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December 29, 2009

The Honorable Elizabeth Dougherty
Chairman, National Mediation Board
1301 K Street, NW, Ste. 250
Washington, DC 20005

The Honorable Harry Hoglander
Member, National Mediation Board
1301 K Street, NW, Ste. 250
Washington, DC 20005

The Honorable Linda Puchala
Member, National Mediation Board
1301 K Street, NW, Ste. 250
Washington, DC 20005

Re: Comment on Proposed Rule Revising NMB Procedures for Determining Monopoly Bargaining Representatives, Docket No. C-6964

Dear Chairman Dougherty and Members Hoglander and Puchala:

INTRODUCTION: The National Right to Work Legal Defense Foundation, Inc., opposes the hastily advanced and fatally flawed rule change, published at 74 Federal Register 56,750 (Nov. 3, 2009), that a two-member majority of the National Mediation Board has proposed at the behest of the AFL-CIO Transportation Trades Division to change the way that workers under the Railway Labor Act choose or reject union monopoly representation.

If the NMB majority's politically-motivated proposal becomes final, the NMB will have discarded 75-year-old election procedures in order to maximize the unionization of workers in the railway and airline industries, without regard to the limits of its own statutory power or the views of a true majority of employees.

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violations of their Right to Work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and

of the states. Since its founding in 1968, the Foundation has provided free legal assistance in all of the United States Supreme Court cases involving employees' right to refrain from joining or supporting a labor organization as a condition of employment, some of which arose under the RLA. *E.g.*, *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998) (RLA); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (RLA); *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1977). Many cases brought by employees through the Foundation's litigation program have directly concerned the RLA or the NMB's procedures, including *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983); *Masiello v. US Airways*, 113 F. Supp. 2d 870 (W.D.N.C. 2000); *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991); and *Klemens v. Air Line Pilots Ass'n*, 736 F.2d 491 (9th Cir. 1984).

The Foundation's attorneys regularly represent individual employees in litigation challenging the abuses of compulsory unionism arrangements and advise employees about their rights in proceedings involving the imposition of union monopoly bargaining in their workplaces. Therefore, the Foundation is uniquely qualified to comment on the AFL-CIO's proposal for an extraordinary change in the NMB's long-standing election procedures.

REASONS THE PROPOSED RULE SHOULD BE REJECTED: No employee should be subjected to the "representation" of union officials whom they have not *individually* chosen to represent themselves. Although they fall far short of this basic principle of individual liberty, the NMB's current election rules at least ensure that unions receive the extraordinary power of "exclusive representation" only when a true majority of all employees in a given craft or class actually desire such representation. Indeed, Congress mandated certification of only true majority representatives when it decreed that "[*t*]*he 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." 45 U.S.C. § 152, Fourth (emphasis added).

Requiring a showing of true majority support is appropriate given the unbridled and often abused privileges inherent in the exclusive representation regime imposed by, and enforced under, the RLA. These special union privileges include the powers to: a) dictate the terms and conditions of employment for even unwilling nonmembers, denying them freedom of contract; and, b) force an employee's discharge for nonpayment of compulsory union dues, even in the twenty-two Right to Work states.

Because the RLA grants such unbridled power to unions, it is particularly inappropriate for "exclusive representation" to be imposed in the railway and airline industries by a mere majority of employees voting in an election. This is so for four reasons.

First, the Board lacks the statutory authority to make the proposed change. Congress mandated certification of only true majority representatives when it decreed that "[*t*]*he 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." 45 U.S.C. § 152, Fourth (emphasis added), not the majority of employees voting in a representation election. As Chairman Dougherty correctly noted in her dissent from the proposed change, "[s]erious questions exist about the Board's statutory authority to make the rule change and its ability to articulate a rationale for change that complies with the Administrative Procedures Act." 74 Fed. Reg. 56,752 (Nov. 3, 2009).

Although the federal courts have recognized NMB authority to control the format of the ballots in a representation election, they have not clearly interpreted the RLA as allowing for less than true majority certifications. *See Brotherhood of Ry. Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937) . At least one prior NMB considering various ballot change proposals has acknowledged this lack of statutory authority. 43 Fed. Reg. 22,529 (June 13, 1978). Given the NMB's 75-year history of requiring true majority elections, only Congress can change the law at this very late date. *Cf.*, *e.g.*, *Flood v. Kuhn*, 407 U.S. 258 (1972) (only Congress can change a longstanding interpretation of the anti-trust law in which it has readily acquiesced for over fifty years).

