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December 15, 2009

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VIA OVERNIGHT DELIVERY AND EMAIL LEGAL@NMB.GOV

Elizabeth Dougherty, Chairman
Linda Puchala, Member
Harry Hoglander, Member
Mary Johnson, General Counsel
National Mediation Board
1301 K Street N.W.
Suite 250-East
Washington, D.C. 20005

Re: Docket No. C-6964

Dear Chairman Dougherty, Member Puchala, Member Hoglander, and General Counsel Johnson:

We have received Mary Johnson's correspondence dated December 11, 2009, in which she announced a second unilateral extension of time, through December 18, 2009, for the National Mediation Board ("NMB" or "Board") to respond to the Freedom of Information Act ("FOIA") request submitted on behalf of Littler Mendelson, P.C. ("Littler"), on November 3, 2009. As noted in Ms. Johnson's letter, the NMB's original response deadline was December 4, 2009. The decision to extend the timing of the Board's response by two (2) full weeks raises a number of additional legal and practical issues. To accommodate and minimize the impact of those additional issues, Littler hereby requests that the NMB extend the comment period on its Notice of Proposed Rulemaking (Docket No. C-6964) (the "NPRM") by at least an additional thirty (30) days, through and including February 3, 2010. Please also be further advised that, depending on the nature, volume, and sufficiency of the NMB's response to our FOIA request, Littler may request a further extension of the comment period to allow us to fully analyze the NMB's response prior to submitting formal comment on the NPRM. The reasons for our request follow.

1. The timing and pace of the NPRM process have caused many interested parties to question whether the NMB has pre-judged the issue, raising an inference that the comment process is a mere formality and not a meaningful exercise through which to analyze the propriety of a changed election process under the Railway Labor Act. Also, as noted by several commentators during the NMB's December 7 open meeting, the inclusion of a lengthy defense of the proposed rule change in the NPRM was a departure from prior Board conduct and gave the appearance that the ultimate decision of the majority had been

prejudged in a process not open to all interested parties. As I noted in my presentation during the December 7 meeting, Littler is withholding judgment on this issue until we receive sufficient information from the NMB to form a reasoned opinion. However, unless and until the NMB discloses the information requested through FOIA, which will shed light on the extent of the Board's pre-NPRM communications, we cannot meaningfully comment on the appropriateness of the Board's process or respond to the possibly undisclosed basis that may lead to the Board's ultimate decision.

2. Assuming that the NMB holds to its current schedule, we expect that the Board will respond to our FOIA request on Friday, December 18, 2009. In such an event, the soonest we could reasonably expect to receive the response (including any responsive information) would be Monday, December 21. That would leave us fourteen (14) calendar days – and seven (7) business days – in which to accomplish the following:

- (a) cull through the response;
- (b) organize the information;
- (c) analyze its contents;
- (d) make and resolve any appeal to NMB Chair Dougherty regarding the adequacy and lawfulness of the Board's response;
- (e) receive and analyze any additional information that might be forthcoming following any appeal that may be necessary; and finally,
- (f) prepare and submit our comments on the NPRM.

Depending on the nature of the Board's response and the volume of information included, fourteen (14) calendar days is far too short a period in which to accomplish all of these tasks. We are further disadvantaged by the fact that two major holidays fall in the midst of those fourteen (14) days, rendering the time table even less realistic for all involved.

In fact, depending on the nature of the Board's response to our FOIA request, the appeal process alone would very likely more than consume the fourteen (14) calendar days the Board's current response schedule would permit. According to the NMB's FOIA Reference Guide, Section X (Appeal Rights), the Chairman is allowed twenty (20) business days to respond to an appeal of a FOIA determination. If we were to appeal any deficiencies in the Board's response immediately on December 21, which may be unrealistic in itself, the Chairman would have until at least January 20, 2010, to respond to our appeal.

Obviously, our ability to provide comment based on any information we may ultimately receive would be completely frustrated under this scenario unless the Board takes the reasonable step of extending the comment period by the requested thirty (30) days.

3. Since we do not yet have any sense of the nature and scope of the NMB's response, we are in no position to comment on the necessity for multiple extensions of time for the Board to respond to our FOIA request. Regardless of the Board's reasons for requiring additional time to prepare a response to our request, these delays and any further delay in responding will certainly have the effect of prejudicing our ability to air all issues and provide the NMB with valuable information that may contribute to the Board's deliberative process after the close of the comment period. The only way to accommodate the Board's need for additional time without effectively penalizing Littler's participation in the NPRM comment process is to grant our request to extend the comment period.


4. At the December 7 NMB open meeting, it was evident to a number of the Littler attorneys present that there are at least as many people raising questions about the pace and timing of the NPRM process as there are about the actual substance of the proposal itself. We share the concern that the NMB's reputation as an honest broker to ensure labor peace in the air and rail industries has the potential to be unnecessarily tarnished in this process. In addition to ameliorating any prejudice to Littler's ability to provide meaningful comment on the NPRM within the time period prescribed, extending the comment period may also have some incidental positive impact on the industry's perception of the Board's continuing ability to remain impartial in the performance of its important duties.

Littler made its FOIA request immediately after the Board announced its NPRM, and we have been diligent in seeking information that we believe is necessary to evaluate the extensive changes the Board is proposing. Obviously, we appreciate that there may be voluminous information to be assembled and reviewed in response to our FOIA request, and we do not take issue with the Board's exercise of its prerogative to extend its response time by ten (10) business days. However, because we cannot anticipate the form, scope, or timing of the Board's eventual response (and for all of the additional reasons set forth in this letter), Littler hereby requests that the NMB extend the period for comment on its NPRM (Docket No. 6964) by at least an additional thirty (30) days, through and including February 3, 2010. Please do

Mary Johnson, Esq.
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not hesitate to contact me if you would like to discuss the matters raised in this correspondence.

Sincerely,

A handwritten signature in black ink that reads "Donald W. Maliniak". The signature is written in a cursive style with a large initial 'D'.

Donald W. Maliniak

DWM/crs

cc: Littler Transportation Core Group
Ellen Bronchetti
Ron Holland
Kevin Kraham
Jack Lambremont
Chip McWilliams
Peter Petesch
Patrick Ray
Ilyse Schuman
John Telford
Scott Williams