A bold voice for transportation workers

COMMENTS OF THE TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
NATIONAL MEDIATION BOARD
ON
REPRESENTATION DISPUTES PROPOSED RULES
DOCKET NO. C-7034

August 6, 2012

The Transportation Trades Department, AFL-CIO ("TTD") hereby submits its comments regarding the Notice of Proposed Rulemaking ("NPRM") issued by the National Mediation Board ("NMB" or "Board") on May 15, 2012, as corrected on June 7, 2012. By way of background, TTD represents 32 affiliated unions, the majority of which represent workers covered by the Rail Labor Act ("RLA") and therefore have a direct interest in the Board's proceeding. Attached is a list of TTD member unions.[1]

The Board's NPRM was issued in response to the recent amendments to the RLA contained in the Federal Aviation Administration Modernization and Reform Act of 2012. TTD's comments address three topics related to the NPRM.

[1] Attachment A is a list of TTD member unions.

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First, TTD provides its views with respect to the Board's request for "comments regarding the impact of the amended language on the Board's policies and procedures with regard to mergers." 77 Fed. Reg. 28536, 28537 (May 15, 2012). TTD's position is that the recent RLA amendments do not require the NMB to alter its long-established merger procedures, and that continuation of the present merger policy is best accomplished by including the existing single carrier procedures within the Code of Federal Regulations ("CFR"). Second, TTD addresses the Board's proposed changes to its current CFR provisions in light of the RLA amendments. TTD believes that the Board's proposals properly reflect the RLA amendments, although a few modifications to the proposed language are suggested. Lastly, TTD responds to the NMB's request that commenters raise "any other matters they consider relevant to the changes wrought by the amended statutory language." *Id.* at 28536. To this end, TTD offers various proposals designed to insure that the Board can continue to resolve representation disputes expeditiously and free from carrier interference in the wake of the RLA amendments.

I. The Railway Labor Act Amendments Do Not Apply to the Board's Merger Procedures and the Board Should Amend Its Rules to Make Clear That Its Merger Procedures Remain Unchanged.

As the Board correctly emphasizes in its NPRM, the RLA's "amended language is silent with regard to mergers." *Id.* at 28537. In particular, the new showing of interest requirement, to be codified as RLA Section 2, Twelfth, does not indicate whether its terms apply to an application for a single carrier determination by the Board. Because the scope of Section 2, Twelfth is not clear and unambiguous, the Board must interpret the RLA amendments in order to determine the impact, if any, on the NMB's existing merger procedures. *See Air Transp. Ass'n of Am. v. NMB*, 663 F.3d 476, 480 (D.C. Cir. 2011).

The better reading of Section 2, Twelfth is that the new provision does not apply to proceedings under the NMB's merger procedures. Both the language and structure of Section 2, Twelfth indicate that the scope of this provision is narrower than the full range of representation disputes arising under RLA Section 2, Ninth. By its terms, Section 2, Twelfth's showing of interest requirements only apply "upon receipt of an application requesting that an organization or individual *be certified* as the representative of any craft or class of employees." 45 U.S.C. § 152, Twelfth (emphasis added). In contrast, the NMB's single carrier process focuses on determining the impact, if any, of a merger of two or more carriers upon existing representation certifications. The legislative history of the recent RLA amendments confirms this reading of the new statute. Moreover, application of the Section 2, Twelfth showing of interest requirement to single carrier proceedings would in some cases lead to results contrary to the RLA's fundamental public policy goals, and actually frustrate the resolution of representation disputes in the merger context and threaten stability in labor relations.

TTD submits that the NMB should adopt this better reading of Section 2, Twelfth by incorporating the current merger procedures as set forth in the agency's Representation Manual into the NMB Rules contained in the Code of Federal Regulations ("CFR"). In this way, the NMB will provide clear guidance in advance regarding the procedures applicable to mergers. In addition, the NMB's rules are entitled to greater deference than the informal guidance provided in the Representation Manual.

A. The Language and Structure of the RLA Amendments Indicate That Section 2, Twelfth Is Not Intended to Apply to Merger Proceedings.

