NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
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November 19, 2009

By FAX & E-mail

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

Re: Docket No. C-6964

Dear General Counsel Johnson:

I request that I be given an opportunity to make an oral presentation for the Foundation at the Board's hearing scheduled to begin on December 7, 2009, concerning the proposed rule amendment noticed by the Board in the Federal Register on November 3, 2009. As required by the notice of hearing posted on the Board's website, an outline of my oral presentation and my written statement are enclosed.

Sincerely yours,

Raymond J. LaJeunesse, Jr.

Raymond J. LaJeunesse, Jr.

RJL/rpc
Enclosures (2)

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**OUTLINE OF ORAL PRESENTATION OF RAYMOND J. LAJEUNESSE, JR.,
VICE PRESIDENT & LEGAL DIRECTOR,
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,
CONCERNING
THE NATIONAL MEDIATION BOARD'S PROPOSED REVISION OF ITS RULES FOR DETERMINING MONOPOLY BARGAINING REPRESENTATIVES UNDER THE RAILWAY LABOR ACT**

**Hearing Set for December 7, 2009
Docket Number C-6964**

I. The National Right to Work Legal Defense Foundation opposes the Board's proposal to change its voting procedures for imposing union "exclusive representatives" on workers under the Railway Labor Act.

II. The NMB should not discard 75-year-old procedures to assist organized labor in maximizing unionization of workers in the railway and airline industries.

III. The Foundation is uniquely qualified to criticize the proposed radical change in the Board's rules, because Foundation attorneys have for more than forty years represented individual employees in litigation challenging the abuses of compulsory unionism arrangements and advised employees about their rights in proceedings involving the imposition of union monopoly bargaining under the RLA.

IV. No employee should be subjected to the "representation" of union officials whom they have not *individually* chosen. 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 bargaining unit actually want that representation.

V. Requiring a showing of true majority support is appropriate because exclusive representation under the RLA gives union officials the power to dictate the terms

and conditions of employment of even unwilling nonmembers, and to force an employee's discharge for nonpayment of compulsory union dues.

VI. It is particularly inappropriate for exclusive representation to be imposed in the railway and airline industries by a mere majority of employees who vote:

A. The nationwide nature of RLA units makes it extremely difficult for employees who oppose unionization, located in many widely separated facilities, to counter a union's well-funded and professional organizing campaign.

B. Employees whose jobs frequently require traveling or work at odd hours would be forced to take *affirmative action* by showing up and voting against a union to avoid lowering the threshold for imposition of union monopoly bargaining.

C. It is extremely difficult for employees to remove a certified union, because the NMB has not established a formal process for decertification, despite the Fifth Circuit's holding in *Russell v. NMB*, 714 F.2d 1332 (1983), that the Board must conduct elections to terminate a union's monopoly bargaining privilege when a sufficient number of unit employees apply for such an election.

VII. The proposed radical change should be abandoned, because the Board's time-tested election rules 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.

VIII. If the Board is to make any change in its certification rules, it should implement the mandate of the RLA as explicated in *Russell* and establish procedures for the decertification of unions.

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**WRITTEN STATEMENT OF RAYMOND J. LAJEUNESSE, JR.,
VICE PRESIDENT & LEGAL DIRECTOR,
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,
CONCERNING
THE NATIONAL MEDIATION BOARD'S CONTROVERSIAL PROPOSAL TO REVISE
ITS RULES FOR DETERMINING MONOPOLY BARGAINING REPRESENTATIVES
UNDER THE RAILWAY LABOR ACT**

**Hearing Set for December 7, 2009
Docket Number C-6964**

Chairman Dougherty and Members Hoglander and Puchala:

The National Right to Work Legal Defense Foundation opposes the National Mediation Board's proposal, announced on November, 3, 2009, to change its voting procedures for imposition on workers of union "exclusive representatives" under the Railway Labor Act, procedures that the Board has utilized for more than seventy years.

In short, the majority of the Board has acceded to the AFL-CIO Transportation Trades Division's request that the NMB discard 75-year-old procedures and implement new procedures intended to maximize unionization of workers in the railway and airline industries.

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 lower federal court cases brought in the Foundation's litigation program for employees 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).

Because 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, 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.

No employee should be subjected to the "representation" of union officials whom they have not *individually* chosen to represent themselves. 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 bargaining unit actually desires such representation.

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, such as the powers to: a) dictate the terms and conditions of employment for even unwilling nonmembers; and, b) force an employee's discharge for nonpayment of compulsory union dues, even in Right to Work states.

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 for three reasons.

First, the nationwide nature of RLA units makes it extremely difficult for employees opposed to unionization, located around the country in numerous different facilities, to organize against a union's well-funded and professionally orchestrated campaign to win the monopoly bargaining privilege.

Second, the burden of demonstrating majority status would be unfairly and improperly reduced significantly for the union hierarchy seeking the new privilege, while new burdens would be placed on the targeted employees who may wish to remain union free. Under the proposed radical change, employees who are not union activists, who have expressed absolutely no interest in unionization whatsoever, and whose jobs frequently require traveling or work at odd hours, would suddenly be forced to take *affirmative action* by showing up and voting against the union. Otherwise, their silence on the matter would suddenly lower the threshold for imposition of union monopoly bargaining upon them.

Third, it is extremely difficult for employees to remove a union once it is certified as their exclusive bargaining agent, particularly because the NMB has not established a formal process for decertification, despite the United States Court of Appeals for the Fifth Circuit's holding in *Russell v. NMB* that the RLA requires the Board to process

applications for elections to terminate a union's monopoly bargaining privilege.714 F.2d at 1346.

Accordingly, the Board should reconsider and reject the AFL-CIO's attempt to game the system 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 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.

Indeed, if the Board is to make any change in its "exclusive representation" certification rules, it should implement the mandate of the RLA 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.