United States Senate
WASHINGTON, DC 20510

NATIONAL MEDIATION BOARD DOCKET NO. C-6964

COMMENTS OF U. S. SENATORS LAMAR ALEXANDER, ROBERT BENNETT, RICHARD BURR, SAXBY CHAMBLISS, BOB CORKER, MICHAEL ENZI, ORRIN HATCH, and JOHNNY ISAKSON

January 4, 2009

ON NOTICE OF PROPOSED RULEMAKING

ISSUED BY THE

NATIONAL MEDIATION BOARD

These comments are submitted by United States Senators Lamar Alexander, Robert Bennett, Richard Burr, Saxby Chambliss, Bob Corker, Michael Enzi, Orrin Hatch, and Johnny Isakson.

The Integrity of the Board's Process in This Rule-Making Has Been Compromised.

We have reviewed the correspondence from NMB Chair Elizabeth Dougherty dated October 28 and November 2, 2009. This correspondence reveals an unjustifiable haste by the majority members of the NMB to finalize the proposed rule without any input from the Chair of their own Board. This course of conduct plainly reflects a pre-determination to proceed with the proposed rule no matter what comments may be received in response to the NPRM. In addition, we have been made aware of the public remarks of union leaders from the Association of Flight Attendants confirm their "insider" knowledge of the proposed rule even before the Board Chair became aware of it. We note that one of the Board members supporting the NPRM is a former national President of AFA. These facts suggest to us that the integrity of the Board's rulemaking process has been compromised.

There Is No Demonstrated Need For The Proposed Change Or For The Radical Departure It Represents From Prior Board Decisions.

We understand that the Board has previously rejected the proposed change at least four times over many years. We further understand that the Board has previously held that it would not consider such changes unless it found them to be "mandated by the [Railway Labor] Act or essential to the Board's administration of representation matters." *In re Chamber of Commerce of the United States*, 14 N.M.B. 347, 360 (1987); *accord In re Delta Air Lines, Inc.*, 35 NMB 129 (2008). Despite these prior decisions of the Board, neither the NPRM nor the Board has set forth any reason—let alone a

compelling reason—to change practices which have been found satisfactory by all prior members of the Board, of both political parties, since 1934.

It is well known that both the airline and railroad industries are heavily unionized, *far* more so than most other industries in the U.S. economy. We understand that the union success rate in representation elections conducted by the NMB under the RLA has consistently been substantially higher than the union success rate in representation elections conducted by the National Labor Relations Board pursuant to the National Labor Relations Act ("NLRA"). Thus, the RLA would seem to have been remarkably successful in facilitating union representation in the affected industries. Against this backdrop, the Board's failure to articulate objective reasons for the proposed change speaks eloquently about the arbitrary and capricious nature of the Board's action in pursuing this NPRM.

Decertification Is A Necessary Corollary To The Proposed Change.

Unlike the NLRA, the RLA does not contain an express provision for decertification once a union representative has been certified. Fortunately, the Courts have confirmed that employee freedom of choice under the RLA includes the right to reject union representation entirely. See *Brotherhood of Railway & Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650, 659 (1965); *Russell v. National Mediation Board*, 714 F. 2d 1332 (5th Cir. 1983). The Board's practice of requiring a "straw man" election in order to oust an incumbent union is especially complicated for a non-expert to understand. If, however, the Board is prepared to give serious consideration to the certification of minority unions, then it becomes far more important than ever for employees to know that there is a mechanism available to get rid of a representative that is not acting in the best interests of all employees. It is shocking to us that the current Board purports to be interested in promoting

employee free choice but has failed to include revisions to its rules to make decertification reasonably available and understandable.[1]

Promulgation of The Proposed Rule Threatens To Disrupt Labor Relations Among Carriers Subject to the Railway Labor Act.

We are greatly concerned that promulgation of the proposed rule will not only exceed the Board's authority, it will also portend greater instability in the labor relations of the two critical industries which are subject to the RLA, air and rail transportation. Instability is the mildest description of the consequences likely to flow from the certification of minority unions as collective bargaining representatives. The principal purposes of the Railway Labor Act, of course, are to avoid interruptions to commerce and to promote peaceful and stable labor relations in these critical transportation industries. It is especially troubling that the NMB would propose such a major change of practice that is not only inconsistent with its statutory authority, but also with the fundamental purposes of its authorizing statute.

The Board Lacks The Authority To Make The Proposed Change.

The National Mediation Board does not have the authority to proceed with the proposed change. Legislative power rests with the Congress, not with political appointees who are charged with implementing the laws as enacted by the Congress. It is beyond the authority of any Federal agency

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[1] If minority unions are indeed permitted, both we and many of our colleagues will also be concerned with the impact of mandatory union shop provisions which are permitted nationwide under Section 2, Eleventh of the Railway Labor Act. Unlike, the NLRA, the RLA has no carve-out or exclusion permitting the operation of state "right-to-work" laws. If the unions which are seeking mandatory dues payments do not have the active support of a majority of employees as shown in a secret-ballot election, it would not be appropriate to require employees who do not support the minority union to pay dues to that organization where state law is intended to protect their right to refuse to do so.

to ignore or attempt to re-define the laws enacted by the Congress and signed by the President of the United States. Indeed, the Board has consistently recognized the command of this language for more than 75 years, including a published decision recognizing the limits of its authority under the Railway Labor Act, confirms that the NMB "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 Congress." 43 Fed. Reg. 25529 (1978). Nonetheless, the Board now proposes to re-write its balloting procedures to permit a minority of employees in any craft or class to force union representation on the majority.

The 1934 amendments to the Railway Labor Act ("RLA") added the following sentence to Section 2, Fourth of the RLA: "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 chapter." The U. S. Supreme Court has twice confirmed the plain meaning of this sentence, i.e. that the majority of employees---and only the majority—has the right to determine union representation issues. See *Switchmen's Union v. NMB*, 300 U.S. 297 (1937); *Brotherhood of Railway and Steamship Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965). In both of these cases, the Court wrote: "The Act in § 2, Fourth, writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it, and, as an incident thereto, to determine what is the appropriate craft or class in which the election should be held." 320 U.S. at 300-01; quoted at 380 U.S. 659. The Supreme Court has further noted that "under the Board's practice, a majority of the craft or class, *as required by § 2, Fourth*, does have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all." 380 U.S. at 670 (emphasis added).

The Board simply does not have the authority to ignore the expressed command of its authorizing statute on this issue.

Respectfully submitted on January 4, 2009 by: