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Subject: Comments in response to National Mediation Board's request for
comments to proposed rule change notice, dated January 31, 2019.
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This document is intended to outline the exceptions taken to the proposed extension of the two year election bar rule to decertifications by the National Mediation Board (NMB), specifically in the proposed §1206.4 (a). This document is not intended to take exception to the new certification process as described in the January 31, 2019, notice of proposed rule amending existing rules, except for the extension of the two year bar rule to decertifications.

Exception is taken to the proposed extension of the two year election bar rule to decertifications for the following reasons:

1. it is inconsistent with previous election bar rule applications at the NMB and other federal agencies;
2. it is inconsistent with the rationale for the existing two year election bar in cases of certifications that has been restated in National Mediation Board decisions and recognized by courts;
3. the proposed rule change would deny employees of the ability to exercise their statutory rights under the Railway Labor Act, §152, fourth, without justification;
4. The proposed rule change would cause the NMB to fail to fulfill its duty to under the Railway Labor Act, §152, Ninth; and
5. The proposed rule change would be in contravention of the General Purposes of the Railway Labor Act, §151a, (2) and (3), as well as possible (4) and (5).

While the rationale stated for the suggested change is lacking in the proposed rule changes, agency comments made in such notice in part, lay the foundation for the errors in extending the two year bar to decertifications.

I. A two year election bar rule neither applies to the NMB "indirect" decertification process nor to any decertification provisions in other federal statutes or regulations.

§1206.4 – Time Limits Applications states:

Except in unusual or extraordinary circumstances, the National Mediation Board will not accept an application for investigation of a representation dispute among employees of a carrier:

- (a) For a period of two (2) years from the date of a certification covering the same craft or class of employees on the same carrier, and
- (b) For a period of one (1) year from the date on which:

(1) The Board dismissed a docketed application after having conducted an election among the same craft or class of employees on the same carrier and less than a majority of valid ballots cast were for representation; or

(2) The Board dismissed a docketed application covering the same craft or class of employees on the same carrier because no dispute existed as defined in § 1206.2 of these rules; or

(3) The Board dismissed a docketed application after the applicant withdrew an application covering the same craft or class of employees on the same carrier after the application was docketed by the Board.

Under this rule, the "unnecessarily complex and convoluted" and "indirect" decertification process, as described by the agency, that the agency seeks to change would fall under the one year bar in §1206.4(b)(1). There is no instance of support for a two year bar for an election following a decertification election/determination in any federal statute or regulation.

II. The extension of the two year election bar to decertifications is inconsistent with the rationale used to justify the current two year election bar applied in NMB certification cases.

The premise of the two year bar rule is that "labor stability is enhanced by providing labor and management with a reasonable period of time to establish a collective bargaining relationship," Jet America, 11 NMB 173 (1984) and specifically cited in National R.R. Passenger Corp., 13 NMB 4 2, 416 (1986). The current NMB regulation "was held to be consistent with time bars used by the National Labor Relations Board and the Federal Labor Relations Authority. See e.g., NLRB v. Circle A & W Products Co., 647 F.2d 924, 926 (9th Cir.), cert. denied, 54 U.S. 1054, 102 S. Ct. 600, 70 L. Ed. 2d 590 (1981) (NLRB); 5 C.F.R. Sec. 2422.3(1), (e) (1984) (FLRA). It is designed to

maintain the status quo long enough for NMB to investigate a dispute and to stabilize labor representation. As such, the regulation is consistent with the statutory purpose of the Railway Labor Act, 45 U.S.C. § 151a. The rule must be upheld under an equal protection challenge if it serves a legitimate government purpose and it is rationally related to that purpose. Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 942, 59 L. Ed. 2d 171 (1979). Because it is beyond doubt that the two-year bar is rationally related to the government's interest in quieting labor disputes, see 45 U.S.C. § 151a, appellant's constitutional challenge must fail." Hunter v. NMB, 754 F.2d 1496, 1499 (9th Cir. 1985).

Subsequently in 1994, the NMB again restated its rationale: "The Board's certification bar rule furthers the purposes of the Act by ensuring a reasonable period of time following a certification during which the representatives of the carrier and the employees can establish a collective bargaining relationship and/or agreement. See Jet America, *supra*. The Board's policy of not considering applications for the investigation of representation disputes under the certification bar rule has been upheld by the Federal courts as both statutorily consistent and constitutionally valid." Virgin Atlantic, 21 NMB 183, 191 (1994).

