BEFORE THE NATIONAL MEDIATION BOARD
DOCKET NO. C-7198

COMMENTS OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO REGARDING PROPOSED DECERTIFICATION RULE

The International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") submits these comments in opposition to the Board's proposal to amend its regulations regarding procedures for "decertification of representatives." The IAM unequivocally opposes the Board's proposed decertification rule as both unlawful and misguided. In addition to these Comments, the IAM joins in and supports the Comments of the Transportation Trades Department, AFL-CIO.

The IAM has a vital interest in the enforcement of the Railway Labor Act and the proper administration of the NMB's role within the statutory framework. The IAM began representing rail employees even before the adoption of the Act and today represents approximately 150,000 workers in the airline and railroad sectors. The IAM is the largest airline union in North America. It represents employees at every major airline, except Delta. The IAM represents workers at over 25 different carriers and fixed base operators in every classification, except pilots. With its affiliate TCU, the IAM represents tens of thousands of workers in the passenger and freight rail industries.

As more fully discussed below, the Board plainly lacks statutory authority to issue this proposed rule. In fact, Congress has expressly *forbidden* the action now proposed. Were the Board to proceed with its proposal, the regulation would surely be struck down just as the Board's unauthorized "merger procedures" purporting to empower carriers or

the Board to initiate a representation dispute were held to be a "gross violation" of the Act over twenty years ago. The IAM urges the Board not to take such an unlawful action.

Even if the Board had authority to adopt this rule, there is no sound basis for doing so and many reasons not to take such action.

There is no need for the rule because employees have always had and continue to exercise their right to seek to change their representative or end representation. In fact, Aircraft Dispatchers at Endeavor Air recently conducted such a vote under the Board's current procedure.[1]

Adoption of this rule would have many pernicious consequences for employees, carriers, and the public. It would incentivize and empower employers and outside forces to covertly support anti-union decertification effects. Also, it would unfairly prohibit employees from expressing their right to seek representation. Particularly egregious is the Board's proposal to double the amount of time employees would be barred from seeking union representation after a "no-union" vote. The creation of a new two-year bar during which time unrepresented employees would be forbidden from seeking union representation serves no legitimate purpose whatsoever under the Act and would be flatly contrary to the Board's stated intention of maximizing employees' ability to express their choice regarding representation. Adoption of a 2-year bar would also undermine the

[1] *Endeavor Air, Inc.*, 46 NMB 29 (Feb. 15, 2019).

Board's traditional, historical role as a neutral and stabilizing force in the transportation sector.

With respect to both the legality and the perceived need for this proposed rule, we would also note what was missing at the Board's public hearing on March 28, 2019. No major air or rail carrier spoke in favor of the proposed rule (nor to our knowledge have any submitted comments supporting the Board's action). No employees and no organization elected or formed by employees spoke in favor of the proposed rule. Nor did anyone even attempt to explain how the proposed rule could be consistent with the Board's limited jurisdiction under Section 2, Twelfth of the Act. The *only* proponents of the change were two legal assistance organizations, accountable to no one except their funding sources and seeking to expand their own practices, and one minor commuter airline which bemoaned the difficulty it had in interfering with its employees' choice of representatives. In an area of the law based since its inception on the cooperative relationship of employee representatives and carriers, the absence of meaningful support speaks volumes.

The IAM would also note that it made a Freedom of Information Act request for documents relating to the decision to initiate this proceeding (FOIA File No. F-1745). While the Board granted our request for "expedited processing" on March 13, 2019, to date no documents have been provided. The IAM urges the Board to promptly comply with this FOIA request, and reserves its right to supplement these Comments upon receipt of the requested documents.

The Proposed Rule Would Violate the RLA And Exceed the Board's Jurisdiction

The Board should not adopt the proposed rule because such action is outside the Board's jurisdiction and would be a gross violation of the Board's authority.

Federal courts have repeatedly admonished the Board that it has a limited statutory authority confined to the matters expressly authorized by the Act. As the *en banc* D.C. Circuit wrote, "the Board has no freewheeling authority to act as it sees fit with respect to anything denoted a 'representation dispute.' The Board's authority is exclusive *only* with respect to the precise matters delimited" by the Act.[2]

Recognizing this limitation, when the issue of decertification previously came before the Board (and was soundly rejected), the Board emphasized that it "amends its rules only when required by statute or when essential for administrative purposes. Therefore, where there is a question of the Board's statutory authority to amend its rules to include decertification procedures, the standard of persuasion on behalf of the moving party must be very high."[3]

That "standard of persuasion" cannot be met here. Fundamentally, the Proposed Rule is contrary to the plain language of the Railway Labor Act. "[T]he Railway Labor Act spells out no procedures for … decertification and, for that matter, makes no mention

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[2] *RLEA v. NMB*, 29 F.3d 655 (D.C. Cir. 1994) (*en banc*).

