

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AIR TRANSPORT ASSOCIATION	)	
OF AMERICA, INC., <i>et. al</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 10-0804 (PLF)
	)	
NATIONAL MEDIATION BOARD, <i>et. al</i> ,	)	
	)	
Defendants.	)	

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OPINION AND ORDER

This matter is before the Court on the motion of plaintiff, the Air Transport Association of America, Inc. (“ATA”), for expedited discovery and a merits hearing. Defendants oppose the motion. On June 3, 2010, the Court heard oral argument on the motion from ATA, plaintiff-intervenor the United States Chamber of Commerce, defendant National Mediation Board (the “Board”), and putative intervenor defendants, the Association of Flight Attendants-CWA (“AFA”), the Transportation Trades Department, AFL-CIO (“TTD”), and the International Association of Machinists and Aerospace Workers, AFL-CIO (“IAM”). After careful consideration of the parties’ papers, the attached exhibits, including in particular the November 2, 2009 letter from Chairman Elizabeth Dougherty, the relevant case law, and the oral arguments presented by counsel in open court, the Court will deny the motion for discovery.

## I. BACKGROUND

The National Mediation Board, the federal agency that oversees labor-management relations involving railroads and airlines, issued a final rule on May 11, 2010 after an informal rulemaking process (the “New Rule”). See 75 Fed. Reg. 26,062 (May 11, 2010). The New Rule amends the Board’s rules to provide that, in representation disputes, a majority of the valid ballots that are actually cast will determine the craft or class representative. See id. The previous rule required that a majority of eligible voters in the craft or class must cast valid ballots in favor of representation (the “Original Rule”). See id.

In its complaint, ATA asserts that the New Rule violates the Railway Labor Act (“RLA”), 45 U.S.C. §§ 151 *et seq.*, and that it is arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.* ATA has also moved for a preliminary injunction, on which the Court will hear oral argument on June 14, 2010. Although the New Rule was scheduled to go into effect on June 10, 2010, the Board has agreed to stay its implementation in order to allow the Court time to rule on the motion for a preliminary injunction prior to the effective date of the New Rule.

## II. DISCUSSION

ATA raises numerous grounds for relief under the RLA and the APA in its complaint, but the only issue on which it seeks discovery is its contention that two members of the Board — Harry Hoglander and Linda Puchala — acted with unalterably closed minds regarding the New Rule and predetermined the outcome of the rulemaking process in violation of the APA. An agency member must be disqualified from rulemaking under the APA if there “has

been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.” Ass’n of Nat’l Advertisers v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979); see also C & W Fish Co. v. Fox, 931 F.2d 1556, 1564 (D.C. Cir. 1991); Ass’n of Flight Attendants-CWA v. Pension Ben. Guar. Corp., Civil Action No. 05-1036, 2006 U.S. Dist. LEXIS 1318 at \*49-50 (D.D.C. Jan. 13, 2006).

Discovery typically is not available in APA cases. But if a party makes “a significant showing — variously described as a ‘strong’, ‘substantial’, or ‘*prima facie*’ showing — that it will find material in the agency’s possession indicative of bad faith or an incomplete record,” it should be granted limited discovery. Amfac Resorts v. Dep’t of Interior, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (“strong”); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 751 F.2d 1287, 1327 (D.C. Cir. 1984) (“*prima facie*”); Natural Resources Defense Council, Inc. v. Train, 519 F.2d 287, 291 (D.C. Cir. 1975) (“substantial”)). See also Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 420 (“[T]here must be a strong showing of bad faith or improper behavior before [inquiry into the mental processes of the administrative decisionmaker] may be made.”). A plaintiff seeking discovery based on allegations of bad faith or prejudgment must make allegations that are “serious” and “nonconclusory,” Coalition on Sensible Transportation, Inc v. Dole, 826 F.2d 60, 72 (D.C. Cir. 1987) (denying discovery request because plaintiff’s allegations regarding bad faith were “vague”), or present “independent evidence of improper conduct.” San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 789 F.2d 26, 44 (D.C. Cir. 1986). Plaintiffs rely on the November 2, 2009 letter from the dissenting Board Member,

Chairman Elizabeth Dougherty, as well as the timing of events leading up to the Notice of Proposed Rulemaking in its attempt to make this showing.

