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VIA ELECTRONIC FILING (LEGAL@NMB.GOV)

Mary Johnson, Esq.
General Counsel
National Mediation Board
1301 K Street, NW
Suite 250-East
Washington, DC 20005

Re: Docket No. C-6964, Representation Election Procedure (RIN 3140-ZA00)

Dear General Counsel Johnson:

We write on behalf of Littler Mendelson, P.C., to comment on the National Mediation Board's (the "Board" or the "NMB") proposed rule regarding its Representation Election Procedure, published in the Federal Register on November 3, 2009. 74 Fed. Reg. 56750 (Nov. 3, 2009).

Founded over 60 years ago, Littler Mendelson is the country's largest law firm dedicated exclusively to the practice of labor and employment law. With over 750 attorneys in 49 offices across the country, our practice is truly national in scope. The Firm has established subject area "practice groups," which allow our attorneys to further concentrate on discrete areas within the broader field of labor and employment law. Littler Mendelson's Transportation Industry Practice Group focuses on complex labor and employment law issues affecting the Firm's transportation industry clients, including those subject to the Board's jurisdiction under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (the "RLA"). The Board's proposed rule will significantly impact the Firm's air and rail carrier clients, as well as the very nature of representation disputes, legal practice and collective bargaining under the RLA.[1]

In an effort to avoid unnecessary repetition among the various interested parties opposed to the Board's proposed rule, we have limited our comments to address six primary concerns arising from the Board's Notice of Proposed Rulemaking: (1) the proposed rule is inconsistent with the statutory language of the RLA; (2) the proposed rule undermines the policy goals of the RLA; (3) the proposed rule is a "fix" in search of a problem; (4) the Board's current rule is more consistent with democratic election principles; (5) the Board's process for consideration of the proposed rule is inconsistent with the process and standards the Board correctly imposed on itself in *Chamber of Commerce*, 14 NMB 347 (1987); and (6) the proposed rule does not adequately analyze the potential additional costs (both to the regulated community

[1] The views expressed herein are those of the Firm's Transportation Industry Practice Group and do not purport to be the views of any individual air or rail carrier client represented by Littler Mendelson.

and to the Board itself) that may flow from implementation of the proposed election rule change.

1. The Proposed Rule Is Inconsistent With The Statutory Language Of The RLA.

Section 2, Fourth of the RLA provides that "[t]he ***majority*** of the craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter" (emphasis supplied). Notwithstanding this clear statutory mandate, the proposed rule would result in the Board issuing certifications, in some instances, based on support from less than a "majority" of the craft or class.

Specifically, under the proposed rule, the Board would certify a representative based on "the majority of valid votes cast in the election" rather than on the majority of eligible voters working in the craft or class. 74 Fed. Reg. at 56752. For example, in a craft or class of 100 employees, if only 50 employees participate in the election, a representative could be certified on the basis of only 26 votes cast in favor of representation – considerably less than a "majority" of the craft or class. Under the proposed rule, therefore, the Board could certify a representative even though only a "minority" of the craft or class affirmatively select it.

Section 2, Fourth was part of an amendment to the RLA in 1934. Congress intended the 1934 amendment to the RLA to address the problem of carrier-dominated unions, which often lacked the support of the majority of the system-wide craft or class. As International Brotherhood of Teamsters representative John Murphy stated at the Board's December 7, 2009 open meeting on the proposed rule, Congress addressed the "company-union" issue in 1934 by adding to the existing legislation Section 2, Ninth (which prohibits carrier interference in the election process) ***and*** Section 2, Fourth (which requires majority support before a representative can be certified). Consequently, although the "evil" associated with carrier-dominated unions and addressed by Section 2, Ninth is less of a concern, it is clear that Congress also designed Section 2, Fourth to address the problem of recognizing a minority union by requiring that a certified representative have support from the majority of the craft or class.

Because Congress expressly enacted the specific provision for that purpose, only Congress – not the Board – can determine that something less than a majority of the craft or class can select the representative. Consequently, the Board's proposed rule violates the plain language of the RLA and would be subject to legal challenge on that basis.

