UNITED STATES OF AMERICA

BEFORE THE NATIONAL MEDIATION BOARD

Docket No. C-7198

APA'S OPPOSITION TO THE NMB'S PROPOSED DECERTIFICATION RULE

On January 31, 2019, the NMB proposed to "amend its regulations to provide a straightforward procedure for the decertification of representatives" to fulfill its stated mission, "protecting employees' right to select their representative." The proposal cites Section 2, Ninth of the RLA, which charges the NMB to investigate disputes "among a carrier's employees as to who are the representatives of such employees." The Allied Pilots Association (APA) opposes NMB's proposal for several reasons.

First, the text of the Railway Labor Act (RLA) does not support the proposal. Second, the proposal does not promote the primary goal of "stability in labor relations." Third, the proposal imports an anti-union procedure that was added to the NLRA in the Taft-Hartley amendments without also bringing along the protections the NLRB and the NLRA afford, leaving unrepresented employees at even more of a disadvantage. Finally, the proposal will disproportionately impact newer and smaller unions, groups that need union representation the most. It also doubles the length of time employees must be unrepresented as compared to the NLRB's decertification procedure.

The Text of the RLA Does Not Support the Proposal

The Act's stated goal of allowing employees to "select their representative" does not mean that there needs to be an easier and more straightforward way for employees to remove and

decertify their statutorily-allowed representative and all of the advantages that come with representation. The current "straw man" procedure is adequate where the employees absolutely do not want union representation.

The text of the Railway Labor Act makes it clear that having a representative for employees is statutorily favored and that going unrepresented is disfavored. Congress has not changed this preference. Given that having employees go unrepresented is antithetical to the language of the RLA's statutory scheme, it is both unnecessary to streamline employees' ability to remove their representative and beyond the NMB's authority to do so.

The RLA is replete with language concerning the right of employees to be represented while, at the same time, having no direct language concerning the right of employees to determine that they no longer wish to be represented. Section 1(a) sets forth several "general purposes" which either favor representation or assume that employees will select a representative: protecting "the right of employees to join a labor organization;" to forbid "any limitation upon freedom of association among employees;" to provide "for the prompt and orderly settlement of disputes" concerning pay, rules and working conditions, grievances and disputes concerning the interpretation or application of agreements. There is no language concerning the right of employees to discontinue representation and the proposed rule's attempt to add such language exceeds the statutory structure in which the NMB is allowed to operate.

Section 2, First, often known as the "heart of the RLA," provides additional evidence that unions' representation of each craft and class is the preference and policy under the RLA. It provides that:

> It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay,

> rules and working conditions, and to settle all disputes, whether arising out of the applications of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carriers growing out of any dispute between the carrier and the employees thereof.

Making and maintaining agreements with employees individually is impractical, if not impossible, considering the hundreds of thousands of carriers' employees in the airline industry alone.

Section 2, Second of the RLA assumes that employees will be represented by a union: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between ***representatives*** designated and authorized" (emphasis added). As noted above, the RLA gives the NMB authority to investigate disputes "among a carrier's employees as to who are the representatives of such employees" without stating that employees have the right to determine that they no longer wish to have a representative.

By contrast, Section 9(c)(1)(A) of the NLRA allows for employees to "assert that the ***individual or labor organization***, which has been certified or is currently recognized by their employer as the bargaining representative, is no longer a representative" (emphasis added) under the NLRA. The NLRA contemplates both individual and collective representation. The RLA does not and without a Congressional amendment to the statute which inserts similar language into the RLA, the NMB's proposal is improper.

The Proposal Would Destroy Stability in Labor Relations

Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246 (1994), citing *Atchison, T & S.F.R. Co. v. Buell,* 480 U.S.

557, 562 (1987). Allowing a streamlined process for decertification will make it more likely that employees will become unrepresented and lead carriers to have to bargain directly with thousands of individual employees, leading to a dramatic imbalance in bargaining power and the bargaining relationships. Additionally, the NMB's proposal would force employees to wait an arbitrary two years after a decertification election to apply for certification of a new representative, twice the length of the NLRA's election bar.

