April 1, 2019
Submitted via legal@nmb.gov

RE: Docket No. C-7198, National Mediation Board, Proposed Rule Decertification of Representatives, RIN 3140–AA01

Introduction

On behalf of the undersigned organizations, I respectfully submit these comments in response to the National Mediation Board's (NMB) Proposed Rule on the Decertification of Representatives, which seeks to establish formal procedures for employees to reject union representation.

Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective. A strong focus of CEI is removing barriers to the free expression of employee choice in either choosing union representation or declining it.

A Direct Path to Decertifying Union Representation Fulfills the Intent of the Act

Under current law and regulation, employees covered by the Railway Labor Act (RLA) lack a direct path to remove unwanted union representation. As such, CEI supports the NMB's proposed rule to establish a straightforward process for the decertification of a union as exclusive bargaining representative. Developing a direct and clear method for employees to decertify a union fulfills the Congressional intent for the RLA to provide for the "freedom of association among employees."[1] Former NMB Chairman Liz Dougherty describes the current, informal union decertification process as "the biggest obstacle to employee expression of choice under the RLA."[2]

National labor policy, including the RLA, may support collective bargaining, but it does not require it and it does not foreclose the opportunity for workers to reject union representation. Comparable to other federal labor law regimes, the RLA stresses workers' right to freedom of association, which includes the right to form a union and, just as importantly, the right to refrain from joining a union or remove an unwanted union representative. Specifically, a provision of the RLA provides that employees "shall have the right to determine who shall be the representative."[3]

Despite the RLA's failure to directly address the issue of decertification and the NMB's failure to establish procedures for it, the Fifth Circuit Court of Appeals has affirmed employees' right to reject union representation. In the 1980s, the NMB "refused to process a 'straw-man' application. The Fifth Circuit subsequently ordered the Board to process the application,"[4] stating:

> The Act supports but does not require collective bargaining, and in our view, the implicit message throughout the Act is that the "complete independence" of the employees necessarily includes the right to reject collective representation.[5]

A straightforward process for decertification is especially needed because substantial turnover at workplaces has caused the widespread problem of inherited union representation. This occurs because, under national labor policy, labor unions never stand for reelection and remain the exclusive representative of employees indefinitely, unless employees take on the arduous task of decertifying union representation.

In a case before the Court of Appeals for the District of Columbia, in which the NMB's authority to decertify a union was challenged, the court stated:

> [I]t is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit.[6]

The concerns of the Court of Appeals for the District of Columbia related to employee turnover are warranted. Analysis has not been conducted on employees covered by the RLA, but the vast majority of private-sector employees covered by the NLRA did not choose the union that represents them, with only 7 percent of these workers voting for their specific union representation.[7] Most cases of inherited representation occur because the majority of union organizing happened decades prior and the employees that voluntarily chose union representation have either retired or changed jobs. The NMB's failure to provide a direct path to decertification can only exacerbate the problem of inherited unions for employees covered by the RLA.

Under the National Labor Relations Act (NLRA), states can enact Right-to-Work laws, which prohibit union security agreements and agency fees. That option is unavailable under the RLA. That is another reason to favor the promulgation of the NMB's Proposed Rule on the Decertification of Representatives. Once a union is certified as the exclusive representative under the RLA, workers who refrain from joining a union must still pay to the union what are known as "agency fees," to supposedly to cover the costs of collective bargaining, as a condition of employment.

The agency fee requirement, combined with the prevalence of inherited union representation in the railroad and airline industry, makes a clear path to union decertification urgently needed. A scenario could arise where almost none of the employees at a workplace voted for union representation and a majority of the workers there are non-members, but are still required to pay for representation from a labor union that lacks majority support.

Further, the United States Supreme Court and the legislative history of the RLA support the right of employees to entirely reject union representation. As the U.S. Supreme Court ruled in a 1965 case:

> Employees are not required to organize, nor are they required to select labor unions or anyone else as their representatives. It has always been recognized that under the law the employees have the option of rejecting collective representation.[8]

This determination by the U.S. Supreme Court accords with the intent of Congress to permit employees covered by the RLA to decertify a representative. The 1934 House Report on amendments to the RLA, stated:

> 2. It [H. R. 9861] provides that the employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids interference by the carriers' officers with the exercise of said rights.[9]

Case law makes it clear that employees covered by the RLA have the right to decertify a union representative. Thus, the lack of established procedures to remove a union representative is an impingement on employees' freedom of association rights. The NMB's proposed rule would provide employees with a clear framework to decertify a union that allows them the ability to fully exercise their rights under the RLA.

