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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

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May 17, 2011

Harry Hoglander
Chairman
National Mediation Board
1099 14th St. NW
Washington, DC 20570

Dear Chairman Hoglander:

We are concerned by the National Mediation Board's (the "Board" or "NMB") recent decision to advance a rule, which allows a minority of employees to determine union representation.¹ For over 75 years, the Board 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 craft or class voted in favor of union representation. This "Majority Rule" is stated directly in the text of the Railway Labor Act, 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."² The Board's proposed "Minority Rule" allows a union to be certified as the collective bargaining representative based on a majority of votes actually cast, even if only a small minority of all eligible employees voted in favor of union representation.

Over two years ago, Delta Air Lines acquired Northwest Airlines and merged into a single carrier.³ Before the merger, Delta flight attendants were not represented by a union while Northwest flight attendants were represented by the Association of Flight Attendants ("AFA").⁴ The AFA sought to represent Delta employees in May 2008 but ultimately lost the representation election because it could not obtain a majority of the "craft or class" of flight attendant employees.⁵ During this 2008 election, the AFA asked the National Mediation Board (the

¹ See National Mediation Board, Notice of Final Rulemaking in Docket No. C-6964, 75 Fed. Reg. 26,062, 26,067 (May 11, 2010) [hereinafter "Final Rule"].

² 45 U.S.C. § 152 (Fourth).

³ See Carol Sottili, *The Delta-Northwest Merger and You*, WASH. POST, (Oct. 31, 2008), available at http://voices.washingtonpost.com/travellog/2008/10/delta-northwest_merger.html (last visited Apr. 7, 2011).

⁴ Harry R. Weber, *Northwest Flight Attendants Union Sues Delta*, AP, (Nov. 25, 2008), available at http://www.usatoday.com/travel/flights/2008-11-24-nwa-delta-attendant-suit_N.htm (last visited Apr. 7, 2011).

⁵ See INTERVENOR'S COMPLAINT, *Air Transport Association of America, Inc. v. National Mediation Board* (D.D.C. 2010), Case No. 1:10-cv-00804 at 8 [hereinafter "Complaint"].

“Board”) to change its voting rules to allow the AFA to represent Delta’s flight attendants without majority support.⁶ The Board unanimously denied the AFA’s request.⁷

On July 27, 2009, the AFA filed another application with the Board seeking to represent the flight attendants of the merged Delta and Northwest.⁸ On August 13, 2009, the International Association of Machinists and Aerospace Workers (“IAM”) filed an application with the Board to represent customer service agents and other classes of workers at Delta.⁹ However, both of these representation applications were delayed without explanation.¹⁰ Then-Chairman Elizabeth Dougherty urged her colleagues to “move forward with the Delta/AFA case as expeditiously as possible – particularly given that this application was filed over three months ago.”¹¹

On October 30, 2009, the IAM withdrew its representation application.¹² Four days later on November 3, 2009, the AFA withdrew its application.¹³ That same day, the Board published its Notice of Proposed Rulemaking, allowing union representation based on the Minority Rule.¹⁴ In a press release, the AFA stated, “[t]he withdrawal is in response to the NMB’s recent proposed voting procedures announcement that would permit a majority of workers who actually vote in union elections to decide the election and stop assigning ‘no’ votes to workers who do not participate.”¹⁵ Had the AFA not withdrawn its application, the AFA, in its efforts to represent Delta employees, would have been subject to the Majority Rule, as the NLRB’s rule change applied only to prospective applicants, not current ones.¹⁶ The proximity of the IAM and AFA’s withdrawal of their representation applications to the Board’s publication of its Notice of Proposed Rulemaking strongly suggests that someone within the Board communicated with the IAM and AFA concerning the case before the Board.¹⁷

⁶ *Id.*

⁷ See *Delta Air Lines, Inc.*, 35 N.M.B. 129, 132 (2008).

