UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICAN AIRLINES, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:12-CV-00276-Y
	§	
NATIONAL MEDIATION BOARD,	§	
	§	
Defendant.	§	

AMERICAN AIRLINES, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION

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Plaintiff American Airlines, Inc. ("American"), by and through undersigned counsel and pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully files this Brief in Support of its Motion for Temporary Restraining Order and for Preliminary Injunction.

INTRODUCTION

American seeks a Temporary Restraining Order and Preliminary Injunction to maintain the status quo and prevent the National Mediation Board (the "NMB" or "Board") from holding an illegal union representation election beginning on June 14, 2012 among American's Passenger Service employees. American filed this suit to prevent the Board from violating the Railway Labor Act's ("RLA") 50 percent showing of interest requirement to hold an election. The Board should be prevented from conducting this election without judicial approval.

American satisfies all the standards for the issuance of a temporary restraining order or preliminary injunction: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Janvey v. Alguire,* 647 F.3d 585, 595 (5th Cir. 2011) (quoting *Byrum v. Landreth,* 566 F.3d 442, 445 (5th Cir. 2009) (quotation marks omitted); *see also Winter v. NRDC, Inc.,* 555 U.S.7, 129 S. Ct. 365, 374 (2008). Accordingly, a temporary restraining order is necessary to maintain the *status quo* and prevent the NMB from holding an election.[1]

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[1] This Court also has authority under Section 105 of the Administrative Procedures Act to stay all facets of the NMB election process, including the mailing of instructions to employee home addresses, the election notice posting requirements which the NMB has imposed on

BACKGROUND

This case arises out of an election application the Communication Workers of America ("CWA" or "Union") filed with the Board on December 7, 2011 seeking to represent American's Passenger Service employees. *See* Amended Complaint ("Am. Compl."), Dkt. No. 9, ¶ 5. On February 14, 2012, the Federal Aviation Administration Modernization and Reform Act of 2012 ("FAA Reauthorization Act"), Pub. L. No. 112-95, 126 Stat. 11 (2012) was enacted. Am. Compl. ¶¶ 5, 8, 9, 10.

Section 1003 of the FAA Reauthorization Act amended the RLA by adding—for the first time—an explicit statutory provision establishing the required 50 percent showing of interest before the Board could authorize an election.[2] Am. Compl. ¶ 8 The new showing of interest requirement, set forth in Section 2, Twelfth of the RLA, provides that:

> 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.

Id.; 45 U.S.C. § 152, Twelfth ("Section 2, Twelfth") (emphasis added). The effective date of Section 2, Twelfth was February 14, 2012.[3]

American, and the opening of the election polls, until such time as the Court has decided the important statutory question raised by American in this litigation. 5 U.S.C. § 705.

[2] The previous, 35 percent showing of interest requirement, had been adopted by the Board.

[3] Section 3 of the FAA Reauthorization Act provides that "[e]xcept as otherwise expressly provided, this Act and the amendments made by this Act shall take effect on the date of enactment of this Act." Section 1003 of the FAA Reauthorization provides no alternative effective date; accordingly, its effective date is February 14, 2012, the date the law was enacted. *See* Pub. L. No. 112-95, 126 Stat. 11 (2012).

On February 29, 2012, Board Investigator Susanna F. Parker issued a decision regarding the eligibility of certain employees, or groups of employees, who had been challenged by the CWA. Am. Compl. ¶ 10. Investigator Parker determined, among other things, that 749 furloughed Reservations Representatives were eligible to vote in the election because they retained recall rights at American and had a "reasonable expectation of returning to work" -- which satisfied the furloughee eligibility standard in the Board's Representation Manual. *See id*. at ¶¶ 6, 10. The CWA appealed Investigator Parker's decision that the furloughees were eligible. *Id.*, ¶ 11. On April 19, 2012, two out of three Board Members issued a decision overturning Investigator Parker's determination regarding the furloughees. *Id.*, ¶ 12. The decision was issued over a strong dissent by Board Member Dougherty. *Id*., ¶ 14. The majority then authorized an election among American's Passenger Service employees based upon a 35 percent showing of interest. *Id*. ¶ 15. American requested that the Board reconsider this decision. *Id.*, ¶ 18. The Board denied that request on May 3, 2012, in another split decision, with Member Dougherty again dissenting.[4] *Id*. ¶ 19; Ex 6.

