Communications Workers of America
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Mary K. O'Melveny
General Counsel

December 24, 2009

Via Email and U.S. Mail

Mary Johnson, General Counsel
National Mediation Board
1301 K Street, NW
Suite 250E
Washington, D.C. 20005

Re: **Notice of Proposed Rule-Making, Docket No. C-6964**
29 CFR Parts 1202 and 1206

Dear Ms. Johnson:

Enclosed please find Comments from the Communications Workers of America, AFL-CIO on the rule change being proposed by the National Mediation Board to permit a majority of valid ballots cast in an NMB-supervised election to determine the craft or class representative.

CWA strongly supports the proposed change, as set forth in the attached materials.

Please feel free to contact me if you have questions about CWA's Comments or if further information is deemed appropriate or necessary.

Sincerely,

Mary K. O'Melveny
General Counsel

MKOM/kpm
Enclosure

cc: Larry Cohen, President

NATIONAL MEDIATION BOARD
WASHINGTON, D.C.

In the Matter of the	)	**Docket No. C-6964**
Proposed Rule-Making	)	
29 C.F.R. Parts 1202 and 1206	)	

COMMENTS OF COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO IN SUPPORT OF PROPOSED RULE-MAKING

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Introduction

The Communications Workers of America, AFL-CIO ("CWA" or "the Union"), represents over 600,000 workers in the United States and Canada who are employed in the telecommunications, airlines, manufacturing, media and other industries and in the public and private sector. CWA submits these comments on the voting rule change proposed by the National Mediation Board ("NMB"), as set forth in the NPRM published on November 3, 2009 in the *Federal Register*, 74 Fed. Reg. at 56750. The proposed changes would amend the election process previously utilized by the NMB, implementing the Railway Labor Act, 45 U.S.C. §151, *et seq.* ("RLA" or "the Act"), "to provide that, in representation disputes, a majority of valid ballots cast will determine the craft or class representative." CWA strongly endorses the proposed new rule.

The Association of Flight Attendants (AFA-CWA) has been a Sector of CWA since 2004. AFA-CWA represents over 55,000 flight attendants working for numerous carriers around the world.[1] AFA has represented flight attendants at Northwest Airlines for over 60 years and is currently fighting to obtain strong negotiated benefits for thousands of additional flight attendants as a result of the merger of Northwest Airlines and Delta. CWA also represents

[1] AFA-CWA has submitted separate comments on the proposed rule change. CWA endorses and incorporates those comments. CWA also supports the comments submitted at the December 7, 2009 Open Meeting by Carmen Parcelli on behalf of the AFL-CIO Transportation Trades Department.

approximately 4,800 Customer Service Representatives at US Airways.[2] These employees work at US Airways gates, ticket counters and reservation centers. In addition, CWA has been and is currently involved in organizing efforts at Piedmont Airlines, American Airlines and American Eagle. The Piedmont employees work as Customer Service Representatives at gates, ticket counters and reservation centers and also do "below the wing" work at various airports on the east coast. There are approximately 3,000 Piedmont workers involved in the CWA campaign. At American and American Eagle, CWA's organizing campaign involves approximately 7,000 Customer Service Representatives at gates, reservation centers and ticket counters across the country. As discussed more particularly below, CWA's longstanding representational efforts on behalf of these airline employees has been greatly hindered by the NMB's use of the current rules which contradict the democratic principles that govern the election process in other industries, as well as those determining the nation's political process.

The Current Rule Does Not Serve the Statutory Intent of Enabling Covered Employees to Organize and Select a Union Representative without Interference, Influence or Coercion

The Railway Labor Act was intended to grant covered employees a meaningful opportunity to organize and select a representative of their choice, free of "interference, influence or coercion" which could "corrupt or override the

[2] There are approximately 9,000 union-represented Customer Service Representatives at US Airways. CWA's representation covers US Airways Customer Service Representatives working east of the Mississippi River; Customer Service Representatives located west of the Mississippi are represented by the International Brotherhood of Teamsters (IBT) and work at the US Airways subsidiary America West. *See In re Airline Customer Service Employees Association, IBT-CWA*, Case No. R-7085, 33 NMB No. 31 (April 20, 2006); *US Airways/America West Airlines*, 33 NMB 151 (2006).

will" of the employees on the matter of union representation. *Texas & N.O.R.R. Co. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 553 (1930) ("Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme"). The NMB is mandated by the RLA to ensure that employees in any craft or class are able to designate a representative without carrier interference or other improper conduct. The statute grants broad discretion to the agency to determine the manner of fair election that will ensure such a result. *See* 45 U.S.C. § 152, Ninth (NMB may utilize secret ballot election or "any other appropriate method" that ensures that the employees' choice of representatives in honored); 45 U.S.C., §152, Fourth ("majority of any craft or class of employees shall have the right to determine who shall be the representative"). The current NMB "super majority" rule is neither mentioned in nor mandated by the Act.

