NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

OFFICE OF THE CHAIRMAN
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November 2, 2009

The Honorable Mitch McConnell
United States Senate
Washington, D.C. 20510

The Honorable Michael Enzi
United States Senate
Washington, D.C. 20510

The Honorable Johnny Isakson
United States Senate
Washington, D.C. 20510

The Honorable Orin Hatch
United States Senate
Washington, D.C. 20510

The Honorable Pat Roberts
United States Senate
Washington, D.C. 20510

The Honorable Lamar Alexander
United States Senate
Washington, D.C. 20510

The Honorable Tom Coburn
United States Senate
Washington, D.C. 20510

The Honorable Richard Burr
United States Senate
Washington, D.C. 20510

The Honorable Judd Gregg
United States Senate
Washington, D.C. 20510

Dear Senators:

Thank you for your letter of October 8, 2009 regarding a request from the Transportation Trades Department of the AFL-CIO (TTD) that the National Mediation Board (NMB or Board) alter its voting procedures. I share your concern about the TTD request, and I believe the only proper course of action should have been for the Board to have full comment on the TTD request – together with related issues such as decertification procedures, Excelsior list, and others – before making any proposals. A majority of the Board has chosen instead to propose to change our election rules in the manner requested by the TTD. The proposed rule is available for public inspection today at the Federal Register. I have dissented from this proposal, and the substantive reasons for my disagreement are discussed in my dissent.

In addition to my substantive concerns, I dissented because I believe the process by which the proposed rule was drafted and issued was flawed. The proposal was completed without my input or participation, and I was excluded from any discussions regarding the timing of the proposed rule. As I do not believe the Board should be making this proposal without first hearing comment on all related issues (including decertification), it was not a surprise that I was not included in the initial crafting of the proposed rule. However, I should have, at a minimum, (1) been given drafts along the way for consideration and comment; (2) been included in discussions regarding the timing of the proposal; and (3) been given ample time to review a draft and prepare a dissent if necessary. Instead, on Wednesday, October 28 at 11 am, my colleagues informed me that they had prepared a "final" version of the proposed rule and

intended to send it to the Federal Register that day. They initially told me I had one and a half hours to consider their proposed rule. They also told me that I would not be permitted to publish a dissent in the Federal Register and would have to air any disagreement some other way. Publication of my dissent is not prohibited by any agency policy, and their decision to forbid it in this particular case was arbitrary and ad hoc. After several requests from me, they agreed to give me an additional twenty-four hours – until noon on Thursday, October 29 -- to review and determine my position on the rule. They continued to insist that I would not be permitted to publish my dissent. The next day, an hour and a half before my "deadline," I informed my colleagues that I intended to dissent and again asked for more time to digest the rule and draft my dissent. My request for more time was rejected. I was then told I would be permitted to publish my dissent, but only if I could have it completed by the noon deadline – an hour and a half from the time of the conversation. The dissent I originally submitted included a discussion of these process flaws as one of the reasons for my dissent. I was told by my colleagues that if I did not remove the discussion of the process flaws from my dissent, they would not consent to its publication in the Federal Register. I have attached to this letter the full dissent I originally submitted.

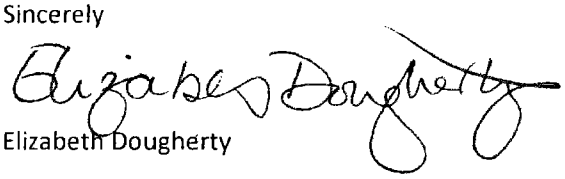
Under normal circumstances, I would have preferred not to discuss Board process so publicly. However, in light of the complete absence of any principled process or consideration of my role as an equal Member of the Board, I feel compelled to bring these issues to your attention. I am also troubled by my colleagues' attempt to prevent me from raising these concerns as a part of my published dissent.

This sort of exclusionary behavior is not the way the Board has conducted itself previously during my tenure. In my past experience, Board Members who wished to dissent from a proposed decision have been given a role in the substantive and procedural discussions related to the decision and ample time to prepare their dissent. I believe this is the better way to conduct agency business.

I also query – why the rush to publish the proposed rule? The election rule in question has been in place for 75 years; why not wait one more day in the interest of ensuring a fair rulemaking process and accommodating the reasonable request of a colleague. Such an obvious rush to put out a proposed rule gives the impression that the Board has prejudged this issue, and it will contribute 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.

