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January 4, 2010

VIA EMAIL (LEGAL@NMB.GOV)

Mary L. Johnson
General Counsel
National Mediation Board
1301 K Street, N.W.
Suite 250 East
Washington, DC 20005

Re: National Mediation Board Proposed Rule Change, Docket No. C-6964

Dear Ms. Johnson:

Enclosed please find the comments of the Regional Airline Association with respect to the above-referenced matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

DOUGLAS WARD HALL

cc: Roger Cohen, Regional Airline Association

DC:81625.1

SUBMISSION OF THE REGIONAL AIRLINE ASSOCIATION REGARDING THE NATIONAL MEDIATION BOARD'S NOTICE OF PROPOSED RULEMAKING REGARDING PROPOSED CHANGES IN REPRESENTATION ELECTION PROCEDURES

Docket No. C-6964

January 4, 2010

Introduction

The Regional Airline Association ("RAA") hereby submits its comments to the National Mediation Board ("NMB") in response to the NMB's Notice of Proposed Rulemaking ("NPRM") in Docket No. C-6964, published at 74 Fed. Reg. 56,750 (Nov. 3, 2009). In the NPRM, the NMB proposes to jettison the rule that, for the past 75 years, has applied to representation elections under the Railway Labor Act ("RLA"). Specifically, rather than continuing to require that a majority of the entire craft or class of affected employees vote for representation, the NMB is proposing that the outcome of representation elections be determined by a majority of votes cast. For the reasons set forth below, RAA strongly opposes the proposed rule change.

The RAA's Interest In The NPRM

Regional airlines play a vital role in the country's aviation industry. Regional airlines operate more than half of the nation's scheduled flights and about 40 percent of the U.S. commercial passenger fleet, transporting more than 160 million passengers annually to over 650 communities across the country. Approximately 450 of these communities depend on regional airlines exclusively to provide their only scheduled service. Any interruption in the service provided by regional airlines to those communities would sever their connection to the global economy and could have a devastating impact on them.

Founded in 1975, RAA provides a wide array of technical, regulatory and other services for regional airlines. RAA's more than 30 member airlines, which transport nearly 95% of regional airline passengers in the U.S., and 280 associate members are key decision makers in this vital sector of the commercial aviation industry. RAA member airlines appear frequently before the NMB and are more likely than other U.S. airlines to be the subject of union organizing drives. Thus, RAA and its members have a keen interest in the manner in which the NMB conducts its elections.

Comments On The Proposed Rule Change

I. There Is No Justification For The Proposed Change To The NMB's Representation Election Procedures

A. The Majority Participation Rule Is Required By The RLA

For the past 75 years, the NMB has required that a majority of an entire craft or class of employees vote for representation before it will certify a representative of those employees. In the NPRM, the NMB proposes to abandon this long-standing requirement and instead make representation determinations based solely on a majority of the votes cast, using a "yes/no" ballot. There is simply no justification for this radical alteration of the voting procedures.

The majority rule requirement was not adopted by the NMB simply as a matter of administrative convenience. On the contrary, it is required by Section 2, Fourth of the RLA, which explicitly states that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." 45 U.S.C. § 152, Fourth. The NMB reached the conclusion that the majority rule was required by the RLA more than 50 years ago. *Pullman Co.*, 1 NMB 503, 508 (1956) ("Studied consideration of [RLA Section 2, Fourth and Section 2, Ninth] will show that the Act clearly provides that the majority of any craft or class shall determine the representative of the craft or class for purposes of the Act.").

B. The NMB Repeatedly Has Rejected Identical Proposals To Abandon The Majority Participation Rule

In light of the statutory requirement of majority support, it is not surprising that the NMB has rejected previous efforts to change its voting procedures in the fashion proposed in the NPRM. In fact, in 1978, the NMB – consisting at the time of George Ives, Bob Harris and David Stowe – held that, "[i]n view of the unchanged forty-year history of the balloting in elections held under the [RLA], the Board is of the view that it does not have the authority to administratively change the form of the ballot used in representation disputes. Rather, such a change if appropriate should be made by the Congress." *NMB Minutes of Session*, Regular Meeting (June 7, 1978) (emphasis added). *See also* 43 Fed. Reg. 22517 (June 13, 1978) (giving notice that NMB will consider "Determination that the Board does not have the authority to administratively change the form of the ballot used in NMB representation elections.").

