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SOUTHWEST AIRLINES PILOTS ASSOCIATION

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OF SHARED AIRCRAFT PILOTS

Joint Comments by Southwest Airlines Pilots Association
and NetJets Association of Shared Aircraft Pilots
[Docket No. C–7198]

Southwest Airlines Pilots Association and the NetJets Association of Shared Aircraft Pilots, on behalf of the 12,000 pilots we collectively represent, respectfully submit these comments concerning the National Mediation Board's (the "Board" or "NMB") proposed rule[1] to create a decertification of representative process under the Railway Labor Act (the "RLA" or the "Act"), including a separate application to the Board to invoke such a process. We do not support the proposed rule for these reasons.

In our view, the NMB lacks statutory authority for its proposed rule since the RLA, unlike the National Labor Relations Act ("NLRA"), contains no provision authorizing the decertification of representatives and the courts have long recognized this fact. The Board may not dispense with the requirement under Section 2, Ninth of the Act that only a putative representative, whether an individual employee or labor organization, can invoke its authority to resolve representation disputes among employees.

We also view the Board's proposed rule as based on a false premise — that employees are inhibited in their ability to express a desire for no union representation in elections before the NMB. To the contrary, while courts have recognized that the RLA permits employees to reject union representation, they have also held that the NMB adequately enables pursuit of this statutory right through its form of ballot. The recent history of individual applicant elections before the Board confirms the courts' view.

In particular, the NMB's 2010 rule changing its form of ballot to allow an express vote of "no union" by employees provides a clear mechanism for employees to state their preference for no union representation. Employees who seek to remove their existing representative may do so by application of a representative who seeks to carry out that purpose. This process conforms to the requirements of the RLA and allows the expression of a no representation preference by employees. To the extent the Board majority believes that statutorily valid process is awkward or confusing to employees, its speculation is unsupported by any data and is, in fact, rejected by the

[1] Decertification of Representatives, 84 Fed. Reg. 21 (January 31, 2019).

past twenty years of elections conducted by the NMB in which no union has survived a "strawman" election because employees voted for the "strawman."

The history of labor relations in the airline and railroad industries clearly shows that unionized employees enjoy better pay, benefits, job protections and working conditions than nonunion employees. All employees covered by the RLA should seek union representation since it unquestionably will *improve* their working lives. But if employees, contrary to the clear benefits of union representation, wish to reject it, they are free to do so by voting against a union or to remove their existing representative through the process permitted under Section 2, Ninth of the Act. The Board majority has shown neither legal nor factual support for its proposed rule. It should be withdrawn.

1. The Board lacks statutory authority for its proposed rule since the RLA does not authorize decertification elections

The NMB majority's proposed rule fails to identify the statutory authority supporting its proposal to create a process under the RLA for decertification of representatives. Under a proper reading of RLA Section 2, Ninth, it has no such authority.[2/] As the United States Court of Appeals for the District of Columbia Circuit recognized in rejecting a challenge to the Board's 2010 ballot rule, "the Railway Labor Act spells out no procedures for either representation or decertification and, for that matter, makes no mention of decertification procedures, much less requires them." *Air Transport Ass'n v. National Mediation Board,* 663 F.3d 476, 485 (D.C. Cir. 2011). Two cases cited by the Board majority for their observation that employees have a right under the Act to reject union representation, *International Brotherhood of Teamsters* v. *Bhd. of Railway, Airline and Steamship Clerks,* 402 F.2d 196, 202 (D.C. Circuit 1968), and *Russell* v. *National Mediation Board,* 714 F.2d 1332 (1983), both recite that the RLA contains no provision for decertification of representatives. The

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[2] 45 U.S.C. § 152, Ninth provides, in pertinent part:

> 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.

D.C. Circuit echoed, "Unlike the National Labor Relations Act, the Railway Labor Act has no decertification provisions." 402 F.2d at 201. The Fifth Circuit in *Russell* also stated that the Act does not provide for decertification. 714 F.2d at 1336. And it noted that while the NMB has authority to change its procedures, it may do so only "so long as such changes comply with the requirements of the Act." *Id.* at 1337, n.3, *citing Brotherhood of Locomotive Firemen and Enginemen v. Kenan*, 87 F.2d 651, 654 (5th Cir.), *cert. denied,* 301 U.S. 687, 57 S. Ct. 790, 81 L. Ed. 1344 (1937).