"Straw Man" Elections

A brief review of the current informal decertification process illustrates the need for the NMB's proposed rule. Unlike the NLRA, which expressly provides for the decertification of a union,[10] the RLA is silent on the issue of decertification. Despite the lack of a formal decertification process, it is not impossible to remove an unwanted union under the RLA, but it is difficult and unnecessarily complex.

To initiate the decertification process, the union-represented employees must choose an individual in the class or craft who is willing to be identified as the "straw man," whose name will appear on the representation election ballot. Next, the employees seeking to decertify a union must collect signed authorization cards from more than 50 percent of the class or craft's employees that state their desire to remove that union. This is extremely difficult, because under the RLA, unions represent employees in large, company-wide class or craft at various locations, not just at a particular worksite. Employees seeking to decertify a union face communication hurdles and may lack resources to contact their fellow employees who work at other company locations.

After the employees collect signed authorization cards from more than 50 percent of unit members, the employees may file an application for an "Investigation of Representational Dispute" with the NMB. Then, the NMB will hold an election with the following options: 1) the current union, 2) the straw man, 3) a write-in candidate, 4) no union.

To decertify the current union representative, the majority vote must be for "no union" or the "straw man." If the straw man is elected, the individual employee would then renounce representative status.

Proposed Rule Removes Needless Barriers to Employee Free Choice

Instead of muddying the waters with an option for "no union" and the "straw man," the NMB's proposal would simply provide employees with the option to vote for the 1) incumbent union, 2) no union, 3) write-in option. If the majority of employees vote "no union," the union is decertified. This simplifies the current unnecessarily complex decertification process.

This proposed rule streamlines the decertification process in several ways. Employees who wish to remove union representation will no longer have to recruit a class or craft member to appear on the ballot as the straw man. Instead of attempting to convince a majority to sign authorization cards for the straw man, "while attempting to explain that this individual is not actually going to represent them,"[11] the employees would collect cards in support of no union representation.

Further, eliminating the straw man option on the ballot creates certainty for employees. Currently, employees are faced with a ballot with a straw man and a no union option, which causes confusion. Some employees who wish to remove union representation will reason they should vote for the straw man because that is the ballot option for which they signed an authorization card. However, other employees who similarly desire to reject union representation will vote for the no union option. This splits the vote for decertification—the votes for the straw man and no union are not combined. A union is only decertified if the straw man or no union ballot option receives a majority of votes cast. The proposed rule, with only the no union ballot option, is a much clearer process and better allows employees to express their desire for no union representation.

Another benefit of removing the straw man option is that it protects employees from harassment. The requirement that employees publicly identify themselves as the straw man provides unions with a ready target for their hostility against decertification. Employees who have sought to decertify their union under the RLA have been derided on a popular online forum for pilots. In one example, a post suggested creating "a Wiki list of these decert[ification] guys so everyone will know their names."[12] In another instance, an employee identified as the straw man was derisively called a "scab."[13]

In a pending complaint against the NetJets Association of Shared Aircraft Pilots, the union and its operatives are accused of sending hundreds of vulgar and threatening letters to the homes of employees who supported a recent union decertification election. In one instance, one recipient of these letters "called a fire department and explosives experts in response to receiving a box full of plain white envelopes with no return address."[14]

Another provision of the NMB proposal creates parity between the union election process and decertification efforts. Under the RLA, when a union wins an election and is certified as the exclusive representative, workers must wait two years to initiate a straw man election to remove the union representation. In contrast, if workers successfully remove unwanted union representation, that same union may seek to unionize these employees after a one-year waiting period. The NMB's proposed rule would install a two-year waiting period for both types of elections.

This provision is an improvement over the current standards. However, if the goal of the RLA to afford workers "freedom of association," then employees should be able to select union

representation or remove unwanted representation whenever there is majority support for either option. Objectors, possibly both employers and unions, to such a rule change would point out that this could create administrative burdens and reduce labor stability. Yet, as previously discussed, the RLA places the right to determine union representation, or no representation, exclusively with employees, not unions or employers. As such, waiting periods between elections infringe on employees' "right to determine who shall be the representative." Regardless of how the NMB chooses to establish waiting periods or other aspects of union election rules, an election to form a union or decertify a union should be mirror images of each other, using the same procedures.

Conclusion

It is unimaginable that Congress crafted the Railway Labor Act with the intent that once past employees select union representation, the option to remove said union would be permanently foreclosed. As case law and legislative history show, Congress did not intend to create a Hotel California scenario where workers can only form a union but never leave it.

To satisfy this statutory mission of the RLA, employees must have a straightforward procedure to remove a union. The NMB's proposed rule helps protect employees' freedom of association of and ensures that workers are able express their free choice to remove a union representative that has lost majority support.

Respectfully submitted,

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