American filed this action on May 2, 2012, and amended its Complaint on May 4, 2012, to reflect the Board's denial of American's request for reconsideration of the Board's April 19 decision.[5] *See* Compl. (Dkt. No. 1); Am. Compl. (Dkt. No. 9). The Complaint seeks a

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[4] Member Dougherty's dissent noted what "[t]he Majority's … order an election without a showing of interest from at least 50 percent of the craft or class violates the FAA Reauthorization Act and thwarts [the] clear will of Congress," accordingly, "I dissent from the Majority's decision to order an election without a showing of interest from at least 50 percent of the craft or class in this case." *See* Am. Compl. Ex 6, [Dougherty Dissent pg. 375]. Neither the Board nor the CWA have disputed that the CWA did not satisfy the 50 percent showing of interest requirement.

[5] The Board's denial expressly acknowledged this case is pending and implied that the Board would defer to the authority of this Court. *See* 39 NMB 363, 370 ("On May 2, 2012,

declaratory judgment that the NMB is prohibited from directing an election unless the CWA's application was supported by a showing of interest of at least 50 percent of the craft or class and, that if the statutory requirement was not met, the application should be dismissed. *Id.* Section IV (Prayer for Relief).

On May 15, 2012, the CWA filed a letter with the Board requesting that the Board proceed with an election using address labels the CWA provided. *See*, Affidavit of Gregg Formella ("Formella Aff.") ¶ 2 and Ex. 1 thereto. American filed a response on May 22, 2012, opposing CWA's request that the Board use CWA's incomplete and unaudited employee home address list. Formella Aff., ¶ 3, Ex. 2. American also restated its position that the Board should not hold an election in this case absent CWA providing a showing of interest from 50 percent of the employees.[6] *Id*. CWA filed a response on May 23, 2012 and American filed a rebuttal on May 24, 2012. Id. ¶ 4, Exs. 3-4.

On May 17, 2012, the Board filed a Motion to Dismiss contending that the Court does not have subject matter jurisdiction over the dispute and that the Complaint fails to state a claim upon which relief may be granted. Motion to Dismiss, Dkt. No. 21. On June 6, 2012, one day before American was to file its Response to the Motion to Dismiss, the Board issued a decision indicating that it would commence the election process on June 14, 2012. Formella Aff. ¶ 5 and

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American filed a Complaint in the Northern District of Texas seeking a declaration that would obviate the need for it to comply with the Board's order to submit mailing labels pending resolution of the Complaint").

[6] CWA acknowledged that its set of address labels is incomplete. Formella Aff. ¶ 2, Ex. 1. More importantly, American is aware of no means that the Board has to independently verify that those addresses provided by the CWA are correct. *See id.* ¶ 3. Nor, to American's knowledge, has the Board asserted that it was able to and in fact did carry out an independent verification.

Ex. B. The Board also ordered American to post election notices throughout its nationwide system and to update the Board on a regular basis throughout the election period as to changes in employee status which could affect their continued eligibility to vote in the election. *Id.* In issuing these orders, the Board completely disregarded that its very statutory authority to act was at issue in this case. American filed its Response to Defendant's Motion to Dismiss ("Response to the Motion to Dismiss") on June 7, 2012. *See* Dkt. No. 25.

ARGUMENT

I. AMERICAN IS ENTITLED TO INJUNCTIVE RELIEF RESTRAINING THE BOARD FROM PROCEEDING TO AN ELECTION

A temporary restraining order or preliminary injunction is appropriate where a plaintiff establishes: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) (quotation marks omitted); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008). As set forth below, each of the four elements required by *Janvey* are fully satisfied here.

A. American Has A Substantial Likelihood of Success On The Merits

American is required to "present a prima facie case but need not show that [it] is certain to win" to establish that it has a substantial likelihood of success on the merits. *Janvey*, 647 F.3d at 595-6; *see also Byrum*, 566 F.3d at 446 (stating that a plaintiff is not required to go so far as to prove its "entitlement to summary judgment"). To assess the likelihood of success on the merits, the court must look to the "standards provided by the substantive law." *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990).