Essentially, the certification of an employee representative, the establishment of the collective bargaining relationship, the statutory duties to bargain that flow from the certification, the development of the labor-management relationship, and potential for collective bargaining agreements are all part of an inextricably related combination of factors that form the rationale that historically justified the NMB two year election bar rule applied to certifications and such references are found in numerous NMB's decisions and court decisions. This rationale involves rights and duties specified in the Railway Labor Act and the rule in this context has been accepted by courts as furthering the purposes of the Railway Labor Act. A decertification, in fact, neither supports collective bargaining nor any collective bargaining process. The extension of the two year election bar to decertifications would effectively delay the possibility of developing collective bargaining relationships and frustrate the purposes of the Railway Labor Act. The NMB's attempt to extend the two year election bar to decertifications where the rationale for the current two year election bar would not apply seems to be a clear rejection of the rationale for the existing two year election bar. If the NMB is serious about disregarding the stated rationale for the existing rule, the one year election bar should apply to both certifications and decertifications. At least, the NMB would achieve the "similar" treatment they sought in the proposed rule change.

III. The proposed two year bar for an election after a decertification denies employees the ability to exercise their statutory rights under the Railway Labor Act, §152, fourth, without justification.

Employees have the statutory right to organize and bargain collectively through representatives of their own choosing. The 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." Railway Labor Act, §152, Fourth. The NMB has proposed to change the one year bar to an election to a two year bar to an election without justification. As demonstrated in section II., above, the rationale for the current two year bar was tied to the certification of an employee representative and the promotion of collective bargaining. The NMB's statement in support of its proposal belies a fundamental flaw in their proposed rule change:

"Successful decertification, like certification, is a challenging and significant undertaking by employees with a substantial impact on the workplace for both employees and their employer. In the Board's view, the changes in the employee-employer relationship that occur when employees become represented, change representative or become unrepresented require similar treatment. For this reason, the Board proposes extending the two year time limit on applications in Sec. 1206.4(a) to decertifications as well as certifications."

The current rationale for the two year bar to an election is inextricably tied to the certification of an employee representative and a time period to allow the employee representative and the carrier representative to establish a "collective bargaining relationship and/or agreement." A decertification process has no such rationale supporting any extension of an election bar that limits statutory rights. While the NMB appears to pay lip-service to an asserted "challenging and significant undertaking with substantial impact on the workplace for both employees and their employer," the NMB seems to cast aside the historic and documented rationale for the current two year election bar in its proposal to extend the two year election bar to instances significantly inconsistent with the rationale for the current rule and appears to be a rejection of the accepted rationale for the current two year election bar.

This inconsistent act by the NMB in its proposed extension of the two year election bar to decertifications would deny employees the ability to exercise their statutory rights for an additional year. It seems that the denial of employee statutory rights is based on a desire to equate a decertification to a certification, but in so doing the NMB must ignore the established rationale for the existing two year election bar rule in the case of certifications.

IV. The proposed extension of the two year contract bar to election for decertification cases would cause the NMB to fail to fulfill its duty to under the Railway Labor Act, §152, Ninth.

NMB's statutory mandate is to investigate representation disputes and to certify designated employee representatives. 45 U.S.C. § 152 Ninth. When the court reviewed the current rule applying to certifications, the court stated it "is designed to maintain the status quo long enough for NMB to investigate a dispute and to stabilize labor representation. As such, the regulation is consistent with the statutory purpose of the Railway Labor Act, 45 U.S.C. § 151a. The rule must be upheld under an equal protection challenge if it serves a legitimate government purpose and it is rationally related to that purpose. *Vance v. Bradley*, 440 U.S.

93, 97, 99 S.Ct. 939, 942, 59 L.Ed.2d 171 (1979).” *Hunter v. NMB*, 754 F.2d 1496, 1499 (1984).

Unlike the two year election bar based on a certification that furthers the purposes of the Act by ensuring a reasonable period of time following a certification during which the representatives of the carrier and the employees can establish a collective bargaining relationship and/or agreement, the proposed two year bar based on a decertification does that exact opposite. It prevents the exercise of employees rights under §152, Fourth, and delays elections for an additional year, as well as delay the formation of collective bargaining relationships, the collective bargaining process itself, and the achievement of collective bargaining agreements.

