**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| AIR TRANSPORT ASSOCIATION OF AMERICA, INC.,<br><br>Plaintiff,<br><br>and<br><br>CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,<br><br>Plaintiff-Intervenor-Applicant,<br><br>v.<br><br>NATIONAL MEDIATION BOARD,<br><br>Defendant. | CIVIL ACTION<br>No. 1:10-cv-00804-PLF |

**COMPLAINT BY PLAINTIFF-INTERVENOR**
**FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff-Intervenor, Chamber of Commerce of the United States of America ("Plaintiff-Intervenor" or the "Chamber"), alleges as follows:

**NATURE OF THE ACTION AND RELIEF SOUGHT**

1. The Chamber brings this action as Intervenor for declaratory and injunctive relief to prevent the defendant National Mediation Board (the "Board" or "NMB") from enforcing a newly-promulgated Final Rule, which violates the Railway Labor Act (the "RLA"), 45 U.S.C. §§ 151 *et seq.*, and is an unjustified departure from 75 years of Board practice, in violation of the Administrative Procedures Act (the "APA"), 5 U.S.C. §§ 551 *et seq*.

2. Throughout its entire 75-year history, the NMB has conducted union representation elections according to the principle that a union would be certified as the collective bargaining representative only if a majority of the eligible employees in the relevant

work group (or "craft or class") voted in favor of union representation. This "Majority Rule" is derived directly from the text of the RLA, which provides 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). And, as the Board has repeatedly affirmed, its duty to investigate representation disputes is "more readily fulfilled and stable relations maintained" by the Majority Rule. *Chamber of Commerce*, 14 N.M.B. 347, 363 (1987) (internal quotation marks omitted); *see also Delta Air Lines, Inc.*, 35 N.M.B. 129, 131-32 (2008) (same).

3. Despite the plain text of the RLA and the Majority Rule's 75 years of consistent use, the Board's new rule abandons the Majority Rule and replaces it with a "Minority Rule" — that is, an election process under which a union would be certified as the collective bargaining representative based on a majority of just the votes cast, even if only a small minority of eligible employees actually voted in favor of union representation.

4. Although the Final Rule states that the Majority Rule is being abandoned in order "to more accurately ascertain employee desires regarding representation," 75 Fed. Reg. 26,062, 26, 076/1 (May 11, 2010), the Final Rule clearly and unmistakably declines to include a similar process with regard to employee desires to decertify a union in order to return to non-union status. The Board's failure to include a parallel decertification process arbitrarily and capriciously discriminates against employees' right under the RLA to reject union representation.

5. The Board has offered no adequate or neutral justification for this sweeping rule change casting aside settled practice, has failed to justify abandoning its own heightened standard for making significant rule changes, and has not employed the evidentiary hearing process that its precedents require. Moreover, publicly available facts — including the Board

majority's exclusion of the Board's Chairman from internal deliberations over the proposed rule change — demonstrate that the Board's majority impermissibly predetermined the issues.

6. Consequently, the final rule fails to comply with the RLA and is incompatible with the APA's requirement of reasoned and neutral agency decision-making. For all of these reasons, the Chamber's request for declaratory and injunctive relief should be granted.

## JURISDICTION AND VENUE

7. The causes of action herein arise under the APA, 5 U.S.C. §§ 551 *et seq.*, the RLA, 45 U.S.C. §§ 151 *et seq.*, and this Court therefore has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. *See also* 28 U.S.C. §§ 2201, 2202. The Chamber seeks declaratory and injunctive relief against defendant NMB to vacate a newly-promulgated final rule regarding the conduct of union representation elections in the airline and railroad industries.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

9. The NMB's new rule, embodied in a Final Rule issued on May 11, 2010, constitutes "final agency action" within the meaning of the APA, 5 U.S.C. § 704, and, accordingly, must be vacated by this Court under the APA if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

10. The Chamber exhausted its arguments before the Board prior to the issuance of the Final Rule. It submitted formal written comments with respect to the Rule on January 4, 2010. Thus, the questions presented by this Complaint were developed before the Board and are now fit for judicial review.

## PARTIES

11. Plaintiff-Intervenor, the Chamber, is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than

3,000,000 businesses and organizations of all sizes and interests in every sector of the economy, and which transact business throughout the United States and around the world.

