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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DOCKET No. C-6964

COMMENTS OF THE CARGO AIRLINE ASSOCIATION

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,

Stephen A. Alterman
President

Yvette A. Rose
Senior Vice President

January 4, 2010

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January 4, 2010

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BY FACSIMILE (202) 692-5085 AND FIRST CLASS MAIL

The Honorable Elizabeth Dougherty
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The Honorable Harry Hoglander
Member
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The Honorable Linda Puchala
Member
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Re: Proposed Representation Election Procedure Rule Change
Docket No.: C-6964

Dear Chairman Dougherty and Members Hoglander and Puchala:

These comments are submitted by WestJet, an Alberta Partnership (WestJet) in response to the November 3, 2009 Federal Register Notice regarding the National Mediation Board's (NMB or Board) Representation Election Procedure in the above-referenced docket number. For the reasons set forth herein, WestJet opposes this proposed rule change, which if implemented, would negatively affect any future decision by WestJet to invest itself in the U.S. market including the potential employment of a U.S. workforce.

The Honorable Elizabeth Dougherty
The Honorable Harry Hoglander
The Honorable Linda Puchala
January 4, 2010

WestJet is Canada's leading high-value low-fare airline operating an average of 383 daily flights to sixty-seven destinations in Canada, the United States, Mexico and the Caribbean. WestJet employs over 7,500 individuals, and approximately 82 percent of eligible employees own shares in the parent company through WestJet's employee share purchase plan. WestJet prides itself on the positive relationship it maintains with its employees, and has been named one of Canada's Most Admired Corporate Cultures four years in a row.

WestJet currently serves seventeen United States destinations, and has continued to explore expansion possibilities within the United States including the potential of employing a U.S. workforce. Given this continued expansion in the U.S. market, WestJet has been actively monitoring applicable U.S. laws and regulations as related to all facets of the airline industry, including labor relations. WestJet was recently made aware of the NMB's notice that proposes to change the manner in which airline employee groups vote to unionize in the United States.

On November 3, 2009, the NMB published a proposed rule that, if implemented, would provide that, "in representation disputes, a majority of valid ballots *cast* will determine the craft or class representative." 74 FR 5670. The NMB's current voting procedure has been utilized for 75 years and was affirmed by the Board as recently as last year. *See Delta Air Lines, Inc.*, 35 NMB 129 (2008). Under the current process, employees do not surrender their right to treat directly with their employer unless a majority of the co-workers in their craft or class choose collective representation. If a majority of eligible voters express their desire for union representation, the bargaining agent receiving the largest number of votes is certified as their legal representative.

The requirement that a majority of eligible employees vote in favor of unionization is the only certain means of ensuring that a majority prefers collective representation. This demonstrable majority support legitimizes the efforts of the union going forward, and the company can be assured that the union is, in fact, speaking as the collective voice of the represented employees. This guarantee that the union represents a true majority of employees serves to foster amenable and constructive labor-management negotiations and relations. On this point we agree with the Chairman's dissenting opinion that "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." 74 F.R. 56753 (*citing Chamber of Commerce of the United States*, 14 NMB 347, 362 (1987)).

The NMB's proposed change would allow certification on the basis of a union receiving the votes of only a majority of employees who choose to participate in the election. This would enable a small minority of voters to determine the long-term future of an entire employee group, regardless of whether the union enjoyed support by a true majority of the workers it is certified to represent. This manner of certification will dilute the legitimacy of the newly certified union

The Honorable Elizabeth Dougherty
The Honorable Harry Hoglander
The Honorable Linda Puchala
January 4, 2010

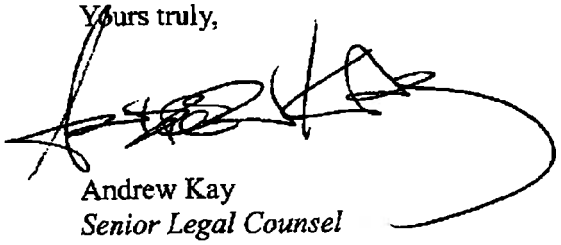
as the election process will no longer confirm that the union truly speaks for its membership. As noted in the Chairman's dissent, assuring that a union "enjoys true majority support is even more important given that union certifications under the RLA must cover an entire transportation system – often over enormously wide geographic areas with large numbers of people." 74 FR 56753.