By the terms of the new legislation, the showing of interest requirement in Section 2, Twelfth applies "upon receipt of an application requesting that an organization or individual be

certified as the representative of any craft or class . . ." 45 U.S.C. § 152, Twelfth. Significantly, the language of Section 2, Twelfth is different from the language used in RLA Section 2, Ninth to define the scope of the NMB's jurisdiction over representation disputes:

> 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.

45 U.S.C. § 152, Ninth (emphasis added).

If legislators had intended for Section 2, Twelfth to apply to all representation disputes arising under the RLA, Congress would have used language applying the showing of interest provision to any dispute arising under Section 2, Ninth. Instead, Congress chose language that is different and narrower than that found in Section 2, Ninth. Under accepted principles of statutory construction, Congress' choice of different language in different parts of a statute should be given effect. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (statute should be construed "to give effect, if possible, to every word Congress used").

Additionally, Congress' decision to place the showing of interest requirement in a new statutory section, instead of amending Section 2, Ninth, confirms that lawmakers did not intend the Section 2, Twelfth requirements to apply to all representation disputes arising under Section 2, Ninth. In contrast, in enacting a new provision regarding run-off elections in the FAA

Modernization and Reform Act, Congress chose to amend Section 2, Ninth of the RLA. This too supports interpreting the scope of Section 2, Twelfth more narrowly than the full scope of Section 2, Ninth.

The language chosen in Section 2, Twelfth also indicates that Congress intended the new showing of interest requirement to apply only where an application is made requesting that an organization or individual "be certified" as the representative of any craft or class of employees. In contrast, single carrier proceedings concern existing certifications. The primary issue addressed in these cases is the impact, if any, of a corporate restructuring on certifications previously issued by the Board. As the NMB explained in *Trans World Airlines/Ozark Airlines*, carrier mergers necessitate that the Board adopt a "policy regarding the survival of certificates of representation on the acquired carrier following the creation of a single transportation system." 14 NMB 218, 233 (1987). "[P]ursuant to Section 2, Ninth the Board upon investigation has *exclusive* authority to grant, withhold and revoke representation certifications." *Id.* at 235. "Absent Board approval, neither the present certifications at [an acquired carrier] nor any other certification may terminate by action of a carrier." *Id.* Accordingly, the Board needs to have procedures in place to determine the status of existing certifications in the event of a representation dispute triggered by a merger. The primary goal of the Board's merger procedures has been to "foster[] stable labor relations." *Id.* at 233.

The application made in a merger proceeding is in the first instance for a determination by the Board as to whether two or more carriers have integrated operationally to such an extent that they should be considered a single carrier for representation purposes. NMB Representation

Manual, § 19.5. If the Board finds that previously separate entities have formed a single carrier, the NMB will proceed to determine the representation consequences. *Id.* § 19.6.

Where the involved work groups are not comparable in size, generally meaning that the smaller work group comprises less than thirty-five percent of the total, the Board's practice has been to extend an existing certification for the larger work group, or extinguish the certification of the smaller work group if the larger group is unrepresented. Where the work groups are comparable in size, the Board's practice has been to decide representation through an election, with the incumbent union or unions appearing on the ballot. If employees choose to be unrepresented as a result of the election, the Board issues a dismissal which has the effect of extinguishing any existing certifications. Thus, single carrier proceedings are a unique type of representation dispute under Section 2, Ninth, unlike more common representation applications where a union seeks to become the certified representative for a previously unrepresented group of employees or an employee group represented solely by an organization other than the applicant.

The recent amendments to the RLA were passed as part of a funding reauthorization act, and the amendments first appeared in conference to reconcile bills passed in the House and Senate. As a result, there is little legislative history regarding the amendments. However, the limited legislative history available plainly indicates that Section 2, Twelfth was not intended to apply to mergers or otherwise alter the NMB's single carrier procedures. The Congressional Record contains a colloquy between Senator Harkin, Chairman of the Committee on Health, Education, Labor and Pensions, Majority Leader Reid and Senator Rockefeller, Chairman of the Senate Commerce, Science, and Transportation Committee, which includes the following:

> Mr. REID. . . . And I would also like to explain that [the RLA amendments are] not intended to apply to the unique situation in mergers. The text of the amendments apply to all applications for representation elections, but not to the entirely different circumstance where a labor organization or employees petition the National Mediation Board for a determination as to whether a merger or other transaction has altered an existing representational structure as a result of creation of a single transportation system. In those cases, it is our intent that the National Mediation Board's existing merger procedures, as modified from time to time by the National Mediation Board, shall determine the percent of the craft or class to establish a showing of interest. Otherwise employees could lose their representation simply by merging with a slightly larger unit without even having the opportunity to vote, which is unacceptable.