The NMB's current rule has allowed the agency to count a failure to vote as a "no" vote, rather than adhere to the settled practice utilized for political elections at the federal, state and local levels, as well as for employee representation elections before other administrative agencies such as the National Labor Relations Board (NLRB), which counts only those votes affirmatively cast. The NMB's present anti-democratic process has no counterpart in any other electoral setting in the United States where those who elect not to vote "are presumed to assent to the expressed will of the majority of those voting." *Virginian Railway Company v. System Federation No. 40,* 300 U.S. 515, 560 (1937)(confirming NMB's broad discretion to determine rules for

elections under the RLA).[3] Yet, in order for a union to be successful in a representation campaign under the NMB's current rules, it must win the votes of more than fifty percent (50%) of all eligible voters in the craft or class, including those who may be on leave or otherwise difficult or impossible to locate, rather than 50% plus one of the people who actually want to cast ballots in the election. Thus, under the existing rules, an eligible voter who decides not to vote, does not know about the election at all or cannot vote for a variety of reasons that may or may not be intentional, is treated as a vote against union representation. This unfair process demeans the right to vote and denies to covered employees the free choice guaranteed by the Act.

Rather than encouraging voter turnout where the election winner truly reflects the majority of those who have voted "yes" or "no," after both sides have been able to effectively and fairly present their arguments for or against union representation, the NMB's unprecedented rule creates a "super majority requirement." This, in turn, creates strong carrier incentives to take actions that undermine the concept of democratic elections. First, the existing rule encourages the creation by employers of inflated and inaccurate lists of "eligible" voters which then require the petitioning union to spend precious time and assets locating individuals who may have no stake in the election issues and challenging incorrect and misleading information. Second, the rule encourages carriers to dissuade their employees from voting and to support

[3] As observed in the December 1, 2009 letter to the NMB from certain members of Congress, if the NMB's current rule treating non-voters as "no" votes was applied to those running for national offices, "thousands of elected federal, state and local officials would never hold public office" because low voter turnout often falls below 50% of the eligible electorate.

ballot destruction and vote suppression rather than election participation which in turn undermines the perception of the agency as a fair or neutral authority.[4] Third, the rule encourages carrier conduct that intimidates prospective voters. It is evident that a rule which fundamentally demeans the value of democratic elections and creates skepticism about the election process is harmful to the agency's ability to effectively carry out its statutory duties and should not be continued.

CWA's Experiences with the NMB's Existing Rule Underscore the Need for Change and the Urgency of Establishing a Truly Democratic Election and Certification Process

CWA respectfully submits that its experiences trying to obtain union representation for employees at US Airways, American/American Eagle and Piedmont Airlines provides important examples of why the proposed rule should be adopted. As described more fully below, CWA encountered numerous obstacles under the existing super majority rule that unfairly deprived workers at those carriers of the free choice guaranteed by the RLA. The proposed rule will better serve the interests of the agency in overseeing a truly fair process for determining whether airline employees desire union representation. The proposed change will also eliminate the current rule's incentives to employer vote suppression, manipulation of voting lists and other anti-democratic tactics.

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[4] As carefully documented in research by Dr. Kate Bronfenbrenner, Director of Labor Education Research at the Cornell School of Industrial and Labor Relations, voter turnout in a typical election conducted under the auspices of the National Labor Relations Board is approximately 88%, while voter turnout in NMB-conducted elections tends to typically fall below 50%. *See* Statement of Dr. Bronfenbrenner submitted at NMB Open Meeting, December 7, 2009.

A. US Airways

Passenger service employees at US Airways began organizing with CWA in June, 1995, seeking wage increases (a wage freeze had been in effect for over three years), job protections and an end to relentless pension and other benefits cuts. CWA filed a petition with the NMB seeking a representation election in April, 1996. A mail ballot election was conducted between December, 1996 and January, 1997. CWA came within 447 votes of satisfying the NMB's "super majority" rule that required votes from 50% plus one of an estimated 10,000-member "eligible" voter pool. Had the rule now proposed been in effect for that first election, CWA would have easily been certified as the winner.