12. The Chamber's membership includes trade associations representing carriers in both the railway and airline industries, as well as individual companies operating in those industries. Chamber members include many airlines and railroads, including many of the nation's largest. These airlines and railroads are subject to the NMB's rules and regulations, including the newly-promulgated voting rule that will govern any prospective union election among their employees.

13. Labor relations for these Chamber members are governed by the RLA. The RLA's purposes include protecting the public's and carrier's interests in "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. A key element of the statutory scheme promoting this purpose is the RLA's protection of the right of "[t]he majority of any craft or class of employees . . . to determine who shall be the representative of the craft or class for purposes of this chapter," *id* at §152, (Fourth), which necessarily includes a majority's determination that there shall be no representative, and the imposition on the Chamber's RLA-covered members of a duty to "treat with" the duly-certified collective bargaining representatives chosen by the majority to represent the entire craft or class, *id.* at §152, (Ninth).

14. Accordingly, the Chamber and its RLA-covered members have a direct and concrete interest in the rules governing RLA union representation elections and, in particular, the rules regarding the proportion of votes needed by a union to be certified as a collective bargaining representative. This interest is immediate, because the Chamber's members include airlines and railroads that are currently, or in the near future will be, the subject of union

organizing campaigns under which labor organizations seek to represent currently-unrepresented work groups. The question whether employees remain non-represented and thus interact with their employer on a collective basis, has a profound and long-lasting impact on the day-to-day economic and operational relationships between an employer and its employees. Among other things, when a union is certified by the NMB, RLA-covered employers may be constrained in their ability to take employment actions according to their own policies and practices. By altering how the question of union representation is resolved in RLA-covered industries, and by permitting the certification of minority-supported unions, the NMB's new rule will likely fundamentally change the legal duties and relationships between Chamber members and their employees.

15. Defendant, the NMB, is an independent agency of the United States Government. The NMB is responsible for the administration of union representation elections under the RLA. The NMB's exercise of these functions is governed by, *inter alia*, Sections 2, Fourth, and 2, Ninth, of the RLA. 45 U.S.C. §§ 152 (Fourth), (Ninth).

16. The NMB has three Members. Currently, the NMB's Chairman is Elizabeth Dougherty, and the other two Members are Harry Hoglander and Linda Puchala. Ms. Puchala is the newest Member of the NMB; she was nominated by President Obama, and sworn into office on or about May 26, 2009. Mr. Hoglander, who had already been serving as an NMB Member, was re-confirmed on or about July 24, 2009 after his re-nomination by President Obama. Chairman Dougherty was nominated by then-President Bush and confirmed on or about December 8, 2006.

## FACTUAL BACKGROUND

### The Majority Rule's 75 Years of Success

17. Throughout its 75 years of investigating representation disputes, the NMB has adhered to Section 2, Fourth's text and applied the Majority Rule: a union was certified as the collective bargaining representative only if a majority of the eligible employees in the relevant work group voted in favor of union representation.

18. By the Board's own accounts, the Majority Rule has been employed with great success. *See Chamber of Commerce*, 14 N.M.B. at 362 (expressing the Board's "firm conviction" that its duty to investigate representation disputes "can be more readily fulfilled and stable relations maintained" by the Majority Rule); *Delta Air Lines*, 35 N.M.B. at 131-32 (same); *see also* NMB, ANNUAL PERFORMANCE AND ACCOUNTABILITY REPORT FY 2009 at 38 (Nov. 14, 2009) (celebrating the Board's performance of its representation function, which "consistently achieves its performance goals, delivering outstanding services to the parties and the public").

19. Over the years, the NMB has been asked on more than one occasion to abandon the Majority Rule in favor of a Minority Rule, under which a union would be certified as the collective bargaining representative based on a majority of the votes cast, even if only a small minority of eligible employees voted in favor of union representation. The NMB has consistently and emphatically rejected such requests. *See, e.g.*, *Chamber of Commerce*, 14 N.M.B. at 362; *Delta Air Lines*, 35 N.M.B. at 132; *see also Pan Am. Airways*, 1 N.M.B. 454, 455 (1948). Indeed, the NMB has recognized that only Congress has the authority to discard the Majority Rule. *See* Minutes of National Mediation Board Meeting, at 78-15 (June 7, 1978).