158 Cong. Rec. S341 (Feb. 6, 2012).

In a recent letter to the NMB, several Republican members of the Transportation and Infrastructure Committee maintain that they intended for the new Section 2, Twelfth to apply to mergers and express their disagreement with the floor comments on the legislation. These Republican House members now claim that most recent representation disputes were due to mergers and they had "full knowledge" of this point. Putting aside for a moment whether this statement is true or relevant, the fact is that there were no cited Congressional hearings or fact-finding reports prepared by Congress that would provide the basis for their asserted knowledge. In fact, Section 2, Twelfth was not included in the House bill nor was any language on showing of interest and instead this provision emerged from the Conference Committee as a replacement to curtail more far-reaching changes to the RLA. *See id.* at S340. For the signatories to this letter to now assert they had specific intent to include mergers, is contrary to the contemporaneous legislative history of the provision as well as the plain language of the statute that makes no mention of Congress seeking to include mergers. Indeed, the Board's analysis of the statute must ultimately rest on the language and structure of the RLA and the new amendments, not after-the-fact attempts to dispute the Congressional Record. As explained

above, the new Section 2, Twelfth stands apart from Section 2, Ninth and contains different language specifically directed to applications to "be certified" as a representative. It is clear from this language that the Board has the authority to exclude mergers from these new rules.

The Board's interpretation of the new RLA amendments should be based on the long-established public policy goals of the RLA, such as stability in labor relations and the expeditious resolution of representation disputes. *See id.* at S340-41. Application of the new showing of interest requirement in merger proceedings would thwart these statutory goals in a variety of contexts.

For example, in the circumstance where two unions represent employees in a newly merged group with the smaller group representing a substantial minority of thirty-five percent or more, under current practice the representative of the substantial minority would appear on the ballot along with the representative of the larger group. If Section 2, Twelfth were applied in the merger context, only the union for the larger group could make a single carrier application based on its existing representation. In order for the union for the smaller group to apply for a single carrier determination or appear on the ballot following such a determination, it would bear the additional burden of having to obtain authorizations sufficient to make a fifty percent showing of interest. If the union for the smaller group failed to make a fifty percent showing, then the Board would presumably have two options, either extend the certification covering the larger group to the entire craft or class, or conduct an election where the only choices are the union for the larger group or no representative. Either way, employees in the smaller group, even though comprising a substantial minority, would not have an opportunity to vote in favor of continued representation by their current union. Plainly, the inability of a substantial minority to place their

current representative on the ballot without the additional requirement to collect authorizations is apt to produce instability in labor relations.

In other merger settings, the application of Section 2, Twelfth could impair the expeditious resolution of representation issues. That would likely be the result where employees of the larger carrier in a merger are unrepresented, but represented employees at the smaller carrier constitute a substantial minority. In this circumstance, the union for the minority group could not initiate a single carrier proceeding until it had collected sufficient authorizations to make a fifty percent showing. A similar situation could arise in a merger involving three or more carriers if no group of represented employees comprises a majority of the combined craft or class. Thus, unless and until sufficient authorizations were obtained, no party would be able to even initiate a single carrier proceeding in these circumstances. *See Ry. Labor Executives Ass'n v. NMB*, 29 F.3d 655 (D.C. Cir. 1994) (only employees or their representatives may initiate representation investigation under Section 2, Ninth). As a result, the operational merger of the carriers would likely be delayed until the representation issues could be resolved.

B. The Board's Current Merger Procedures Should Be Included in the Code of Federal Regulations.

Undoubtedly, the NMB will be required at some point to determine whether or not Section 2, Twelfth applies in single carrier cases. As explained, the better reading of the statute is that the new provision does not apply to merger cases. The best way procedurally for the NMB to make this determination is to incorporate the merger procedures as they currently appear in the Representation Manual into the NMB Rules contained within the CFR.

