

BEFORE THE NATIONAL MEDIATION BOARD

NMB Docket No. C-7198

NOTICE OF PROPOSED RULEMAKING

Decertification of Representatives

**COMMENTS OF THE RAIL CONFERENCE AND THE AIRLINE DIVISION OF THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

The International Brotherhood of Teamsters Rail Conference, comprised of the Brotherhood of Locomotive Engineers and Trainmen (“BLET”) and the Brotherhood of Maintenance of Way Employes (“BMWED”), and the International Brotherhood of Teamsters Airline Division (collectively “Teamster Unions”) submit these comments in response to the NMB’s Notice of Proposed Rulemaking, 84 Fed. Reg. No. 21, January 31, 2019 (“Notice”) to amend the agency’s representation regulations to expressly provide a formal and specifically titled procedure for represented railroad and airline employees to “decertify the current representative of a craft or class” for collective bargaining under the Railway Labor Act.

The BLET represents over 36,000 employees in the operating crafts of the nation’s rail carriers. The BMWED represents approximately 35,000 employees in the maintenance of way craft or class of the nation’s rail carriers. The Teamsters Airline Division represents about 80,000 workers in various crafts or classes in the airline industry.

There is no demonstrated need for the changes the Board is proposing. The Board’s Notice implies that airline and railroad workers are somehow locked into existing representation even if they no longer desire to retain that representation, or that such employees are

“unjustifiab[ly]” impeded in efforts to remove a representative by an “unnecessarily complex and convoluted” process. But employees who are dissatisfied with a union that represents a craft or class are not stymied by existing procedures; they already have the ability to choose a different representative, or to become “unrepresented.” Experience shows that employees who desire such changes have utilized the processes of the Board to effect changes in representation.

Furthermore, to the extent that there ever was a problem with respect to the ability of employees to decertify a representative, that putative problem was solved when the Board mandated that the option of “no representative” be placed on all ballots so employees who prefer not to be represented could easily and clearly express their preferences in that regard. There is no evidence that the existing process has proven too complicated to understand or otherwise has become an insurmountable barrier to employees desirous of making a change.

The Board’s notice refers to the so-called “strawman” process that employees have available to decertify existing representatives. In the original construct, an employee would submit an application for an election to supplant the existing representative, while indicating that he or she would renounce representation if he or she garnered a majority vote. Employees who desired that outcome would have to elect a fellow employee who acted as a “strawman” to be their new representative, in reliance on that employee’s representations of intent to renounce representation, in order to accomplish decertification.

The process changed in 2010, when the Board began providing an express “no representative” line on every ballot, and for a runoff if no option gained a majority when more than one union and “no representative” were on the ballot. Now, in every Board election -- whether sought by employees desiring to be represented by a union and or by employees desiring

to replace their representative or to cease representation -- there is a “no representative” option clearly identified to all eligible voters.

The Board’s Notice, and advocates of the proposed change, assert that the absence of an express decertification procedure somehow impedes the ability of employees to decertify an existing representative because it requires that an employee initiate the process by filing an application to become the representative. It is also asserted that employees desiring decertification are confused or uncertain as to how to vote to end representation; or that they will be less motivated to vote to do so because that would require voting for the strawman. But an employee seeking to decertify an incumbent union no longer has to vote “for” a strawman in order to become unrepresented; such an employee can simply and easily check the “no representative” box. The Board’s own records reveal that employees on many occasions have done just that and succeeded in becoming unrepresented.¹ Thus, the suggestion that railroad and airline workers cannot directly vote to become unrepresented is refuted not only by the structure of the ballots since 2010, but also by actual experience.

Some have suggested that having a new formal decertification procedure will remove a purported impediment for employees who desire to become unrepresented because no one will be required to lead the effort by being the person to initiate the process and whose name would be on the ballot. This contention is also contradicted by experience; employees have engaged in this process and have succeeded in changing representatives or ending representation.

¹ We refer the Board to the “NMB Agency Determinations Chart – Fiscal Years 1998-2019” filed by the Transportation Trades Department of the AFL-CIO. It shows that since 2010, there were 39% more reported cases of individual employees filing applications after the “no representative” choice was added to the ballot than occurred in the previous 12 years.