Thank you for your interest in this matter.

Sincerely



Elizabeth Dougherty

Chairman Dougherty dissented from the action of the Board majority in approving this proposed rule. Her reasons for dissenting are set forth below.

I dissent from the proposed rulemaking for several reasons. Our current election rules have a long history and are supported by important policy reasons. I do not believe there is any evidence or legal analysis currently before the Board to support making the change proposed by my colleagues. Serious questions exist about the Board's statutory authority to make the rule change and its ability to articulate a rationale for change that complies with the Administrative Procedures Act. Moreover, I believe the process by which this rule was drafted is flawed. Perhaps most importantly, the proposed rule makes no reference to other requests the Board has received to consider decertification and Excelsior list issues. For these and the following reasons, I believe it is, at a minimum, premature to propose a rule change of this magnitude, and a more prudent course of action would be for the Board not to prejudge this issue, but rather to give all interested parties an opportunity to comment on the request made by the Transportation Trades Division of the AFL-CIO (TTD), together with subsequent requests regarding decertification and other issues, before making any proposals.

The rule in question has been applied consistently for 75 years – including by Boards appointed by Presidents Roosevelt, Truman, Johnson, Carter, and Clinton. Making this change would be an unprecedented event in the history of the NMB, which has always followed a policy of making major rule changes with consensus and only when required by statutory amendments or essential to reduce administrative burdens on the agency. Chamber of Commerce of the United States, 14 NMB 347, 356 (1987). Regardless of the composition of the Board or the inhabitant of the White House, this independent agency has never been in the business of making controversial, one-sided rule changes at the behest of only labor or management.

No one, including my colleagues, has suggested that the Railway Labor Act mandates the change in the proposed rule or that the rule change is necessary to reduce administrative burdens on the Agency. In fact, a serious question exists as to whether the NMB even has the statutory authority to make this reversal. A Board appointed by President Carter unanimously decided that the Board is of the view that it does not have the authority to administratively change the form of the ballot used in representation disputes and that such a change, if appropriate, should be made by Congress. [1]

I also believe that my colleagues have not articulated a rationale for this rule change as required by the Administrative Procedures Act. With this notice of proposed rulemaking, my colleagues seek to radically depart from long-standing, consistently applied administrative practices. Under the Administrative Procedure Act, a change in such a long-standing policy must be supported by a strong rationale. While administrative agencies are not bound by prior policy, there is a duty to explain adequately "departures

[1] In addition, the only court ever to rule specifically on the question of whether the Board has the authority to certify a representative where less than a majority of the eligible voters participates in an election found that it did not. Virginian Railways Co. v. Sys. Fed'n, 11 F. Supp. 621, 625 (E.D. Va 1935). That ruling was not appealed and no court has ever specifically held that the Board has this authority.

from agency norms." Pre-Fab Transit Co. v. Interstate Commerce Comm'n, 595 F.2d 384, 387 (7th Cir. 1979). A change in the majority voting rule must be based on more than the preferences of the current Board. "An agency's view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . [I]f it wishes to depart from its prior policies, it must explain the reasons for its departure. " Panhandle E. Pipeline Co. v. Fed. Energy Regulatory Comm'n, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (internal citations omitted). "Conclusory statements" and "conjecture cannot substitute for a reasoned explanation" for such a change in precedent. Graphic Comm. Int'l Union v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490, 1494 (D.C. Cir.

There is nothing in the proposed rule to support changing this long-standing Board tradition. The Board has repeatedly articulated important policy reasons for our current majority voting rule – including our duty to maintain stability in the air and rail industries. 16 NMB ANN. REP. 20 (1950); Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). This duty stems directly from our statutory mandate to "avoid interruption to commerce or the operation of any rail or air carrier." Id. The Majority attempts to ignore this important statutory mandate by claiming that only our mediation function is relevant to keeping stability in the air and rail industries. This argument has no merit. The statute does not limit our mandate to only mediation, and it is disingenuous to suggest that our representation function does not play an important role in carrying out our duty to maintain stability in these industries. Moreover, the Board has repeatedly in the past raised this policy issue in conjunction with our representation function. 16 NMB ANN. REP. 20 (1950); Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). As the Board stated in 1987, "[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." Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). Assuring that a representative certified by the NMB enjoys true majority support is even more important given that union certifications under the RLA must cover an entire transportation system[2] -- often over enormously wide geographic areas with large numbers of people. I also note that there is no process for decertifying a union under the Railway Labor Act. These unique aspects of the RLA do not exist under the National Labor Relations Act or elsewhere, and they render irrelevant comparisons between the RLA and other election procedures.[3]