2. The Proposed Rule Undermines The Policy Goals Of The RLA.

Congress enacted the RLA for the stated purposes of avoiding any interruption to commerce or to the operation of the carrier. *See* 45 U.S.C. § 151a ("General Purposes"). Above all else, Congress saw an overriding need to maintain stability in an industry critical to interstate commerce. Consequently, Congress drafted the RLA to promote stability in the making and maintenance of agreements and the resolution of disputes, which are critical to ensuring

uninterrupted service by rail and air carriers. *See Chamber of Commerce*, 14 NMB at 362; 16 NMB Ann. Rep. 20 (1950). Congress has not abandoned its emphasis on maintaining stability; and the importance of the transportation infrastructure continues to demand this emphasis on stability.

The RLA, including the process through which labor organizations obtain certification as the representative of a craft or class, is the cornerstone of stable labor relations in the air and rail industries. By contemplating the certification of a representative elected by a minority of the craft or class, the proposed rule unnecessarily threatens to destabilize that cornerstone. The Board's long-standing election process, which is completely and fundamentally consistent with the plain statutory language and the congressional intent underlying the RLA, is the foundation upon which the statute's broader statutory framework functions. By requiring that the true majority of eligible voters affirmatively demonstrate its desire for representation, the Board accomplishes several crucial objectives, all of which foster stability in the making and maintenance of agreements and the resolution of disputes:

- First, the election of a representative by a majority of the craft or class quells any doubts about the authority of the selected representative. Even a vocal minority within the same craft or class cannot quarrel with the democratic concept of majority rule, tempered in part by a concomitant duty of fair representation. The Board has stated that its proposed rule will establish a more reliable indicator of employee sentiment regarding representation. 4 Fed. Reg. at 56752. However, the current rule is a manifestly more reliable indicator of the desire of the entire craft or class for representation. In fact, the Supreme Court observed in *BRAC v. Association for the Benefit of Non-contract Employees*, 380 U.S. 650, 669 n. 5 (1965), that the Board's current election process "might well be more effective" at determining the representational desires of the majority of the craft or class than utilizing a "yes/no" ballot as is now being proposed by the Board.

- Second, the Board's current certification procedure facilitates a process for employees and their representative to work cohesively toward negotiating, making, and maintaining agreements with a carrier. Knowing that the majority of the entire craft or class (and not a potential minority of the craft or class) affirmatively supported some form of representation signals to employers the need to work with and support the representative selected by that majority. Likewise, the election validates the efforts of the chosen representative on behalf of the craft or class going forward.

- Third, minority certification would seem to raise a substantially higher likelihood of increased "raids" by rival unions and inter-union conflicts, which would in turn further destabilize labor relations at the affected carriers, potentially with cascading effects across the industry. Under the current election process, a rival union must demonstrate that it has majority support from the entire craft or class in order to oust the incumbent representative. If the Board confers certification on a representative

based on something less than a majority, the dubiously certified union must be constantly concerned that a rival union might generate the necessary majority support (that it was unable to obtain) and replace it. Such distractions from collective bargaining and the contract administration process do not foster stability in the making and maintaining of agreements. Furthermore, when a rival union successfully raids an incumbent, it disturbs the existing relationship between the carrier and the incumbent representative. The raiding union may have a different bargaining strategy and different bargaining goals from the incumbent, not to mention a desire to remake the parties' existing agreement, which was bargained by and identified with the ousted union. These disturbances to a carrier's relationship with its employees may likely become commonplace under the proposed minority certification rule, and they are inconsistent with the overall statutory purposes of the RLA.

- Fourth, negotiations conducted under the RLA are unlike those under the National Labor Relations Act (the "NLRA"). Those differences justify and necessitate a different certification process. Often RLA negotiations cover a craft or class that is widely dispersed in multiple geographic locations, each with its own localized issues. The representative must be able to assimilate or reconcile these issues into a negotiation strategy designed to reach a unified agreement. The tension created by trying to harmonize multiple locations with multiple needs and agendas underscores the need for a showing of true majority support (across geographies) within the craft or class. Intra-union conflicts that might frustrate overall agreement between a carrier and a union will likely be commonplace under a minority certification rule, where a geographically isolated minority can elect its preferred representative even though that union may not actually represent the interests of a majority of the entire, widely dispersed craft or class.