In the mid-1980s, the International Brotherhood of Teamsters ("IBT") again petitioned the NMB to change its majority participation rule; the U.S. Chamber of Commerce filed a related petition asking the NMB to create a formal process for decertifying a union. After conducting extensive proceedings, the NMB denied both requests, stating that it would not change its majority rule in the absence of evidence that such a change was either mandated by the RLA itself, or "essential to the Board's administration of representation matters." *Chamber of Commerce of the United States*, 14 NMB 347, 360 (1987). *See also id.* at 355 (when considering proposals for altering

the majority participation rule, the change must be supported by "a clear showing of necessity therefore in the administration" of the RLA). The NMB also emphasized that the party seeking to change the rule bears a "heavy burden of persuasion." *Id.* at 356. *See also id.* at 363 (the level of proof to convince the NMB that the proposed changes are "essential" is "quite high"). Most recently, in 2008, the NMB dismissed AFA's request to change the majority voting rule, concluding that "no caselaw ... supports [such] as extreme departure from decades of balloting rules and procedures." *Delta Airlines*, 35 NMB 129, 130-31 (2008).

C. The Proposed Change Is In No Way "Essential" To The NMB's Administration of Representation Elections Under The RLA

Patently, the proposed abandonment of the majority rule is not mandated by the RLA itself. Therefore, the only conceivable basis to justify the change is that it is somehow "essential" to the NMB's administration of representation matters. Tellingly, this standard was not even mentioned in the NPRM, or by any of the supporters of the rule change at the "meeting" held by the NMB on December 7, 2009. Nothing in the NPRM, or that was presented at the meeting, remotely suggests that it is "essential" to the NMB's administration of the RLA, much less that the proponents of the rule change have met their "heavy burden of persuasion" that the proposed change is required. The only thing that the change appears to be "essential" to is the unions' effort to make it easier for them to organize railroad and airline employees.

That the proposed change is not "essential" to the NMB's administration of representation elections is demonstrated by the fact that it has been rejected by the NMB on several occasions, including as recently as 2008 in the *Delta* case. Nothing has changed since the *Chamber of Commerce* determination in 1987, and certainly not since the NMB's reaffirmation of that decision in 2008, that suddenly has made abandonment of the majority participation rule "essential" to the NMB's performance of its functions under the RLA. On the contrary, unions are still having great success organizing employees in the airline and railroad industries under the majority participation rule. In calendar year 2009, for example, the NMB held 21 representation elections among previously unrepresented employees. Unions won 15 of those 21 elections – over 70% – all of which were conducted using the NMB's existing voting rules. *See* Exhibit 1. Indeed, the Association of Flight Attendants – CWA, which is the one of the primary proponents of the proposed rule change, won all four elections conducted in 2009, again with the standard election procedures. *Id.*

The proposed rule change is also inconsistent with the NMB's historical approach towards allegations of carrier interference in representation elections. The NMB has reserved the use of "yes/no" ballots – known as "*Laker*" ballots in NMB parlance – to those cases where there has been "egregious carrier interference" with the laboratory conditions that apply during a representation proceeding. *Delta*, 35 NMB at 131. Critically, the NMB has held 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.* (emphasis added). Yet by making the *Laker* ballot the standard ballot in all representation elections, the NMB effectively would be doing

just that: assuming, in advance of the initial election period, that the carrier has engaged in the type of egregious interference that would warrant what heretofore has been an extraordinary remedy.[1] No justification has been offered for such a dramatic reversal of NMB policy.

II. The NMB's Majority Participation Rule Has Worked – And Worked Well – For All Concerned

A. The Majority Participation Rule Fosters Stability In Labor-Management Relations

If anything, it is the current majority participation rule, not the proposed change, which is "essential" to the NMB's administration of its duties under the RLA. One of the stated purposes of the RLA is to "avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. In addition, the RLA states that it the parties must "exert every reasonable effort to make and maintain agreements." 45 U.S.C. § 152. The NMB's majority participation rule supports both of these goals.

As the NMB has previously noted:

> One need look no further than to the area of potential strikes to conclude that certification based upon majority participation promotes harmonious labor relations. 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 desire representation.

Chamber of Commerce, 14 NMB at 362-63. *See also Delta* 35 NMB at 131-32 (NMB's duty under Section 2, Ninth "'can more readily be fulfilled and stable relations maintained by carriers' and employees' representatives by a requirement that a majority of eligible employees cast valid ballots in elections conducted under the Act before certifications of employee representatives are issued'") (quoting Sixteenth Annual Report of the Board (1950)).