American seeks a declaratory judgment that: (1) the NMB is prohibited by the RLA from directing an election among the carrier's Passenger Service employees unless there is a showing of interest of at least 50 percent of the craft or class; and (2) CWA's application should be dismissed if it was not supported by at least a 50 percent showing of interest. Amend Compl. Section IV (Prayer for Relief). American seeks this relief pursuant to the Declaratory Judgment Act, which provides that the Court may "[i]n a case of actual controversy within its jurisdiction, … declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). As explained in American's Response to the Motion to Dismiss, there is an actual controversy warranting a declaratory judgment. *See* Response to the Motion to Dismiss p. 24-25. The Court should restrain the NMB from holding an election beginning on June 14, 2012, until the Court has ruled on the merits of American's claim.

Section 2, Twelfth of the RLA went into effect on February 14, 2012, thereby providing a new, statutorily-mandated showing of interest threshold that must be met before the Board can authorize an election. Specifically, Section 2, Twelfth provides that the Board: "shall not direct an election … unless [it] 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." Prior to February 14, 2012, the RLA did not specify a showing of interest requirement and gave the NMB broad discretion to "establish the rules to govern the election." *See* 45 U.S.C. 152, Ninth. By amending the RLA, Congress abrogated the Board's authority to determine the appropriate showing of interest

threshold that must be met before the Board can authorize an election. The Board no longer has any discretion to authorize an election in the absence of a 50 percent showing of interest.[7]

The Board contends that it was not required to apply Section 2, Twelfth of the RLA because doing so would have had an "impermissibly retroactive effect." The Board's contention is unavailing for two reasons. First, applying Section 2, Twelfth to the CWA's showing of interest does not constitute a retroactive *application* of the statute that could result in an impermissible retroactive *effect*. Second, even assuming *arguendo* that it is a retroactive application, it would not create an impermissible retroactive *effect*.

1. Applying The 50 Percent Requirement To CWA's Showing of Interest Does Not Constitute A Retroactive Application of the Statute

The dispositive case on statutory retroactivity is *Landgraf v. USI Film Prods*., 511 U.S. 244 (1994). The analytical framework in that case centers around the question of whether a court (or administrative agency) "should … appl[y] the law ***in effect at the time the*** … ***conduct occurred***, **or** ***at the time of its decision***." 511 U.S. at 250. In this case, the law in effect at the time the "conduct" occurred and the law in effect at the time the Board rendered its decision are

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[7] The Board's decision not to apply the 50 percent showing of interest is not entitled to any deference. The deference generally accorded to Board decisions surrounding its administration of elections under *Switchmen's Union v. NMB*, 320 U.S. 297 (1943) does not apply here because the Board is acting outside its delegated powers and contrary to a specific prohibition in the RLA. *See Leedom v. Kyne*, 358 U.S. 184, 188–90 (1958); *Russell v. NMB*, 714 F.2d 1332, 1339–40 (5th Cir. 1983); *Freeman v. Quicken Loans, Inc*., No. 10-1042, slip op. at 6 (U.S. May 24, 2012); *Ry. Labor Execs. Ass'n v. NMB*, 29 F.3d 655, 659, 661–64 (D.C. Cir. 1994) ("*Railway Labor*"). Moreover, interpreting the temporal reach of a statute, particularly where retroactivity issues are raised, is a question of pure statutory construction for the courts to decide, not the NMB. *See Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Petrou Fisheries, Inc. v. I.C.C.*, 727 F.2d 542, 545 (5th Cir. 1984); *Sandoval v. Reno*, 166 F.3d 225, 239–40 (3d Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 127 (1st Cir. 1998); *Pak v. Reno*, 196 F.3d 666, 675 n. 10 (6th Cir. 1999). These issues are fully briefed in American's Response to the Motion to Dismiss, filed June 7, 2012.

one in the same. This is because Section 2, Twelfth directly regulates the "conduct" of the Board—"[t]he Mediation Board … shall not direct an election … 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." Because Section 2, Twelfth went into effect on February 14—over two months before the Board rendered its decision regarding CWA's showing of interest on April 19—that section was in effect at the time the relevant "conduct" occurred. The Board should have applied Section 2, Twelfth to its decision. This is not a retroactive application of Section 2, Twelfth.