The advantages of proceeding in this fashion are two-fold. First, by proceeding through rulemaking, the Board will provide clear guidance to both labor and management. The Board's

current merger procedures and practices are well understood by unions and carriers alike, and serve to guide the conduct of both labor and management in the merger context. If the Board were to defer a decision on the issue of Section 2, Twelfth's applicability until raised in a particular single carrier application, the involved unions and carriers would be forced to proceed with substantial uncertainty. The clearest means for the Board to reaffirm its current merger procedures would be to incorporate them as a new section in the CFR. Such action would remove any doubt regarding the continuation of existing practices. [2]

Second, inclusion of the merger procedures in the Board's rules will insure that the Board's decision-making in this regard receives full deference from any reviewing court. Except where a statute clearly and unambiguously speaks to an issue, an agency's rulemaking interpretation of its governing statute will be afforded substantial deference as long as it is a "reasonable" interpretation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). As discussed above, the conclusion that Section 2, Twelfth does not apply to mergers is not only reasonable, but constitutes the better reading of the statute.

If the Board were to address the merger issue through a procedure other than rulemaking, its decision would not necessarily enjoy the same high level of deference afforded under the *Chevron* standard. As a general matter, "[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all

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[2] TTD believes that the adoption of the current merger procedures as part of the CFR is a "logical outgrowth" of the Board's NPRM which broadly sought comment regarding the impact, if any, of the RLA amendments on existing merger procedures. *See City of Waukesha v. EPA*, 320 F.3d 228, 245-247 (D.C. Cir. 2003) (discussing the APA "logical outgrowth" test). Generally, a "final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with 'their first occasion to offer new and different criticisms which the agency might find convincing.'" *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1059 (D.C. Cir. 2000). Here, the NMB's broad request for comment on the merger issue in its NPRM has given ample opportunity to address any and all aspects of the matter, and a second round of notice and comment would not offer an occasion for any new arguments. However, out of an abundance of caution, the Board may wish to issue a second NPRM proposing the adoption of the merger procedures as part of the CFR.

of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Instead, such agency interpretations are "entitled to respect," but only to the extent that those interpretations have "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As noted in the NPRM itself, the NMB's Representation Manual "is an internal statement of agency policy and not a compilation of regularly promulgated regulations having the force and effect of law." 77 Fed. Reg. at 28537 n.2 (*citing Hawaiian Airlines v. NMB*, 107 L.R.R.M. 3322 (D. Haw. 1979), *aff'd without op.* 659 F.2d 1088 (9th Cir. 1981)). Accordingly, if the Board were to resolve the merger question simply by leaving the current Representation Manual unchanged, interpreting the statute in this manner likely would not be afforded full *Chevron* deference.

TTD suggests that the Board incorporate its existing merger procedures into a new Section 1206.9 of the CFR. Attachment B sets forth proposed language for this new CFR section. The proposed language is essentially verbatim from the current provisions of the Representation Manual, although adapted to adhere to the stylistic conventions of the CFR. TTD suggests only one substantive change to the language of the current merger procedures. Insofar as Section 19.602 of the current Representation Manual would permit an organization or individual that does not represent any of the employees involved in the single carrier proceeding to file an application supported by a thirty-five percent showing of interest, that provision is arguably inconsistent with the requirements of Section 2, Twelfth because the union in such a case would not be seeking to determine the status of an existing certification, but rather would seek to be certified as a representative through a single carrier proceeding. For that reason, this language should be removed from Section 19.602 as proposed in Attachment B. TTD is

unaware of any case in which a union has sought to obtain certification where none existed previously through the Board's single carrier process. Accordingly, we do not believe that this change in the language of the current merger procedures will have any practical effect.

II. The Board's Proposed Rule Changes to Reflect Statutory Language Added to or Amending the Railway Labor Act Are Generally Appropriate, But Should be Modified in a Few Respects.

For the most part, the changes to the current CFR provisions necessitated by the RLA amendments are obvious and straightforward. The Board's proposals appropriately conform the CFR to the new statutory language as a general matter, although TTD suggests a few changes. TTD also believes that the Board's NPRM addresses all sections of the current rules which are impacted by the RLA amendments. Plainly, the amendments will also require changes to the NMB's Representation Manual, which we assume the Board will address in a subsequent proceeding. We address each of the Board's proposed rule changes in turn.