The restriction on employee rights and the limitations on the access to the NMB election procedures directly causes the NMB to fail to fulfill its duty under §152, Ninth. Indeed, while the NMB seems to acknowledge its “statutory mandate to protect employees’ freedom to choose a representative,” its actions would directly infringe those rights and cause it to fail in the fulfillment of its own duties.

V. The NMB proposed extension of the two year bar to an election is in contravention of the General Purposes of the Railway Labor Act, §151a, (2) and (3), as well as possible (4) and (5).

§ 151a. General purposes states:

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

The two year contract bar in the case of certifications was designed to maintain the status quo long enough for NMB to investigate a dispute and to stabilize labor representation. As such, the regulation is consistent with the statutory purpose of the Railway Labor Act, 45 U.S.C. § 151a. *Hunter v. NMB*, 754 F.2d 1496, 1499 (1984). To the contrary, the extension of the two year contract bar in the case of decertifications is directly inconsistent with the statutory purposes of the Railway Labor Act.

Essentially, the extension of the two year bar to an election in the decertification cases would effectively seriously interfere with the employees ability to exercise their freedom of association and join a labor organization in violation of §151a(2). Also, see II., above. This attempt to extend the two year election bar to decertifications is purportedly based on the NMB’s

observation that "successful decertifications, like certifications, is a challenging and significant undertaking by employees with substantial impact on the work place for both employees and their employer." One could question the accuracy of this statement on several counts: why is "successful" decertification any more impactful than one that is unsuccessful, and why should a successful certification with its statutory implications for the duty to bargain not be considered significantly more impactful than a decertification and the elimination of a duty to bargain.

Simply stated, the NMB seeks to infringe on employee rights based on a "rationale" composed of jargon not supported by evidence, and likely not based on reality, that alludes to a mutual "substantial impact" on both the "employees and employer." The NMB offers this mutual "substantial impact" rationale in support of infringing employee statutory rights in complete disregard for the purpose of the act to provide for "the complete independence of carriers and of employees in the matter of self-organization." See §151a(3).

Additionally, the delay in allowing for elections for the additional year contravenes the Railway Labor Act's §151a, (4) and (5), by delaying the selection of a new employee representative, the collective bargaining process, the consummation of a bargaining agreement, and the settlement of disputes relating thereto.

VI. The NMB's proposed rule itself contains comments that undermine the foundations for the proposed extension of the two year election bar to decertifications.

There are two internal inconsistencies in the NMB's proposed extension of the two year bar to an election in decertifications.

First, "Under its current procedures, the NMB allows indirect rather than direct decertification." The Board calls this process "a more convoluted path to an election because of the Board's requirement of the 'straw man.'" Accordingly, the Board proposes changing its rules to simplify the decertification process and put decertification on an equal footing with certification. Employees may submit authorization cards to decertify their current representative. The wording on the card must be unambiguous and clearly state the intent to no longer be represented by the current union. The showing of interest requirement will be the same showing of interest required for a certification election—at least 50 percent of the craft or class." The "straw man is eliminated."

While the Board seems to tout its laudable goal of simplifying a process, i.e., a "convoluted" process is made simple. The current "convoluted" process is viewed as an indirect certification process, and the new process would be a simple and a direct certification process. The current "convoluted" process, if successful, receives a one year bar under the existing rules, but somehow the proposed simple and direct process would warrant a two year election bar. Something made "simple" for employees comes at the cost of denying employees an exercise of their statutory rights for a year longer than that under the much denigrated current, indirect, and complex process. In reality, there is no need or justification, to add the infringement of an employee statutory right to simplifying the rule.

Second, the NMB assumes in its proposed rule comments, that employees seeking to decertify a union want to become unrepresented and remain unrepresented. It seems this sentiment is incorporated in NMB's attempt to equate the decertification of an employee representative to the certification of an employee representative. This is an error of significance. The NMB seems to assume it knows what various groups of employees want. In fact, an effort to decertify one union could very well be a prelude to an attempt to change union representatives, knowing full well that labor organizations will avoid instances that would be viewed as raiding an organized group of employees. There may be no desire to be unrepresented, but there may be a desire to change union representation with the knowledge of the reality that exists among unions. Again, the proposed extension of the two year election bar to decertifications is an infringement of employee statutory rights, an abdication of the NMB's explicit duty, and results in establishing procedures that frustrate the purposes of the Railway Labor Act. Such a provision is not needed, is not justified, and is ill advised.

For the foregoing reasons I believe the Railway Labor Act, and its purposes, would be better served by not extending the two year election bar to decertifications.

Thank you for the opportunity to comment