[3] *Chamber of Commerce*, 14 NMB 347, 356-357 (1987).

of decertification procedures, much less requires them."[4] As the Court of Appeals for the Fifth Circuit correctly observed in 1983, "the Board has stated time and time again" that the direct "decertification vote [process] under the National Labor Relations Act … is not allowed by the [Railway Labor] Act."[5]

If there ever was any question whether the Railway Labor Act allowed for a direct decertification procedure, Congress closed the door to that option in 2012. After the Board declined to create "direct" decertification procedures in 2010, and after the D.C. Circuit held that no such procedures were called for under the Act, Congress amended the Act in 2012. Crucially, Congress did not in those amendments require any decertification procedures, but instead adopted language which specifically precludes the proposed rule change here.

The 2012 Amendments added a new Section 2, Twelfth to the Act, addressing the "Showing of interest for representation elections," and providing an additional statutory limit on the Board's authority to carry out its authority to make a representation determination.

That new Section provided for the first time a congressional mandate regarding the threshold an application must meet before an election may be held. It also specifically prohibited the Board from "using any … method to determine who shall be the representative of … [a] craft or class," unless it has first received "*an application*

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[4] *Air Transport Ass'n of America v. National Mediation Board*, 663 F.3d 476, 485 (D.C. Cir. 2011).

[5] *Russell v. NMB*, 714 F.2d 1332, 1342 (5th Cir. 1983).

requesting that an organization or individual be certified as the representative." This "application" must be "supported by a showing of interest from not less than 50 percent of the employees in the craft or class." The Board is specifically precluded from using any method to determine representation unless there is an application seeking certification of a representative.

The proposed rule, however, would permit an election based on another sort of application -- an application "seeking decertification." This approach is not permitted by the statute as written and is outside the Board's authority and jurisdiction. The finding of the *en banc* court of appeals regarding the merger procedures would apply equally to the proposed action here: "the Board's attempt to expand its jurisdiction has no basis whatsoever in the language of the statute or its legislative history, and … the Board's novel claim of authority is belied by longstanding agency practice." Here, as then, such action would be a "gross violation" of the Act.[6]

While the statutory language is controlling, the Board should also take note that Congress was well aware in 2012 of disputes over decertification under the RLA and decided to specifically preserve the status quo pending further investigation. Congress added a new Section 15 to Title I of the Act to require an "Immediate Review of Certification Procedures."[7] Congress directed the Comptroller General to promptly "review the procedures applied by the Mediation Board to certify or decertify

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[6] *RLEA v. NMB*, 29 F.3d at 659.

[7] Pub. L. 112-95, § 1004, "Oversight."

representation of employees by a labor organization and make recommendations to the Board and appropriate congressional committees regarding actions that may be taken by the Board or Congress to ensure that the processes are fair and reasonable for all parties."[8] GAO promptly carried out its mission and made no recommendation that any action needed to be taken by either the Board or Congress.[9]

In light of the clear and controlling statutory language, and the supporting indications of Congressional purpose, moving forward with the proposed rule would be a grave mistake for the Board.

The Proposed Rule Would Undermine the Purposes of the Act

Even if the Board had jurisdiction to make such a rule, the proposed change would have profoundly negative effects that undermine the very purposes of the Act.

Among the stated rights recognized by the Act is the "right [of employees] to organize and bargain collectively through representatives of their own choosing." The Act also strictly prohibits any carrier from "interfer[ing] in any way with the organization of its employees" or "us[ing] the funds of the carrier … to influence … employees in an effort to induce them … not to join or remain members of any labor organization."[10] The proposed rule would undermine these rights and restrictions.

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[8] *Id.*

[9] *See* GAO Report to Congressional Committees, "National Mediation Board", GAO-14-5, at 46-7 (Dec. 2013) (confirming that "the RLA does not specify a decertification process", describing the current procedure, and making no recommended changes).

[10] 45 U.S.C. § 152, Fourth.

The Board has formally considered adopting a direct decertification procedure on at least two occasions – in 1987 and again in 2010. After careful consideration (including an extensive fact-finding proceeding in 1987), the Board concluded in both instances that there was not only no reason to adopt such a rule, there were multiple reasons *not* to do so. Nothing has changed in this regard. Indeed, the fact that the GAO found no reason to recommend any changes when specifically directed by Congress to investigate and recommend any productive changes amply confirms that there is no basis for the Board to change course.[11]

The IAM is particularly concerned about two profoundly negative consequences of the proposed change.

First, the proposed rule will open up additional avenues for rail and air carriers, as well as outside groups supported by employers (in this and other industries), to seek to influence or interfere with employees' choice of representatives. As the Board is well aware, even under the straw man procedure, carriers have been caught in the act of

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[11] The Board has previously and properly rejected the argument that it must adopt a direct decertification process just because such a process exists under the National Labor Relations Act. Among many other reasons, that Act was amended by Congress to provide for decertification; while the RLA has never been so amended. Moreover, the proposed rule here goes far beyond the process on NLRA properties. The NLRB bars decertification elections not only for a period of time after certification of a representative, but in addition applies a "contract bar" under which decertification may not be sought during the first three years of a CBA except during a 30-day "window period" a set amount of time prior to the agreement's expiration date. *See* NLRB, "Decertification Election," https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/decertification-election. The Board's proposed rule contains no such contract bar.

illegally supporting and directing efforts to oust duly-elected representatives. Indeed, at the public hearing in this matter, the testimony of Allegiant Air made this strategy plain – Allegiant management described an employee who had sought decertification as "*our straw man*" and bemoaned the difficulty in educating employees how to oust the elected union representative. Another example with which I am personally aware involved Great Lakes Aviation - where the employer recruited and directed an employee in an effort to obtain a "straw man" election. Thankfully that effort was discovered by the IAM and stopped by the Board.[12]

The proposed rule will incentivize carriers to further push the envelope in this regard, multiply the opportunities for such illegal conduct, and make it even more difficult for the Board to enforce the legal prohibition against carrier interference.

