United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

August 6, 2012

National Mediation Board
1301 K Street, NW, Suite 250E
Washington, D.C. 20005

Re: ***Docket Number C-7034, Proposed Rules on Representation Procedures and Rulemaking Authority***

Dear Chairman Hoglander:

The undersigned Senators submit the following written comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the National Mediation Board (NMB) on May 15, 2012 titled, "Representation Procedures and Rulemaking Authority."[1] As members of the committees of jurisdiction, we seek to ensure that the rule carries out the intent of Congress.

On February 14, 2012 the President signed into law the Federal Aviation Administration Modernization and Reform Act, Pub.L. 112-095. Included in that major piece of legislation were two substantive provisions concerning the election process under the Railway Labor Act (RLA). Those changes were the result of careful negotiations and compromise between House and Senate members. Nonetheless, the plain language and intent of the new law have been mischaracterized in the public sphere. Our comments intend to correct the record with a focus on the proposal to amend 29 C.F.R. § 1206.2, "Percentage of valid authorizations required to determine existence of a representation dispute." It is the role of the NMB to adhere to the intent of Congress and the plain language of the law in determining that a majority showing of support from a class or craft is required for representation elections involving merger situations.

Prior to the enactment of the FAA reform act, the RLA representation election procedure required a showing of support from at least 35% of the employees in an unrepresented class or craft and more than a 50% show of support if they were already represented before the NMB could order a secret ballot election.[2] Under the FAA reform act, Congress decided that all

[1] 77 FED. REG. 28,536 (May 15, 2012).
[2] 29 C.F.R. § 1206.2 (a), (b).

representation elections under the RLA require no less than a 50% show of support before a secret ballot election can be held. Under the new law:

> *The Mediation Board, upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Mediation Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.*[3] (Emphasis added)

This section clearly describes a new standard that applies to all applications to the NMB to be represented by a union. Under existing procedures the NMB requires the filing of "an application" when requesting a representation election as part of a merger.[4] Therefore, there is no question that the new 50% standard is required to be applied where an application is filed, which includes mergers.

Despite the clear language agreed to by the bill's conferees, after the Senate approved the FAA reform bill several Senators inserted a "colloquy" into the Congressional Record claiming the 50% show of support did not apply to the "unique situations of mergers."[5] Several supporters of this view subsequently cited the "colloquy" in their statements at the NMB public hearing on the proposed rule on June 19, 2012, as proof of Congress' intent to exclude mergers from the new standard.

The NMB has opened itself to misinterpretation by stating in the NPRM, "The amended language is silent with regard to mergers."[6] This reasoning ignores the traditional construction of statutory language: if Congress wanted something to be excluded it would have said so. Without express language regulatory agencies cannot presume an exclusion which is not there. If Congress wanted to specifically exempt mergers from the majority rule, it would have expressly done so. Instead, Congress chose to apply the new standard to all "application[s] requesting that an organization or individual be certified as the representative of any craft or class of employees." There is no legitimate legislative history to point to the contrary.

We supported the new 50% rule as a reasonable compromise. The bill's language on this subject is more than clear, leaving no room for the misinterpretation that has been suggested. The final language is the result of bipartisan negotiations and compromise, where opponents could have specifically included language exempting mergers if that were truly the intent. We

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[3] FAA Modernization and Reform Act of 2012, Pub. L. 112-95, § 1003, 126 Stat. 15 (2012).

[4] "Pursuant to Section 2, Ninth, the NMB, upon an Application, has the authority to resolve representation disputes arising from a merger involving a Carrier or Carriers covered by the RLA." National Mediation Board Representation Manual, p. 26 (March 21, 2011), *available at*: http://www.nmb.gov/representation/representation-manual.pdf.

[5] 158 CONG. REC. S340 (Feb. 6. 2012) (statements of Sens. Reid, Harkin, and Rockefeller).

[6] 77 FED. REG. at 28, 537.

expect the rule finalized by the NMB to reflect the law's plain language and clear legislative intent by applying the new majority standard to apply to all representation elections, including mergers.

Sincerely,

Johnny Isakson
United States Senator

Michael B. Enzi
United States Senator

Orrin Hatch
United States Senator