On November 3, 2009, the Board published a Notice of Proposed Rulemaking (“NPRM”), proposing that the New Rule be adopted. The day before publication of the NPRM, Chairman Dougherty wrote a letter to several Republican senators complaining about the process that led to the NPRM. See Motion for Expedited Discovery (“Mot.”), Smith Decl, Ex. H (Letter from Chairman Elizabeth Dougherty, National Mediation Board, to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009)) (“Dougherty Letter”). In her letter, Chairman Dougherty asserts that the other Board Members surprised her with a draft proposed rule on October 28, 2009, gave her only one and one half hours to consider it, and initially told her that she could not publish a dissent. See id. at 1-2. Upon her protest, the Board majority agreed to give her one day to review the proposed rule and permitted her to publish a dissent in the Federal Register, although they did not allow the dissent to describe Chairman Dougherty’s complaints about the process leading to the NPRM. See id. at 2. In her letter, Chairman Dougherty states that although she would not normally discuss Board processes so publicly, “in light of the complete absence of any principled process or consideration of my role as an equal Member of the Board,” she felt compelled to write the letter. Id. at 2. Chairman Dougherty also stated that the “rush to put out a proposed rule gives the impression that the Board has prejudged the 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.” Id. ATA argues that the facts described in this letter show “that the two majority members were unwilling

to consider views and arguments inconsistent with their own and had, by that time, reached an irreversible decision to adopt the proposed rule.” Mot., Memorandum in Support (“Mem.”) at 9.

ATA also argues that events relating to organizing campaigns by air carrier unions show that Board Members Puchala and Hoglander had prejudged the issues relating to the New Rule and, indeed, that they were colluding with the unions to ensure that future union elections at Delta took place under the New Rule. This argument is based largely on the timing of particular events, not on any direct evidence of collusion. For example, ATA points out that in July 2009, the AFA filed an application with the Board seeking to represent flight attendants at Delta Airlines, which recently had acquired Northwest Airlines. See Mem. at 8. In August 2009, the IAM filed an application with the Board seeking to represent the fleet service employees employed by Delta. See id. The Board did not process these applications as quickly as it processed other applications for representation; according to plaintiffs, this fact shows that the Board majority intended that any resulting representation elections not take place until after the New Rule went into effect. See id. at 10-11. Even more telling, according to plaintiffs, is the fact that the IAM withdrew its representation application three days before publication of the NPRM and that AFA withdrew its application on the same day the NPRM was published. See id. at 12. ATA asserts that this fact shows that “the two Board Members communicated their intentions to the AFA and IAM in a manner which caused those unions to withdraw their pending representation applications in anticipation of the Board’s ultimate adoption of the [New Rule].” See id. at 13.

Despite the vigor with which plaintiffs have presented their arguments, the Court concludes that these allegations do not meet the standard required in order to obtain discovery in

an APA case. The Court necessarily starts with the presumption that agency members act in good faith. See United States v. Morgan, 313 U.S. 409, 421 (1941); Menkes v. Dep't of Homeland Sec., 662 F. Supp. 2d 62, 69 (D.D.C. 2009). Without such a presumption, disappointed citizens would routinely be able to invoke the aid of the courts to look behind the policy decisions of duly appointed and confirmed presidential appointees and into their deliberative process. The Supreme Court has cautioned against such a result, stating: "Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. . . . [A]lthough the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." United States v. Morgan, 313 U.S. at 422 (internal citations omitted). The Court must proceed cautiously because judicial examination of the collective mental processes of the Board "represent[s] an extraordinary intrusion into the realm of the agency." San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 789 F.2d at 44.