A. Section 1206.1 Run-off elections

In its proposed Rule 1206.1(a), the Board refers to both "valid votes" and "legal votes." The context suggests that the Board is using these two terms interchangeably, but the intent of the regulation would be clearer if the Board only used the term "valid votes." The term "valid votes" is defined in Section 13.304-1 of the NMB's Representation Manual. In addition, Rule 1202.4 pertaining to secret ballot elections uses the term "valid ballots cast." The term "legal votes" is not defined in the Board's Representation Manual nor does it appear elsewhere in the Board's rules. Accordingly, TTD believes that the Board should change "legal votes" to "valid votes" in its final rulemaking in order to avoid any ambiguity or confusion.

B. Section 1206.2 Percentage of valid authorizations required to determine existence of a representation dispute

Under the NMB's current Rule 1206.2, a distinction is made between represented and unrepresented employee groups for purposes of the showing of interest requirement. Where employees are represented, Rule 1206.2(a) requires a showing of authorizations "from at least a majority of the craft or class," i.e. fifty percent plus one. With respect to unrepresented employees, Rule 1206.2(b) requires authorizations "from at least thirty-five (35) percent of the employees in the craft or class."

The new showing of interest requirement contained in Section 2, Twelfth specifies that an application to be certified as the representative of any craft or class must be supported by a showing of interest "from not less than 50 percent of the employees in the craft or class." Plainly, the current language of Rule 1206.2(b) regarding unrepresented employees is inconsistent with the new Section 2, Twelfth and therefore must be changed to require at least a fifty percent showing. However, the language of current Rule 1206.2(a), which requires at least a fifty percent plus one showing of interest, is not inconsistent with Section 2, Twelfth.

Provided that no election is authorized with less than a fifty percent showing of interest, the text of the recent RLA amendments does not require that the Board alter its current fifty plus one showing of interest for represented employee groups. Accordingly, we submit that the NMB should retain the current language of Rule 1206.2(a) and amend the language of Rule 1206.2(b) as follows:

> (b) Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from no less than fifty (50) percent of employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

C. Section 1206.5 Necessary evidence of intervenor's interest in a representation dispute

The Board's NPRM proposes to raise the showing of interest for an intervenor to appear on the ballot from thirty-five percent to fifty percent. TTD believes that the NMB has correctly proposed to change its Rule regarding intervenors. Under the new Section 2, Twelfth an initial application to be certified as a representative must be supported by at least a fifty percent showing of interest. Since the statute now requires that the applicant satisfy this fifty percent threshold, it would be incongruous to permit an intervenor to appear on the ballot based on a lesser showing of interest.

The Board's long-established practice is to apply the same rules and requirements to both the applicant and any intervenor in a representation dispute. Under current practice, an intervenor must make the same showing of interest as the initial applicant. At present, "[t]he NMB permits potential representatives other than the applicant and incumbent, if any, to intervene in the representation dispute by submitting valid authorizations from at least 35 percent of eligible employees if the craft or class is unrepresented or the proceedings arise under the NMB Merger Rules, or 50 percent of eligible employees if the craft or class is represented and is covered by a valid existing contract between the carrier and the representative." *See The Railway Labor Act*, at 185 (3d ed. 2012) (*citing* 29 C.F.R. § 1206.5 and NMB Representation Manual, § 3.601). Similarly, the NMB treats applicants and intervenors in the same manner with respect to the deadline for the submission of authorizations and application of the Board's bar rules. *See Iberia Int'l Airlines*, 16 NMB 490, 492-94 (1989); *United Airlines, Inc.*, 8 NMB 642, 651-52 (1981). The Board should not depart from its current policy of treating applicants and

intervenors in the same fashion. Accordingly, the NMB has appropriately proposed to raise the showing of interest for intervenors to fifty percent.

D. Section 1206.8 Amendment or rescission of rules in this part

TTD believes that the Board has appropriately proposed to modify Section 1206.8 in light of the newly enacted Section 10A of the RLA.

