



Freedom Through Justice Foundation

2111 Wilson Blvd # 700 | Arlington, VA, 22201 | 703.875.8625

October 7, 2011

VIA E-MAIL AND FIRST CLASS MAIL

Mary L. Johnson
General Counsel & Chief FOIA officer
National Mediation Board
1301 K Street NW, Ste. 250 East
Washington, D.C. 20572
OLA-efile@nmb.gov

Re: Freedom of Information Act Request

Dear Ms. Johnson,

We write on behalf of the Freedom Through Justice Foundation, a 501(c)(3) nonprofit, nonpartisan public interest firm that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests, and promote social and economic freedoms.

We are concerned by the National Mediation Board's (the "Board" or "NMB") recent decision to advance a rule which allows only a small minority of all eligible 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" reverses this democratic precedent.

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.³ We are particularly troubled by evidence tending to

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 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.

show that this change in the rule was the result of a predetermined effort to advance a partisan policy agenda.⁴

In light of these concerns and the radical shift in the Board's interpretation of the Railway Labor Act, Freedom Through Justice requests that you provide copies of the following documents, from the time period of June 1, 2009, to the present, within twenty ("20") days from the date of this request:

- 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.⁵
- 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.

Freedom Through Justice Qualifies Under the Non-Commercial Fee Category

The Freedom Through Justice Foundation requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). The Freedom Through Justice Foundation is a 501(c)(3), not-for-profit, representative of the news media and has no commercial purpose in requesting information. Freedom Through Justice has no commercial, trade or profit interests and is organized and operated to publish or broadcast news to the general public. Freedom Through Justice will use its editorial skills to turn raw materials into a distinct work

Freedom Through Justice Is Entitled to a Complete Waiver of Fees

Freedom Through Justice requests a waiver of fees as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of the

⁴ *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").

⁵ See 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 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").

government and is not primarily in the commercial interest of the requester pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).⁶

The subject matter of the requested records specifically concerns identifiable “operations or activities of the government.” The disclosable portions of the requested information will be meaningfully informative in relation to this request. This disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Freedom Through Justice has a dynamic and diverse staff whose range of expertise includes a combined 15 years of government oversight, investigative reporting, and federal public interest litigation experience.

Production of Documents and Contact Information

We call your attention to President Obama’s January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . . The presumption of disclosure should be applied to all decisions involving FOIA.⁷

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption.⁸ In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material.⁹

In an effort to facilitate record production within the statutory time limit, the Freedom Through Justice Foundation prefers to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, the Freedom Through Justice Foundation will accept the “rolling production” of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately via Amber Taylor (amber.taylor@ftjfoundation.org) or at 703-875-8625. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

⁶ See, e.g., *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 814 n.3 (2d Cir. 1994); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006).

⁷ PRESIDENT BARACK OBAMA, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, Jan. 21, 2009 (available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>).

⁸ *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)

⁹ 5 U.S.C. § 552(b)

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Sincerely,

A handwritten signature in black ink, appearing to read 'Amber Taylor', written in a cursive style.

AMBER TAYLOR
SENIOR ATTORNEY
FREEDOM THROUGH JUSTICE FOUNDATION

Encl. "Responding to Records Requests" and "Definitions" for the purposes of this request

Responding to 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 Freedom Through Justice Foundation.
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 Freedom Through Justice Foundation's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the paragraph in the Freedom Through Justice Foundation's request to which the documents respond.
5. 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.
6. 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 Freedom Through Justice Foundation staff to determine the appropriate format in which to produce the information.
7. 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.
8. 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.
9. 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.
10. 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.

11. 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.
12. 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.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

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, confirmation, 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.