⁸ Final Rule, *supra* note 1 at *id.*

⁹ *Id.*

¹⁰ See *e.g. id.* at 26,067 (“the use of hyperlinks in representation elections had to be resolved before the Board could move forward with the investigation of AFA’s application”); *But compare* Letter from Chairman Elizabeth Dougherty to Senators Isakson, Corker, Bunning, Bennett, Chambliss, Voinovich, & Hatch (Oct. 28, 2009) [hereinafter “Dougherty Letter 2”] (Claiming the Board was incorrect because the pending AFA request concerning hyperlinks was not tied to any representation application and was not part of AFA’s representation application for Delta flight attendants).

¹¹ Dougherty Letter 2, *supra* note 10 at 2.

¹² *Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 19 (Oct. 30, 2009).

¹³ See Dismissal – Withdrawn During Election, *In re Representation of Employees of Northwest Airlines & Delta Airlines Flight Attendants*, 37 N.M.B. No. 4 (Nov. 3, 2009).

¹⁴ Notice of Proposed Rulemaking, Docket No. C-6964, 74 Fed. Reg. 56750 (Nov. 3, 2009).

¹⁵ PRESS RELEASE, ASSOCIATION OF FLIGHT ATTENDANTS-CWA, *AFA-CWA Applauds National Mediation Board for Proposed Voting Procedure Change*, (Nov. 3, 2009), available at <http://www.afacwa.org/default.asp?id=1229> (last visited Apr. 8, 2011).

¹⁶ *Id.*

¹⁷ National Mediation Board, Statement of Delta Airlines, Inc. at Open Meeting on Notice of Proposed Rulemaking Issued by the Nat’l Mediation Bd. at 74 Fed. Reg. 56750 on Nov. 3, 2009, (Dec. 7, 2009) available at <http://www.nmb.gov/representation/proposed-rulemaking/delta-presentation.pdf> (“The Board has abandoned any semblance of neutrality on representation issues — surrendering the integrity which both the Supreme Court and the NMB have long recognized as essential to the Board’s effective discharge of its responsibilities under the RLA. Such conduct by the Board has also trampled on the interests of Delta and *all* Delta employees in the prompt and fair

On May 11, 2010, the NMB issued a final rule, effective June 10, 2010, allowing a union to be certified as a firm's collective bargaining representative based on a majority of votes cast, therefore abandoning the Majority Rule.¹⁸ We are particularly troubled by evidence tending to show that this change in the rule was the result of a predetermined effort to advance a partisan policy agenda.¹⁹

First, both you and Board Member Linda Puchala published the Notice of Proposed Rulemaking²⁰ by means of an internal process that inappropriately excluded then-Chairman Dougherty.²¹

Second, Patricia Friend, the former International President of the Association of Flight Attendants ("AFA"), claimed in a radio interview that the AFA with "lots of help within the labor movement and within the Obama administration" was able to place Member Puchala on the Board.²² Member Puchala's placement on the Board would seem to benefit the AFA, as Member Puchala preceded Ms. Friend as the International President of the AFA.²³

Third, both you and Member Puchala sought to prevent the publication of Member Dougherty's dissent.²⁴ Ms. Dougherty stated, "[s]uch 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."²⁵

Finally, according to a complaint filed by Delta flight attendants, both you and Member Puchala denied requests that you disqualify yourselves from considering the regulations "despite longstanding ideological ties to labor unions operating under the [Railway Labor Act] and [your]

resolution of representation issues resulting from its acquisition of Northwest Airlines. The treatment of the Chairman by the other member (sic) of the Board is unprecedented and inappropriate. The gamesmanship surrounding the withdrawal of representation applications by the AFA and IAM is transparent") (emphasis in original).

¹⁸ Final Rule, *supra* note 1 at *id.* This rule constitutes "final agency action" within the meaning of 5 U.S.C. § 704. See Complaint, *supra* note 5 at 10.