Under current rules, an individual seeking to invoke the Board's jurisdiction for the purpose of securing a "no representation" outcome in a "straw man" proceeding is required to first take responsibility among his or her co-workers and affirmatively seek to act as their representative (just as Mr. Russell did in the case triggering the Fifth Circuit's *Russell* decision). The proposed rule would allow **any** "organization or individual seeking decertification" to invoke the Board's jurisdiction through the filing of cards seeking, not a representative, but no representative. The rule thus eliminates even the minimum threshold of accountability and responsibility, or connection with the actual workforce, which the current procedures require.

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[12] *Application of Mike A. McNeal*, 35 NMB 213 (2008).

As we have seen in recent years, the removal of individual and institutional transparency, accountability and responsibility from the public sphere creates the real danger of improper influence and interference that is difficult if not impossible to uncover and prevent.[13] The Board's proposal would no doubt embolden and empower outside organizations, funded by employer groups or interests in ways that are opaque to both the Board and employees, to seek to decertify elected representatives.[14] This would be a profound and dramatically negative change in the system of employee self-determination that has been written into law for over eight decades.

The *second* negative consequence of the current proposal is the utterly unjustifiable prohibition on employee self-organization following a direct decertification. The Board proposes to double the length of time after an effective decertification that employees must wait before seeking representation again. Currently, there is a one-year bar after dismissal of an application whether through a "no-union" vote or otherwise. The proposed rule expands that period to two full years. During such time, not only would employees be without a collective bargaining representative and without a collective bargaining agreement, but the employer would have two years to carry out

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[13] *See, e.g.*, J. Mayer, *Dark Money*, ch. 6 (2016); S. Haan, "Shareholder Proposal Settlement and the Private Ordering of Public Elections," 126 Yale Law Journal 262, 303-04 (2016) (describing "opaque" and "fragmented" disclosure of corporate political spending despite outsized role in political persuasion); M. Severns, "Super PACs use new trick to hide donors," Politico, Aug. 17, 2018.

[14] *See, e.g.,* J. Eidelson, "Koch Brothers-Linked Group Declares New War on Unions," Bloomberg News (June 27, 2018), *https://www.bloomberg.com/news/articles/2018-06-27/koch-brothers-linked-group-declares-new-war-on-unions*.

efforts to deter and defeat any future representation. The IAM has no doubt that employers who today spend millions of dollars to prevent unrepresented groups from becoming represented, will redouble their effort in the two-year window the Board's rule would open.

There is absolutely no legitimate reason for this limitation on employees' statutory rights to organize. The two-year bar on applications following the certification of an organization furthers the statutory purposes of Section 2 of the Act by allowing the employer and newly certified organization to engage in the lengthy process of negotiations under the Act and carry out the expressed wishes of employees.[15] The Board now asserts without evidence that "changes in the employer-employee relationship that occur when employees become represented … or become unrepresented require similar treatment." No such evidence was presented at the public hearing, nor could it have been because the claim makes no practical sense. The certification of a new representative imposes a complex set of legal obligations on carriers, employees and representatives with regard to both negotiation of agreements and their enforcement. Certification may ultimately lead to the involvement of the Board in the purposefully drawn out mediation process. A change to an unrepresented status does not impose any such obligations - it simply removes them. There is no obligation to bargain; there is no administration or enforcement of a collective bargaining agreement; there is no role for the Board in mediation. There is no need for a two-year ban in that circumstance.

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[15] *See Nat'l R.R. Passenger Corp.,* 13 NMB 412, 416 (1986).

More importantly, however, the proposed bar would have the truly unprecedented effect of prohibiting employee self-organization for a two-year period. The Board acknowledges that it has a "statutory mandate to protect employees' freedom to choose a representative."[16] The 2-year bar runs directly contrary to that mandate. Once there is a loss of representation, employees would be forbidden from submitting applications seeking representation. There is no statutory basis for this administrative restriction on statutory rights.

Conclusion

The IAM asks the Board to listen to the legal and practical concerns of the organizations which have been democratically elected to represent employees in the airline and rail industries, and to take note of the absence of meaningful support for the proposed rule from any of the key participants in this industry. We submit that the proposed action is unlawful, unneeded and would undermine the purpose of the Railway Labor Act. We hope the Board will reconsider this ill-advised proposal and retain the current system which has been upheld by federal courts.

Respectfully submitted,

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[16] 84 Fed. Reg. at 613