When an entity has applied to a government agency for a future benefit, the agency is "required to act under the law as it existed when its order … was entered." *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943); *see also, Landgraf*, 511 U.S. at 273-74 (distinguishing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921) where the Supreme Court held "that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing … [because] relief by injunction operates *in futuro*, and … the plaintiff had no vested right in the decree entered by the trial court.") (internal quotations omitted). In *Ziffrin*, an entity filed an application for a permit to continue certain trucking operations with the Interstate Commerce Commission ("ICC"). *Id*. at 74-75. The governing statute was then amended before the ICC ruled on the application. *Id*. at 75. The Supreme Court upheld the ICC's application of the amended statute because "[t]he permit was effective for the future" and the amended statute forbade issuance of the permit to a certain class of entities, which included the applicant in that case. *Id*. at 78.

The facts of this case are directly analogous to *Ziffrin*. The CWA filed a representation application with the Board seeking an election to occur in the future and an eventual collective

bargaining certification if the CWA prevailed. The amendment to the RLA forbade the authorization of an election under the circumstances of CWA's application. The same underlying principle applies here and the Board was required to act under the law as it existed when it calculated the CWA's showing of interest.

2. Applying Section 2, Twelfth To CWA's Showing of Interest Does Not Create An Impermissible Retroactive Effect

Even if applying Section 2, Twelfth to the CWA's showing of interest constitutes a retroactive application of the statute, such application is permissible because it does not create an impermissible retroactive *effect*. As explained in *Blaz v. Belfer*, a statute may be applied retroactively if it does not create one of the following impermissible retroactive effects: "impair rights a party possessed when he acted; increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 368 F.3d 501, 503 (5th Cir. 2004) (internal quotation marks and emphasis omitted) (quoting *Landgraf*, 511 U.S. at 280).

3. The CWA Has No Vested Right To the Old 35 Percent Requirement

CWA's mere filing of a representation application does not give it a vested right in obtaining an election and it does not constitute a "completed transaction" with respect to which new duties can be imposed.[8] *See Brown v. Apfel*, 192 F.3d 492, 497 (5th Cir. 1999) (upholding retroactive application of statute that barred claimant from obtaining social security benefits because claimant "had no vested property or contract rights" in such benefits); *Durable Mfg. Co. v. United States Dep't of Labor*, 578 F. 3d 497, 503 (7th Cir. 2009) ("Because [an application] is

[8] The Board has not asserted that the application of the 50 percent standard would increase CWA's liability for past conduct and the CWA does not face any civil nor criminal liability in this case that could even arguably be increased.

not a final determination or event, no new legal consequences would affect the application as a result of the [application of a new regulation.]"); *Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005) (holding that an application for a visa petition, which was a prerequisite to the filing of an application for adjustment of status, could not be considered a "'completed transaction' that gives rise to vested rights or settled expectations for purposes of the presumption against retroactivity."); *BellSouth Telecomms., Inc. v. Se. Tel., Inc.*, 462 F.3d 650, 660–61 (6th Cir. 2006) (stating that "filing an application with an agency does not generally confer upon the applicant an inviolable right to have the agency rule on the application pursuant to the regulations in effect at the time of filing"); *Pine Tree Med. Assocs. v. Sec'y of Health & Human Servs*., 127 F.3d 118, 121 (1st Cir.1997) (holding that "the mere filing of an application is not the kind of completed transaction in which a party could fairly expect stability of the relevant laws as of the transaction date"); *Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 241 (D.C. Cir. 1997) (finding that no right vested upon the filing of plaintiff's application for an extended implementation period to construct a mobile radio system). In each of these cases, a party filed an application with an agency at a time when a rule or standard was in effect and the rule or standard was changed before the agency could rule on the application. In each case, the court found that the mere filing of an application was insufficient to give rise to a "vested right" or constitute a "completed transaction."

The mere fact that CWA may have expected the 35 percent showing of interest requirement to apply at the time it filed its application does not create a "vested right" or a "completed transaction."[9] As explained by the Supreme Court in *Landgraf*:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law…. Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. *See* [L. Fuller, The Morality of Law 60 (1964)] ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever").

