LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION

U.S. CHAMBER OF COMMERCE

Statement of Randel K. Johnson
Senior Vice President, Labor, Immigration, and Employee Benefits
Before the National Mediation Board
Regarding Proposed Changes to Representation Election Procedures
December 7, 2009

Thank you Chairman Dougherty and Members of the Board. My name is Randy Johnson and I am Senior Vice President of Labor, Immigration, and Employee Benefits at the U.S. Chamber of Commerce (Chamber). The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber's membership includes many employers subject to the Railway Labor Act ("RLA" or "the Act") including those in the railroad industry, airline industry, and in other industries that are deemed derivative carriers under the RLA. Our membership also includes trade associations that broadly represent carriers in both the railroad and airline industries.

The Chamber opposes the Board's proposal to change its rules for representation proceeding. However, rather than offer comprehensive comments in response to the Board's proposal, our comments today focus on two particular issues, one substantive and one a matter of process.

Our substantive comments today are focused on the failure of the Board to include in its proposal any changes to the method by which unions are decertified under the RLA. Specifically, if the Board is to change its procedures to rely on a majority of votes cast, then the Board should also amend its procedures to allow employees to vote to decertify a representative in the same manner. Decertification should be a mirror image of certification and should be conducted using the same criteria and voting procedures used by the Board in response to an application to certify a union representative beginning with an application supported by a showing of interest from 35% of the affected craft or class rather than the majority showing of interest required today. This would then be followed by an election using the same ballot used to elect a representative, re-phrased to permit a vote to decertify rather than to elect a representative. Such a change is needed to ensure that the representation duties of the Board are carried out in a manner that is consistent with the Act and that is fair and just.

The Act contemplates that the right of the majority to determine their representative will be exercised in the same way to the decertification process as is applied to the certification process. In its proposal, the Board has stated that its "primary duty in representation disputes is to determine the clear, un-coerced choice of the affected employees."[1] This duty applies equally when employees no longer wish to be represented and the Board's current proposal creates a double standard in RLA representation disputes, overtly favoring unions at the expense of employee freedom of choice.

We recognize that the Board has previously considered and rejected our proposed change, but in each instance that rejection was under the assumption that the Board's longstanding majority rule voting procedures would remain unchanged, i.e. that majority support for union representation would be required in order to certify a representative. If the proposal is adopted, however, there is no longer a determination that a majority of employees has ever supported representation, let alone that a majority continue to support representation by the union certified. In those circumstances, it is all the more important that the employees have an equal right to exercise their choice not to have union representation—just as the employees subject to the National Labor Relations Act ("NLRA") are able to do. If, as the Board argues, the expressed will of a majority of voters is sufficient to select a union, the same standard must apply to de-selection. To require any other standard would be to impair and inhibit employee freedom of choice in representation matters. The Supreme Court has confirmed that such freedom of choice is required by the RLA.[2] As the Court stated in *Russell* v. *National Mediation Board*,:[3]

> employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well. The language of the Act…clearly stands for this proposition. ….the implicit message throughout the Act is that the "complete independence" of the employees necessarily includes the right to reject collective representation. Indeed, the concept of "complete independence" is inconsistent with forced representation, most especially when that forced representation is at odds with employees' will and desires.[4]

In *Teamsters* v. *BRAC*,[5] the Court expressly agreed with *the Board's* position that under the RLA "it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face, that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit."[6] As the Fifth Circuit further stated in *Russell,* the Board's duty under Section 2, Ninth of the RLA is to find the fact in dispute

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[1] 74 Fed. Reg. 56,742.

[2] *BRAC v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650 at 669 n.5 (1965) ("legislative history of the RLA] supports the view that the employees are to have the option of rejecting collective representation.").

[3] 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

[4] 714 F.2d at 1343.

[5] 402 F.2d 196 (D.C. Cir.), *cert denied*, 393 U.S. 848 (1968),

[6] 402 F.2d at 202-03.

and the "Board failed here to find the fact in dispute: who is the true representative of the employees?"[7]

Nevertheless, the Board has a long history of disfavoring employee rights when it comes to decertification of a union.[8] If the Board truly believes the existing certification rules are out-of-date and confusing, they are a model of clarity when compared to current decertification procedures that effectively require the replacement of one union with a "straw man" that is ultimately abandoned.[9] It is incumbent upon the Board to equally respect the freedom to association with the freedom not to associate.

The second matter I wish to address today is procedural. This is not the first time the Chamber has made a request such as this. On September 5, 1985, the Chamber made a similar request. Records indicated that the Board received this request on September 9 and on September 12, the Board announced a hearing on the matter. On September 30, 1985, the International Brotherhood of Teamsters filed a petition similar to that proposed by the AFL-CIO's Transportation Trade Department (TTD) earlier this year. The next day, the Board filed a notice consolidating the matters. Evidentiary hearings and other formal proceedings were held and, as the Board knows, ultimately no changes were made as a result of the petitions.[10]

Whatever one thinks of the results of the Board's deliberations in the 1980s, one thing was clear—both the Chamber and the petitioning labor unions had their proposals before the Board and stakeholders had an opportunity to evaluate them and participate in the Board's processes.

Contrast this with the processes in use by the current Board. After learning of the TTD's request for the Board to adopt the change it has proposed today, the Chamber sent a letter in opposition to the request and making the same points I am making today—that if the Board goes down this road it is incumbent upon it to adopt mirror-image decertification rules. To date we have received no response and no acknowledgement of our request. Nevertheless, here we are debating the TTD's proposal, as embraced by the

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[7] 714 F.2d at 1347.

[8] For example, by requiring putative representatives to comply with the organizational and reporting requirements of the Labor-Management Reporting and Disclosure Act within 90 days of filing an application, requiring a one year period before a representative could renounce representation, and refusing to conduct an election if the applicant did not intend to "represent" employees. THE RAILWAY LABOR ACT (Douglas L. Leslie ed., 1995) 136.

[9] As described in one treatise:

> The NMB has no standard procedure governing cases in which employees desire to terminate their union's representative status. Decertification has typically been achieved through a "straw man" petition by one or more employees who only nominally seek to become the new representative. The straw man must present a majority showing of interest. The ensuing election could result in decertification in two ways. If a majority of employees do not vote for any representative, the incumbent union would be decertifiedand the employees would become unrepresented. Alternatively, the straw man could petition for an election, win the election, and then disclaim representative status.

THE RAILWAY LABOR ACT (Douglas L. Leslie ed., 1995) 136 (*citing In re* Chamber of Commerce, 14 NMB 347).

[10] *See* 14 NMB 347 (1987).

Board without any knowledge of whether the Board has even received the Chamber's request or when it will move to invite the views of interested stakeholders and properly consider the matter.

If the Board truly believes it is necessary to amend its representation rules, it is critically important that it do so in a fair and impartial manner.

Thank you for the opportunity to present these views. Please do not hesitate to contact us if the Chamber can be of further assistance in this matter.