UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AIR TRANSPORT ASSOCIATION OF AMERICA, INC.,

Plaintiff,

1301 Pennsylvania Ave., NW St. 1100 Washington, DC 20004

v.

NATIONAL MEDIATION BOARD,

Defendant.

Case: 1:10-cv-00804
Assigned To : Friedman, Paul L.
Assign. Date : 5/17/2010
Description: Admin. Agency Review

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the Air Transport Association of America, Inc. ("Plaintiff" or the "ATA"), by and through its counsel, O'Melveny & Myers LLP, for its Complaint against the National Mediation Board ("NMB" or the "Board") alleges as follows:

NATURE OF THE ACTION AND RELIEF SOUGHT

1. The ATA brings this action for declaratory and injunctive relief to prevent the Board 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 Procedure 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 ATA'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.*, and 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.

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 ATA exhausted its arguments before the Board prior to the issuance of the Final Rule. It submitted a comment letter on January 4, 2010, and a motion for disqualification on January 8, 2010. Thus, the questions presented by this Complaint were developed before the Board and are now fit for judicial review.

PARTIES

11. Plaintiff, the ATA, is the principal trade association representing scheduled airlines in the United States.[*] ATA's purposes include working with its members in legal,

---

[*] The ATA's members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Air Lines, Inc.; UPS Airlines; and US Airways, Inc. The following ATA members do not join in this lawsuit: American Airlines, Inc., Continental Airlines, Inc., Southwest Airlines Co., UPS Airlines, United Air Lines, Inc., and US Airways, Inc.

political, and regulatory arenas to foster a business and regulatory environment that promotes a safe, secure and financially stable (if not profitable) U.S. airline industry.

12. The ATA's members and affiliated airlines account for more than 90% of the annual passenger and air cargo traffic on U.S airlines, and more than 300,000 full-time equivalent airline-industry jobs. Roughly 50% of the airline industry workforce in the United States is represented by labor organizations for collective bargaining purposes.

13. Labor relations for the ATA's members are governed by the RLA. The RLA's purposes include protecting the public's and carriers' 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 the purposes of this chapter," *id.* § 152 (Fourth), which necessarily includes a majority's determination that there shall be no representative, and the imposition on the ATA's 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.* § 152 (Ninth).

14. Accordingly, the ATA and its 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 ATA's members, including some of those who are participating in this lawsuit, consist in part of airlines 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 an individualized basis, or instead become represented

by a union, 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, airlines are 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 the airline industry, and by permitting the certification of minority-supported unions, the NMB's new rule will likely fundamentally change the legal duties and relationships between many ATA member-airlines 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 in the past, 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. In the airline industry under the RLA, unlike in other industries governed by the National Labor Relations Act, labor unions are certified and 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 the airline industry than in other industries. 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 engaged therein." 45 U.S.C. § 151a.

21. In the past, the Board has also 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 U.S. Chamber of Commerce ("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 ATA 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 U.S. Chamber of Commerce separately reminded the Board 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. The Board's majority did not respond to the ATA's September 10, 2009 letter.

27. Instead of providing the evidentiary hearing process required by the Board's precedents and requested in the ATA's September 10, 2009 letter, 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. Moreover, 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, even though 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.

28. ATA submitted a comment letter and participated in the December 7, 2009 "meeting." On January 8, 2010, certain members of ATA also moved to disqualify Members Hoglander and Puchala.

29. The Motion for Disqualification was based on publicly available facts demonstrating that Members Hoglander and Puchala had impermissibly predetermined the issues:

(a) First, Members Hoglander and Puchala published the NPRM by means of an improper internal process, detailed in a November 2, 2009 letter from Chairman Dougherty to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr, which was not deliberative and did not involve consultation with Chairman Dougherty. As Chairman Dougherty observed in her letter, there was a "complete absence of any principled process." Members Hoglander and Puchala excluded the Chairman from internal deliberations, made decisions about the timing of the planned publication of their NPRM without the Chairman's consent or participation, and effectively operated as a two-person Board. Specifically, on October 28, 2009, the Board's majority surprised Chairman Dougherty with a draft proposed rule and told her she had one-and-a-half hours to consider it and could not publish a dissent, even though the NMB's policies do not prohibit dissents. When Chairman Dougherty protested, the Board's majority only partially relented, allowing her a brief additional period in which to review the rule, but continuing to bar her from publishing a dissent. When the Chairman then insisted on publishing her dissent, she was allowed to do so, but only if she deleted any references to the Board majority's extraordinary behavior.

(b) Second, the timing of the proposed rule change had an unmistakable relationship with the on-going organizing campaign at Delta—which reveals not only prejudging, but also seeking to implement the prejudgment so as to affect then-pending or imminent representation elections. After the TTD sought this rule change, the Board continued in almost all cases to process representation applications and schedule elections under the Majority Rule. It failed, however, to move forward on the representation applications that had been filed by the AFA and IAM at Delta, even though those applications were filed on July 27, and August 13, 2009, respectively, which was before the filing date for many of the applications that the NMB processed to conclusion under the Majority Rule. The NMB failed to offer any plausible reasons for this delay, and the only conceivable explanation is that the NMB wanted to benefit those unions by avoiding the likelihood of election defeats under the long-standing Majority Rule. As Chairman Dougherty stated in her letter, this sequence of events "contribute[s] to the growing perception that the majority is attempting to push through a controversial election rule change to influence the outcome of several very large and important representation cases currently pending at the Board."

(c) Third, the Board's majority (i) departed from the Board's past practice of neutrally inviting participation and comment on a petition for an election rule change by instead issuing an argumentative NPRM that defended the change requested by TTD; (ii) failed to identify any adequate and neutral justifications for its sweeping rule change in its argumentative NPRM; (iii) refused to adopt a parallel decertification election procedure; (iv) unjustifiably ignored its "compelling reasons" standard for rule changes; and (v) refused to employ the evidentiary hearing process it has previously said would be required for a fair consideration of whether to discard the Majority Rule.

The Board's Final Rule Abandoning the Majority Rule

30. On May 11, 2010, the NMB issued a Final Rule in which it summarily denied the Motion for Disqualification 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.

31. 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.

32. 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))

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

34. 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 Resource 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).

35. 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 shall have any representation at all." *ABNE*, 380 U.S. at 670.

36. The ATA 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 ATA and its members will be substantially injured. The ATA 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)

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

38. 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.

39. 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.

40. The ATA 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 ATA and its members will be substantially injured. The ATA 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 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;

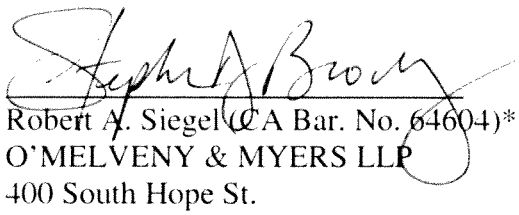
c) Preliminarily and permanently enjoining the NMB from implementing the Final Rule;

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 17, 2010

Respectfully submitted,



Robert A. Siegel (CA Bar. No. 64604)*
O'MELVENY & MYERS LLP
400 South Hope St.
Los Angeles, CA 90071-2899

Chris A. Hollinger (CA Bar No. 147637)*
O'MELVENY & MYERS LLP
2 Embarcadero Center
San Francisco, CA 94111-3823

Irv Gornstein (DC Bar No. 345751)*
Stephen D. Brody (DC Bar No. 459263)
Micah W.J. Smith (DC Bar. No. 988330)
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, DC 20006-4001
**pro hac vice motions pending*

Attorneys for Plaintiff Air Transport Association of America, Inc.