- Finally, under the Board's current election process, there is no question about the will of the majority of the craft or class on the question of representation because the majority must affirmatively indicate its support for the representative. Under the proposed rule, the certified representative will largely derive its strength on the basis of election participation rates. And while the representative certified under the proposed rule may sense some relief having won representation of a craft or class that it might not otherwise have secured under the current election rule, the union's future collective bargaining success may be in serious jeopardy if a substantial portion of the craft or class did not participate in the election. Stated more directly, a newly certified labor representative's effectiveness as a bargaining representative of the craft or class is based entirely on its support from a majority of the electorate. The Board recognized as much in *Chamber of Commerce*: "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 desires representation." 14 NMB at 362. A reasonably foreseeable outcome of minority certification is that some carriers may be tempted to test the power of the minority representative in collective bargaining by bargaining

> hard, since they may have little incentive to make agreements on terms they may have agreed to in the past with a representative with a clear mandate from the majority of the craft or class. Such carriers may suspect that the union in question will not have support from the majority to engage in economic action if negotiations are not successful. Other carriers may decide to hold more in "reserve," thinking that the representative may have trouble getting a tentative agreement ratified because it failed to secure majority support from the craft or class during the certification election. Neither of these outcomes serves the RLA's statutory purpose; yet, by adopting a minority certification rule, the Board would be fomenting the type of bargaining conduct that Congress intended the RLA to prevent. This will, in turn, only add to the mediation burden and challenges that even now appear to exceed the NMB's resources.

We base these observations on our Firm's unique perspective — having been involved in countless representation elections and collective bargaining negotiations over the past 60 years — as to how the NLRA's election model often leads to instability in collective bargaining relationships. Adopting an election model similar to the one under the NLRA, will likely lead to an increase in the incidence of attempts to engage in self-help i.e., strikes on rail and air carriers. Consequently, the minority certification rule will, at least indirectly, lead to more interruptions to commerce and decrease stability in the industry – both of which undermine the statutory goals of the RLA.

3. The Proposed Rule Is A "Fix" In Search Of A Problem.

As recently as April 2008, a *unanimous* Board reaffirmed its long-standing election procedure and recognized that there was no legal basis for "an unannounced and extreme departure from decades of [Board] balloting rules and procedures." *Delta Air Lines*, 35 NMB 129, 130 (2008). The Board made clear that it "will not assume in advance of an initial election period that a carrier will engage in activities that interfere with employee free choice or taint the laboratory conditions." *Id.* In light of the Board's recent and unanimous affirmation of the current rule, and the Board's refusal to impose the very voting procedures the Board now proposes in the absence of evidence of carrier interference, the Board's regulated community has a reasonable basis to question the timing of, and motivation for, the Board's proposed rule.

Such skepticism is particularly appropriate in the context of this specific proposed rule change because in *Chamber of Commerce*, where the Board considered an identical request to alter its election rules, the Board held that it would only consider changes of such magnitude when they are "mandated by the [RLA] or essential to the Board's administration of representation matters." 14 NMB at 360. The Board's current Notice of Proposed Rulemaking, however, only vaguely alludes to the Board's motivation for the rule change: that it is "part of [the Board's] ongoing efforts to further the statutory goals of the [RLA]" and that "this change to [the Board's] election procedures will provide a more reliable measure/indicator of employee

sentiment in representation disputes and provide employees with clear choices in representation matters." 74 Fed. Reg. at 56750. The Board's Notice, however, does not detail any problems or deficiencies in the current election process, nor does it identify any changed circumstances that call into question the efficacy of the current election rule. Thus, the Board majority's implicit basis for the rule change is that the current election procedures are suddenly and inexplicably unreliable, despite every prior Board expressly or tacitly endorsing and/or applying the current election procedures since their initial adoption.

