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December 23, 2009

To: The Honorable Elizabeth Dougherty Fax: 202.692.5082 Phone: National Mediation Board

Fax #(s) verified before sending (initial):

From: Ilyse Wolens Schuman Fax: 202.478.2215 Phone: 202.423.2223

Length, including this cover letter: 5 Pages

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Message:

Please see the attached FOIA request. Thank you.

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Littler Mendelson, P.C. 1150 17th Street N.W., Suite 900, Washington, DC 20036 Tel: 202.842.3400 Fax: 202.842.0011 www.littler.com



Littler Mendelson, P.C.
1150 17th Street N.W.
Suite 900
Washington, DC 20036

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Ilyse Wolens Schuman
202.423.2223 direct
202.842.3400 main
202.478.2215 fax
ischuman@littler.com

BY FAX (202) 692-5082 & FIRST CLASS MAIL

The Honorable Elizabeth Dougherty
Chair
National Mediation Board
1301 K Street N.W.
Suite 250E
Washington, DC 20005

Re: Freedom of Information Act Request Appeal
FOIA File No. F.-1498

Dear Chairman Dougherty:

This is an appeal pursuant to 5 U.S.C. § 552(a)(6) and 29 C.F.R. § 1208.2(c) of the National Mediation Board's ("NMB") response to Littler Mendelson's Freedom of Information Act ("FOIA") request for information. On November 3, 2009, we requested, pursuant to FOIA, 5 U.S.C. § 552, 29 C.F.R. § 1208, information related to the NMB's Notice of Proposed Rule Making ("Proposed Rulemaking") concerning Representation Election Procedures, Docket No. C-6964, dated October 28, 2009, published at FR Doc. 2009-26437. By letter dated December 4, 2009, the NMB unilaterally extended its response deadline to our FOIA request until December 11, 2009. By letter dated December 11, 2009, the NMB again unilaterally extended its response deadline until December 18, 2009, purportedly due to the voluminous nature of the responsive material. On December 17, 2009, we received a response from Mary L. Johnson, General Counsel of the NMB, granting in part and denying in part our FOIA request, and providing a very small amount of material. The denial of our request violates FOIA and we appeal such denial for the following reasons.

First, the NMB's response granting in part and denying in part our FOIA request is insufficient as a matter of law because it does not comply with 29 C.F.R. Section 1208.2(b)(2)(i). Based on the dearth of documents provided by the NMB in response to our FOIA request, we challenge the adequacy of the NMB's search for and production of responsive documents. We are also entitled to additional, specific information explaining why two documents are allegedly "privileged." Specifically, the NMB states that it withheld two "full" documents because they are purportedly privileged under Exemption 5, the deliberative process privilege. However, the NMB provides no basis for its determination — not even a brief description of the nature of the material or an explanation of how the exemption allegedly applies to the withheld documents. 29 C.F.R. § 1208.2(b)(2)(i). In this regard, a District Court aptly noted that "it should not be necessary for a party to seek court intervention in order to receive

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sufficient information to assess the strength of an adversary's privilege claim." Securities and Exchange Commission v. Collins & Aikman Corp., 2009 U.S. Dist. LEXIS 3367 (S.D.N.Y. Jan. 13, 2009). Therefore, we request a ruling on our appeal with respect to the NMB's determination to classify certain documents as privileged.

Second, the NMB's response does not disclose the "name or names and positions of the person or persons, other than the Chief of Staff, responsible for the denial." 29 C.F.R. § 1208.2(b)(2)(ii). Accordingly, we are entitled to such information.

Third, the NMB's response does not "specify the number of pages" Ms. Johnson withheld or indicate whether Ms. Johnson made "a reasonable effort to estimate the amount of withheld information," in violation of the NMB's FOIA Reference Guide.

The deliberative process privilege protects only disclosure of "inter-agency or intra-agency memorandums or letters," which typically would not be available to a party in litigation with the agency. 5 U.S.C. § 552(b)(5). Thus, documents that were obtained from any interested parties are not protected. U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9, 12, 13 (2001). To satisfy the deliberative process privilege and properly withhold a document or communication, the NMB must meet two requirements. First, the document or communication must be prepared in order to assist an NMB decision-maker in arriving at the NMB's decision. Second, the document or communication must form a part of the NMB's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. And, even if these two requirements are met, the NMB has a statutory duty to release all "reasonably segregable" factual portions of a withheld document. 5 U.S.C. § 552(b) ("The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made").