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[2] It is well settled that the Board applies the term "craft or class" under the RLA on a system-wide basis. Delta Air Lines Global Servs., 28 NMB 456, 460 (2001); American Eagle Airlines, 28 NMB 371, 381 (2001); American Airlines, 19 NMB 113, 126 (1991); America West Airlines, Inc., 16 NMB 135, 141 (1989); Houston Belt & Terminal Railway, 2 NMB 226 (1952).

[3] As the Supreme Court has long recognized, "that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Railroad Trainmen v. Jacksonville Terminal Co., 394 US 369, 383 (1969).

The only other rationale offered by my colleagues is changed circumstances and an increasingly participatory workforce. I fail to see how these changes, if true, support changing a 75-year-old practice based on important statutory mandates that have not changed. Moreover, any arguments that changed labor relations support changing our election practices are definitively rebutted by the facts: the percentage of rail and air employees who are union members is dramatically higher than in other industries, and the percentage of air and rail employees participating in elections has increased by almost 20% over the last decade.

The Majority has not articulated a sufficient rationale for making the change. Moreover, the request from the Transportation Trades Division of the AFL-CIO that prompted this rule change was made in an informal, two-page letter with no legal analysis, no mention of changed conditions, and no discussion of our statutory authority. In light of these facts, the Board's history, and the lack of support for the change, I don't see how the Board could propose a rule change this controversial and divisive without the benefit of a full briefing from all interested parties.

I also dissent because I am concerned about the timing of the Majority's proposal. The Board recently established a bi-partisan, labor-management committee (which we are calling Dunlop II) to examine the RLA and the NMB and recommend changes. The committee has not yet delivered its report. In my view, it would be premature and irresponsible for the Board to propose any change to one of its most long-standing procedures before this committee has made its report.

Moreover, the Board has received requests to begin representation proceedings involving close to 40,000 employees at two major airlines – the largest group of elections in the history of the NMB. I believe it is harmful to the reputation and credibility of the Board for it to take a position in favor of a change to our election rules during these elections, which the Majority does by proposing this change. As I have previously stated, I believe the more impartial and responsible approach would be to seek comment on the TTD's request, together with other related issues, so that we could have the benefit of a full briefing on all the issues before without making proposals in favor of the change.

I also dissent because the Majority's proposed rule does not request comment on several related issues that have been raised by our constituents in connection with the TTD's request. I believe firmly that the Board should not consider the TTD petition in a vacuum. Several parties have requested that we consider a decertification procedure, noting that a minority voting rule necessitates some sort of decertification mechanism or else it deprives employees of the right to be unrepresented. We have also received a request to consider providing Excelsior lists to unions. And there are also other areas of our representation policy and procedures that would be implicated by a change in voting rules. For example, we currently require a union seeking to challenge an incumbent union to submit authorization cards from more than 50% of eligible voters. If we were to change our voting rules to permit fewer than 50% of eligible voters to select a representative, we must contemporaneously consider whether we should still require a greater than 50% showing of authorization cards to challenge an incumbent union. In order in order to be fair to all interested parties, I believe that Board must consider all of these issues together, and I am surprised that my colleagues have ignored these other requests and are addressing

only the TDD's request. I encourage interested parties to submit comments addressing these other issues.

Finally, I dissent because I believe that the process by which this rule was drafted is flawed. The rule was drafted without my input or participation. I was notified of the existence of a final proposed rule at 11:30 am on October 28, and I was given only 24 hours to review the rule and draft a dissent. I believe this sort of rushed, exclusionary rulemaking does not produce the best results for the agency, and I believe a better way of conducting business would be to have a comment period on all the relevant proposals before taking a position, review those comments together, and craft a decision collaboratively.

Chairman Elizabeth Dougherty.