The Supreme Court noted in *Railway Clerks v. Association for the Benefit of Noncontract Employees*, 380 US 650 (1965), that employees have a right under the Act to reject collective representation. 380 U.S. at 669, n.5. But it concluded that right is vindicated through the form of ballot adopted by the Board. *Id.* at 670-71. The Court also held that the Board's old form of ballot, which contained no express provision for a vote of "no union" nonetheless satisfied statutory requirements for upholding employees' right to decline representation. *Id.* at 671-72. The NMB's adoption in 2010 of a "no union" line on its form of ballot only reinforces that it has provided for the expression of employees' right to decline representation. Indeed, the Board majority at the time adopted that ballot designation for the express purpose of facilitating a clear vote by employees opposed to union representation. *See, e.g.,* 75 Fed. Reg. 90 (May 11, 2010) ("providing a clear method of registering that [no union] choice would provide the Board with a more accurate measure of employee sentiment.") The right to no representation that is the majority's sole justification for this proposed rule has been fully accommodated by the NMB's new ballot form.[3/]

The NMB may not exceed its authority under Section 2, Ninth by relying on its "statutory mandate to protect employees' freedom to choose a representative."

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[3] To the extent the majority would argue that existing certifications issued prior to the new form of ballot did not adequately permit employees to express their opposition to representation such an argument was rejected by the Supreme Court in *Non-Contract Employees* concerning elections under the old form of ballot. That argument would also raise the specter that the Board majority's proposed rule is designed to destabilize longstanding collective bargaining relationships contrary to the purposes of the Act. *International Association of Machinists v. Street*, 367 U.S. 740, 760, 81 S. Ct. 1784, 1795, 6 L. Ed. 2d 1141 (1961)(Congress gave unions "a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry.") *See also Russell,* 714 F.2d at 1342.

This general statutory rationale is akin to the justification relied on by the Board in promulgating its merger procedures in 1989 contrary to the requirements of Section 2, Ninth, which the District of Columbia Circuit invalidated in *Railway Labor Executives' Ass'n. v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc), *cert. denied,* 514 U.S. 1032 (1995) ("*RLEA*"). In *RLEA*, the court of appeals considered the Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry, 17 N.M.B. 44 (1989) ("Merger Procedures"), issued by the Board, which allowed carriers, as well as the NMB itself, to initiate representation proceedings in the wake of railroad mergers and acquisitions. 29 F.3d at 658. The Board acted on the theory that such events were likely to precipitate uncertainty as to the proper representation of employees. *Id.* The court characterized the Board's justification for its action as "further[ing] the Board's purported mandate of certifying only unions which represent the 'majority of a system-wide class of employees.'" *RLEA*, 29 F.3d at 660 (quoting the NMB's "Merger Procedures," 17 NMB 44, 46 (1989)).

The D.C. Circuit held these procedures constituted "a gross violation" of § 2 Ninth, contrary to its plain language and legislative history. *Id.* at 659, 665-69. It explained that the plain language of § 2, Ninth states that only representatives of employees may request the NMB to commence a representation investigation and make a representation determination; the law "does not contemplate action initiating roles for the Board or for carriers" *Id.* at 665. "[T]he entire structure of Section 2, Ninth makes it plain that representation investigations and determinations are conducted only at the behest and for the specific protection of 'employees.'" *Id.* The D.C. Circuit said the first sentence of Section 2, Ninth imposed restraints upon the NMB's authority to investigate representation matters, stating: "[T]he entire first sentence of Section 2, Ninth imposes strict limitations on the Board's power." *Id.* The Board could not evade these limitations by invoking its general statutory responsibilities.

Here, the Board majority's proposed rule permits only employees to initiate the decertification procedure, but without the employee purporting to represent his or her coworkers in the application. Framing the proposed rule to only allow employees to file the decertification application is insufficient to escape the "strict limitations on the Board's power" under Section 2, Ninth created by the lack of statutory authorization for decertification of representatives. That section defines the Board's authority as invoked only on application by a "party" to a dispute among employees "as to who are the representatives of such employees." 45 U.S.C. § 152, Ninth. The

NMB is then to certify to the parties "the name or names of the individuals or organizations that have been designated and authorized to represent the employees." *Id.* While the RLA does not mandate certification of a representative if the employees do not vote for one, nothing in Section 2, Ninth permits the Board to investigate where no putative representative has invoked its services – i.e., a decertification process. The D.C. Circuit has confirmed that the RLA differs from the National Labor Relations Act in having no decertification provision. 402 F.2d at 201. That this omission works as a restraint on the Board's authority is seen clearly by the fact that prior to the 1947 amendment of the NLRA to establish a decertification provision, "once employees had chosen a union, they could not vote to revoke its authority and refrain from union activities." *Brooks v. National Labor Relations Board,* 348 U.S. 96, 100 (1954). It was only as the result of the Taft-Hartley amendments to the NLRA under the Labor-Management Relations Act that decertification elections were authorized. *Id.* at 100-101. The NLRB did not permit decertification elections prior to those amendments. Gerhard P. Van Arkel, An Analysis of the Labor Management Relations Act, 1947 8 (PLI 1947).