Landgraf, 511 U.S. at 269 and n. 24 (internal citations omitted). The mere act of filing the application did not give CWA a right to proceed to an election. *See* Am. Compl. Ex. 6, [Dougherty Dissent pg. 374]. Rather, the authorization of an election is contingent upon many factors other than CWA's application, such as the Board determining the validity of the authorization cards, the number of valid cards, the eligibility of the signators of those cards, and the proper scope of the eligibility list and craft or class, among other issues. *Id*. Additionally, "all of these matters are subject to challenges by the carrier." *Id*.

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[9] If Congress intended that the 50 percent requirement would not apply to pending applications, it would have included clear language to that effect. The mere fact that Congress included the prefatory language "upon receipt of an application" in Section 2, Twelfth does not indicate such an intent. As Member Dougherty explained in her dissent: "[a] more logical reading of this language is simply that a filing of an application is a condition precedent to the NMB directing an election under *any* standard." Am. Compl. Ex 6, [Dougherty Dissent pg. 372 n. 4]; *see also*, *Railway Labor*, 29 F.3d at 658 (finding that the language "upon request of either party to the dispute," 45 U.S.C. § 152, Ninth, requires *a union* to take the preliminary step of making a request to the Board in order to trigger the Board's obligation to investigate a representation dispute).

Accordingly, CWA did not have a vested right to an election, nor would applying the 50 percent showing of interest requirement impose any new requirements on a "completed transaction." Thus, there is no impermissible retroactive effect created by applying the 50 percent requirement and it is clear that American has a substantial likelihood of success on the merits of its declaratory judgment claim.

B. American Faces A Substantial Threat Of Irreparable Injury If A Temporary Restraining Order And Preliminary Injunction Are Not Granted

The general rule in this Court is that a party seeking injunctive relief must show that it will be irreparably injured if such extraordinary relief is not granted.[10] A showing of irreparable injury is not required (or is presumed to be met) where, as here, a statutory violation is alleged because it is presumed that the violation constitutes irreparable harm. *United States v. FDIC*, 881 F.2d 207, 210 (5th Cir. 1997) ("However, if a statutory violation is involved and the statute by necessary and inescapable inference requires injunctive relief, the movant is not required to prove the injury and public interest factors."); *United States v. Richlyn Lab., Inc.*, 827 F.Supp. 1145, 1150 (E.D. Pa. 1992) ("Indeed, because Congress has seen fit to act in a given area by enacting a statute, irreparable injury must be presumed in a statutory enforcement action."); *Dallas County, Texas v. Bureau of Justice Assistance,* 988 F.Supp. 1030, 1031 (W.D. Tx. 1996) ("A continuing violation of a federal statute is the type of harm that must be enjoined" and satisfies the irreparable harm requirement).

That no showing of irreparable harm need be made to support an injunction for violating a statute is particularly true under the RLA because of the unique aspects of the statute and

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[10] Generally, an irreparable harm cannot be undone through monetary relief. *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

Congress's desire to maintain labor peace in the vital transportation industries. *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 581-582 (1971). Recognizing that strict adherence to the mandates of the statute is imperative, the Supreme Court has held that the regular requirements to obtain injunctive relief do not apply and a party need not show irreparable harm to obtain injunctive relief against an alleged violation of the statute. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) (federal courts have subject matter jurisdiction to enjoin a violation of the status quo under the Railway Labor Act without the customary showing of irreparable harm); *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994) (remanding case for entry of declaratory and injunctive relief in favor of union association without any requirement that the movant show irreparable injury); *see also America West Airlines, Inc. v. National Mediation Board*, 743 F. Supp. 693, 697 (D. Az. 1990) (issuing preliminary injunction against National Mediation Board in representation dispute finding that the NMB's violation of the RLA constituted irreparable injury), *aff'd* 986 F.2d 1252 (9th Cir. 1993); *US Airways v. US Airline Pilots Ass'n*, 813 F.Supp.2d 710, 735-736 (W.D.N.C. 2011) (district courts have jurisdiction to enjoin a violation of the status quo requirements under Section 152, First without the customary showing of irreparable injury).