From a practical standpoint, the implementation of this proposed rule will certainly affect any decision by WestJet to expand its operations to include U.S. based employees. As previously discussed, WestJet takes great pride in the positive relationship that it has created and currently maintains directly with its employees. WestJet would bring this same corporate culture to any potential U.S. workforce. The implementation of the proposed rule would, however, allow a small voting minority to immediately choose to unionize before the true majority of employees had been afforded an opportunity to experience the WestJet corporate culture and decide for themselves whether unionization was in their best interest.

From a financial standpoint, the likelihood of immediate unionization without support from a true majority of employees represents a substantial cost increase that WestJet could not ignore when making a decision to employ U.S. workers. This is not because of an increase in wages and benefits, which WestJet sets at competitive levels. Rather, it would be the immediate costs associated with union elections, negotiations and grievances/arbitrations that would dissuade WestJet from expanding and creating jobs for U.S. citizens.

Given all of these complications, the current NMB election process at least provides assurance that a true majority of employees have decided to seek third party representation and that the elected union does, in fact, speak for the entire employee group. Under the proposed rule, by contrast, that assurance may be lost.

Yours truly,



Andrew Kay
Senior Legal Counsel
WestJet

SkyWest AIRLINES®

RUSSELL "CHIP" CHILDS
President and Chief Operating Officer

December 28, 2009

The Honorable Elizabeth Dougherty
Chairman, National Mediation Board
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The Honorable Harry Hoglander
Member, National Mediation Board
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The Honorable Linda Puchala
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Dear Chairman Dougherty and Members Hoglander and Puchala:

I am writing on behalf of SkyWest Airlines, the nation's largest independently-owned regional airline with more than 10,000 employees who have chosen to remain union free for more than 37 years. I am aware of the AFL-CIO (TTD) request to the NMB to fundamentally change the current voting rules for union representation at airlines – a request that is without question politically driven and flies in the face of the NMB's role as an objective party in matters of union representation. We strongly believe that the TTD request should be rejected. However, if the Board adopts the change requested by the TTD, then the Board must amend its procedures to allow employees to vote to decertify a representative using the same criteria and voting procedures used by the Board in response to an application to certify a union representative. The NMB for 75 years has stood firm on the appropriateness of the rule, and rejected at least four requests to change voting process. SkyWest joins the Regional Airlines Association (RAA), and the Air Transport Association (ATA) in firm opposition to changing the voting rules.

The proposed change would abandon rules that have worked well for both employees and unions for more than 75 years. In that time, more than 1,850 union elections have been held using the traditional majority rule voting process, and more than 65% of those elections resulted in union certification. If anything, the rules should be changed to make the results more equal. Making it easier for unions to win, considering the fact that they already win two-thirds of the time, is obviously unfair to the workers who do not want to be forced into unions and now must overcome even higher hurdles to avoid them. The authors of the Railway Labor Act (RLA) and its voting rules believed strongly that unions could be effective only if they were supported by a majority of the workforce. This wisdom has proven true from our own experience over the past 37 years. The labor representative, in any form, fails if the majority of the workforce does not support it. The NMB itself has followed this wisdom – through every Democratic and Republican administration starting with President Franklin Roosevelt – by requiring a majority of a craft or class to vote in favor of representation in order to certify a union. Indeed, the current NMB has authorized two elections using the traditional voting rules – Comair and USA3000 – since the new Board members were confirmed on May 22, 2009.

