A bold voice for transportation workers

September 21, 2010

Oppose the Isakson Resolution of Disapproval (S J Res 30)

Dear Senator:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I urge you to vote against S J Res 30, Senator Isakson's resolution disapproving of the National Mediation Board's (NMB or Board) new rule that allows a majority of ballots cast to determine union representation, when it is brought to the Senate floor for consideration this week. The NMB's new rule is consistent with statute, was considered in an open and transparent process, and makes union election procedures for airline and rail workers fairer and more consistent with democratic norms. Moreover, a recent federal court decision upheld the Board's new rule change.

The Air Transport Association (ATA) immediately challenged the NMB's new rule in federal court on the grounds that the rule was "arbitrary, capricious and not in accordance with the law under the Administrative Procedures Act (APA)" and violated the Railway Labor Act (RLA). The U.S. District Court for the District of Columbia rejected these claims and issued a strong opinion upholding the Board's rulemaking. The Board is now operating under its new rules and has moved forward with several representation elections.

Previously, the NMB counted all workers who did not vote in a representation election as a vote against a union. There are, of course, several reasons why a person may not vote in an election, and it makes no sense to automatically and arbitrarily assign a "no" vote to all non-voters. As a result, the old process was structurally tilted against those workers seeking representation, despite the Board's clear mandate to promote collective bargaining.

The new NMB rule provides workers with an opportunity to vote either for a union, against a union, or to abstain from voting and have a voting majority decide the outcome. Despite claims from the supporters of the resolution, this is not "card-check" or "minority rule." Rather, it is the same procedure that we use to elect Senators, Members of Congress and is found throughout our democratic society.

Senator Isakson and his supporters have also stated that the NMB does not have the authority to issue this rule. The Railway Labor Act (RLA) does not require the old procedure and gives the Board broad discretion on how it conducts elections. Specifically, Section 2, Fourth of the RLA states 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 ...." This section is silent on how a majority should be determined, and the District Court correctly determined that the NMB is given the authority to conduct elections using any appropriate method for ascertaining voter intent. In fact, the Board has, in the past, applied different union election procedures including rules similar to those embodied in the final rule.

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Supporters of the resolution similarly claim that Congress must authorize any change to the NMB's voting procedure. The claim is based upon a single 1978 Federal Register notice that appeared to indicate, without explanation, that the NMB is unable to make any change to its election procedures. As a matter of administrative law, such a statement is not binding, and further, the Board has never interpreted the 1978 statement as guiding its decision-making process. The charge is a baseless distraction and in no way bears any legal merit on the Board's ability to set its elections procedures.

The process the Board used to adopt this rule was fair, open and allowed all parties an opportunity to comment. The NMB published a Notice of Proposed Rulemaking in the Federal Register on November 3, 2009 that included a detailed explanation of why the Board was considering this change, allowed interested parties 60 days to comment, and provided detailed rationale for offering the proposal. As part of this comment period, the NMB held a public meeting where it heard from 34 members of the public. The final rule included a detailed response to the substantive comments offered and provided a thorough and well-reasoned explanation for the Board's final rule. In the opinion of the District Court judge, the Board "provided a neutral and rational basis" for its rulemaking in a manner "adequate under the APA" and was not "arbitrary and capricious."

Opponents of the rule claim that the well-established notice and comment process the Board used in this proceeding is insufficient, and instead the Board should have engaged in an evidentiary hearing, with witnesses, cross-examination and submitted evidence. The sole rationale for this position is that the NMB used this process in 1987 to review requests to change union representation rules. Simply because the Board chose to use evidentiary hearing procedures more than two decades ago does not obligate subsequent Boards to follow this approach. The District Court agreed, stating that the NMB's "precedent did not require an evidentiary hearing." There is nothing in the RLA or any other law that requires the Board to follow this process to change its rules or procedures. Federal agencies issue new regulations every day following the same notice and comment procedures employed by the Board in this proceeding. It makes no sense to hold the NMB to a different standard, and the allegation is simply an attempt to distract policy makers from the merits of the rule.

Please oppose the Isakson "resolution of disapproval" (S J Res 30) when it is considered this week on the Senate floor.

Sincerely,

Edward Wytkind
President