This alleged need for change flies in the face of the Board's own election data, which demonstrate that unions have had remarkable success under the current election process.[2] Consequently, the Board has little justification to conclude that the current rules discourage unionization. In the absence of any meaningful discussion or analysis of the Board's motivation for the rule change, the regulated community is left to conclude that there is no real "problem" at all and that this change is motivated by reasons other than what the Board stated in its Notice of Proposed Rulemaking. More importantly, the Board majority's stated basis for change certainly does not meet the high standard that the Board correctly and reasonably imposed on itself in *Chamber of Commerce*.

4. The Existing Rule Is More Consistent With Democratic Election Principles.

The Board's only clearly articulated basis for its proposal to change the current election process is its claim that the current rule is undemocratic. Specifically, the Board states: "There are many reasons individuals do not vote in elections. Nonvoting can be a conscious choice and assigning those who choose not to vote a role in determining the outcome of an election is a type of compulsory voting, not practiced in our democratic system." *See* 74 Fed. Reg. at 56752. In other words, according to the Board majority, counting a nonvoter as a "no" vote in a union representation election is inconsistent with democratic election principles.

Setting aside for the moment the fact that there is no mechanism for a craft or class member to both participate in an RLA election and also vote "no" under the current rules, the Board's reasoning could certainly be understood, accepted, even embraced if political elections and the Board's representation elections operated similarly, with analogous consequences for the candidates and electorate. But they do not, and comparisons of Board-conducted representation elections to political elections are fundamentally flawed.

In a political election, the only question is **who** will represent the electorate, not **whether** there will be a representative; there will be a representative selected regardless of the voter turnout. In most political elections, the public does not have the luxury of waiting for a majority of eligible voters to participate before announcing a winner. Rather, in order to

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[2] Our review of Board election data since 1935 shows that the union win rate in Board-conducted elections approaches sixty-eight percent (68%). By comparison, the union win rate in elections held during this same period under the NLRA, utilizing the election process currently being proposed by the Board, was only fifty-eight percent (58%).

ensure continuity of government service, the office must be filled regardless of voter turnout. Pure democratic principles must accommodate the reality of the public's need for continuous government. Instead of compelling eligible voters to turn out for every election or risk sanction, the accommodation takes the form of declaring a winner based on a plurality of votes cast in a given election. The fact that most Americans are familiar with such an election process does not make it purely democratic. In fact, one of the most frequent complaints following many elections is low voter turn-out and the resulting election of a public official by a substantial minority of eligible voters can cloud efforts to make sweeping changes. Most pundits lament low voter turn-out and express frustration that more Americans choose not to participate in determining who should hold public office.

Another distinction between political elections and the existing NMB vote process is that in a political election, the winning candidate serves for a definite, relatively brief term. When that term ends, the representative must run for re-election. Each time the publicly elected official decides to run for re-election, he or she must face the voting electorate anew and accept the decision that the next election provides. For the non-voter in a political election, the decision not to vote in a given election has a transitory quality inasmuch as that decision lasts only as long as the election cycle and the voter is free to participate in the next election.

By contrast, in a representation election, employees are deciding two issues: first, whether to be represented and, second, by whom. The first question really involves a decision by the craft or class to apply a whole new set of rules, i.e., the RLA and the NMB's policies and procedures, to the workplace. As such, the election is far more akin to a vote on legislation in Congress, or even voting on a constitutional amendment affecting how the workplace is "governed," than it is to the election of a public official. The second question boils down to a determination of the particular agent through which the craft or class will enforce the new workplace rules the majority has chosen to implement. It is only after a majority of the craft or class indicates that it desires representation that the identity of the representative is decided, i.e., the representative obtaining the majority of the votes cast.

A representation election also results in a more permanent outcome than a political election. The election process as it currently exists under the RLA appropriately recognizes the need for stability both before and after the election takes place. First, for the "candidate" labor organization, being selected as the representative by a majority of the craft or class election brings immense and immediate security — both from rival union challenges and from challenges to its majority status by the carrier. Consequently, unlike in a political election, once elected, the certified representative faces no term limits and does not have to contend with regular re-election campaigns. Moreover, since the RLA has no formal method for decertification, the certified representative theoretically remains in place indefinitely. In most cases, if the craft or class does not like its current representative, it has but one meaningful option: select another representative. Even in that situation, the craft or class must first demonstrate that a majority is interested in replacing its current representative before the Board will conduct an election.