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Additionally, in 1978, under the Carter Administration, the Board unanimously stated 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.*" 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. In 1993, the Clinton Administration Commission on the Future of Worker-Management Relations (Dunlop Commission) was asked to consider whether changes to the RLA were warranted, and its final report recommended no changes. Thereafter, the Airline Industry Labor-Management Committee was formed to consider whether changes in NMB procedures were warranted. The committee did not recommend any changes to the NMB majority voting rule. And finally, in 2008, the Board rejected a request from the AFA to change the rule, declaring that the *"AFA has failed to provide sufficient justification for changing its 1987 decision.*" The current NMB offers no explanation for its dramatic departure from this precedent.

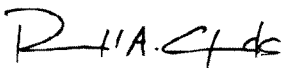
History shows that the Board's conclusion for a "majority rule" ballot is the correct procedure to effectuate the purposes of the Railway Labor Act. There have been absolutely no material changed circumstances since the Board decided in 1987 (*Chamber of Commerce/IBT*, 14 N.M.B. 347) and in 2008 (*Delta Airlines/AFA*, 35 N.M.B. 129) that the unions had not met their "high" burden of proof to show "compelling reasons" in favor of a change to the Board's long-standing ballot process.

The TTD's requested change would allow the minority to represent the majority, undermining the very workers these unions claim to want to represent. A union without majority support cannot be as effective in representing workers as a union selected by a process which assures that a majority of employees desire representation.

SkyWest is firmly opposed to the rule change, and we believe the NMB does not possess the authority to make such a change to voting rules; further, Congress is the only body that can make a decision that so fundamentally alters employees' rights to select representation under the RLA. The requested rule change puts undue pressure on employees two-fold: by allowing the minority to represent the majority and then ensuring that minority vote is upheld indefinitely.

SkyWest vigorously defends our employees' right to choose and encourages the NMB to reject the TTD's proposal in favor of the current effective process that is legitimate and fair. If the Board were to adopt such a fundamental change, it should be through a thoughtful and deliberate process and only with Congressional involvement.

Sincerely,



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RACCA
REGIONAL AIR CARGO CARRIERS ASSOCIATION

December 28, 2009

SENT VIA E-MAIL [LEGAL@NMB.GOV] AND FACSIMILE [202-692–5085]

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Member Linda Puchala
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RE: Docket # C-6964 Notice of Proposed Rulemaking (Representation Election Procedure)

Dear Members of the Board:

Regional Air Cargo Carriers Association (RACCA) submits the following comments in response to the Notice of Proposed Rulemaking (NPRM) published on November 3, 2009. RACCA is an organization dedicated to meeting the policy, communications and information needs of on-demand cargo aircraft operators in the United States. Our membership includes more than 50 certificated air carriers, as well as many other companies involved in the service and support of these carriers.

RACCA is opposed to changing the 75-year-old majority rule, requiring that a majority of eligible employees in a craft or class cast ballots for representation before the Board will certify a union as the bargaining representative of a craft or class. In the 75 years that the majority rule has been in place, the Board has consistently held that the majority rule is necessary for labor stability. The Board's NPRM contains no persuasive reasoning for changing the rule at this time. Additionally, the process by which the Board published the NPRM and under which the Board is considering changing the rule is flawed.

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Since the Board was formed in 1934, the Board has held that a majority of eligible voters in a craft or class must cast ballots for representation in order for a union to be certified as the bargaining representative for that craft or class. From its inception, the Board has dismissed applications where only a minority of eligible voters cast ballots for representation. See e.g. Third Annual Report of the National Mediation Board, pg. 9 (noting that, from June 1936 until June 1937, two representation cases were dismissed because fewer than a majority of eligible voters cast votes for representation); Fifth Annual Report of the National Mediation Board, pg. 11 (noting that, from June 1938 until June 1939, two cases were dismissed because fewer than a majority of eligible voters cast votes for representation). During this 75-year period, the Board has consistently held that the majority rule helps the Board to fulfill its duty under Section 2, Ninth of the Railway Labor Act and promotes stable labor relations. For example, when the majority rule was challenged in 1948, the Board held, "The Board is of the opinion that this duty can more readily be fulfilled and stable relations maintained by carriers' and employees' representatives by a requirement that a majority of eligible employees cast valid ballots in elections conducted under the Act before certifications of employee representatives are issued." Pan American Airways, Inc., 1 NMB 454, 455 (1948). In 1987, the Board stated that labor unions that do not enjoy the support of a majority of employees "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 U.S. and the Internat'l Brotherhood of Teamsters, 14 NMB 347, 362 (1987). In 2008, the Board reiterated its stance that the Board's duty under Section 2, Ninth "'can be more readily fulfilled and stable labor relations maintained by a requirement that a majority of eligible employees cast valid ballots...'" Delta Air Lines, Inc., 35 NMB 129, 131-32 (2008).