The proposed rule's negative impact on the stability of labor relations is exacerbated by the fact that the duty to maintain the status quo under the RLA, at least in one circuit, begins only when the parties have negotiated their initial collective bargaining agreement. *Teamsters v. North American Airlines*, 518 F.3d. 1052 (9th Cir. 2008). By contrast, the duty to refrain from making unilateral changes under the NLRA begins with an apparent union victory at a representation election. *See, e.g. The Ardit Co.*, 364 NLRB No. 130 (2016). Thus, even if a new union came in two long years after decertification, stability would take a great deal of time and effort to achieve and employers would have even more of an incentive to avoid agreement with unions.

The Proposal Imports an Anti-Union Procedure from the NLRA without NLRA Protections

When the NLRA was passed in 1935, it did not contain a decertification procedure; employees could only vote to replace one union with another.[1] When the anti-union Taft-Hartley amendments were passed in 1947, the NLRA was amended to include the decertification procedure found in Section 9(c)(1)(A). The NMB's proposed rule appears now to attempt to

[1]Abraham, Steven E. (1994) "How the Taft-Hartley Act Hindered Unions," Hofstra Labor and Employment Law Journal: Vol. 12: Iss. 1, Article 1. Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol12/iss1/1

follow the Congressional Taft-Hartley amendments by shifting the RLA's enforcement even further in favor of carriers at the expense of unions and it is doing so without amending the RLA.

For example, unions would face potential decertification without the ability to turn to the NMB to allege unlawful carrier influence in the decertification process;[2] because the NMB does not have provisions to remedy unfair practices, it is not equipped to deal with the ramifications of a straightforward decertification process. The NMB relies on labor and management to resolve issues, through arbitration or otherwise, that would be resolved through NLRB adjudication under the NLRA. A neutral party needs to determine whether an employer's influence on a decertification petition at a given carrier is unlawful. Unless Congress amends the RLA to give the NMB an expanded role in adjudicating unfair labor practices, a straightforward decertification process cannot be allowed.

The NMB's proposed rule is attempting to introduce, or at least to expand upon, an anti-union procedure under the false premise of fairness with the goal of passing along the damaging effects Taft-Hartley had on the NLRA while not providing its countervailing protections. This is contrary to the purposes of the RLA and will have disproportionate impact on newer, smaller unions.

The Proposal, if Successful, Would Disproportionately Affect Newer, Smaller Unions

Unions which have not yet negotiated initial collective bargaining agreements will be particularly vulnerable to decertification. As a comparator, under the NLRA, more decertification elections were consistently lost by the union than won by the union in fiscal years 2009 through 2018 and the median size of those units ranged between 24 and 27 members.

[2] *See, e.g. Eastern States Optical Co.*, 275 NLRB 371 (1985), finding that an employer violates Section 8(a)(1) of the NLRA by soliciting signatures for a decertification petition or by lending more than minimal support and approval to it.

	Petitions Filed	Elections	Won by Union	Lost by Union	Petitions Dismissed	Petitions Withdrawn
FY09	568	270	111	159	88	235
FY10	530	233	90	143	43	238
FY11	500	271	122	149	52	193
FY12	472	233	98	135	52	206
FY13	472	202	79	123	49	181
FY14	410	178	63	123	49	183
FY15	407	178	76	106	55	180
FY16	313	174	69	108	37	122
FY17	328	168	59	118	27	125
FY18	337	159	50	109	30	111

Decertification elections results. As published by the NLRB at https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/decertification-petitions-rd.

	Median Size
FY09	24
FY10	27
FY11	26
FY12	28
FY13	24
FY14	26
FY15	25
FY16	26
FY17	24
FY18	26

Median Size of Bargaining Units in Elections as published on the NLRB. https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections

This concept is not new. "The units decertified, therefore, tend to be smaller units…." Krislov, Joseph, *Union Decertification*, ILR Review, Vol. 9 , No. 4 (Jul 1956), page 591. Younger and smaller unions are particularly vulnerable to this new, proposed NMB rule. An institutionalized process which targets younger and smaller represented crafts and classes destabilizes labor relations at a time when stability is needed most.The NMB's proposed rule exceeds the NMB's authority and is inconsistent with the RLA's foundational tenants and language. Additionally, as noted above, the impact will have a disproportionate effect on younger and smaller labor representatives and then create, if a labor organization is decertified or

none selected, an excessive and arbitrary two-year bar for representation. The NMB offers no explanation in its proposal, and certainly no rational basis for its justification of a two-year ban for a follow-on certification vote following a decertification. From a practical perspective, what this means is that the individual member lacks not only representation, but also less overall employment and work support which creates an absence of labor stability.