Additionally, the new rule would not, and could not, eliminate the requirement for an employee(s) to collect the requisite authorization cards because that requirement is found in the statute itself. Section 2, Ninth authorizes the Board to determine representation of a carrier's employees only upon request by an employee or group of employees:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

45 U.S.C. §152 Ninth. "Nothing in this statutory provision authorizes the Board to investigate or resolve a representation dispute either *sua sponte* or pursuant to a petition from a carrier."

Railway Labor Executives' Ass'n v. NMB, 29 F. 3d 655, 658 (D.C.Cir. 1994).

Additionally, RLA Section 2, Twelfth, describes the procedure the Board must follow "upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees." The Board's regulations and Representation Manual recognize that to initiate a representation dispute, a request must be made for the Board to investigate a dispute, and that an employee(s) sign the application and enter an appearance(s) as the representative of those seeking decertification. 29 C.F.R. 1203.2 (as currently written, and as proposed to be amended); Representation Manual §1.02. Accordingly, even if the new rule is adopted, some employee or employees would have to come forward and initiate the card collection drive, sign the application, and appear as representative(s), so the proposed rule would not change the necessity for an employee or employees to be identified with and be responsible for the decertification effort. Otherwise, there would be no accountable party to receive notices

from the Board and respond to matters raised during the representation proceeding.

The Teamster Unions therefore submit that even if efforts of airline and railroad employees at one time were encumbered by the Board's processes, that has not been the case since 2010. There is therefore no present need for the Board to adopt its proposed decertification rule. Simply put, the proposal seeks to fix a system that is not broken.²

The Teamster Unions further submit that if the Board does adopt the proposed new procedure, the additional imposition of a two year bar on subsequent representation applications is unwarranted. The reasoning behind that aspect of the Board's proposal is flawed. Under the Board's Regulations, when an applicant for representation loses an election, there is a one-year bar on new applications to represent the craft or class. 29 C.F.R. 1206.4(b). However, there is a two-year bar when an application for representation succeeds. 29 C.F.R. 1206.4(a). The Board's Notice proposes to double the bar from one year to two when a decertification application

² If Section 1203.2 is to be changed, it should only be changed to acknowledge that an employee may file an application and require an employee who does so to sign it. That can be accomplished by adding the words in boldface type and correctly identifying the NMB Form:

§ 1203.2 Investigation of representation disputes.

Applications for the services of the National Mediation Board under section 2, Ninth, of the Railway Labor Act to investigate representation disputes among carriers' employees may be made on printed forms NMB-**13**, copies of which may be secured from the Board's Representation & Legal Department or on the Internet at www.nmb.gov. Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by signed authorization cards from the employees composing the craft or class involved in the dispute. The applications should show specifically the name or description of the craft or class of employees involved, the name of the invoking organization **or employee**, the name of the organization currently representing the employees, if any, and the estimated number of employees in each craft or class involved. The applications should be signed by the chief executive of the invoking organization, or other authorized officer of the organization, **or the employee filing the application**. These disputes are given docket numbers in series "R".

succeeds, premised on the assumption that there is some parallel required between the bar when a representative is certified and when a representative is decertified. That assumption is unwarranted because it ignores the reason for a two-year bar when a representative attains certification.

The longer bar is imposed after a certification because a newly-certified representative must engage in the process of bargaining for an initial agreement to cover the employees it now represents. The new representative needs to be afforded adequate time to establish a bargaining committee, prepare proposals, engage in negotiations and if necessary participate in mediation, before its status becomes subject to challenge. *The Railway Labor Act*, Fourth Edition (Hall, Winston), ABA Section of Labor and Employment Law, Bloomberg BNA at 4-47. This insulation period serves the statutory goal of labor-management stability and supports the mandate that parties exert every reasonable effort to make agreements and settle disputes without interruptions to interstate commerce. 45 U.S.C. §§ 151a, 152, First. Furthermore, the RLA negotiation/mediation process has famously been described as “purposely long and drawn out” (*Detroit and Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 150 (1969)). This is especially so when parties are negotiating a first agreement. *The Railway Labor Act* at 4-44 – 4-47. Since a successful decertification effort will simply end representation and not result in collective bargaining, there is no similar convincing justification for the longer bar in those circumstances. Instead the one-year bar when an application for representation fails is appropriate. Accordingly, if the Board does adopt a new decertification procedure, it should not adopt the two-year bar that is described in the Notice.

For these reasons, the Teamster Unions respectfully urge the Board not to adopt the

changes proposed in its Notice. If the Board disagrees and a new rule is adopted, the application bar after successful decertification applications should remain one year.

Respectfully submitted,



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