March 13, 2019
Mary Johnson, General Counsel
National Mediation Board
1301 K Street NW, Suite 250E
Washington, D.C. 20005

Dear Ms. Johnson:

On January 30, 2019, the National Mediation Board ("NMB" or "the Board") issued a proposed rule (ID: NMB-2019-0001-0001, RIN: 3140-AA01, Docket No. C-7198, Federal Register Number 2019-00406) concerning the decertification process for labor representatives in the airline and railway industries under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq*. *See* 45 U.S.C. § 152, Ninth (vesting NMB with authority to alter its rules to carry out its statutory duties and stating, "In the conduct of any election[,] . . . the Board shall designate who may participate in the election and establish the rules to govern the election[.]")); 84 Fed. Reg. 21, 612 (proposed January 30, 2019) (to be codified at 29 C.F.R. §§ 1203, 1206). I urge NMB not to adopt that rule.

Overview and Background of Proposed Rule

Currently, the Board's decertification procedure requires "[e]mployees who wish to become unrepresented [to] follow a . . . convoluted path to an election," one which includes a "straw man." 84 Fed. Reg. 21 at 612. "This . . . means that if a craft or class of employees want to decertify, they must find a person willing to put their name up, . . . and then explain to at least fifty percent of the workforce that [the straw man] does not want to represent them, but if they want to decertify they have to sign the card authorizing him to represent them." *Id.* In other words, if elected, the straw man would disavow an interest in representing the class or craft and serves only as a "stand-in" for decertification. In the ensuing election, the ballot would include

the names of both the current labor representative and the straw man; a "no union" option; and a write-in space. *Id.* at 612-13. If the straw man and the "no union" option combined receive more than fifty percent of the votes cast, the class or craft will be unrepresented. Additionally, current law prohibits the Board from processing a representation application for a one-year period after any election that does not result in the certification of a union. *See* 29 C.F.R. § 1206.4(b).

The Board's proposed rule would do away with the straw man procedure in favor of a more direct method. The Board's proposal would lead to an election if at least fifty percent of a craft or class indicated their intent to no longer be represented by a labor representative by signing authorization cards. The ensuing election would involve two options, the incumbent labor representative and no representative. The Board also proposes to extend the § 1206.4(b) bar from one year to two years following a successful decertification election. *See* 29 C.F.R. § 1206.4(a) (establishing an analogous two-year period in instances of a representative winning certification).

Comments

The Board's proposal has some appeal. The existing NMB procedures concerning the conduct of elections, particularly decertification elections, are flawed and would arguably benefit from simplification and structure. As the Board's notice of proposed rulemaking points out, the straw man procedure is not required by the RLA, and the procedure operates in an unnecessarily complicated and confusing manner. The Board believes this change in favor of directness would better effectuate the RLA's statutory purpose of "freedom of association among employees." 45 U.S.C. § 151a(2). Additionally, the Board's proposed extension of § 1206.4(b) may have the paradoxical effect of discouraging participants in decertification elections from voting in favor of

decertification. The prospect of being unrepresented for two full years following a successful decertification election may persuade some undecided voters against casting their vote in favor of decertification. Counterintuitively, therefore, the Board's proposal may lead to more stability, more representation, and less volatility.

The first issue with the Board's proposed rule is that, much like the current rule, the proposal is unjustified under the RLA. The RLA, after all, is silent as to what procedures are required in a decertification election. *See* 84 Fed. Reg. 21 at 612 ("Unlike the National Labor Relations Act, the RLA has no statutory provision for decertification of a bargaining representative."). This is not to say, of course, that the only appropriate course for the Board is to play no role in administering decertification elections. *See Intern. Bhd. of Teamsters v. Bhd. of Rwy. Airline, & Steamship Clerks*, 402 F.2d 196, 202 (D.C. Cir. 1968) ("[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."); *see also Russell v. National Mediation Board*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (stating that "employees of rail and air carriers are entitled to decertify an incumbent union under the [RLA]"). The Board is nonetheless mistaken when it suggests in its proposal that the new rule finds any more justification in the text of the RLA than does the status quo. Again, the RLA says nothing about procedural requirements for decertification.