American has shown that the Board violated Section 2, Twelfth of the amended RLA by ordering an election in violation of the new showing of interest requirements that became effective February 14, 2012.[11] The NMB's flagrant violation of the statute itself constitutes

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[11] During the pendency of this case, the CWA has undertaken a national advertising campaign aimed at damaging American's reputation. *See* Formella Aff. ¶ 6; *see also* http://www.cwa-union.org/pages/unamerican_airlines, attached as Ex. C. Public communications from the Board and the Union have mischaracterized American's actions and

irreparable harm *per se* and must be enjoined by the Court to effectuate the purpose of the RLA. *Chicago & N.W. Ry. Co., supra,* 402 U.S. at 581-582 (1971) (injunctive relief is appropriate under the Railway Labor Act when a specific statutory provision is implicated). The Board's actions here are even more egregious. The Board has refused to wait for this Court to decide whether the Board exceeded its statutory authority by authorizing an election under these circumstances. The Board has essentially ignored this pending litigation by ordering an election using incomplete, unverified, and unverifiable address labels provided by the CWA, while the issue of its legal authority to act is still unresolved.

Indeed, injunctive relief is particularly appropriate in this case because, absent injunctive relief, there is no other viable means to enforce the statute because the NMB will commence the election process. *Burlington N. R.R. Co. v. Bhd. of Maintenance of Way Employees,* 481 U.S. 429, 446 (1987) (under the RLA, injunctive relief is appropriate to remedy a violation of a

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negatively impacted its business reputation at a time when it can least afford it because of its bankruptcy, causing damage to its brand and goodwill in the marketplace. If the Board were permitted to proceed with the election while American continues to contest the Board's authority to do so, the resulting harm to American's brand and goodwill from the negative publicity will be compounded. *Allied Mktg. Group, Inc. v. CDL Mktg., Inc.,* 878 F.2d 806, 810 (5th Cir. 1989) (A loss of a business' customers and damage to its goodwill are widely recognized as injuries incapable of ascertainment in monetary terms and may thus be irreparable); *Ferrero v. Associated Materials, Inc.,* 923 F.2d 1441, 1449 (11th Cir. 1991) (recognizing that the "Fifth Circuit has held that the loss of customers and goodwill is an 'irreparable injury,'" and agreeing that where there has been a loss of a party's customers, the injury is "difficult, if not impossible to determine monetarily"); *see also, Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1056 (5th Cir.1997) (irreparable injury to reputation caused by governmental entity); *Florida Businessmen v. City of Hollywood,* 648 F.2d 956, 958 n. 2 (5th Cir.1981) (irreparable harm may be more severe if it could result in a bankruptcy situation). Proceeding with the election also could harm the relationship between American and its employees. *See, e.g., America West Airlines, Inc.,* 743 F. Supp. at 697 (noting that the mailing of the election notice would have "implications for America West … with respect to relations with employees …"). It is impossible to calculate the potential scope of damages that American is suffering and will continue to suffer if the election proceeds, nor could monetary damages fully remedy the harm American has suffered and will continue to suffer. *Id.*

specific provision of the RLA, particularly where an injunction is the only practical, effective means to enforce the statute). Once the election is held, it will be too late for the Court to remedy the NMB's violation of the RLA. Like the *America West* case, this is not the type of case "where it is appropriate to have a verdict now and the trial later. The issues involved in this case and the election itself are too important for that." *America West,* 743 F.Supp. at 696.

C. The Threatened Injury to American If The Injunction Is Denied Outweighs Any Threatened Injury To The Board If the Injunction is Granted

In order to determine whether the threatened injury to American outweighs any threatened injury to the Board, the Court engages in a "balancing of the conveniences and rights of the parties and a balancing of the possible injuries to them according to how they may be affected by the granting or withholding" of the injunction. *Congress of Racial Equality v. Douglas*, 318 F.2d 95, 97 (5th Cir. 1963). As set forth above, American will suffer irreparable harm if the NMB continues to violate the statute by proceeding with an election based upon a 35 percent showing of interest. Conversely, the Board will suffer no injury as a result of an injunction being issued in this highly unusual case. *See, e.g., Hunt v. U.S. Securities & Exchange Comm.,* 520 F.Supp. 580, 609 (D.C. Tex. 1981) (the entry of a preliminary injunction against a government agency that has not followed the law “could not possibly result in any harm to the Defendant agency” and “would merely require the agency to do what the law already requires of it”). An injunction merely will maintain the *status quo* pending a determination by the Court whether the NMB has exceeded the authority vested in it by Congress. Thus, the threatened injury to American if the injunction is denied clearly outweighs the Board’s lack of injury should the injunction be granted.