It is true that employees can effectively "decertify" an existing representative by designating a representative, either an individual employee or a labor organization, to initiate a representation proceeding before the NMB to obtain an election in which the incumbent may be displaced. The Board and others in the industry colloquially refer to this process as a "strawman" election. The Board majority asserts, without citation to authority, that there is "no statutory basis" for the requirement that an applicant claim to be a representative of employees. To the contrary, as the Fifth Circuit reasoned in *Russell*, it is the applicant's claim to represent employees, Russell in that instance, which permits the "strawman" to invoke the NMB's services under the RLA. 728 F.2d at 1341-42.[4/] Since the Act nowhere defines the type or scope of representation a representative provides, Russell "fit the bill" of a representative under Section 2, Ninth and it did not matter the extent

[4] The court of appeals recited that certain policemen employed by the Atchison, Topeka & Santa Fe R.R. had formed the Association of Santa Fe Railway Police Officers and solicited support from the employees to decertify of the Railway Clerks as their representative. 714 F.2d at 1334. The Association "will have its own representation, with collective bargaining rights, to bargain for our own needs, not those of the clerks." *Id.* A follow-up letter identified Russell as the representative for purposes of negotiating the policemen's status as "exempt" employees and listed the proposals Russell would negotiate. *Id.* Russell won the representation election with 110 votes out of 175 eligible employees. 12 NMB 143 (1985).

of representation he intended to provide. *Id.* Given that Section 2, Ninth gives no discretion to the Board to refrain from processing the application of a representative who otherwise satisfies the requirements of the Act, 728 F.2d at 1338, the NMB violated the RLA by refusing to process Russell's application.

The Board majority, however, purports to dispense with the applicant requirement that Russell satisfied – to be a representative of employees. "The necessity of a straw man [that is, a representative] will be eliminated." It fails to identify any statutory authority permitting it to do away with Section 2, Ninth's requirement that an applicant claim to be a representative of employees. Instead, it simply characterizes the current statutorily-compliant process as "unnecessarily complex and convoluted." The Fifth Circuit similarly cited characterizations of the process as "awkward," 714 F.2d at 1337, n.3. Yet it nowhere implied that characterization permitted the Board to do away with the requirement under § 2, Ninth that an applicant be a representative within the meaning of the Act.

As shown next, these characterizations of the statutory process for resolution of representation disputes where employees seek to remove their current representative as complex, convoluted, awkward or confusing have never been supported by facts and are refuted by the Board's election data involving individual applicant elections that shows employees have no difficulty removing an incumbent representative when they so desire. Such baseless characterizations of the RLA representation dispute process illustrate the point courts frequently make that "adjectives and adverbs, no matter how strong, are no substitutes for facts." *Harland v. Chandler*, 208 Ore. 167, 172, 300 P.2d 412, 415 (Ore. 1956).

2. The Board's election data involving individual applicant elections shows the current process is clear and in no way restricts the right of employees to pursue non-representation

The Board majority implies the current "strawman" process fails to adequately uphold employees' right to nonrepresentation. It nowhere explains how the current process fails in that regard. Its only critique is implied by its characterization of the process as "convoluted." But that characterization says nothing about the adequacy of the process in upholding employees' representational rights. The majority wrongly asserts it is "the Board's requirement of the 'straw man.'" In fact, the process about which the majority complains was imposed by court order in *Russell* as a result of the court of appeals' interpretation of the RLA – so it is a statutorily-required process, not one established by the NMB in its discretion.

In practical terms, the RLA "strawman" process only differs from the decertification process authorized under the NLRA in that employees gathering signatures of fellow employees for removal of their incumbent representative under the RLA designate one of their colleagues as their representative for that purpose. But the NLRB petition used for decertification identifies a specific employee as the petitioner.[5/] The same NLRB form is used when employees want to replace their current representative with another union; the rival union is identified on Line 12 of the form. Employees must solicit their coworkers' signatures on either cards or a petition supporting decertification of their representative. The activists for decertification obviously must be "representative" of their coworkers' desires or they couldn't persuade them to sign decertification cards. While the petitioner in a NLRB decertification election does not appear on the ballot, there is no evidence that distinction makes a difference in outcome. To the extent the Board majority's criticism of the RLA process as complicated refers to the form of ballot presented to employees in a strawman election, and the requirement that the applicant appear on the ballot, any such concern was conclusively resolved by the Board's 2010 rule adding the "no union" line to the ballot, which obviously allows for a clear statement of an employee's preference for no representation.