Chairman Dougherty's letter is extraordinary in that it publically airs significant internal disagreements about both policy and process. The content of the letter certainly supports the inference that the relationship between the Board Members had become dysfunctional after a second Democrat was added to the three-member Board following the change in administration in 2009 and that more than a routine disagreement among political appointees was exposed. See Mem. at 7-8. But this apparent dysfunction does not ineluctably require the inference that the majority Board Members were acting with closed minds, in bad faith, or in collusion with outsiders regarding issuance of the New Rule.

Focusing solely on the factual statements Chairman Dougherty makes in her letter, it is plain that she was not included in the deliberation and drafting of the proposed rule and that she was not treated with courtesy and a spirit of collegiality. But her exclusion appears to this Court to be the product of her suddenly being in the political minority following the confirmation of Ms. Puchala to the Board. Indeed, Chairman Dougherty herself recognizes that given her substantive disagreement about the policy change in the New Rule, “it was not a surprise that I was not included in the initial crafting of the proposed rule.” Dougherty Letter at 1. Chairman Dougherty does not allege that the majority Board Members violated any specific requirement of the APA. She simply states that her preferred method of internal deliberation is “the better way to conduct agency business,” Dougherty Letter at 2, and on that point she may well be right. Still, while the Board’s internal policy debate appears to have descended into hostilities, the structure of its internal debate is not appropriate for the Court’s review. See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm’n, 789 F.2d at 44; Nat’l Small Shipments Traffic Conference v. ICC, 725 F.2d 1442, 1451-52 (D.C. Cir. 1984).

Although the Chairman’s letter suggests that the “rush” to publish the proposed rule “gives the impression that the Board has prejudged the issue,” Dougherty Letter at 2, the court of appeals has instructed that such a conclusory statement by a dissenting agency member does not meet a plaintiff’s burden for obtaining discovery. See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 751 F.2d at 1328 (finding that discovery would be inappropriate where the plaintiff’s “proof of bad faith . . . [were] inferences based on the speculation and conjecture of a dissenting Commissioner”). In addition, in the context of the rulemaking as a whole, the Board’s actions do not appear to have been rushed. Two months

prior to the publication of the NPRM, the TTD, of which the AFA and IAM are members, submitted a letter to the Board requesting that the Board adopt the New Rule on an industry-wide basis. See Mem. at 8. Thus, the proposed rule was not considered for the first time just days before publication of the NPRM. Furthermore, after publication of the NPRM, the Board received thousands of comments and responded substantively to them in its Final Rule, which was issued six months later. See 75 Fed. Reg. 26,062-83. The level of detail with which the agency considered and discussed negative comments in the Final Rule belies ATA's allegations that the Board rushed its consideration of the New Rule and therefore that two of its members were unwilling to waver from a predetermined position regarding its issuance.

Plaintiffs' other primary basis for seeking discovery is the argument that the Board's delay in processing IAM and AFA applications for representation and the timing of the withdrawal of these applications are suspicious. Specifically, at the time the Board allegedly delayed acting on IAM and AFA's representation applications, it continued to process other representation applications, including other applications made by IAM to represent Delta employees. See 75 Fed. Reg. 26,067. As the government and the putative intervenor unions have noted, however, threshold representation issues — known as “pre-docketing” issues — caused the delay in resolution of the representation applications.

IAM's application to represent Delta fleet service employees was delayed because Delta challenged the appropriateness of the group IAM proposed to represent. See Memorandum of Law in Support of Motion of TTD for Protective Order, Dkt. No. 35 at 21-22. Delta and IAM had finished briefing this issue before the Board only nine days before IAM withdrew its application. See *id.* at 22. The Board did not delay resolution of IAM's application; rather, it

appears that challenges to the proposed representation required further briefing which slowed the process.