In fact, the proposed rule arguably has *less* textual support than the status quo. As an initial matter, the Supreme Court of the United States has previously declared that representation procedures broadly similar to those now in existence are consistent with the language and

requirements of the RLA. *See Rwy. Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) ("*Railway Clerks*"). In fact, the Board has previously considered the course charted by its proposed rule and declined to follow it. In *In re Petition of Chamber of Commerce of the United States*, 14 NMB 347 (1987) ("*Chamber of Commerce*"), following several days of evidentiary hearings, full pre- and post-hearing briefing, and input from dozens of industry representatives, the Board declined the Chamber of Commerce's invitation to adopt "provisions covering the handling of decertification elections[.]" 14 NMB at 347-49. The Board also made the important observation in *Chamber of Commerce* that it had "made it a policy to limit rulemaking activities only to those matters required by statute or essential for the well-ordered management of agency programs," and that "those seeking rule changes bear a heavy burden of persuasion." 14 NMB at 355-56 (noting that, in the preceding forty years, only two relatively minor rules concerning representation procedures had been promulgated by the Board).

If existing procedures (particularly the straw man procedure) meaningfully impeded the Board's efforts to carry out its statutory duties, or lacked textual support entirely, one would expect that the Supreme Court would have said so in *Railway Clerks* or the Board itself would have suggested as much in *Chamber of Commerce*. Instead, those authorities effectively confirm the adequacy and lawfulness of the status quo. The Board admittedly enjoys wide discretionary latitude in administering representation elections, *Railway Clerks*, 380 U.S. at 371, and an agency will not (and arguably should not) be subjected to heightened, searching judicial review every time it changes course, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (decisions will be upheld "if the agency's path may reasonably be discerned") (citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). *See also*

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) (stating that an agency must "examine the relevant data and articulate a satisfactory explanation for its action").

Although controlling Supreme Court precedent requires that the Board follow a reasonable decisionmaking path, consider relevant data, and put forward an affirmative "satisfactory explanation for its action," the Board has failed to lay the groundwork for such an explanation with its proposal. *See State Farm*, 463 U.S. at 43; *see also Fox Television*, 556 U.S.at 513-514. It is unlikely that such a showing can possibly be made with respect to the Board's proposed change to § 1206.4(b) in particular. The widely-acknowledged purpose of that section's analog in the certification context, § 1206.4(a), is to provide a labor representative and an employer sufficient time to reach an agreement before pursuing further investigation. No such consideration justifies the extension of the § 1206.4(b) period to two years in the decertification context unless, as previously mentioned, the Board is attempting to decrease the amount of successful decertification elections by giving voters a heightened sense of what's at stake—i.e., two years of no representation. If this counterintuitive rationale is indeed the Board's justification, however, it should—and, indeed, by law it must—say as much.

Conclusion

The Board's longstanding general policy of only promulgating "necessary" rules and imposing a "heavy burden of persuasion" upon those seeking rule changes; the lack of affirmative justification for the proposed rule; and the apparent adequacy of existing procedures all suggest that the Board should be exceedingly reluctant to enact the proposed rule. Indeed, the Board should only do so if evidence adduced at an administrative hearing or through public

comment demonstrates that such an enactment is "required by [the RLA] or essential for the well-ordered management of agency programs." *Chamber of Commerce*, 14 NMB at 355-56. Instead, the rule proposed by the NMB appears to suffer from the same defect it perceives—and purports to remedy—in the status quo: It is unjustified by the RLA. Further, the proposed rule lacks an obvious empirical justification (although this may be borne out in the notice-and-comment process). The Board has considered this proposal before in *Chamber of Commerce*, and the Board should reject it now for the same reasons. No fundamental shift has changed the positions of the parties since *Chamber of Commerce*, and its rationale remains sound. At bottom, the Board has failed to carry its "heavy burden of persuasion" that its proposed rule is necessary, and it is highly unlikely that portions of the rule can be justified at all.

Sincerely,

Colin Wescott