20. In declining to discard the Majority Rule, the Board has recognized that the rule is essential to promoting stability in labor relations. *See, e.g.*, *Chamber of Commerce*, 14 N.M.B. at 362 ("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."). That remains true today. Unlike in industries governed by the National Labor Relations Act ("NLRA"), the NMB certifies labor unions to bargain on a company-wide basis, rather than on a local or plant basis. As a result, the stability of the relationship between an employer and a union generally is of much greater significance in RLA-covered industries than it might be for NLRA-covered employers. If a union does not have the support of the majority of employees in the craft or class it represents, it is likely that the stability of labor relations will be adversely affected. Such a lack of stability will adversely affect the RLA's purpose of avoiding "any interruption to commerce or to the operation of any carrier therein." 45 U.S.C. § 151a.

21. In the past, the Board has recognized that the Majority Rule is inextricably intertwined with other aspects of its representation functions — and that the Board cannot rationally consider whether to abandon the Majority Rule without also considering the inseparable issue of decertification. Thus, in the *Chamber of Commerce* proceeding in 1985-1987, the Board consolidated its consideration of a petition for adoption of the Minority Rule filed by the International Brotherhood of Teamsters with a petition for adoption of a parallel decertification procedure filed by the Chamber. *See In re Petition of the Int'l Bhd. of Teamsters Requesting the Amendment of the Bd. Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 13 N.M.B. 1 (1985). Following its consideration of these interrelated issues, the Board denied both petitions.

22. The Board has recognized further that it could not reasonably abandon the Majority Rule without first conducting a robust evidentiary hearing. In the *Chamber of Commerce* proceeding, the NMB conducted a full evidentiary hearing lasting nine days, designated a hearing officer, and allowed for appealable rulings on procedural matters prior to the hearing, as well as pre-hearing briefs, motions to dismiss and post-hearing briefs. *See*

*Chamber of Commerce*, 14 N.M.B. at 348-49. And in 2008, the Board confirmed that it "would not make such a fundamental change without utilizing a process similar to the one employed in *Chamber of Commerce*." *Delta Air Lines*, 35 N.M.B. at 132.

23. Moreover, under the Board's precedents, requests for fundamental rule changes — such as a request to abandon the Majority Rule — are disfavored. Any such change must be supported by "compelling reasons," *Chamber of Commerce*, 14 N.M.B. at 362, which the Board has defined to mean that the change must be "either mandated by statute or essential to the well-ordered management of the Board's representation functions," *id.* at 364. *See also id.* at 363 (explaining that "[t]he level of proof required to convince the Board the changes proposed are essential, then, is quite high").

**The Proposal to Abandon the Majority Rule**

24. On November 3, 2009, only a few months after the change in its composition caused by the confirmation of Ms. Puchala and re-confirmation of Mr. Hoglander, the Board, in a 2-1 decision, issued a Notice of Proposed Rulemaking in Docket No. C-6964, 74 Fed. Reg. 56,750 (Nov. 3, 2009) (the "NPRM"), in which the NMB signaled its intention to abandon its 75-year-old Majority Rule and to replace it with a Minority Rule. In a sharp departure from its earlier approach, the NPRM not only indicated an intention to adopt the proposed rule, but sought to justify the change by attempting to refute anticipated objections from the relevant employer community. The last time the Board considered changing its voting rules, it issued a neutral invitation for participation and comment. *In re Petition of the Chamber of Commerce of the U.S. Requesting the Amendment of the Bd. Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 12 N.M.B. 326 (1985).

25. The NPRM was issued in response to the September 2, 2009 AFL-CIO's Transportation Trades Department's ("TTD") two-page letter request to the Board. At that time, both the Association of Flight Attendants-CWA (the "AFA") and the International Association of Machinists and Aerospace Workers (the "IAM") had representation applications pending with the NMB for employees of Delta Air Lines, Inc. ("Delta"). The work groups that AFA and IAM were seeking to represent at Delta included very large numbers of employees, and AFA had lost previous elections at Delta.