The Board's NPRM does not provide any compelling reasoning to change the majority rule. The Board claims that it can fulfill its duty to maintain stable labor relations through mediation. This claim ignores the reality that a union that does not enjoy the support of a majority of employees will not have bargaining power, regardless of whether the Board is mediating negotiations or not.

The Board further claims that the rule change will make elections under the RLA more democratic. The Board states that it is unaware of any democratic elections conducted in the manner of the majority rule election. While it may be true that some political elections and elections held under the National Labor Relations Act result in a win for whichever candidate or union draws the majority of votes cast, it is also true that, under both the American political process and the NLRA, constituents have an opportunity to vote out a political candidate or union if they are displeased with their representation. Thus, unless a formal decertification process is added to the Board's election procedure, any analogies to political elections and to the NLRA are not relevant because a fundamental key to those election processes is that the majority has the ability to vote the politician or union out.

In addition to the flaws in the reasoning behind the NPRM, the process under which the Board is proceeding is in violation of the Board's past precedent. The

Board has repeatedly held that, prior to any change to the majority rule, the Board would hold "a full, evidentiary hearing with witnesses subject to cross-examination..." Chamber of Commerce of the U.S. and the Internat'l Brotherhood of Teamsters, 13 NMB 90, 94 (1986). See also Delta Air Lines, Inc., 35 NMB 129 (2008) (finding that the Board would not make a change to the majority rule without first engaging in a process similar to the one used in Chamber of Commerce of the U.S. and the Internat'l Brotherhood of Teamsters). The Board has not held a full evidentiary hearing on the issue, nor has it subjected any witnesses to direct or cross-examination. Instead, the Board held a one-day "open meeting" during which participants read statements regarding their position on the NPRM. No participants were subjected to examination of any kind during the open meeting.

The process used to draft and publish the NPRM was similarly flawed. The Board failed to consult Chairman Elizabeth Dougherty during the drafting and finalizing of the NPRM. Instead, Chairman Dougherty was presented a "final" version of the NPRM and told that it would be published on that same day. Chairman Dougherty was also told that she could not publish a dissent in the Federal Register. After continued requests, Chairman Dougherty was told that she could publish a dissent, but that she had only one and one-half hours to complete it. Chairman Dougherty's dissent was then edited by the other two members of the Board, and she was informed that she could not include any discussion of the procedure flaws in the preparation of the NPRM in her dissent.

We appreciate the opportunity to provide comments on the NPRM.

Sincerely,

Stan Bernstein, President

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VIA EMAIL AND FIRST CLASS MAIL

December 28, 2009

The Honorable Elizabeth Dougherty, Chair
The Honorable Harry Hoglander, Member
The Honorable Linda Puchala, Member
National Mediation Board
1301 K Street, NW, Suite 250
Washington, D.C. 20005

Re: Representation Election Procedure, Docket No. C-6964

Dear Chairperson Dougherty and Members Hoglander and Puchala:

Southwest Airlines Co. ("Southwest") offers the following comments with respect to two specific issues related to the above-captioned Notice of Proposed Rulemaking ("NPRM") to amend the National Mediation Board's ("NMB") election procedures under the Railway Labor Act ("RLA"). While Southwest generally is supportive of the NMB's stated goal "to create election procedures that will provide a more reliable measure/indicator of employee sentiment in representation disputes and provide employees with clear choices in representation matters,"[1] we are neutral on the particular proposal the Board is now considering. However, should the Board choose to move forward in amending the RLA election procedures, the final rule should ensure that any new election procedures are applied broadly and consistently to cover representation and decertification procedures.