Recognizing that a Board-conducted election may very well be the one and only opportunity for employees to decide on their workplace representative and whether employees are even bound to an exclusive representative, the Board's current election procedure is designed to determine the true desires of the majority of the craft or class. The current process is the most logical, stable, consistent, and purely democratic way to insure the majority's desire prevails on the two questions addressed in an initial representation election. First, it requires a minimum participation rate before any representative is certified and, second, it requires a clear demonstration that a majority of the craft or class desires representation at all. Unless and until both of these questions are answered in the affirmative, the unrepresented status quo continues.

These substantial, and obvious, differences between representation and political elections call into question the Board's reliance on analogies between the two as a basis for modifying the current rule. Far from trampling democratic principles, the current election rule enhances and protects them in the unique context of a representation election. There is no more democratic process for selecting a representative than requiring majority support from the entire craft or class. The Board's current process is not only required by Section 2, Fourth of the RLA, it is consistent with the RLA's statutory goals. For these reasons, the Board should not rely on the fallacious and simplistic comparison of representation and political elections as a basis for modifying the current election process.

5. The Board's Process For Consideration Of The Proposed Rule Is Inconsistent With The Process Required By *Chamber of Commerce*.

In *Chamber of Commerce*, 13 NMB 90 (1986), the Board held that when it is petitioned to make changes to its election rules, "a full, evidentiary hearing with witnesses subject to cross-examination" is "the most appropriate method of gathering the information and evidence" needed to decide whether to even propose changes to the existing rules, let alone adopt such changes. *See also Chamber of Commerce,* 14 NMB at 348. Such a procedure would permit the Board's regulated community to present testimony, evidence (both anecdotal and empirical), and written argument to challenge any factual assertions and argument made in support of a rule change. Less than two years ago, the Board reaffirmed the need for such process, stating that it would not make such fundamental changes without "first engaging in a complete and open administrative process to consider the matter." *Delta Air Lines, Inc.*, 35 NMB at 132 (referring to the *Chamber of Commerce* process). Importantly, both *Chamber of Commerce* and *Delta Air Lines* involved requests for the Board to adopt precisely the same rule set forth in the Notice of Proposed Rulemaking. For this reason, the Board has established an informal rule (through adjudication rather than rulemaking) requiring it to utilize the *Chamber of Commerce* process to consider a rule permitting minority certification. Thus, the Board's current rulemaking process is fundamentally inconsistent with the Board's

self-imposed *Chamber of Commerce* procedure, even if the current rulemaking might otherwise comply with the Administrative Procedure Act (the "APA").[3]

The reason the *Chamber of Commerce* process is so critical in considering a fundamental change, such as the one proposed here, is illustrated by Professor Kate Bronfenbrenner's presentation at the Board's December 7, 2009 Open Meeting. At that meeting, the Board permitted individuals to present brief statements but the Board did not permit any cross-examination or other means to challenge the factual assertions being presented – as required by the *Chamber of Commerce* process. Had the Board followed the *Chamber of Commerce* process, the numerous statistical flaws in research methodology in the presentation made by Professor Bronfenbrenner at the Open Meeting concerning the impact of voter participation on the outcome of elections conducted by the Board would have been exposed. By not following the *Chamber of Commerce* process, the Board might rely upon Professor Bronfenbrenner's "analysis" without the benefit of a complete understanding of the process she used to arrive at her conclusions, or without an opportunity to test her methodology, analysis, and conclusions.

The *Chamber of Commerce* process, had it been followed at the December 7 Open Meeting, would have revealed that key aspects of Professor Bronfenbrenner's data are entirely subjective and were not obtained using valid research methodologies. She gathers information regarding the tactics allegedly used by employers by surveying **union organizers**. The respondents were apparently not asked about their own tactics. What union organizer who has lost an election, if given the chance to shift blame, is going to say, "I lost fair and square." The fundamental assumption of her research is that these interested persons — union organizers — provide truthful answers to questions that let them off the hook with respect to their own failed tactics.