The US Airways election results also reflected the consequence of serious voter suppression efforts by the carrier which were documented in extensive objections filed by CWA in February, 1997. In June, 1997, the NMB upheld CWA's objections and ordered a re-run election. *In re Application of CWA (US Airways),* Case No. R-6435, 24 NMB 354 (June 19,1997). Rather than comply with the NMB order establishing ground rules for the re-run election, US Airways filed a lawsuit claiming that its First Amendment rights had been "chilled" by the NMB's ruling. The carrier then brought further legal proceedings to try to prevent the re-run election from taking place. Eventually, however, a re-run election was conducted between August and September, 1997 and 55% of the 8,772 employees then deemed eligible to vote did so. CWA was certified as the bargaining agent in October, 1997.

While contract negotiations were underway, in May, 1999, the United States Court of Appeals for the District of Columbia Circuit invalidated the re-run election, holding that NMB's order had improperly "chilled" the carrier's First Amendment right to aggressively argue against union representation. *US Airways, Inc. v. National Mediation Board,* 177 F.3d 161 (D.C. Cir. 1999).[5] Despite the overwhelming support demonstrated by the second vote, US Airways refused to abide by the election results, forcing CWA to request an expedited second re-run election; US Airways then filed "objections" which further delayed the election process until mid-July. *See In re Communications Workers of America (US Airways),* Case No. R-6435, 26 NMB No. 63 (June 25, 1999). On August 20, 1999 CWA was again certified as the election winner with 5,254 votes out of an eligibility pool of 7,806 (67% vote for union representation). A first contract was finally reached in November and ratified in December, 1999, more than four years after US Airways' customer service workers first sought union representation and a full three years after the first election which CWA would have won, had it been conducted in the democratic tradition of political or workplace elections in every other arena. In short, had the NMB followed the rule now proposed when workers at US Airways first sought union representation at work, years of effort and costly legal proceedings and re-run elections would have been completely unnecessary.

[5] The appeals court did not overturn the NMB's findings that the carrier had unlawfully interfered with its employees' free choice opportunities in the election, nor did it modify the NMB's order notifying US Airways' employees that the carrier had "interfered with and coerced the employees' choice of a representative." 177 F.3d at 987 and 988, n.1.

B. American Airlines/American Eagle

CWA's organizing efforts for Customer Service employees at American Airlines began in 1997. After CWA filed a petition for representation with the NMB, American produced an "eligibility" list which included hundreds of individuals who had worked at locations closed many years before, many of whom had agreed to severance packages, others of whom were on "furlough" but not likely to ever return to the closed locations and still others of whom were listed at addresses that had not been accurate for many years.[6] The padded American eligibility lists meant that CWA was forced to spend hundreds of hours trying to locate the individuals whose names appeared on the list. Many of these individuals turned out to have elected severance payments when their offices were closed rather than remain on potential "recall" status. Thus, they were improperly listed as "eligible" voters, even though American was uniquely in a position to know their correct status. Others on the so-called eligibility list had long since moved on to jobs at different airlines or to other non-airline positions and thus had no interest of any kind in voting in the upcoming election at American. Others on the list were never located at all, despite repeated efforts to do so on the part of CWA representatives. Despite this obvious evidence of disqualification and/or disinterest, the existing NMB rules allowed each of these non-voting individuals to be counted as a "no" vote against CWA's representation petition.

[6] Many of the "furloughed" employees had worked at reservation centers and other locations that were closed almost ten years before the creation of the "eligibility" list.

Eventually, after CWA produced evidence to the NMB that hundreds of people listed as "eligible" to vote had no furlough recall rights of any kind, the carrier agreed to remove these names from the eligibility list. However, the time and resources that CWA was forced to expend trying to locate these individuals and to verify their eligibility took away from crucial time available to explain the benefits of union representation to potential voters who had a real stake in the election's outcome. If the NMB's proposed election rule had been in effect during the 1998 American election, these crucial hours wasted trying to determine whether the carrier had properly categorized eligible voters would not have been necessary. And, having created the erroneously inflated eligibility list – which immediately served the purpose of suppressing the voting impact of currently employed workers -- American had no motivation or need to verify the information it contained or to independently try to argue the merits of union representation to those workers. When the election was held, CWA failed to obtain 50% plus one of the 17,000 workers on the eligibility list, gaining "only" 45% of those votes. Had the new rules been in effect, however, CWA would likely have won, assuming voter turnout of less than 90% of eligible voters.[7]