A union which cannot even get the majority of the employees to vote in the election is unlikely to be able to effectively represent the employees at the table, or to get majority support to ratify a contract. That, in turn, would lead to widespread frustration and dissatisfaction among the employees, which could be directed at the union, the carrier, or both parties. Lacking any meaningful way to decertify the union, the employees might pursue replacement of the union with another representative, and/or an illegal job action against the carrier, neither of which fosters harmonious labor-

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[1] Our research indicates that the NMB has ordered elections using *Laker* ballots in only 28 cases since 1981 – and many of those involved multiple crafts or classes at the same airline. *See* Exhibit 2. Interestingly, unions failed to gain representation in 16 of the 28 elections conducted with the "yes/no" ballot – a lower percentage of success than unions have in elections conducted under the majority participation rule. *Id.*

management relations. The instability inherent in such a situation is at odds with the goal of the statute to avoid disruption to interstate commerce.

B. The Majority Participation Rule Has Not Been An Impediment To Union Organizing

The supporters of the proposed rule change readily admit they are motivated by a desire to make it easier for unions to succeed in representation elections. That cannot, however, be a valid consideration for the NMB, whose role in representation elections is that of a neutral referee, tasked with protecting the right of employees to choose whether or not to be represented by a collective bargaining agent. *See Switchmen's Union of North America v. NMB*, 320 U.S. 297, 304 (1943).

Moreover, the contention that the NMB's majority voting rule must be changed because it somehow stacks the deck against unions attempting to organize employees under the RLA is simply not borne out by the data. Airlines and railroads are much more heavily unionized than the industries covered by the National Labor Relations Act ("NLRA"), and unions have prevailed in a higher percentage of elections under the RLA, using the NMB's existing majority participation rule, than they have in elections under the NLRA. Nor is this just a historical phenomenon. As noted previously, in calendar year 2009 alone, unions won 15 of the 21 elections held among previously unrepresented employees, all using the NMB's existing voting rules.

One of the speakers at the December 7, 2009 NMB meeting who supports the proposed rule change was James Dolezal, a fleet service employee of Continental. Mr. Dolezal lamented during his presentation that "we don't have a union after five attempts in recent years," and that the "other groups of workers at Continental have union representation but the Fleet Service Workers don't." Transcript of Dec. 7, 2009 meeting, page 248, lines 9-13. Although it was not his intention, Mr. Dolezal's statement points out that the existing majority participation rule works in that it permits employees to organize when that is what they desire – as most of the Continental workforce has done – and to reject unionization when that is their wish. Five failed attempts to unionize the fleet service workers, while other crafts or classes have opted for representation, shows that the employees have not been interested in having a union, not that the voting rule is fundamentally flawed.

C. The NMB's Majority Participation Rule Is Not "Undemocratic"

Those who support changing the majority participation rule have criticized it as "undemocratic" or even "un-American," comparing representation elections under the RLA to political elections. That is a false analogy on several fronts.

In a representation election, the threshold question that must be addressed is whether or not employees want to be represented by a collective bargaining agent in the first place. It is only after the majority has decided that it does, in fact, want union representation that the question of who that representative will be is resolved. In a political election, by contrast, the question is not whether the electorate will be

represented. That decision has already been made; at the end of the election, someone will be mayor, governor, Senator. The only question is who that representative will be – a very different inquiry.

Another fundamental difference between NMB-conducted representation elections and political elections is that the winner of a political election serves for an established period of time – two years, four years, six years – after which he must run for re-election (or is barred by term limit restrictions from continuing to serve in that office). There is no comparable requirement for unions certified to represent employees under the RLA; they do not need to sit for "re-election" to continue their role. Indeed, given the NMB's decision not to adopt a formal decertification process, once a craft or class chooses union representation, it is nigh impossible to go back to non-union status.

Supporters of the proposed rule change argue that the NMB should not assume that anyone who does not cast a vote in a representation election is doing so because they do not want to be represented. Once a union is certified, however, the NMB makes similar assumptions about the representation wishes of employees who have not voted – except it assumes that those employees want to be represented by the union. For example, say that a union is certified to represent a craft or class consisting of 50 employees. Every employee hired after the eligibility cut-off date established in the representation election will be represented by the union, even though they never had a say in the matter. That is true even if the craft or class had grown to 100, 200, or 500 employees: the entire craft or class is assumed to desire representation by the certified union even though few – if any – of them ever had an opportunity to vote.

Conclusion

RAA believes that the NMB's majority participation rule has worked – and worked well – for 75 years. It has worked well for unions, as railroads and airlines are among the most heavily organized private sector industries in the country. It has worked well for airline and railroad employees, as they have been able to obtain representation when a majority of their fellow employees want that, and to avoid having representation forced upon them when not supported by a majority. And it has worked well for the nation, as it has brought stability to airline and railroad labor-management relationships and minimized disruptions to interstate commerce, just as Congress intended in enacting the RLA. No compelling reason exists now to change this long and successful history.

