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VIA E-Mail to legal@nmb.gov

The Honorable Kyle Fortson
Chairman, National Mediation Board
1301 K Street, NW, Ste. 250
Washington, DC 20005

The Honorable Gerald W. Fauth, III
Member, National Mediation Board
1301 K Street, NW, Ste. 250
Washington, DC 20005

The Honorable Linda Puchala
Member, National Mediation Board
1301 K Street, NW, Ste. 250
Washington, DC 20005

Re: Decertification of Representatives, Docket No. C-7198

Dear Chairman Fortson and Members Fauth and Puchala:

The National Right to Work Legal Defense Foundation, Inc. submits the following comments regarding the National Mediation Board's proposed rules to simplify the decertification process for employees who wish to exercise their statutory and constitutional rights to rid themselves of unwanted union representation. *See Notice of Proposed Rulemaking to Simplify Decertification; Eliminate Straw Man Requirement*, 84 Fed. Reg. 612 (January 31, 2019). The Foundation supports the proposed rules.

I. INTEREST OF THE FOUNDATION

The Foundation is a nonprofit, charitable organization providing free legal assistance to individual employees only. The Foundation's staff attorneys represent individual employees in litigation challenging the abuses of compulsory unionism arrangements and advise employees about their rights concerning the imposition of union monopoly bargaining in their workplaces. Since its founding in 1968, the Foundation has provided free legal assistance in virtually all of the United States Supreme Court cases involving employees' right to refrain from joining or supporting a labor organization as a condition of employment, some of which arose under the Railway Labor Act. *E.g.*, *Janus*

v. AFSCME, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU Local 1000*, 567 U.S. 298 (2012); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

In addition, the Foundation's litigation program has funded many precedential cases under the RLA concerning employee free choice and compulsory union fees. *E.g.*, *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509 (10th Cir. 1996); *Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276 (D.C. Cir. 1995); *Kidwell v. Transportation Commc'ns Int'l Union*, 946 F.2d 283 (4th Cir. 1991); *Dean v. TWA*, 924 F.2d 805 (9th Cir. 1991); *Klemens v. Air Line Pilots Ass'n*, 736 F.2d 491 (9th Cir. 1984); *Masiello v. US Airways, Inc.*, 113 F. Supp. 2d 870 (W.D.N.C. 2000). Most recently, Foundation attorneys represented Delta Air Lines employees during the NMB rulemaking proceeding that changed the "majority of eligible voters" rule. *Representation Election Procedure*, 75 Fed. Reg. 26,062 (May 11, 2010); *see also Air Transp. Ass'n v. NMB*, 663 F.3d 476 (D.C. Cir. 2011).

Finally, and of most importance to this rulemaking proceeding, Foundation staff attorneys represented the employees who attempted to decertify in *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), the groundbreaking case that recognized the right of employees to decertify under the RLA and that is cited in the Notice of Proposed Rulemaking in this proceeding as one of the main reasons to simplify the decertification process.

For all these reasons, the Foundation is uniquely qualified to comment on the proposed rules.

II. ARGUMENT IN SUPPORT OF CHANGING THE RULES

a) The Foundation supports the proposed rules because the RLA mandates employee free choice, not perpetual forced unionization.

RLA Section 2, Fourth, 45 U.S.C. § 152, Fourth, provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

Applying that statute, the federal courts are unanimous in holding that the RLA gives employees the right – but not the obligation – to choose a representative, and the corresponding right to have no representative at all. "The legislative history supports the view that the employees are to have the option of rejecting collective representation."

Bhd. of Ry. & S. S. Clerks, Freight Handlers, Exp. & Station Emp. v. Ass'n for Benefit of Non-Contract Emp., 380 U.S. 650, 669, n.5 (1965) ("*ABNE*"). Indeed, "[e]mployees are not required to organize, nor are they required to select labor unions or anyone else as their representatives. It has always been recognized that under the law the employees have the option of rejecting collective representation." *Id*. at 674 (Stewart, J., dissenting).