With regard to the delay in processing AFA's application, the Board majority explained that it did not act on this application because "the issue of the use of hyperlinks in representation elections had to be resolved before the Board could move forward with the investigation of AFA's application." 75 Fed. Reg. 26,067. Although plaintiffs argue that the use of hyperlinks in voting was an issue common to all representation elections, AFA did specifically request that the Board review its hyperlink policy "[b]ecause of the anticipated representation elections at Delta Airlines." *Id.* Given the presumption that agency members act in good faith, and the lack of concrete evidence to the contrary, the Court will not discredit the Board's stated reasons for the delay in processing AFA's representation application. The delays in processing both IAM and AFA's applications are explained by independent reasons unrelated to the plaintiffs' assertion that the Board majority had an agenda to ensure that these representation elections go forward under the New Rule.

Nor does the timing of the withdrawals of these applications raise the inference that the majority Board Members acted in bad faith. The likelihood that the Board would issue the NPRM was covered in the press, *see* *Opp.* at 15, and it appears that the unions were simply acting in their own strategic interest. If the Board majority and the unions had been colluding, it is more likely that the unions would have known to wait until the issuance of the New Rule before applying to represent the Delta employees and thereby would have avoided the back and forth of applying for representation and then withdrawing those applications that they ultimately engaged in.

These facts make this case different from those on which plaintiffs primarily rely, which are among the very few reported cases in which a judge has determined that a plaintiff has met the high standard necessary to obtain discovery. In Corel Corp. v United States, the plaintiff complained that the Department of Labor had acted in bad faith in its decision to adopt Microsoft software. Judge Roberts determined that the plaintiff had made the requisite showing to obtain limited discovery based primarily on an agency email stating that it had decided to use Microsoft products exclusively, an email that was sent six months before the agency informed Corel of this decision. See Corel Corp v United States, Civil Action No. 99-3348, Opinion at \*20-21 (D.D.C. Aug. 4, 2000). Judge Roberts concluded that this evidence supported Corel's argument that the Department of Labor requested a bid from Corel *only after it had already chosen Microsoft products* in order to create the illusion of competition and therefore that it had acted in bad faith. See id. at 20.

The other case relied on by plaintiffs is a three paragraph opinion by Judge Penn, in which he concluded that a plaintiff challenging a procurement decision had adequately shown the possibility of bad faith by pointing to a memorandum written by the agency *two years after* a prior contract between the plaintiff and the agency had been terminated. The memorandum recommended that plaintiff receive a final unsatisfactory evaluation for its performance on that project, and was transmitted to the procuring entity for the contract at issue *on the very same day it was written*. MCI Constructors Inc v. U.S. Army Corps of Engineers, Civil Action No. 90-3091, 1991 WL 73182 at \*1 (D.D.C. 1991). Plaintiffs have brought no such smoking guns to the Court's attention in this case. These cases therefore do not support the plaintiffs' argument in favor of obtaining discovery.

The Court concludes that plaintiffs have not made the “strong showing of bad faith or improper behavior” that would permit discovery into the “the mental processes of the administrative decisionmaker.” San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 789 F.2d at 44 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 420). It therefore will deny ATA’s motion for discovery.

For the reasons stated above, it is hereby

ORDERED that ATA’s motion for expedited discovery [11] is DENIED; it is

FURTHER ORDERED that the motions to intervene for the limited purpose of filing a protective order from AFA, IAM, and TTD, [32], [34] and [35], are DENIED as moot; and it is

FURTHER ORDERED that the government shall file the administrative record in this case on an expedited basis by June 14, 2010, although it may stipulate to the contents of the numerous identical comments on the proposed Rule that it received. The Court will set a date for further briefing and/or a merits hearing following resolution of the motion for a preliminary injunction.

SO ORDERED.

/s/ \_\_\_\_\_  
PAUL L. FRIEDMAN  
United States District Judge

DATE: June 4, 2010