Within APA, in addition to contractual collective bargaining, the Association's efforts in collective bargaining agreement enforcement goes well beyond simply asserting a grievance. In the airline industry generally, safety depends largely on the efforts of unions to educate their membership, develop specialized and responsive training, communicate about the details of equipment, and stress the importance of following proper procedure. Though the employer carries this burden, the employer is motivated by factors other than purely the interests of its employees and its passengers. As recent events have demonstrated, the airline industry needs unions to be safety advocates more than ever. The NMB's proposal discourages this role and promotes the fiction that employees will work just as safely fending for themselves.

Recently, APA was specifically requested by the Department of Transportation to identify and provide pilot experts to assist in a commission to review equipment certification processes following the Boeing 737 MAX aircraft mishaps. The recognition to include represented pilots as part of a national review evidences the need to promote union certification (not decertification) to ensure protected activities, independent of Company influence, such as discussions related to industry safety and regulatory matters, remain open and free.

APA exerts its expertise and promotes stability within the labor relationship through several other avenues as well. In addition to safety efforts, APA sponsors dozens of pilot-staffed committees to assist the union in its representational efforts, promote both the class and

individual pilot, and stabilize the employee group. A few examples include, the Aeromedical committee which promotes overall pilot health, addresses occupational health issues, responds to individual pilots in need, and interacts with Federal Aviation Authority ("FAA") medical personnel. The Flight Time/Duty Time committee focusses on FAA regulations in relation to duty limits and fatigue. This committee promotes regulatory compliance against Company efforts to expand duty days and operational periods. Some APA committees focus solely on contractual representational issues, such as contract compliance, scheduling, and negotiating. American Airlines declared bankruptcy in November 2011. The Association secured a seat on the unsecured creditor's committee and worked closely with the Bankruptcy Court, fellow creditors, and the Company throughout the bankruptcy process. As a direct result of APA's efforts, the pilot pension plan (A-Plan) was not terminated but instead frozen, which meant the pension, although frozen from future accruals, would not revert to the Pension Benefit Guarantee Corporation ("PBGC") which would have led to a loss of millions of dollars to represented pilots.

As mentioned, the NMB's proposed rule appears to target smaller and younger employee groups and the two-year bar arbitrarily imposes a restriction on certification. If a bankruptcy, major safety event, or impactful regulatory change came about during the two-year bar for representation, covered employees would have no avenue to seek assistance or collectively address these significant events.

The NMB Should Not Implement Its Proposed Rule

The NMB should not implement its proposed rule on decertification. The "straw man" method is adequate to provide a decertification method when employees truly do not want union representation.

The text of the RLA clearly favors union representation and disfavors employees having to work without representatives as to their wages, hours, working conditions and grievances. Its text, unlike the NLRA, provides no support for a straightforward decertification process.

"Stability in labor relations" is a key purpose of the RLA. The proposed rule would have a devastating effect on labor stability, forcing management to bargain individually with thousands of employees and forcing employees to go unrepresented for an arbitrarily long period. Even if employees succeed in bringing back a union after a decertification, they potentially face a period of years during which management could unilaterally alter their wages, hours and working conditions.

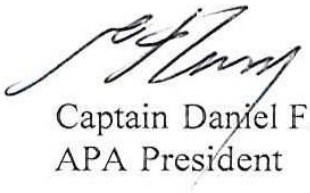
The NLRB, in accordance with the language of the NLRA (introduced through the anti-union Taft-Hartley amendments), provides a straightforward decertification process. However, it also provides for a host of protections, including the ability of the NLRB to adjudicate unfair labor practices concerning unlawful employer support for the decertification process. The NMB cannot fairly implement a straightforward decertification process unless Congress amends the RLA to provide an expanded role for the NMB in addressing unfair labor practices. The NMB depends on labor and management to resolve issues on their own; with decertification, these issues will simply remain unresolved as employees will have no mechanism to address them.

Finally, the proposed rule would have a disproportionately negative effect on newly-certified and smaller unions at a time when airline industry employees most need the safety focus unions provide. Safety is at the forefront of APA's work on a daily basis. Smaller carriers and unions need safe operating procedures and equipment just as much. They should not be disadvantaged by having to fend for themselves, and carriers should not go unchecked in their

emphasis on profit at the expense of safety.

APA urges the NMB not to implement its proposed rule on decertification.

Respectfully Submitted,



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