As the Fifth Circuit Court of Appeals pointed out in *Russell*, 714 F.2d at 1343, "employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well." *Russell* cited the official House committee report on the 1934 RLA amendments, which states that "the employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire ...." H.R.Rep. No. 1944 to accompany H.R. 9861, Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 2 (1934). *Id*.

In short, the RLA's undisputed and primary policy is employee free choice in the selection or non-selection of a representative.[1] Indeed, collective representation cannot even exist under the RLA until employees first exercise their right to choose or decline such representation.

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[1] In addition to the RLA's statutory text and policy mandating the right to eliminate forced union representation, the U.S. Constitution's guarantees of free speech and assembly are implicated when employees are compelled to be represented by a union. *See, e.g.*, *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286–87 (11th Cir. 2010) (employee challenging a neutrality and card check arrangement that would make it easier to unionize him "has a cognizable associational interest under the First Amendment to challenge the alleged collusive arrangement between the employer and the union . . . . If Unite is certified as the majority representative of Mardi Gras' employees, [the employee] will have been thrust unwillingly into an agency relationship."); *see also Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (citations omitted) ("The collective bargaining system as encouraged by Congress . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. This Court recognized in *Steele* [*v. Louisville & N.R. Co*., 323 U.S. 192 (1944),] that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further . . . discrimination."); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

b) The proposed rules are desperately needed and long overdue.

Currently and for too many decades the Board has employed a "confusing and obfuscatory process" for employees seeking to unseat an unpopular incumbent union. 75 Fed. Reg. at 26,086-87 (Member Dougherty, dissenting). Under current rules employees cannot simply request a decertification election; they must designate a "straw man" to run ostensibly as the employees' new "representative," with the straw man expected (though not legally bound) to disclaim that representative status if he or she gets elected. *See Air Transp. Ass'n. of Am., Inc. v. NMB*, 719 F. Supp. 2d 26, 41 (D.D.C. 2010) ("the Board does not have a formal union decertification rule, and instead uses a process in which the majority of employees in the craft or class sign individual authorization cards to select an individual (known as the "straw man") to run against the incumbent union, with the understanding that if elected the challenger will disclaim collective representation if he or she is elected)," *aff'd*, 663 F.3d 476 (D.C. Cir. 2011).

To trigger such a convoluted election, the employee "straw man" must obtain signed authorizations from "at least a majority of the craft or class." 29 C.F.R. § 1206.2(a); *see Air Transp. Ass'n.*, 719 F. Supp. 2d at 41. The employee straw man, moreover, must conduct this campaign using his or her own time and financial resources, while the incumbent labor union can use its "often considerable economic, political, and informational resources," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991), to try to defeat the decertification effort and cling to power. Given this convoluted process and the large nationwide bargaining units common in the air and rail industries, the Foundation does not believe the Board's current procedures have *ever* resulted in decertification of a representative of a craft or class of more than a few hundred employees. This convoluted process is simply unfair and unacceptable in a free America.

Every day Foundation staff attorneys field inquiries from employees seeking information about their right to disassociate from the union, whether by resignation from union membership, revoking a dues checkoff authorization, declaring dues objector status under *Ellis v. BRAC*, or by decertifying the incumbent union.

One result of these inquiries is that RLA-covered employees are often left confused and disheartened when the straw man rules are explained to them. While the decertification process under the National Labor Relations Act is complicated and contains all sorts of technical rules regarding election blocks and bars, decertification under the RLA straw man rules is even more daunting. Many RLA-covered employees simply give up when the straw man obstacles are explained to them. But as shown above, the text and policy of the RLA do not countenance such an asymmetrical regime of "easy to get in, difficult to get out."