To accomplish its stated purpose, Southwest urges the Board to pursue amendments to RLA election procedures that more closely conform with the election procedures of the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA"). Specifically, Southwest urges the Board to amend its proposed election procedures as follows: (a) to institute a uniform showing of interest for representation regardless of whether the employees are presently represented or not, and (b) to provide for a decertification procedure that mirrors the NMB's proposed new election procedure (i.e., a "yes" or "no" ballot with an election outcome based on the majority of ballots cast) and that is consistent with the election and decertification rules under the NLRA.

Southwest requests that any further action on the NPRM be taken in a manner consistent with the comments set forth in this submission. The measures we advocate correspond fully to the stated purpose and goals of the NPRM – i.e., "to provide a more

[1] 74 Fed. Reg. 56750 (Nov. 3, 2009).

reliable measure/indicator of employee sentiment in representation disputes and provide employees with clear choices in representation matters."

Background

Under the NMB's longstanding election procedures, a labor organization seeking to represent a craft or class must receive affirmative votes from a majority of eligible employees in the craft or class. These procedures are based on the NMB's interpretation of the provision in the RLA that states that "[t]he majority of a craft or class of employees shall have the right to determine who shall be the representative of the craft or class...." 45 U.S.C. § 152. Currently, NMB ballots do not contain a choice – i.e. there is no provision on the ballot for an employee to express "no" to union representation. If an employee does not desire union representation then the employee is instructed to refrain from voting.

Contrasted with the NMB election procedures are the NLRB election procedures under the NLRA. The NLRA procedures provide that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining...." 29 U.S.C. § 159(a). Although both the RLA and NLRA require a labor organization to obtain designation by a majority of employees in order to achieve representative status, unlike the NMB, the NLRB has always certified a collective bargaining representative on the basis of the majority of valid ballots cast by eligible employees. Unlike the NMB ballot, the NLRB ballot provides employees with a "yes" or "no" choice.

The NMB is now proposing to change its voting procedures in two respects: (1) to provide employees with a "yes" or "no" choice on the ballot; and (2) to determine the outcome of the election based upon the majority of the valid ballots cast.

Standards for Showing of Interest Should be Fair and Consistent

Under existing procedures, before conducting a representation election, the NMB requires signed authorization cards from a specified percentage of the employees in the craft or class to ensure that there is a sufficient interest among the employees to justify an election. In this regard, the NMB rules provide:

> (a) Where the employees involved in a representation dispute are represented by an individual or labor organization... a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees....
>
> (b) Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made

> before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees....
>
> 29 C.F.R. § 1206.2.

The NMB rules require a 35% showing of interest among employees who are unrepresented, but require more than a 50% showing of interest among employees who are already represented and covered by an existing collective bargaining agreement. Although the NMB is proposing to change its election rules as described above, the Board is not proposing to change its rules relating to showing of interest. 74 Fed. Reg. at 56752 ("The Board's proposed change will not affect the showing of interest requirements as set forth in 29 CFR 1206.2").

Failure of the NMB to amend its showing of interest requirements in circumstances where employees are already represented, will result in the anomalous situation of the Board requiring a greater showing of interest (more than 50%) than would be required to win the election (majority of affirmative votes cast). It would be logical, therefore, for the NMB to amend its showing of interest rules to require a 35% showing of interest without regard to whether employees are already represented or not. This would bring NMB practice into conformity with NLRB practice of requiring a 30% showing of interest whether the employees are already represented or not.[2]

NMB Should Establish Clear Decertification Procedures

The RLA not only guarantees employees the right to union representation, it also guarantees employees the right to be unrepresented. See Railway & Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees, 380 U.S. 650, 669, n.5 (1965) ("The legislative history supports the view that employees are to have the option of rejecting representation."). Nevertheless, the NMB, unlike the NLRB, has established no decertification election procedure. It defends this lack of decertification procedure on the grounds that the NLRA, unlike the RLA, specifically provides for such a procedure. See 29 U.S.C. § 159 (c) (1) (A) (ii); see also In re Chamber of Commerce, 14 N.M.B. 347 (1987) (denying the Chamber of Commerce's request that the NMB amend its rules to provide for a decertification procedure).