26. On September 10, 2009 — after the TTD's letter was sent but before the issuance of the NPRM — the Air Transport Association of America, Inc. (the "ATA"), plaintiff in this litigation, submitted a letter to the NMB in which it noted that, based on the NMB's own prior decisions, the NMB lacked authority to abandon the Majority Rule absent Congressional action, and that, based on its 2008 decision in *Delta Air Lines*, if the NMB were to consider granting the TTD's request to adopt the Minority Rule, it must utilize the briefing and evidentiary hearing process required by the Board's precedent. In addition, both the ATA and the Chamber separately reminded the Board by letter that abandoning the Majority Rule would necessarily require changes to interrelated aspects of the NMB's election procedures — including revisions to the Board's decertification procedure. *See* Letter from Chamber to NMB of September 30, 2009 (attached as Exhibit A).

27. The Board's majority did not respond to the ATA's September 10, 2009 letter or to the Chamber's September 30, 2009 letter. Although Chairman Dougherty, in dissent, explained that any proposal to abandon the Majority Rule would "necessitate[] some sort of decertification mechanism or else it deprives employees of the right to be unrepresented," 74 Fed. Reg. at 56,754, the Board majority's NPRM called for consideration of the Minority

Rule in isolation, and did not even acknowledge the pending request for consideration of a parallel process for decertification. Moreover, instead of providing the evidentiary hearing process required by the Board's precedents, the NPRM provided only a 60-day notice-and-comment period, which closed on January 4, 2010. The Board also conducted a limited public "meeting" on December 7, 2009, but did not offer an opportunity for cross-examination of witnesses under oath or for rebuttal.

28. The Chamber submitted a comment letter and participated in the December 7, 2009 "meeting," but its letter went unanswered. The Chamber also submitted formal comments on January 4, 2010 to the Board regarding the Minority Rule proposed by the NPRM.

**The Board's Final Rule Abandoning the Majority Rule**

29. On May 11, 2010, the NMB issued a Final Rule and adopted the proposed Minority Rule. 75 Fed. Reg. 26,062. Chairman Dougherty filed a dissent. *Id*. at 26,083. Without identifying any relevant change in circumstances, and without amending its election rules to create a parallel decertification procedure, the Board abandoned its Majority Rule. The Board adopted without change its proposed rule to "determine the craft or class representative by a majority of valid ballots cast and provide employees with an opportunity to vote 'no' or against union representation." *Id.* at 26,063/1. Pursuant to the APA, the NMB's Final Rule will become effective on June 10, 2010.

30. The Board's Final Rule fails to identify any "compelling" reasons — or even legitimate and neutral reasons — for replacing the Majority Rule with a Minority Rule:

(a) The Final Rule states that the Majority Rule is being abandoned in order "to more accurately ascertain employee desires regarding representation." 75 Fed. Reg. at 26,076/1. In particular, the Board faults the Majority Rule for counting nonvoters as not

favoring unionization. *Id.* at 26,073/2. But countless elections have been held throughout the airline and railroad industries using the clear instruction that "no vote is a vote for no representation." *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees* ("*ABNE*"), 380 U.S. 650, 670 (1965). The Board offers no evidence that nonvoters have misunderstood these clear directions. Moreover, the Board's new rule treats nonvoters as having acquiesced in the decision of the voting majority, but that assumption is utterly irrational with respect to employees who do not vote because of travel, illness, or religious objections. With respect to disinterested voters, for 75 years the Board has understood that the proper question under Section 2, Fourth, is whether the majority of a craft or class has actually exercised their right to change the status quo, not whether those who choose to vote want a union. And as Chairman Dougherty recognized in her dissent, the Majority Rule "appropriately measure[s]" the preferences of disinterested voters "as *not* affirmatively desiring a change in the status quo." 75 Fed. Reg. at 26,084/3.

(b) The Final Rule asserts that the maintenance of "stability in labor relations" through peaceful relations between carriers and employees is accomplished through the Board's separate mediation function, not its representation function. *See* 75 Fed. Reg. at 26,076. But it is clear that the NMB must work to promote stable labor relations in *both* capacities. *See, e.g.*, 45 U.S.C. § 151a (noting the RLA's "general purpose[]" of "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein"). And it is also clear, as the Board has repeatedly found in the past, that the Majority Rule is essential to achieving stable relations between carriers and employees. *See, e.g., Chamber of Commerce*, 14 N.M.B. at 362 ("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."). Thus, the NMB cannot

neutrally or rationally justify its adoption of the Minority Rule by asserting that stability does not support retaining the Majority Rule. Indeed, the Board ignores stability when necessary to justify changing its voting rule, but is "happy to acknowledge the stabilizing role of representation procedures" when it is convenient to do so, such as in maintaining its rule requiring a "showing-of-interest" of a *majority* of eligible employees in order to obtain an election to challenge an incumbent union. 75 Fed. Reg. at 26,086/2 (Chairman Dougherty, dissenting). The Board's inconsistent treatment of stability is arbitrary and capricious.