EXHIBIT 1

NMB ELECTIONS CONDUCTED IN 2009
AMONG PREVIOUSLY UNREPRESENTED EMPLOYEE GROUPS

Date of Count	Carrier	Craft or Class and Union	Outcome
1/7/09	Ryan Int'l Airlines	Flight Attendants – AFA	AFA certified
1/13/09	Lynx Aviation	Flight Attendants – AFA	AFA certified
2/3/09	Atlas Air/Polar	Dispatchers – IBT	IBT certified
2/4/09	JetBlue	Pilots – JBPA	Union lost
2/23/09	US Airways	Airport Service Training Instructors – TWU	Union lost
4/13/09	Dakota, Minnesota & Eastern RR	Signalmen – BRS	BRS certified
5/20/09	Jefferson Warrior RR	Operating Employees – USW	USW certified
5/20/09	Jefferson Warrior RR	Non-Operating Employees – USW	Union lost
6/25/09	Center for Emergency Medicine	Mechanics & Related – IAM	Union lost
7/9/09	Alabama & Gulf Coast	Maintenance of Way – UTU	UTU certified
8/25/09	Stillwater Central	Train & Engine – UTU	UTU certified
8/2709	Progressive Rail	Train & Engine Service – UTU	UTU certified
9/3/09	Lynx Aviation	Pilots – UTU	UTU certified
9/17/09	Comair	Dispatchers – TWU	Union lost
10/7/09	USA 3000	Flight Attendants – AFA	AFA certified
11/4/09	Chicago, Ft. Wayne & Eastern RR	Signalmen – BRS	Union lost
11/13/09	Liberty Helicopters	Mechanics & Related – IAM	IAM certified
11/19/09	Compass Airlines	Flight Attendants – AFA	AFA certified
12/1/09	Port Authority Trans-Hudson	Transportation Operations Examiners – IBEW	IBEW certified
12/10/09	Ohio Central RR	Train & Engine Service – BLET	BLET certified
12/16/09	Austin Western RR	Train & Engine Service – BLET	BLET certified

Source: NMB website

EXHIBIT 2

NMB ELECTIONS CONDUCTED USING "LAKER" (YES/NO) BALLOTS

Year	Carrier	Craft or Class – Union	Outcome
1981	Laker Airways	Office Clerical – IBT	39-4 against representation
1981	Laker Airways	Passenger Service – IBT	134-31 against representation
1981	Transkentucky RR	Locomotive Engineers – IAM	2-1 for representation
1981	Transkentucky RR	Maintenance of Way – IAM	22-2 against representation
1981	Transkentucky RR	Machinists - IAM	6-4 against representation
1982	Mercury Services	Fleet Service – IBT	25-0 for representation
1982	Mercury Services	Mechanics - IBT	23-1 for representation
1983	Rio Airways	Flight Attendants – TWU	4-3 for representation
1984	Sea Airmotive	Flight Attendants – SACEA	2-0 for representation
1984	Sea Airmotive	Mechanics – SACEA	23-22 against representation
1984	Sea Airmotive	Pilots – SACEA	18-18 – no representation
1984	Sea Airmotive	Stock Clerks – SACEA	1-1 – no representation
1984	Sea Airmotive	Pilots – SACEA	18-9 for representation
1984	Sea Airmotive	Mechanics – SACEA	14-6 against representation
1984	Sea Airmotive	Stock Clerks - SACEA	2-0 against representation
1986	Key Airlines	Pilots – KAPA	19-2 against representation
1986	Key Airlines	Flight Engineers – KAPA	6-5 against representation
1986	Mid Pacific	Pilots – IBT	36-35 against representation
1986	Mid Pacific	Flight Engineers – IBT	30-15 against representation
1986	Metroflight	Mechanics – IBT	35-34 for representation
1991	Metroflight	Mechanics – IBT	64-38 for representation
1993	Evergreen	Pilots – IBT	89-71 for representation
1993	Evergreen	Flight Engineers – IBT	38-30 for representation
1998	Petroleum Helicopters	Flight Deck Crew – OPEIU	254-248 against representation
1999	Mesa	Dispatchers – TWU	14-5 against representation
2000	LSG Lufthansa Services	Inflight Kitchen/Commissary – HERE	65-54 for representation
2000	Era Aviation	Flight Attendants – IBEW	8-5 against representation
2001	Aeromexico	Passenger Service – IAM	43-32 for representation

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