A review of NMB elections involving a "strawman" since 2000 confirms that the current, statutorily-compliant procedure does not prevent employees from removing a representative. (*See* Attachment 1.) In the 24 such elections that have occurred since 2000, incumbents only prevailed in two elections (R-7322 and R-7438) where they received the majority of votes cast under the new form of ballot. All other such elections resulted in the removal of the incumbent representative.[6/] Two-thirds of "strawman" elections, 17 out of 24, resulted in the dismissal of the case with no representative certified, showing that employees clearly understand how to vote in the election, so no representative prevails. That was also true under the old ballot form, where twice as many cases resulted in dismissal as resulted in certification of the individual applicant; and none resulted in the certification of the incumbent representative. So the only conceivable basis for objection to the strawman process as "confusing" is rejected by the facts.

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[5] https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3040/nlrb_502rd_2-18.pdf

[6] One election, R-7509, resulted in the incumbent union being replaced by a union chosen through write-in ballots.

In the vast majority of cases, 20 out of 24, the applicant received either no votes in the representation election or a statistically meaningless number of votes. There were only four elections where the individual applicant received a determinative number of votes and the incumbent union lost all four elections.[7] Under the new form of ballot, only one election involved the individual applicant receiving a determinative number of votes, and he won the election.[8] Reinforcing that employees understand precisely the issue presented to them by a "strawman" election, even in the three cases where a union was certified as representative, the applicant received either no votes or a trivial number of votes. The union outpolled the "no union" line. In other words, in the past approximately twenty years of "strawman" elections, an incumbent union has never survived decertification based on employees "mistakenly" voting for the strawman to assist the incumbent in retaining certification.

Moreover, it is simply incorrect that a decertification process better accommodates employees' right to nonrepresentation. The NLRB's statistics for decertification ("RD") cases from 2009-2018 shows that the agency had on average 433 decertification petitions per year. (*See* Attachment 2.) Forty-one percent were withdrawn by the petitioner. *Id.* The NLRB dismissed another eleven percent, presumably for inadequate showing of interest or violations in the fomenting of the petition. *Id.* So only a minority of RD petitions even resulted in an election and only 29% resulted in decertification of the incumbent union. By contrast, only a handful of "strawman" applications to the NMB since 2000 were either withdrawn by the applicant or dismissed by the Board for inadequate showing of interest.[9] Employees under the RLA have been more successful in obtaining elections before the NMB when they seek to remove their representative than have decertification petitioners before the NLRB. These statistics show there is no factual support for the Board majority's assertion that a decertification election – even if it were permitted under the Act – better accommodates employees' right to pursue nonrepresentation.

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[7] R-6972, R-7013, R-7034 and R-7447.

[8] In R-7447, unlike the other "strawman" elections under the new ballot form, none of the employees voted "no union", reflecting that the majority of voting employees in fact wanted the applicant to be their representative.

[9] R-6985 and R-7524 were withdrawn by the applicant; R-6935, R-7170 and R-7522 were dismissed by the Board for the applicant's failure to make the required showing of interest among employees. The Board dismissed 26 applications by labor organizations for inadequate showing of interest in that same period of time.

CONCLUSION

The Board has no authority under Section 2, Ninth to adopt the proposed decertification rule. It may not dispense with the statutory mandate that only a putative representative may invoke the NMB's authority to resolve a dispute among employees over who is their representative. The proposed rule would constitute a "gross violation" of the Act. And the Board's own election data shows that the only asserted premise for the proposed rule – that employees' right to pursue no union representation has been frustrated by the "complex" and "convoluted" process required by the RLA – is simply false. Section 2, Ninth and the current form of ballot used by the Board fully accommodate employees' right to nonrepresentation. There is no justification for the proposed rule in either law or in fact. The Board should withdraw the proposed rule.

Respectfully submitted,

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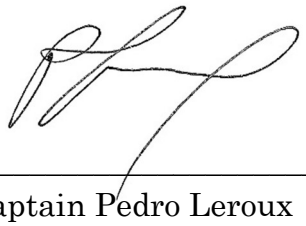

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Dated: April 1, 2019