She makes no attempt to corroborate any of the assertions by these union organizers through objective data. For example, her Appendix Table 1 reports that distributing pay stubs with dues deducted is alleged to occur twenty-six percent 26% of the time in RLA campaigns, but she apparently has not obtained any. In eleven percent 11% of the cases, employers allegedly "brought police into the workplace." If so, these would be matters of public record, but she cites none. Similarly, employers allegedly used "bribes and special favors" eleven percent 11% of the time. If true, one would expect criminal charges to have been filed somewhere, sometime. She makes no effort to find these records or corroborate these statements. Ripped-up ballots are alleged to be pervasive, but where are they? There is no data provided by employees who corroborate the claim that they ripped up their ballots.

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[3] We make no comment here on whether the Board's rulemaking actually complies with the APA and other principles of due process because that is an issue for another time and forum. Nevertheless, we have significant concerns that the Board's rulemaking is procedurally arbitrary and capricious under the APA for its failure to follow the process set forth in *Chamber of Commerce*.

Finally, her results, even if accepted for the sake of argument as valid, do not support the conclusions she draws. The thrust of her testimony is that because the RLA permits workers to vote with their feet, employers are more likely to engage in coercive tactics that are more effective than those utilized under the NLRA. The data does not bear this out. The relevant comparisons are between Table 3 in her report called "No Holds Barred," and Appendix Table 1 to her testimony. Her own data indicates that, under the NLRA, management **more** frequently engaged in tactics such as "mounted a campaign against the union" (ninety-six percent 96% v. eighty-five percent 85%), "hired management consultants" (seventy-five percent 75% v. sixty-six percent 66%), and "granted unscheduled raises" (eighteen percent 18% v. thirteen percent 13%)! Her Appendix Table 1 identifies 20 categories of anti-union tactics in which employers allegedly engage. In only three of the 20 categories is the tactic more prevalent under the RLA than the NLRA: "laid off bargaining unit members" (eleven percent 11% v. five percent 5%), "distributed pay checks with dues deducted" (twenty-six percent 26% v. twenty-three percent 23%), and "threatened to file for bankruptcy" (seven percent 7% v. three percent 3%). A fourth category, "urged workers to tear up ballots or misled workers on voting procedures," is not reported under the NLRA. Thus, in 16 of 20 categories, the offensive employer tactic was more prevalent in organizing campaigns under the NLRA than the RLA. Presumably, if the RLA were changed to provide for representation rules that more closely resemble the NLRA's, the result would be **more**, not less, coercion by employers, according to her own data. Thus, Professor Bronfenbrenner has again used flawed data to reach erroneous conclusions supporting her pro-union bias.[4]

Similarly, Chairman Dougherty stated in her dissent to the Notice of Proposed Rulemaking that the AFL-CIO Transportation Trades Department's request for rulemaking provided no factual or legal basis for the requested change. (Consequently, it is at least arguable that the only basis for the Transportation Trades Department's request for rulemaking was the change

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[4] We have previously criticized Professor Bronfenbrenner's statistical analyses as biased in favor of unionization. *See* David L. Christlieb and Allan G. King, Littler Mendelson Special Report, *The Perils of Union Activism Have Been Greatly Exaggerated* (June 2007), *available at* www.littler.com/collateral/16586.pdf. In Christlieb's and King's analysis, they determined that Professor Bronfenbrenner's analysis in *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing, Submitted to the U.S. Trade Deficit Review Commission* (Sept. 6, 2000) *available at* http://digitalcommons.ilr.cornell.edu/reports/3, was "irreparably biased" by her flawed research methodology.