CWA encountered other significant problems related to carrier misconduct that contributed to its 1998 election loss, including blatant captive

[7] On September 13, 2001, ballots were counted in CWA's representation petition for passenger service employees at American Eagle. CWA received 1,104 votes out of a potential voter pool of 2,962. Despite the fact that the voting period encompassed the September 11, 2001 attacks on the World Trade Center and Pentagon and the grounding and disruption of air traffic during this period of national emergency, the NMB refused to allow additional time for voting and rejected CWA's efforts to obtain a new election.

audience meetings and an aggressive ballot destruction campaign at airport terminals which intimidated many employees who had been supportive of the union at the time the petition was initially filed with the NMB.[8] Any election process which encourages potential voters to destroy ballots rather than exercise their right to express their views at the ballot box or polling place is, on its face, inconsistent with democratic ideals. Any process which relieves one side from the obligation to present cogent arguments in favor of its position, allowing it to win instead by simply arguing against casting votes at all, while burdening the other side with having to verify inflated and inaccurate ballot lists and at the same time trying to present arguments in favor of union representation is deeply flawed. Even more significantly, such a process undermines respect for the overall legitimacy of the agency's authority and integrity in creating a fair election certification process. As the agency charged with the important role of determining employee representation choices in such a key industry, the NMB's proposed rule correctly seeks a process which does not produce such an anti-democratic result.

C. Piedmont Airlines

CWA filed a petition to represent Fleet and Passenger Service employees working at Piedmont gates and ramps throughout the country in November,

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[8] For example, American set up tables at the Dallas, Texas airport, one of the largest locations in the country, and pressed employees to bring their ballots to be publicly shredded at the company's table. When a ballot was shredded, a company representative rang a bell which could be heard throughout the nearby area. Company literature stressed that workers should decline to participate in the election, rather than trying to argue its case for voting "no," because ballot destruction was the most effective option available under the NMB's existing voting rules. Company-prepared videos actually urged employees to tear up the NMB's ballots, with demonstrations of someone ripping the actual ballot in half.

2007. The NMB scheduled an election using telephone and internet voting to take place on February 19, 2008. The initial "eligibility" list prepared by the carrier in mid-December, 2007 included 2,787 individuals. In early January, 2008, after CWA learned that many of those on the initial list were not eligible to vote, Piedmont submitted a list of 78 "status changes" reflecting that 31 employees had resigned, 37 had been terminated, eight had become managers and two others were no longer members of the craft or class sought to be represented. As CWA's investigation and efforts to locate people on the list continued, it turned out that Piedmont had included numerous others who were not eligible to vote -- supervisors, former employees, employees on lengthy disability leaves, individuals working in positions not covered by the proposed unit and even the names of individuals who had died. CWA continually brought these status change issues to the NMB at various points prior to the election but eventually was unable to challenge a sufficient number to impact the election's outcome. After reviewing some of the CWA challenges, the NMB investigator agreed that additional individuals on the list included office and clerical workers who were not in the craft or class, individuals who had been on disability leave for more than two years and were ineligible under Piedmont's own policies, more individuals promoted to management positions and at least one who had resigned from the company. On February 12, 2008, the NMB investigator ordered 25 more names removed from the carrier's list; other names of ineligible voters, however, were not removed because the NMB

refused to change the list within seven days before the ballot count.[9] In total, CWA was able to provide evidence before the election that 169 individuals listed were not eligible to vote. After the election, the Union learned that 43 additional individuals had become ineligible to vote *before the election occurred.* These improperly included individuals had absolutely no stake in the outcome of the election, yet their votes were counted as "no" votes against CWA's petition for representation.

Another problem exacerbated by the NMB's super majority rule is that individuals who never receive ballots due to faulty addresses or other factors, including individuals who would like to vote "yes" for union representation, are nonetheless counted as "no" votes. At Piedmont, the carrier's eligibility list included a number of individuals who were serving in the armed forces in Iraq and Afghanistan who were impossible to reach by regular mailing methods in the short mailing/balloting time frame involved in that election. Although the company was aware that these individuals were no longer located within U.S. borders due to their military service, it did not change the addresses on the list used to determine the voting pool and did not notify CWA or the NMB that these potential voters were serving overseas and would not likely receive mail ballots or voting information in time to vote. The current rule encouraged the