The current straw man rules for decertification violate the spirit and letter of the RLA, which do not favor employees' right to select a union over the right to *discard* that same union's representation. *ABNE*, 380 U.S. at 669 n.5; *Russell*, 714 F.2d at 1343. This was explained by *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Bhd. of Ry., Airline & S. S. Clerks*, 402 F.2d 196, 202-03 (D.C. Cir. 1968), where the court of appeals stated:

> The Supreme Court indicated that employees under the Railway Labor Act . . . have the option of rejecting collective representation entirely. The decision precludes a ruling that the Board's sole power is to certify someone or group as an employee representative, imposing on the carrier a duty to treat with that representative. We think that the Board has the power to certify to the carrier that a particular group of employees has no representative to carry on the negotiations contemplated by the Railway Labor Act . . . .

Russell, too, makes it clear that the right not to be represented stands on equal footing with the right to collective representation:

> [T]he obvious intent of the Act, as indicated by the language of the statute itself and the underlying legislative history, is that the goals of collective bargaining and employee freedom of choice are consonant and concurrent. The latter goal clearly is *not* subsumed by the former.

714 F.2d at 1346. Contrary to arguments the unions will likely make, nothing in these cases should be read as a mandate that the Board use the straw man rules, or that the Board is forbidden to make the decertification process less convoluted.

Attempting to justify the current asymmetrical regime of "easy to get in, difficult to get out," the Board in the past invoked the rationale of "labor stability," claiming that the headwind its straw man rule imposes against decertification is necessary to discourage unions from raiding an already-represented workplace. 75 Fed. Reg. at 26,079. That is more properly called "labor union stability." The NMB's past reliance upon stability for unions to impede decertification was wrong, and highlights the way in which the agency lost its way in the past. The touchstone of the RLA is the right of employees "to organize and bargain collectively through representatives *of their own choosing*," 45 U.S.C. § 152, Fourth (emphasis added), not compelled unionization that entrenches incumbent unions in perpetuity.

Indeed, continued representation by an unpopular minority union is itself a grave threat to the stable operation of interstate commerce the RLA is supposed to foster. *See, e.g., Int'l Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgement" of the labor law than for a union and employer to enter into a

collective bargaining relationship when a majority of employees do not support union representation). Unfortunately, because labor unions in America do not have to stand for periodic recertification, it has been estimated that 94% of unionized workers have never voted for the union representing their workplace. James Sherk, *Union Members Never Voted for a Union*, Heritage Foundation, August 30, 2016, available at https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union. Perpetually encrusting a labor union onto a workplace, with no showing of *current* employee support, does not lead to workplace stability.

Russell was decided thirty-six years ago. Almost two generations of workers have come and gone in that time, yet employees under the RLA still are saddled with unions voted in many decades ago, with no easy means to express their representational preferences. Even if the proposed rule is adopted, those employees wishing to end (or change) union representation will still face enormous hurdles, including the statutory requirement that they collect authorization cards from 50% of the workforce just to trigger the election process. *See* 45 U.S.C. § 152, Twelfth. The time has come to change the convoluted straw man rules and place certification and decertification elections on an equal footing.

c) The Board has statutory authority to enact the proposed rules.

In an attempt to retain the current unbalanced and discriminatory regime, labor unions will likely argue that because the RLA contains no specific statutory decertification procedure the NMB is forbidden from creating one. Such an argument is hypocritical. The courts have long recognized, and the Board agrees, that employees have the right to reject representation. *ABNE*, 380 U.S. at 669 n.5; *Air Transp. Ass'n*, 663 F.3d at 481 (citing 75 Fed. Reg. at 26,077 and "reiterating that decertification is allowed when fifty percent of the craft or class shows interest").

Implicit in employees' right to eschew union representation is the Board's power to issue a certification order when employees so choose. *Russell*, 714 F.2d at 1341-46 (finding that since employees have right under the RLA to opt for non-representation, the Board could not refuse to process a representation application after it determined that the employee "straw man" intended to terminate collective representation if certified); *Teamsters*, 402 F.2d at 202; *see also* Representation Election Procedure, 75 Fed Reg. 26062 (May 10, 2010), in which the Board recognized its power to issue a certification order when no union was chosen.

