

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AIR TRANSPORT)
ASSOCIATION OF AMERICA, INC.,)
1301 Pennsylvania Avenue, N.W.)
Suite 1100)
Washington, D.C. 2004-1707)

Plaintiff,)

and)

CHAMBER OF COMMERCE OF THE)
UNITED STATES OF AMERICA,)
1615 H Street, N.W.)
Washington, D.C. 20062)

Civil Action No. 1:10-cv-00804-PLF

Plaintiff-Intervenor-Applicant,)

vs.)

NATIONAL MEDIATION BOARD,)
1301 K Street, N.W.)
Suite 250E)
Washington, D.C. 20005)

Defendant.)

_____)

MEMORANDUM OF LAW IN SUPPORT OF
THE MOTION OF CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA TO INTERVENE AS PLAINTIFF

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National Mediation Board, Representation Election Procedure,
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The National Mediation Board has published a new regulation scheduled to go into effect on June 10, 2010. *See* National Mediation Board, Representation Election Procedure, 75 Fed. Reg. 26,062 (May 11, 2010) (to be codified at 29 C.F.R. Parts 1202 & 1206) (“Final Rule”). That Rule overturns the standards for conducting union elections under the Railway Labor Act (the “RLA”) that have been applied for 75 years. Members of the Chamber of Commerce of the United States of America (“Chamber”) are directly affected by these new standards. Accordingly, pursuant to Rules 24(a) and (b) of the Federal Rules of Civil Procedure and LCvR 7(j), the Chamber respectfully submits this Memorandum of Law in support of its Motion to Intervene as Plaintiff in this litigation. For reasons set forth below, the Chamber meets all of the factors under Rule 24(a) for intervention as of right as a plaintiff in this litigation, challenging the Final Rule issued by the National Mediation Board (the “Board” or the “NMB”) on May 11, 2010. Alternatively, the Chamber meets the requisite factors under Rule 24(b) for permissive intervention.

I. INTRODUCTION AND BACKGROUND

The Chamber is the world’s largest business federation. Declaration of Randel K. Johnson (“Johnson Decl.”) at ¶ 4 (attached as Exh. A).¹ It directly represents 300,000 businesses and organizations, and indirectly represents the interests of more than 3,000,000 businesses and organizations of every size and in every region of this country. *Id.* The Chamber’s membership includes many companies that operate in the airline and railroad industries. Johnson Decl. at ¶ 5.

¹ The Chamber is incorporated and has its principal place of business in the District of Columbia. *See* Johnson Decl. at ¶ 3.

In addition, the Chamber's membership also includes trade associations that represent carriers in both the railroad and airline industries. *Id.*

These business and trade associations will be directly and significantly affected by dramatic changes to the standards applicable to union elections under the RLA; these changes are reflected in the Final Rule that is the subject of this litigation. Under existing election standards in the railroad and airline industry, no entity can be certified as a collective bargaining representative unless a majority of the unit of employees at issue (called a "craft or class" under the RLA) votes in an election, *and* that entity receives votes from a majority of those voting. Under the new Rule about to go into effect, a labor organization need only obtain a majority of the votes cast in the election without requiring a majority of the craft or class to have voted, thus allowing a union to be certified as a collective bargaining representative without demonstrating the affirmative support of a majority of the affected employees.

All of the Chamber's members rely upon uninterrupted service from the national air and rail transportation systems, and thus all have a direct and immediate interest in labor stability in the airline and railroad industries. Johnson Decl. at ¶ 8. These interests are at stake in this litigation.

II. THE CHAMBER HAS STANDING TO INTERVENE IN THIS SUIT

"[A] party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003) (citing *Military Toxics Project v. EPA*, 146 F.3d 948, 953 (D.C.Cir. 1998)).

Associations such as the Chamber have standing to sue on behalf of their members when:

- (a) its members would otherwise have standing to sue in their own right;
- (b) the interests it seeks to protect are germane to the organization's purpose; and

(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Military Toxics Project, 146 F.3d at 953-54 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (internal quotation marks omitted).

As to the first criterion, “[i]n many if not most cases the petitioner’s standing to seek review of administrative action is self-evident.” *Hardin v. Jackson*, 600 F. Supp. 2d 13, 15 (D.D.C. 2009) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002)). That is true here. The Chamber’s membership includes trade associations representing carriers in both the railroad and airline industries, as well as individual companies operating in those industries. *See Johnson Decl.* at ¶ 5. Many of the nation’s largest airlines and railroads belong to the Chamber. *Id.* If the Final Rule goes into effect, these Chamber members will be subject to the Board’s Rule in any representation election and certification proceeding arising after the Rule’s effective date, which is June 10, 2010. *See 75 Fed. Reg.* at 26,062. This could mean that the Chamber’s members would be compelled to bargain with unions that do not have the support of the majority of the employees they will be representing, which could result in labor instability and disruption. These businesses will therefore suffer concrete injury-in-fact from the issuance of this Final Rule, and would have standing to bring suit in their own right.

The remaining two criteria of *Military Toxics Project* are also easily satisfied. The interests that the Chamber seeks to vindicate by intervening in this lawsuit — ensuring that the National Mediation Board complied with the requirements of the Administrative Procedure Act, ensuring that union elections are administered in a manner consistent with the requirements of the RLA and the Board’s decades-old practice, and thus are conducive to harmonious labor-management relations — are germane to the Chamber’s purposes of promoting the interests of business before governmental agencies and in the courts. *Johnson Decl.* at ¶¶ 8-9.