Assuming the NMB has inappropriately withheld these wholly unidentified documents and communications, we request that the NMB provide them to us without further delay. We further request that, if any of the documents and communications, or any portion of the documents and communications, are withheld, the NMB explain the full basis for its determination and that it meet all of its other obligations under the law.

Moreover, after more than six weeks, we received a total of 19 letters or faxes and seven e-mails and were instructed to download "relevant documents" from the NMB's website. Based on the types of documents and communications we seek in our FOIA request and the scant response the NMB provided, we believe that the NMB has not conducted a complete or even a reasonable search of and review for responsive documents.

The NMB nonetheless determined that two extensions of time were necessary to respond to our FOIA request. Both notices of extension cited the need to "search for, collect, and

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examine the voluminous amount of records identified in your request". Therefore, it was quite surprising that, from this "voluminous amount of records", a total of only 26 documents were disclosed and two were withheld.

Our request asked for the following information related to the Proposed Rulemaking:

1. All communications, including but not limited to, correspondence; e-mails; faxes; voice mails or notes, between Members Harry Hoglander, Linda Puchala and/or Board Chairman Elizabeth Dougherty and any labor organizations or collective bargaining representatives as defined by either the Railway Labor Act or the National Labor Relations Act, their officers or agents, concerning the above-referenced proposed rule change or any request that the Board alter representation election procedures, from January 1, 2009 until the present.
2. All communications, including but not limited to, correspondence; e-mails; faxes; voice mails or notes, between Members Hoglander, Puchala and/or Chairman Dougherty and any other outside parties, including but not limited to, Members of Congress, the White House, their staffs, or congressional committees and their staffs, concerning the above-referenced proposed rule change, from January 1, 2009 until the present.
3. All calendar entries reflecting the above-referenced subject matter of Members Hoglander, Puchala and/or Chairman Dougherty, and maintained in their official capacities as Members/Chairman of the Board from January 1, 2009 until the present.
4. All minutes and/or notes from deliberations conducted by the Members/Chairman of the Board, including but not limited to correspondence, notes, e-mails or voice mails from January 1, 2009 until the present.
5. All opinion memoranda or other non-privileged advice or counsel sought by and/or received by Members Hoglander and/or Puchala and/or Chairman Dougherty in conjunction with their consideration of the proposed rule, including but not limited to, memoranda, advice or counsel regarding the scope of the Board's statutory authority, if any, to implement such a change, from January 1, 2009 until the present.

We note, for example, that with respect to item 1 above, only five documents were disclosed. We also note that no items with respect to item 3 above were disclosed, and it strains credulity to accept the representation that no documentation pertaining to meetings or calendar entries regarding this pivotal shift in policy exists in any form.

In our FOIA request, we requested that the NMB take steps to ensure that all of the aforementioned information sought is retained and protected against loss or destruction, including, but not limited to, information that might be required to be produced pursuant to Federal Rules of Civil Procedure 34. Accordingly, please advise which, if any, such steps were taken.

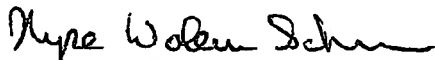
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Given the significance of the Proposed Rule Making, it is remarkable that the NMB's search of the "voluminous amount of records" generated only 28 documents, two of which were withheld. Please confirm that the 28 documents produced constitute the entire scope of documents responsive to our request for information regarding the Proposed Rule Making.

As you know, on December 15, 2009, Littler Mendelson requested an extension of the comment period on the Proposed Rule Making citing, at that time, the failure of the NMB to respond to the FOIA request. While the NMB did subsequently submit a response to our FOIA request, accompanied by a denial of our request to extend the comment period for reasons of mootness, the incomplete response (which we challenge for the reasons discussed above) does not obviate the necessity for an extension to the comment period. Because it does not obviate the need for an extension, we are expressly restating our request for an extension of the comment period for 30 days. We ask both that our FOIA request be properly answered and that the comment period be extended.

Thank you for your consideration.

Sincerely,



Ilyse Wolens Schuman

cc: Ellen Bronchetti
Ron Holland
Kevin Kraham
Jack Lambremont
Don Maliniak
Chip McWilliams
Peter Petesch
Patrick Ray
John Telford
C. Scott Williams