It is true that the Railway Labor Act spells out no specific procedures for either representation or decertification and, for that matter, makes no mention of decertification or straw men. However, in *Russell* the court rejected the Board's argument that it could

not process the plaintiff's application for an election to terminate collective representation because "no procedure for decertification was contained in the Act." 714 F.2d at 1345. Thus, *Russell* implicitly recognized that the NMB has authority to specify procedures for decertification.

Moreover, the D.C. Circuit has held that

> "[a]bsent plain statutory language or some other evidence of congressional intent to guide us one way or the other, we defer to the Board's reasonable balance of the competing interests at stake." *See Am. Mar. Ass'n v. United States*, 766 F.2d 545, 560 (D.C. Cir.1985) ("[Courts] accord substantial deference to an interpretation of a statute" when that interpretation "represents a reasonable accommodation of the conflicting policies that were committed to the agency's care by the statute."

Air Transp. Ass'n, 663 F.3d at 485.

Air Transp. Ass'n stands for the proposition that the federal courts will readily defer to the NMB's reasonable policies regarding the structure and conduct of union elections. Arguments that the NMB lacks statutory power to create a smoother decertification process because Congress did not explicitly create one, as opposed to using the current tortured "straw man" path to achieve the same result, fall flat. This is especially true given Congress' failure to spell out the "straw man" process in the first place.

Railway Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655 (D.C. Cir.1994) (en banc) does *not* stand for the proposition that the Board cannot adopt the proposed rule, as many unions will surely argue. There, the issue was a proposed rule allowing both the Board and carriers to initiate the election process despite the RLA's command that only "a carrier's employees" can initiate the process. A sharply divided en banc D.C. Circuit held that the Board overstated its power under 45 U.S.C. § 152, Ninth, given that the Board can only initiate a representation process "[i]f any dispute shall arise *among a carrier's employees* as to who are the representatives of such employees." *Id*. at 665.

The issue in this rulemaking proceeding is much different. Here, it is universally accepted that the RLA authorizes employees to choose no representative and to oust an incumbent representative. *ABNE*, 380 U.S. at 669 n.5. Since *Russell*, if not longer, there has been no serious dispute about employees' right to rid themselves of a particular union's representation. *Air Transp. Ass'n*, 719 F. Supp. 2d at 41. Thus, the only real issue is what procedures the NMB should employ to allow that free choice to be measured. The establishment of such procedures is uniquely within the Board's discretion, and that discretion is properly exercised here to adopt the proposed rules. *See Switchmen's Union*

of N. Am. v. Nat'l Mediation Bd., 320 U.S. 297, 305–06 (1943); *Air Transp. Ass'n*, 663 F.3d at 493; *Int'l Ass'n of Machinists v. Trans World Airlines, Inc.*, 839 F.2d 809, 811 (D.C. Cir.1988) ("[j]udicial review of NMB decisions is one of the narrowest known to the law" and "courts have no authority to review NMB certification decisions in the absence of . . . a gross violation of the Railway Labor Act").

III. CONCLUSION

The proposed rules are long overdue. Employee free choice is the RLA's most significant policy, and the proposed rules are needed to ensure that all employees have an equal and fair choice regarding union representation. The Board has statutory authority to adopt the proposed rules, and should do so as soon as possible.

Moreover, because decertification will remain a difficult process even under the proposed rules, the Foundation encourages the Board to consider further rulemaking to reinstate its previous election rules related to how to count employees in a craft or class who refrain from voting. The RLA contains particular language requiring a majority of employees in a craft or class to support representation before the Board may certify a representative. The Board's current rule allows for union certification with less support than the statute intended, essentially meaning that a union can be certified with only minority support. The Board should consider changing that rule to further the RLA's goals of encouraging employee free choice and allowing certifications only when a majority of employees clearly express their desire for it.

Respectfully submitted,

/s/ Glenn M. Taubman

Staff Attorney