

April 1, 2019

Ms. Mary Johnson
General Counsel
National Mediation Board
1301 K Street NW
Ste. 250E
Washington, DC 20005

Submitted via email at legal@nmb.gov

RE: Docket No. C-7198

Ms. Johnson:

I appreciate this opportunity to provide comments¹ to the National Mediation Board (NMB) on its proposed rule to provide a straightforward procedure for the decertification of representatives. I am writing in support of the NMB's proposed rule on the decertification of representatives under the Railway Labor Act² (RLA). As it stands, the process for decertification under the RLA is needlessly convoluted and significantly more complicated than the process to certify a representative. The promulgation of this rule would ensure that all workers, whether they want to be represented by a union or not, are treated equally.

The current process provides no direct path for the decertification of a union. The NMB does not allow an employee of a craft or class to apply for an election to vote for no representation. Instead, employees who no longer wish to be represented by a union must first find an employee willing to serve as a "strawman" representative—in effect, a non-representative. Those who do not want union representation than have to explain to all the employees of a class or craft that the strawman does not want to represent them, but that they have to say they want the strawman to represent them in order to petition the NMB to hold an election.

This fiction of choosing a strawman representative that does not actually want to represent the employees creates a needlessly complicated procedure. The strawman then has to collect authorization cards from more than 50 percent of the members of the class or craft. If the strawman can gather enough support, he or she can petition the NMB to hold an election.

The ballot for the election then presents an excess of four options: the existing representative, the strawman, no union, or a write-in, but in reality, the strawman and no union represent the same choice. In order to successfully decertify a union, 50 percent or more of the eligible voters must vote for either the strawman or no representation. However, it is important to note that it is simply not enough for the strawman and no representation option to achieve a combined total greater than 50 percent of the vote. If none of the ballot options earns over 50

¹ The views I have expressed in this comment are my own, and should not be construed as representing any official position of The Heritage Foundation.

² 45 U.S.C. 151

percent of the vote, then the NMB's run-off rules apply. For example, if the strawman receives 49 percent of the vote, the existing representative option receives 26 percent of the vote, and the no union option receives 25 percent of the vote, then a run-off election will be held between the strawman and the existing representative. This will occur even though the combined total of votes against representation accounted for 74 percent of the vote. The winner would be determined by whichever option receives the most votes in the run-off election.

The requirement to have a strawman is counterintuitive because it requires employees that are seeking to divest themselves of representation to first petition for a strawman to represent them. Further seeds of confusion are sown because the class or craft for which the strawman is seeking to represent can consist of thousands of employees spread across multiple geographical locations. This wide dispersal of a large population presents significant barriers to communicating the convoluted concept of the strawman.

That is why this proposed rule is necessary to correct an injustice and provide a level playing field. This proposed rule is lawful and within the NMB's authority to promulgate. The courts have long recognized that employees have the right to choose whether to be represented or not, but the higher hurdle for not being represented effectively takes away that choice.

As the D.C. Circuit Court stated, "it 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."³ The RLA vested in the NMB the authority to alter its rules to carry out its statutory duties. Specifically, it provides that "the Board shall designate who may participate in the election and establish the rules to govern the election."⁴ The NMB has a statutory requirement under the RLA in safeguarding the "freedom of association among employees."⁵ Promulgating this rule will ensure that the NMB meets this requirement. It is for all of the reasons set forth above, that I support the NMB's proposal to simplify the procedures for decertification.

Respectfully submitted,

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³ *Intern. Bhd. of Teamsters v. Bhd. of Rwy. Airline, & Steamship Clerks*, 402 F.2d 196, 202 (D.C. Cir. 1968)

⁴ 45 U.S.C. § 152, Ninth

⁵ 45 U.S.C. § 151a(2)