(c) The Final Rule asserts that the NMB adopted the Majority Rule in response to company unionism and constraints on communications technology prevalent in the 1930s. 75 Fed. Reg. at 26,074. According to the Board, changed circumstances have removed these underpinnings of the Majority Rule. However, there is no evidence that the Board adopted the Majority Rule to combat company unions or to ameliorate communications constraints. And it is clear the Board has adhered to the Majority Rule for decades because its experience shows the rule promotes labor stability. Indeed, the NMB reaffirmed the Majority Rule as recently as 2008, *see Delta Air Lines*, 35 N.M.B. at 131-132, and there have been no material changes in the past two years that dictate a different conclusion today. Moreover, the NMB cannot reasonably claim to have found material changed circumstances without first completing the thorough and open evidentiary hearing utilized in *Chamber of Commerce* to scrutinize any potentially relevant factual assertions — which the NMB majority refused to do.

31. The Board's failure to identify "any changed circumstances or any explanation whatsoever for why employee choice is now a dispositive concern when it was not as recently as 2008" supports the "unattractive inference[]" that the changed circumstances which explain the Board's rule change are "a shift in political power and the imminence of several large

representation elections." 75 Fed. Reg. at 26,085/2 (Chairman Dougherty, dissenting). This inference further demonstrates that the Board's Final Rule is arbitrary and capricious. The inference is supported by the Board's pattern of promoting employees' right to select a union representative while impeding their equal right to decline union representation:

(a) The Board refuses to bring its largely theoretical decertification procedure into alignment with its newly-minted Minority Rule. *Id.* at 26,078-79. As Chairman Dougherty recognized, "[g]iven that the stated purpose of the rule change is to 'more accurately measure employee choice,'" it is arbitrary for the Board to continue to utilize the "most confusing and obfuscatory practice in all of [its] representation procedures" with respect to honoring employee choice to remove a union. *Id.* at 26,086/3-87/1 (Chairman Dougherty dissenting). Under this "confusing and obfuscatory" procedure, it has proven to be virtually impossible for a large company-wide craft or class of employees to decertify a union and return to non-union status.

(b) The Board also adopts a run-off procedure which arbitrarily discriminates in favor of unionization by refusing to include a "no union" option on a run-off election ballot, even though the Board justifies its use of such an option for an initial ballot as essential to ensuring an accurate measure of employee intent. *Id.* at 26,081-82. If the Board is correct, then the most accurate measure of employee sentiment during a run-off election would be to also offer a "no union" option. Moreover, because the Board will aggregate votes for the named union on the ballot, together with write-in votes, as votes for "union representation," a run-off ballot almost always would include only an option to vote for a named union or a write-in without any option to vote for "no union"—even if "no union" received more votes than the named union or the write-ins in the first election. The Board cannot reconcile this system with its stated accuracy rationale for abandoning the Majority Rule.

## CLAIMS FOR RELIEF

### Count I

**(Declaratory and Injunctive Relief under the APA, 5 U.S.C. § 706, and Section 2, Fourth of the RLA, 45 U.S.C. § 152 (Fourth))**

32. Plaintiff-Intervenor incorporates, as if set forth in full herein, Paragraphs 1-31.

33. The APA provides that an agency's final action shall be "h[e]ld unlawful and set aside" if, *inter alia*, it is found to be "not in accordance with law." 5 U.S.C. § 706(2). Under the two-step approach of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a court must, at Step One, reject an agency's interpretation of a statute when it is inconsistent with the statute's unambiguous text. If the statute is ambiguous, a court must reject the agency's interpretation at Step Two if it is unreasonable. *See Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 500 (D.C. Cir. 2009); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005). In addition, the NMB's Final Rule must be vacated directly under the RLA if "it exceed[s] [the Board's] statutory authority." *Am. W. Airlines, Inc. v. Nat'l Mediation Bd.*, 986 F.2d 1252, 1258 (9th Cir. 1992); *see also Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 659 n.1, 661-63 (D.C. Cir. 1994) (en banc).