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[2] NLRB Rules and Regulations and Statements of Procedure § 101.18 states as follows:

> The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.

As a consequence of the NMB's refusal to provide for a decertification procedure, some creative employees who desired to remove an incumbent union developed a technique of filing an application for representation with the NMB with no intent of representing the craft or class if successful in the election. Initially, the NMB took the position that it was contrary to the purposes of the RLA to process such an application. Atchison, Topeka & Santa Fe Ry. Co., 8 N.M.B. 469 (1981). The NMB also amended its Representation Manual to require any applicant for representation to comply with the reporting requirements of the Labor Management Reporting and Disclosure Act, 29 U.S.C. sec. 401 et seq., and to require any representative to refrain from renouncing representative status for a period of one year following certification. Lamoille Valley R.R., 8 N.M.B. 454, 455 (1981), upheld in Lamoille Valley R.R. v. NMB, 539 F. Supp. 237 (D. Vt. 1982); Transkentucky Transp. Ry., 9 N.M.B. 190 (1982).

However, the Fifth Circuit in 1983 held that the NMB's refusal to entertain an application when the applicant had no intention of representing the craft or class was contrary to the Board's statutory duty to investigate representation disputes under the RLA. Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983), cert. denied 467 U.S. 1204 (1984). The court rejected the NMB argument that its refusal was justified because the purpose of the RLA was to encourage representation. In this regard, the Fifth Circuit noted that the RLA "supports but does not require collective bargaining" and that inherent in the freedom to select a collective bargaining representative is the concomitant right to reject such representation. 714 F.2d at 1341.

In response to the Russell decision, the NMB will now process the application of a representative without regard to whether the applicant intends to represent the craft or class. In re Chamber of Commerce, 14 NMB 347, 358 (1987). But the NMB continues to refuse to establish a forthright procedure for employees to decertify an incumbent union whose representation the employees wish to end, requiring employees to engage in the charade of filing an application for representation with no intent to represent. It is time for the NMB to establish a straightforward procedure for decertification.

In summary, this rulemaking initiative provides the Board with an excellent opportunity to fully examine the fairness and reliability of its long-established representation election procedures under the RLA. Southwest therefore requests that, given the broad and substantive changes being proposed by the Board, any further action on the NPRM be taken in a manner consistent with the comments presented above. The measures described herein are fully consistent with, and will materially advance, the stated purpose of the NPRM to provide employees with clear choices in representation matters. We appreciate your consideration of this submission.

Respectfully submitted,

Robert W. Kneisley

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December 16, 2009

SENT VIA E-MAIL [LEGAL@NMB.GOV] AND U.S. MAIL

National Mediation Board
1301 K Street, NW
Suite 250 East
Washington, DC 20005

RE: Docket # C-6964 Notice of Proposed Rulemaking (Representation Election Procedure)

Dear NMB Board Members:

We at Bombardier Aerospace/Flexjet ("Flexjet") write to express our opposition to the Notice of Proposed Rulemaking ("NPRM") published on November 3, 2009. The NPRM would change the way in which elections have been conducted under the Railway Labor Act ("RLA") for the past 75 years, and the NPRM further undermines the stability of labor relations in the airline industry. Moreover, the process under which the NPRM was drafted was flawed and gives the impression that two members of the Board were attempting to push the NPRM through without giving due respect to the input of the third member of the Board.

