not more. Second, the all-cargo industry is

substantially concentrated creating the potential for economic disruption if there is labor instability at any one carrier. Regulators should be very careful not to introduce changes that invite instability.

Consistent with this perspective, the NMB Chairman issued a strong dissent in this case, arguing against the proposed rule both on legal and public policy grounds. She also called into question the timing of the proposal before a bi-partisan committee has delivered its report on this very issue. *See* 74 Fed. Reg. 56753. She stated, "[i]n 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." *Id.* The Association also is curious about the timing of this proposal, and questions why this committee was not allowed to move forward with a recommendation.

Finally, the CAA finds it incongruent that the Board would not also propose to change the decertification procedures at the same time as the representation procedures. The combination of a rule allowing certification of a minority union along with the lack of a straightforward decertification procedure means that, not only could a union with weak support be certified, but once established, the majority of employees would have no straightforward means of unseating it. In other words, if a majority of employees acquiesced (whether intentionally or through misunderstanding) to the will of a minority of its peers, the majority would have no straightforward means of ending the unwanted representation. The Board has failed to provide a reasonable argument for declining to apply the same standard to decertification as it proposes to apply to certification.

The wisdom and balance of the current voting rule has stood the test of decades of economic change and dozens of changes in political power. Changing it now without good cause would be bad public policy.

III. FINALIZING THE PROPOSED RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURES ACT

In separately filed comments, the Air Transport Association and AIR Conference have thoroughly analyzed, from the perspective of compliance with the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"), both the substance of the proposed rule change and the procedure the Board has undertaken to change it. The CAA shares their view that finalizing the proposed rule would be arbitrary and capricious and therefore invalid under the APA. The CAA therefore endorses the comments submitted by ATA and AIR Conference in this Docket.

In this regard, it is important to stress that this proceeding is not the first time that the Board has considered this issue. In 1986, the International Brotherhood of Teamsters requested an identical change in NMB voting procedures. At that time, unlike here, the Board called for full evidentiary hearings before taking action and ultimately rejected the Teamsters' request. *See, In re Chamber of Commerce of the United States*, 13 N.M.B. 90, 94 (1986). Nothing has changed since 1986, and both the procedural and substantive conclusions reached by the Board in 1986 cannot be overturned without a compelling evidentiary record to do so. No such record exists herein.

In sum, the CAA believes the proposed rule change constitutes ill-advised public policy promulgated through a rushed and legally insufficient means. Faced with the many deficiencies

in this NPRM, CAA urges that the proposed change be rejected.

Respectfully submitted,

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January 4, 2010