34. The Board's Minority Rule must be set aside because it is both inconsistent with Section 2, Fourth's unambiguous text and an unreasonable interpretation of that text. Section 2, Fourth, provides 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." The section thus "require[s]" that "a majority" of a craft or class of employees be ensured "the right to determine who shall be the representative of the group or, indeed, whether they have any representation at all." *ABNE*, 380 U.S. at 670.

35. The Chamber and its members are aggrieved by the violations of law alleged herein. Unless the Court issues declaratory and injunctive relief resolving the legal issues with respect to the violations alleged, the Chamber and its members will be substantially injured. The Chamber and its members have no prompt, adequate and effective remedy at law and this action is the only means available to them for protection of their rights.

**Count II**

**(Declaratory and Injunctive Relief under the APA, 5 U.S.C. § 706)**

36. Plaintiff-Intervenor incorporates, as if set forth in full herein, Paragraphs 1-31.

37. The Board' Final Rule also must be "h[e]ld unlawful and set aside" if it is found to be "arbitrary, capricious, [or] an abuse of discretion . . . ." 5 U.S.C. § 706(2). When an agency has reversed course, such as with the NMB's abandonment of the Majority Rule, "[t]he question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are *rational, neutral*, and in accord with the agency's proper understanding of its authority." *FCC v. Fox TV Stations, Inc.*, 556 U.S. ____, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment; controlling concurring opinion) (emphasis added). Moreover, since it is the "duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation," an agency "cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Id.* at 1824.

38. The NMB's Final Rule is arbitrary, capricious, and otherwise not in accordance with law under the APA because, *inter alia*:

(a) there is no legitimate justification for the NMB's departure from its long-standing substantive standard (*i.e.*, "compelling reasons") for making material changes to its election rules;

(b) there is no legitimate justification for the NMB's departure from its longstanding use of the Majority Rule;

(c) there is no legitimate justification for the NMB's departure from its prior precedents regarding the evidentiary hearing process to be utilized in connection with any consideration of a Minority Rule;

(d) the NMB's majority predetermined the issues raised by the NPRM;

(e) it was arbitrary and capricious for the Board to engage in a selective and one-sided borrowing exercise from NLRB rules in a manner designed to favor unionization.

(f) it was arbitrary and capricious for the Board to refuse to adopt a parallel decertification procedure and a "no union" option on a run-off election ballot, and the resulting Final Rule impermissibly discriminates against employees' "option of rejecting collective representation," as guaranteed by Section 2, Fourth, of the RLA. *ABNE*, 380 U.S. at 669 n.5.

39. The Chamber and its members are aggrieved by the violations of law alleged herein. Unless the Court issues declaratory and injunctive relief resolving the legal issues with respect to the violations alleged, the Chamber and its members will be substantially injured. The Chamber and its members have no prompt, adequate and effective remedy at law and this action is the only means available to them for protection of their rights.

## PRAYER FOR RELIEF

WHEREFORE, PLAINTIFF-INTERVENOR prays for preliminary and permanent injunctions, and demands declaratory judgment against the Defendant as follows:

a) Declaring that the NMB's Final Rule is invalid because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA;

b) Declaring that the NMB's Final Rule is invalid because it is in excess of the NMB's jurisdiction under, and otherwise contrary to, the RLA;

c) Preliminarily and permanently enjoining the NMB from implementing the Final Rule;

d) Awarding costs, expenses and fees incurred in this litigation; and

e) Ordering such further relief as the Court may deem just and proper.

Dated: May 24, 2010

Respectfully submitted,

By: /s/ Neal D. Mollen

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# Exhibit A

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

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September 30, 2009

The Honorable Elizabeth Dougherty
Chairman
National Mediation Board
Suite 250 East
1301 K Street, N.W.
Washington, D.C. 20005

The Honorable Harry Hoglander
Member
National Mediation Board
Suite 250 East
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The Honorable Linda Puchala
Member
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**Re: Revisions To NMB Procedures in Representation Disputes**

Dear Chairman Dougherty and Members Hoglander and Puchala:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber's membership includes many employers subject to the Railway Labor Act ("RLA" or "the Act") including those in the railroad industry, airline industry, and in other industries that are deemed derivative carriers under the RLA. Our membership also includes trade associations that broadly represent carriers in both the railroad and airline industries.