First, with respect to our Company, Flexjet is headquartered in Dallas, Texas. Since 1995 Flexjet has been offering fractional ownership in business jets. We provide dedicated flight operations and related services to our customers and currently employ approximately 820 dedicated professional aviation employees. As safety is our number one priority, our standards for hiring, training, and aircraft maintenance are among the highest in the industry. As such, Flexjet has a vital interest in this proposed rule change and the possible adverse effect it may have on the stability of airline labor.

Second, with respect to the merits of the proposed rule change, since its inception in 1934, the National Mediation Board has consistently held that a majority of eligible voters must vote for representation in order for a union to be certified as the bargaining representative of a craft or class. This "majority rule" has been challenged on four separate occasions, and the Board upheld the majority rule in each of those cases. In a 1948 challenge to the majority rule, the Board recognized that the majority rule promoted stable labor relations.[1] The Board reiterated this sentiment in its Sixteenth Annual Report of the National Mediation Board, noting that the Board's duty under Section 2, Ninth "can be more readily fulfilled and stable relations maintained by a requirement that a majority of eligible employees cast valid ballots..." When the International Brotherhood of Teamsters challenged the majority rule in 1987, the Board denied the IBT's request, holding, "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."[2]

The Board's NPRM does not provide any persuasive reason for changing a rule that has been in place for 75 years, nor does the Board's NPRM satisfactorily address the impact of the proposed rule on the stability of labor relations. Instead, the Board claims that it is unaware of any democratic elections conducted in the manner of the majority rule election. While it is true that politician elections are

[1] Pan American Airways, 1 NMB 454, 455 (1948).
[2] Chamber of Commerce of the U.S. and the International Bhd. of Teamsters, 14 NMB 347, 362 (1987).

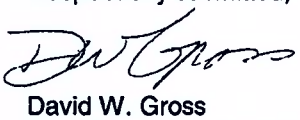
conducted based on the number of voters who cast votes, that situation is completely inapposite. Politicians serve for terms that are both limited and specified. If the voters are displeased with a politician, or if the politician loses the support of the constituency, the constituents have the opportunity to vote the politician out of office. No such right exists under the RLA.

It is also true that, under the National Labor Relations Act ("NLRA"), the National Labor Relations Board ("NLRB") will certify a union as a group's bargaining representative if that union receives a majority of the votes cast. However, the Board has recognized that its voting rules and election procedures are different from those used by the NLRB.[3] One of the most fundamental differences between election procedure under the NLRA and election procedure under the RLA is that there is no formal decertification procedure under the RLA. If the Board is going to change the election rules to allow a minority of employees to vote in a union, the Board must also change the rules to allow a majority of employees to vote the union out if they are displeased with the union.

Finally, the process that the Board used to prepare the NPRM is also flawed. The Board failed to consult Chairman Elizabeth Dougherty during the drafting of the NPRM. The Board also failed to ask Chairman Dougherty for her input prior to finalizing the NPRM. Instead, Chairman Dougherty was presented a "final" version of the NPRM and told that it would be published on that same day. Chairman Dougherty was also told that she could not publish a dissent in the Federal Register. After continued requests, Chairman Dougherty was told that she could publish a dissent, but that she had only one and one-half hours to complete it. Chairman Dougherty's dissent was then edited by the other two members of the Board, and she was informed that she could not include any discussion of the procedure flaws in the preparation of the NPRM in her dissent. The Board's rushed and exclusionary behavior gives the impression that the Board is biased towards the change.

We appreciate the opportunity to comment on this important and unprecedented change to the RLA voting procedure. We also want to add that we have reviewed the comments made during the NMB's December 7, 2009 hearing and urge the Board to adopt the positions opposing the rule change and the process in which the NPRM was prepared including those presented by the Air Transport Association of America, The Airline Industrial Relations Conference, the US Chamber of Commerce, and the Regional Airline Association. Thank you for your consideration of our views.

Respectfully submitted,



David W. Gross
Vice-President, Flexjet Operations

DWG:mj

cc: Mary Johnson, General Counsel (via U.S. mail)

[3] See e.g. Zantop Int'l Airlines, 9 NMB 70, 79 (1981).