D. The Public Interest Supports Issuance of an Injunction.

The court must assess the impact of the temporary restraining order on the public interest. An injunction may be granted unless "the public interest will be disserved by the grant of an injunction." *Cottonwood Financial Ltd. v. Cash Store Financial Services, Inc*. 778 F.Supp.2d 726, 760 (N.D. Tex. 2011); *see also, Speaks v. Krause*, 445 F.3d 396, 400 (5th Cir. 2006); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); *Concerned Women for America Inc. v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989). "The focus of the district court's public interest analysis should be whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Conceal City, LLC v. Looper Law Enforcement*, LLC, 2011 WL 5557421 at *8 (N.D. Tex. 2011).

Where a violation of a statute is involved, there is no requirement to prove the public interest factor. *United States v. FDIC*, 881 F.2d 207, 210 (5th Cir. 1997) ("However, if a statutory violation is involved and the statute by necessary and inescapable inference requires injunctive relief, the movant is not required to prove the injury and public interest factors."). Even if American were required to meet this factor, which it is not, no critical public interest would be harmed by the grant of a temporary restraining order. *See*, *Hunt*, 520 F.Supp. at 609 (reasoning that the entry of a preliminary injunction against a government agency that has not followed the law "could not possibly result in any harm to the Defendant agency"). The public interest strongly supports issuance of a temporary restraining order where, as here, an agency acts beyond the scope of authority vested in it by Congress.

It is well established that an agency may not confer power upon itself. *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986) ("An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its

jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."). When an agency extends its power beyond that delegated to it by Congress, it is acting against the public interest. *Livestock Marketing Ass'n v. U.S. Dept. of Agric*., 132 F. Supp. 2d 817, 829 (D.S.D. 2001) ("The public has an interest in executive compliance with the restrictions placed upon an agency by Congress."). There is thus a strong public interest in ensuring that agencies do not extend the scope of their authority. *Id.; First Premier Bank v. U.S. Consumer Financial Protection Bureau*, 819 F. Supp. 2d 906, 922 (D.S.D. 2011) ("While the public has an interest in agencies administering laws that Congress enacts, the public interest is served by ensuring that those same agencies do not extend their power beyond the express delegation from Congress. The public has a clear interest that Congress's word be supreme and not extended or amended by agency action.").

By moving forward with an election before meeting the Congressionally-mandated threshold of obtaining authorization cards from 50 percent of the employees in the craft or class, the Board is conferring power upon itself and extending its power beyond that delegated by Congress. There is a strong public interest in having the Board administer Section 2, Twelfth of the Act as mandated by Congress and not acting beyond the scope of its statutory authority. Accordingly, the public interest supports issuance of the injunction to ensure that the Board does not act outside the scope of its authority.

II. NO SECURITY SHOULD BE REQUIRED FOR ENTRY OF INJUNCTIVE RELIEF

Federal Rule of Civil Procedure 65(c) requires "security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." "[T]he amount of security required pursuant to Rule 65(c) is a matter for the discretion of the trial court." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628

(5th Cir. 1996) (citing *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)) (internal quotations omitted); *see also, City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084, 1094 (5th Cir. 1981) (citing *Corrigan Dispatch Co.*, 569 F.2d at 303). Accordingly, the Court may "dispense[] with the requirement of security" where "it appears unlikely that the defendant … would incur any significant cost or damages as a result of the injunction." *Incubus Investments, LLC v. City of Garland*, 2003 WL 23095680 at *4 (N.D. Tex. 2003); *see also, Kaepa*, 76 F.3d at 628; *City of Atlanta*, 636 F.2d at 1094.

The Board will not incur any cost or damages as a result of this injunction. On the contrary, going forward with the election would require the Board to needlessly incur costs that may ultimately prove fruitless if the election is declared to have been authorized in violation of the law. Accordingly, American respectfully submits that the Court should require no security or, at the very most, a minimal bond.

CONCLUSION

For the reasons set forth herein, American respectfully requests that the Court grant its Motion for Temporary Restraining Order and Motion for Preliminary Injunction.

Dated: June 11, 2012

Respectfully submitted,

By /s/ *Roger C. Diseker*

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2012, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" via electronic mail on that date to all counsel of record.

/s/ Roger C. Diseker