We have recently become aware of the letter request dated September 2, 2009 from the Transportation Trades Division ("TTD") of the AFL-CIO, requesting a change to the voting procedures used by the National Mediation Board ("Board" or NMB) in representation disputes arising under the RLA. We believe that the TTD request should be rejected. However, if the Board considers the change requested by the TTD, then, on behalf of our members, we request that the Board amend its procedures to allow employees to vote to decertify a representative using the same criteria and voting procedures used by the Board in response to an application to certify a union representative, i.e. an application supported by a showing of interest from 35% of the affected craft or class, followed by an election using the same ballot used to elect a

representative, re-phrased to permit a vote to decertify rather than to elect a representative. Such a change would be needed to ensure that the representation duties of the Board are carried out in a manner that is consistent with the Act and that is fair and just.

If the Board were to grant the TTD request, then the Board would have an obligation to provide a process for employees to vote out a certified union in an election conducted in the same manner as the election which resulted in certification of the union in the first instance. The Act contemplates that the right of the majority to determine their representative will apply in the same way to the decertification process as is applied to the certification process. If the Board were to grant the TTD request, but fail or refuse to grant this related request, the Board would be creating a double standard in RLA representation disputes, and overtly favoring unions at the expense of employee freedom of choice.

We recognize that the Board has previously considered and rejected our proposed change, but in each instance that rejection was under the assumption that the Board's longstanding majority rule voting procedures would remain unchanged, i.e. that majority support for union representation would be required in order to certify a representative. If the TTD proposal is adopted, however, there is no longer a determination that a majority of employees has ever supported representation, let alone that a majority continue to support representation by the union certified. In those circumstances, it is all the more important that the employees have an equal right to exercise their choice not to have union representation—just as the employees subject to the National Labor Relations Act ("NLRA") are able to do. If, as the TTD argues, the expressed will of a majority of voters is sufficient to select a union, the same standard must apply to de-selection. To require any other standard would be to impair and inhibit employee freedom of choice in representation matters. The Supreme Court has confirmed that such freedom of choice is required by the RLA.[1] As the Court stated in *Russell* v. *National Mediation Board*,:[2]

> employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well. The language of the Act...clearly stands for this proposition. ....the implicit message throughout the Act is that the "complete independence" of the employees necessarily includes the right to reject collective representation. Indeed, the concept of "complete independence" is inconsistent with forced representation, most especially when that forced representation is at odds with employees' will and desires.[3]

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[1] *BRAC v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650 at 669 n.5 (1965) ("legislative history [of the RLA] supports the view that the employees are to have the option of rejecting collective representation.").

[2] 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

[3] 714 F.2d at 1343.

If adoption of the TTD's proposal were determined to be appropriate, then the same logic compels adoption of our proposal as well. Indeed, in *Teamsters* v. *BRAC*,[4] the Court expressly agreed with *the Board's* position that under the RLA "it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face, that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit."[5] As the Fifth Circuit further stated in *Russell,* the Board's duty under Section 2, Ninth of the RLA is to find the fact in dispute and the "Board failed here to find the fact in dispute: who is the true representative of the employees?"[6]

We understand that the Board has not yet announced whether or how it will address the TTD's request. We note that when similar issues were considered by the Board in 1985-87, the Board consolidated requests from both the Chamber and from labor organizations for simultaneous proceedings, which included evidentiary hearings. We respectfully request that, if the Board considers the TTD's request, the Board follow similar procedures here, consolidating our request with that of the TTD, conducting hearings, and seeking the views of all interested parties on the issues presented.[7]

We look forward to the opportunity to provide further input in support of these proposed changes. Thank you for your consideration of our views.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration, and Employee Benefits

[4] 402 F.2d 196 (D.C. Cir.), *cert denied*, 393 U.S. 848 (1968),

[5] 402 F.2d at 202-03.

[6] 714 F.2d at 1347.

[7] We note that in her responses dated May 13, 2009, to Questions for the Record, Member Puchala told the Senate Committee on Health Education Labor and Pensions that she believed that "with respect to significant changes to NMB Representation Procedures, the Board should seek to engage in a robust rulemaking process."