¹⁹ *Id.* at 3-4 ("Members Hoglander and Puchala should have recused themselves from these proceedings because of their prejudgment of the regulations. Their failure to do so violates the APA and the Due Process Clause of the United States Constitution").

²⁰ National Mediation Board, Notice of Proposed Rulemaking, Docket No. C-6964, 74 Fed. Reg. 56750 (Nov. 3, 2009).

²¹ Letter from Chairman Elizabeth Dougherty to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, & Burr (Nov. 2, 2009) [hereinafter "Dougherty Letter 1"] ("[t]he proposal was completed without my input or participation, and I was excluded from any discussions regarding the timing of the proposed rule").

²² Interview with AFA-CWA Int'l President Patricia Friend, THE UNION EDGE TALK RADIO SHOW (Aug. 24, 2009).

²³ LINDA PUCHALA, BOARD MEMBER, NAT'L MEDIATION BD. WEBSITE, *available at* http://www.nmb.gov/directory/puchala-linda_bio.html (last visited Apr. 6, 2011).

²⁴ Dougherty Letter 1, *supra* note 21 at 2 ("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. . . . 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").

²⁵ *Id.* at 2.

obvious pre-conceived bias toward the proposed regulations, as demonstrated by [your] inordinate haste and attempts to censor the Chairman from dissenting in November, 2009.”²⁶

The Board’s actions prompted the Air Transport Association of America to file a complaint in federal court, where they argued,

The inescapable conclusion from these actions is that Members Hoglander and Puchala engaged in a **coordinated effort to change the Board’s 75-year old Majority Rule** in order to impact the AFA and IAM organizing campaigns at Delta. The fact that the IAM withdrew its pending representation application on the eve of the Board’s publication of the NPRM, followed closely thereafter by the AFA’s withdrawal of its own pending application, further suggests that **the above actions were taken by the two Board Members in coordination with each other, and with the unions as well.**²⁷ [emphasis added].

In light of these concerns and the radical shift in the Board’s interpretation of the Railway Labor Act, the Committee requests that you provide copies of the following documents, from the time period of June 1, 2009, to the present, no later than June 1, 2011:

- 1) All documents and communications between the National Mediation Board and any union representative or member, referring or relating to any representation proceeding, NMB election procedures or the NMB’s policy regarding the use of hyperlinks to the NMB’s official voting website.
- 2) All documents and communications between any NMB Members, staff or other personnel and any officer, employee, or representative of the International Association of Machinists and Aerospace Workers, the Transport Workers Union of America, the Association of Flight Attendants, and/or the Communications Workers of America.²⁸
- 3) All documents referring or relating to any meetings involving you and/or Linda Puchala and any current or former representative, employee or member of the AFL-CIO and/or the Air Line Pilots Association.

When producing documents to the Committee, please deliver production sets to the Majority Staff in room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

²⁶ Complaint, *supra* note 5 at 10-11.

²⁷ Memorandum of Points and Authorities in Support of Air Transport Association of America, Inc.’s Motion for Expedited Discovery and Final Hearing on the Merits, *Air Transport Association of America, Inc. v. National Mediation Board* (D.D.C. 2010), Case No. 1:10-cv-00804 at 7 [hereinafter “ATA Motion”].

²⁸ See ATA Motion, *supra* note 27 at 14 (“the third-party unions [] appear to have communicated with Mr. Hoglander and Ms. Puchala about the rule change and/or its impact on elections at Delta”).

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In addition, the Committee requests that you designate officials with the Board to provide a briefing to the Committee staff on or before May 24, 2011, regarding the NMB's rulemaking authority and internal oversight processes to ensure compliance with federal laws.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact Kristina Moore or Daniel Epstein of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



Dennis Ross
Chairman, Subcommittee on Federal
Workforce, U.S. Postal Service and
Labor Policy

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Stephen Lynch, Ranking Member
Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy

ONE HUNDRED TWELFTH CONGRESS
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Minority (202) 225-5051

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.