



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', is centered on the page.

AMBER TAYLOR
SENIOR ATTORNEY
FREEDOM THROUGH JUSTICE FOUNDATION

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