III. The Amendments to the Railway Labor Act Require Further Action by the NMB to Insure That Representation Disputes Continue to Be Resolved Expeditiously and Without Carrier Interference.

The new showing of interest requirement contained in Section 2, Twelfth will likely affect the Board's handling of representation disputes in several respects. Because the threshold requirement for an organization seeking an election among an unrepresented group is now higher, disputes over voter eligibility are likely to take place at an earlier stage in the representation process. In addition, the new showing of interest requirement will likely incentivize carriers to pad voting lists with hard-to-reach workers or individuals no longer employed at the company in an effort to prevent employees from even having an opportunity to vote on representation. Unless appropriate measures are adopted by the Board, disputes over the lists used to determine the showing of interest threaten to delay substantially the resolution of representation cases in derogation of the key policy goals of the RLA.

TTD submits that the Board should adopt several measures to insure that representation disputes continue to be resolved expeditiously and without carrier interference. First, the Board should amend its Representation Manual to require that carriers submit information necessary to verify voter eligibility in conjunction with providing the initial list of potential eligible voters. Second, the Board should insure that carriers do not abuse the election process by claiming that terminated employees should be classified as furloughees. Lastly, the Board should impose

appropriate remedies on a case-by-case basis where a carrier has failed to provide accurate information necessary for the Board to determine eligibility or otherwise sought to manipulate the eligible voter list in bad faith. The Board possesses the full authority under Section 2, Ninth to implement these measures.

A. The Board Should Require Carriers to Disclose Information Relevant to Voter Eligibility at the Outset of the Representation Process.

Under the RLA, the speedy resolution of representation disputes is "an objective of the first order." *Bhd. of Ry. & Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650, 668 (1965). Section 2, Ninth actually specifies that the Board should issue its certification "within thirty days after the receipt of the invocation of its services," 45 U.S.C. § 152, Ninth, although the courts have long held that this "part of the Act prescribes a duty rather than a limitation upon the powers of the Board." *Sys. Fed. No. 40 v. Virginian Ry. Co.*, 11 F. Supp. 621, 627 (E.D. Va. 1935). Even though the statutory thirty-day deadline is unrealistic in many cases, the Board remains obligated to fulfill this statutory duty as closely as possible.

Section 2, Ninth also grants the Board sole authority to "designate who may participate in [a representation] election," as well as the "power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out" its statutory duty to resolve representation matters. 45 U.S.C. § 152, Ninth. TTD submits that pursuant to this authority the Board should require that carriers disclose certain relevant information upon submitting the list of potential eligible voters. The disclosure of necessary information at the outset of the process will facilitate the expeditious resolution of representation cases in accordance with the requirements of the RLA.

The Board currently requires that the carrier provide only an employee's full name, job title, and the duty station or location as part of the list of potential eligible voters. NMB Representation Manual, § 2.4. In many cases, this information is insufficient to permit the Board to make determinations regarding voter eligibility. In most cases, the Board must solicit additional information as part of its investigation, which adds time to the process. In the interest of expediting the Board's investigation, the following additional information should be required. This additional information should be readily available to the carrier since it is information needed to generate an accurate list of potential eligible voters.

Current job descriptions: Carriers should be required to provide the formal job descriptions for all positions included in the list of potential eligible voters. In the course of investigating representation disputes, the Board frequently has need to review formal job descriptions in order to assess whether a particular position is properly included in the craft or class or whether a position is managerial or supervisory in nature. Although an employer's formal description is not dispositive of these issues, it is evidence commonly sought and reviewed by the Board as part of its investigation. Given that this information is routinely sought, this information should be provided at the outset of the investigation in order to aid the process.

Dates of compensated service: Carriers should provide the dates of the first and the last payroll periods in which each listed employee most recently performed compensated service in the craft or class. The dates when an employee first and last performed compensated service are often crucial to determining eligibility to vote. Those who performed service as of the eligibility cut-off date (i.e. the last day of the payroll period ending before the NMB received the

representation application) are eligible provided they are properly included in the craft or class. Although temporary employees, disabled employees, employees on leaves of absence, or furloughees are eligible to vote in some circumstances, the dates of compensated service are generally relevant to determining their eligibility.