[9] The perversity of the existing rule is exemplified by Piedmont's "passive" conduct in the face of CWA's ongoing presentation of evidence that the carrier had listed individuals who were not eligible to vote; although Piedmont alone had access to its employee personnel records, it did nothing to address obvious problems. Fifty seven (57%) of the status changes were first raised by CWA and then "confirmed" by the carrier when confronted with CWA's evidence. Essentially, the company simply watched the clock run out and did nothing affirmatively to ensure that the voting pool was accurate. And the NMB declined to use its statutory authority to investigate the carriers books to verify the accuracy of the proffered list. *See* RLA Section 2, Ninth, 45 U.S.C. § 152, Ninth; Section 12.3, NMB Representation Manual.

carrier's inaction because those lost votes were counted by the NMB as votes *against* union representation.

CWA came within 60 votes of the 50% plus one super-majority required by the NMB rules in the February, 2008 Piedmont election (1,228 votes out of 2,574 or 47.7% of those "eligible" to cast votes.)[10] The NMB declined to order a re-run of the election despite these well-documented problems.[11]

Conclusion

Many commentators have noted that the original justification for the current rule was a perceived danger posed by "company unions" to stable labor-management relations within the industry and that such a danger no longer exists.[12] Today, one need only read the business section of any newspaper to see that carriers are not promoting unions of any kind; instead, they are aggressively anti-union and they are aided in that motivation by the existing NMB rules which are overwhelmingly stacked in their favor. Moreover,

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[10] Had the NMB not counted as "no" votes the failure to vote by members of the military who did not receive ballots as well as by employees who requested but never received duplicate ballot instructions, CWA would likely have won the election.

[11] CWA's prior representation efforts at Piedmont were also compromised by the NMB's rigid adherence to its super majority rule. Between September and October, 2003, an election involving fleet and passenger service employees was held under NMB auspices. Of 1,121 voters listed as eligible, 469 cast votes seeking representation by CWA. CWA filed challenges to the carrier's conduct, including allegations of captive audience meetings and inaccurate employer statements about the voting process. Ultimately, the NMB found that the laboratory conditions required by the RLA for a fair election were not tainted. *See In the Matter of the Application of CWA,* Case No. R-6954, 31 NMB 257 (February 25, 2004).

[12] *See, e.g.,* Statement submitted by IBT Rail Conference Director and Vice President John Murphy at NMB Open Meeting, December 7, 2009.

the nature of the industry itself has been dramatically transformed in recent years.[13]

The proposed rule allows a simple majority of those employees who decide to vote to have their desire for union representation acknowledged and respected. This is the rule at the heart of our democratic system. It is essential to the RLA's goal of furthering cooperative labor-management relations because it ensures that the wishes of voting employees are respected. Our political system does not require a "super-majority" before we install Presidents, members of Congress or other key public servants to represent our citizens. School boards, judges, mayors and others in public life serve all even though they are frequently elected by a small minority of eligible voters. There is no basis for imposing a stricter standard on workers who happen to work in industries governed by the RLA.

As exemplified by CWA's experiences summarized above, the current NMB rule not only allows carriers to hide behind the "super majority" requirement, but encourages them to do so in an environment that undermines confidence in the electoral process and discourages informed participation by the very workers whose interests are supposed to be the focus of NMB protection. The proposed rule, by contrast, will ensure that airline industry employees are able to exercise meaningful electoral choice using a process that

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[13] The changes to the airline industry have been dramatic and draconian. De-regulation, bankruptcy, mergers and other major market-shaping events have eliminated many stable, longstanding collective bargaining relationships which functioned well for years without bitter election contests. The current situation involving Northwest and Delta flight attendants is but one example of such changes.

mirrors every other election opportunity with which they are familiar. Employees who want union representation will not be forced to overcome any obstacles to that goal other than opposing points of view. Unions and their supporters will no longer have to try to locate and/or persuade individuals who, for reasons beyond the reach of effective advocacy, have no interest in participating in the electoral process at all. Representation elections in RLA-covered industries will no longer be determined by non-engaged and disinterested individuals. The new rule will stabilize management-labor relations within the airline industry and will provide each side with the level playing field that we expect in every other aspect of our democratic process.

CWA respectfully urges the NMB to formally adopt the proposed voting rule change so that thousands of RLA-covered employees can enjoy the same right of self-determination on the job as workers in other industries enjoy and to which they are entitled in making crucial governance decisions in every other aspect of their lives.

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