In Bronfenbrenner's *Uneasy Terrain* paper, which focused mostly on alleged employer plant closings and threats of plant closings, two sentences were devoted to illegal discharges of union activists. She stated that NLRA-covered employers discharged union supporters in twenty-five percent 25% of election campaigns. Bronfenbrenner, rather than rely on any objective measure, simply surveyed lead union organizers as to whether employers illegally terminate union supporters – the exact research methodology allegedly supporting her conclusions on RLA employer conduct presented at the December 7 Open Meeting. As Christlieb and King observed, "relying on lead union organizers to answer this question is akin to asking an NBA basketball player how many personal fouls he was wrongfully charged with this season." To state the obvious, surveys of self-interested parties, like the "research" Bronfenbrenner cited and relied on during the December 7 Open Meeting, are notoriously unreliable and lend no weight to the case for the Board's proposed rule change.

in political make-up of the Board.) Although the Board's Notice of Proposed Rulemaking sets forth a conclusory basis for the change, as discussed above, the Board majority failed to address other pre-rulemaking comments from the regulated community that provided the factual and legal basis for maintaining the current rule. This omission certainly suggests that the Board majority pre-judged the issue and the entire rulemaking process is simply a *fait accompli*.[5] Although the December 7 Open Meeting may be characterized as a step in the right direction that allowed the regulated community an additional opportunity to comment on the proposed rule, a one-way conversation simply cannot develop the administrative record needed to justify such a radical change in Board practice. Only the *Chamber of Commerce* process can create such a record, as the Board recognized in 1986, and that process should be followed here.

6. The Proposed Rule Does Not Adequately Analyze The Costs Associated With A Change In Election Procedures.

Finally, the Board's Notice of Proposed Rulemaking does not analyze the potential additional costs, both to the regulated community and to the Board itself, which may flow from the rule change. For example, the Board has not analyzed whether and how the new rule will increase the number of elections conducted by the Board in a given fiscal year, and whether the Board will need to increase its staff to conduct those additional elections within the required statutory timeframe. Carriers and unions will also bear additional costs if elections are more frequent due to the administrative requirements the Board places on them during

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[5] In order to understand what the Board considered in arriving at its proposed rule, and the degree to which deliberations or meetings occurred leading to the issuance of the proposed rulemaking (particularly in view of the statement issued by Chairman Dougherty), we submitted a Freedom of Information Act (FOIA) request. That FOIA request, submitted on November 4, 2009, just one day after the Board's Notice of Proposed Rulemaking was published in the Federal Register, seeks the information from the regulated community that the Board considered and information on the degree to which the Board truly deliberated prior to issuing the Notice of Proposed Rulemaking. After two extensions of time unilaterally granted by the Board to itself, supposedly due to the "voluminous" nature of the responsive material, the Board released 26 letters and e-mails, and withheld two wholly unidentified documents under the deliberative process exemption to FOIA. Due to the Board's inadequate disclosure and failure to comply with the requirements of FOIA in withholding documents, we submitted an appeal on December 23, 2009. On that same day, we requested that the Board extend the time for filing comments until that appeal could be heard and responsive documents reviewed. On December 30, 2009, the Board denied that request. Therefore, we are submitting this comment subject to our objection over the Board's denial and without prejudice to our ability to supplement our comments if, and when, the Board fully responds to our FOIA request.

At this point, our review of the small amount of responsive information produced indicates that the Board considered only the scant and conclusory representations contained in the Transportation Trades Department's and the Teamsters' requests for rulemaking. Neither of these submissions set forth any legal or factual basis justifying the proposed change as represented in the Notice of Proposed Rulemaking. Moreover, the Board's abrupt decision to issue the Notice of Proposed Rulemaking, not to mention its delays in responding to the FOIA request and unwillingness to disclose all the responsive information on which the Notice of Proposed Rulemaking was based, warrants the inference that not only are the Board's actions purely partisan and not based on sound legal or factual analysis, but the final outcome of this rushed rulemaking process has already been determined.

elections, not to mention the costs associated with conducting organizing and election campaigns more frequently. The Board has failed to consider these costs, or the potentially severe economic impact to the industry resulting from the increased instability (discussed in Section 2, *supra*) caused by the proposed change. The Board's compressed, sixty (60)-day time frame and refusal to follow the *Chamber of Commerce* process render analysis of these economic considerations impossible.

We appreciate your consideration of our comments and would be eager to discuss any of them with you further or provide additional information upon request.

Sincerely,

Donald W. Maliniak /cs

Donald W. Maliniak
LITTLER MENDELSON, P.C.

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