The Chamber is also capable of representing its members' positions and interests in this case. One of the Chamber's most important functions is to give voice to the interests and concerns of American business on important matters before the Courts, the United States Congress, the Executive Branch, and the independent Regulatory Agencies of the Federal government. Johnson Decl. at ¶ 9. To date, the Chamber has filed briefs in more than 1,700 cases of importance to business community. *Id.*

III. THE CHAMBER MEETS THE STANDARD FOR INTERVENTION AS OF RIGHT UNDER RULE 24(A)

Federal Rule of Civil Procedure 24(a) provides for intervention as of right if the following test is met: (1) the motion is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action in the applicant's absence may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interests. *See* Fed. R. Civ. P. 24(a); *Fund for Animals*, 322 F.3d at 731 (citing *Foster v. Gueory*, 655 F.2d 1319, 1323-24 (D.C. Cir. 1981)). The Chamber satisfies each of these requirements.

A. The Chamber's Motion To Intervene Is Timely.

The Chamber's motion is timely. The Chamber seeks to intervene in the current proceeding while it is in its earliest stage. The Complaint has just been filed, the defendant has not answered, the parties have not briefed any issues, and the Court has issued no substantive orders.

Thus, the proposed intervention would not result in any prejudice to any of the parties to the litigation due to delay. *See Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 561 (5th Cir. 2003) (the inquiry for the prejudice factor is "whether other parties were

prejudiced *by the delay*, not whether they would be prejudiced *by the addition of the claim*”). The Court has not yet set a briefing schedule on ATA’s request for a preliminary injunction. Therefore, intervention now would not result in any delay in the briefing schedule or compromise the ability of the defendant to respond to the arguments raised by the Chamber.

B. The Chamber Has An Interest Relating To The Subject Of The Action.

Because the Chamber has Article III standing, it automatically satisfies the second prong of the Rule 24(a) test, namely a showing of an interest relating to the property of transaction which is the subject of the suit. *See Fund for Animals*, 322 F.3d at 735 (“Our conclusion that the [intervenor] has constitutional standing is alone sufficient to establish that the [intervenor] has an interest relating to the property or transaction which is the subject of the action[.]”) (citations and internal quotation marks omitted).

C. The Chamber’s Members Have a Cognizable Interest That Will Be Impaired Or Impeded As a Result Of This Proceeding.

An entity has sufficient interests to intervene where the proceeding has the potential to subject the movant to governmental regulation. *See, e.g., Fund for Animals*, 322 F.3d at 735; *Military Toxics Project*, 146 F.3d at 954. As already discussed, many of the Chamber’s members, and the members of the organizations that are themselves Chamber members, have a direct and immediate interest in the change the Rule would make to the union certification rules applicable to their businesses, consequently, in the result of this litigation. Johnson Decl. at ¶¶ 6. In addition, this litigation will impact the broader membership of the Chamber, which includes countless businesses and individuals that rely on stable labor relations in the airline and railroad industries for the success of their own businesses. *Id.* at ¶ 8. The maintenance of stable labor relations in those industries is imperiled by the Rule. Therefore, the Chamber’s members have a cognizable interest that will be impaired or impeded as a result of this proceeding.

D. The Interests Of The Members Of The Chamber May Not Be Adequately Protected By ATA's Prosecution Of This Lawsuit without The Chamber's Intervention.

While the ATA represents many airline carriers subject to the RLA, it does not represent any railroads or the range of non-RLA-covered companies the Chamber represents, all of which depend on the railroad and airline industries for their operations and that will therefore be impacted by the Rule. *See United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (intervention permitted where intervenor's interests are "similar but not identical" to other litigants in the case). All of these businesses have distinct interests in this lawsuit that may not be adequately represented by the ATA. Johnson Decl. at ¶¶ 11-12. This prong of the Rule 24(a)(2) test requires only a "minimal" showing that "representation of [the applicant's] interest may be inadequate," *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)) (internal quotation marks omitted), and thus the Chamber easily satisfies this requirement as well.

IV. THE CHAMBER MEETS THE STANDARD FOR PERMISSIVE INTERVENTION UNDER RULE 24(B)

Even if intervention as of right were not required, the Court should grant permissive intervention under Fed. R. Civ. P. 24(b). The Chamber has members who have an independent basis for subject-matter jurisdiction, has timely filed the instant motion, and has a claim or defense that has a question of law or fact in common with the main action. *See EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The requirements for permissive intervention are construed liberally, with all doubts resolved in favor of permitting intervention. *Id.*

For the reasons discussed above, the Chamber's motion is timely and the Chamber has an independent basis for subject-matter jurisdiction. As demonstrated by the Chamber's proposed

pleading, attached as Exhibit B, the Chamber's intervention also shares common questions of law or fact with those raised by the ATA.

Furthermore, the Chamber's proposed intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." *Nat'l Ass'n of Home Builders v. United States Army Corps of Eng'rs*, 519 F. Supp. 2d 89, 92 (D.D.C. 2007). ATA — the Plaintiff in this litigation — has consented to the Chamber's intervention, and the Chamber intervened prior to the NMB's responsive pleading.

* * *

For the foregoing reasons, the Chamber satisfies the requirements for intervention pursuant to Fed. R. Civ. P. 24(a) or, alternatively, Fed. R. Civ. P. 24(b). Accordingly, the Chamber respectfully requests that the Court grant its motion for leave to intervene in this proceeding.