Second, the Board applies the term "craft or class" under the RLA on a system-wide basis. *E.g.*, *Delta Air Lines Global Servs.*, 28 N.M.B. 456 (2001); *American Eagle Airlines*, 28 N.M.B. 371 (2001). This results in the creation of huge, nationwide bargaining units in which employees in the same craft or class are scattered around the country at different locations, on different shifts, and with little or no ability to communicate with each other. The existence of such huge, nationwide units makes it extremely difficult, if not impossible, for individual employees opposed to unionization to organize against a union's well-funded and professionally orchestrated campaign to win the monopoly bargaining privilege.

This inability of workers to organize effectively against unionization is compounded by the current lack of any simple and inexpensive administrative mechanism under the RLA for them to challenge union officials' often abusive organizing techniques. In contrast, the National Labor Relations Act does at least provide some minimal such protections. *See* 29 U.S.C. §§ 158(b), 160 (defining, and providing an administrative procedure for preventing, union unfair labor practices); 29 U.S.C. §§ 159(c)(1)(A)(ii), 159(e) (explicitly requiring elections to decertify monopoly bargaining agents and to rescind compulsory unionism provisions of collective bargaining agreements); *Dana Corp.*, 351 N.L.R.B. 434 (2007) (employees faced with an employer's voluntary recognition of a

monopoly bargaining agent through an abusive "card check" can petition the NLRB for a decertification election).[1]

The proposed rule change would further stack the deck against railway and airline employees opposed to unionization.

Third, the burden of demonstrating majority status would be unfairly and improperly reduced significantly for the union hierarchy seeking the monopoly representation privilege, while new burdens would be placed on the targeted employees, who may wish to remain union free, like the Delta Airlines flight attendants who testified against the rules change at the NMB's hearing on December 7, 2008. Under the AFL-CIO's proposed radical change, employees who are not union activists, who have expressed absolutely no interest in unionization, and whose jobs frequently require traveling and/or work at odd hours, would be forced to take *affirmative action* to vote against a union. Otherwise, their inaction would make it easier for union monopoly bargaining to be imposed upon them.

This problem is highlighted by the unions' push for internet voting through hyperlinks controlled by the unions themselves. Under a recent proposal pressed by the Association of Flight Attendants (AFA/CWA), unions would be allowed to use technology to track which employees have accessed the NMB's voting website. That information would make it easier for unions to threaten or coerce individuals into voting. On December 1, 2009, the NMB agreed to re-establish a voting "hyperlink" on its own website but rejected the AFA/CWA's request to set up a similar hyperlink on its website. 37 N.M.B No. 11 (Dec. 1, 2009). However, the mere fact of AFA/CWA's proposal shows the lengths that unions will go to destroy employees' right to anonymity and silence on the issue of unionization. This concern is not imaginary or overstated, as union officials have long used such coercive tactics in representational proceedings. *See*, *e.g.*, *Randell Warehouse*, 347 N.L.R.B. 591 (2006) (union surveillance and photographing of employees taints a representation election).

Fourth, it is extremely difficult for employees to remove a union once it is certified as their monopoly bargaining agent. This is particularly true under the RLA, because the NMB has refused to establish a formal process for decertification, despite the United States Court of Appeals for the Fifth Circuit's holding in *Russell v. NMB* in 1983 that the RLA requires the Board to process an application for an election to terminate a union's monopoly bargaining privilege. 714 F.2d at 1346. The Board betrays the RLA's intent and the rights of employees to freely choose or reject a union by considering only this one-sided, AFL-CIO proposal, while ignoring a federal appellate court's admonition and the many calls to establish formal decertification procedures.

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[1] However, the only fully adequate protections against union coercion of employees who wish to refrain from union association are Right to Work laws and prohibitions of monopoly bargaining.

Accordingly, the Board should reconsider and reject the AFL-CIO's attempt to game the system to "grease the skids" for union organizers. The NMB has previously, indeed, as recently as 2008, considered and rejected the AFL-CIO's proposed change, and should do so again. Changes in the partisan political climate in Washington, DC, do not warrant radical changes in the NMB's time-tested election procedures, which are more consistent with the RLA's "statutory mandate to allow employees their right to full and free expression of their choice regarding collective representation, including the right to reject collective representation." *Id*. at 1341.

In fairness, if the Board is to make any change in its "exclusive representation" certification rules, it should implement the RLA's mandate as explicated in *Russell* and establish procedures for the decertification of unions. The Board's previous failure to do so should be remedied, because the RLA's stated policy of freedom of association includes, of necessity, the freedom of non-representation and the freedom to decertify an unwanted union. *See* 45 U.S.C. §§ 151a, 152, Fourth; *Russell*, 714 F.2d at 1343-46.

Finally, the Foundation again strongly urges the Board to reject the proposed amendment of its rules as an unwarranted diminution of the rights and choices of individual railway and airline employees.

Thank you for your consideration of these views.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.

RJL/gmt