Information regarding temporary employees: The Board should require that carriers identify all temporary employees included on the list of potential eligible voters and the anticipated duration of employment for each temporary employee. Under Board policy, temporary employees may be eligible to vote provided "they have a reasonable expectation of continued employment or re-employment in the craft or class." NMB Representation Manual, § 9.202. The Board's determination of whether temporary employees are eligible would be facilitated by knowing the identity of these employees and the duration of employment anticipated by the carrier, as well as the dates of compensated service for each employee as discussed above.

Information regarding dismissed employees: Dismissed employees are not eligible to vote unless the dismissal is being appealed through the grievance procedure or an action seeking reinstatement which is pending in court or before an appropriate government agency. NMB Representation Manual, § 9.203. Accordingly, the carrier should identify any dismissed employees included on the list and provide documentation for each employee establishing that the dismissal is being challenged through a grievance or a legal action which is not yet final.

Information regarding furloughed employees: Carriers should be required to identify furloughees and provide documentation regarding the terms of any asserted recall rights whether pursuant to a collective bargaining agreement or carrier policy. In this way, the Board can

determine whether there is a threshold showing of an entitlement to recall sufficient to warrant further investigation regarding the eligibility of these individuals.

Information regarding employees on authorized leaves of absence: Board policy permits employees to vote if they are on authorized leaves of absence, such as military leave, union leave, or authorized sick leave. NMB Representation Manual, § 9.205. Therefore, carriers should identify employees on leave who are included on the list of potential eligible voters and provide documentation establishing that the leave is duly authorized.

Information regarding employees receiving disability payments: Employees who are receiving disability payments may be eligible to vote provided that they retain an employee-employer relationship with the carrier and have a reasonable expectation of return. In order for the Board to determine expeditiously the eligibility of these employees, the carrier should identify them and provide documentation establishing the expected date of return from disability leave. If the carrier is unable to document an employee's anticipated date of return, it is unlikely that the employee in question can be deemed to have a reasonable expectation of return to work and many cases involving disabled employees can be resolved on this basis.

Death audit documentation: Obviously, deceased employees should not be included on the Board's list of eligible voters. When an employee is currently performing compensated service, the carrier can be expected to know if such an employee dies. However, when an individual has been on leave or furlough, especially for an extended period of time, the carrier would not necessarily have reason to know that such a person has died. For that reason, the Board should require that the carrier document that a death audit has been performed with respect to those individuals included on the list who last performed compensated service for the

carrier in a payroll period prior to the one used to determine the eligibility cut-off date. A death audit is generally performed by comparing an individual's social security number to the Social Security Administration's Master Death File. There are several commercial services available to perform death audits for a modest fee per social security number and the audit can be accomplished quickly through a computerized search. Benefit funds commonly conduct death audits to avoid overpayments or to detect fraud. We submit that the Board should require a similar process to safeguard its own lists.

Lastly, the Board should require that the carrier submit the list of potential eligible voters along with a sworn certification from a responsible carrier official attesting that the contents of the list and supporting documentation are true and correct. Generally, evidentiary materials are submitted to the Board in the form of a sworn declaration or affidavit. The list of potential eligible voters should be subject to the same standard. A sworn certification will help to insure that the list provided is based upon the most complete and reliable information available.

The Board's Representation Manual sets forth procedures for submission of the list of potential eligible voters. The NMB should revise its Manual to require the disclosures outlined above, as reflected in the proposed language contained in Attachment C.

B. The NMB Should Insure That Carriers Do Not Abuse the Process by Claiming That Former Employees Should Be Considered Eligible as Furloughed Employees.

In the past, some carriers have sought to take improper advantage of the Board's policy permitting furloughees to vote in representation elections. In cases involving unrepresented employees, carriers have asserted that former employees possess recall "rights" pursuant to the carrier's unilateral employment policies and practices, sometimes claiming that employees who

have not worked for many years are eligible for recall. In the at-will employment setting, however, gratuitous promises of future reemployment are not legally enforceable, in contrast to recall rights established pursuant to a collective bargaining agreement and subject to Section 6 of the RLA. Therefore, it is all too easy for carriers to conveniently claim that terminated employees are furloughees. Because these recall "rights" are not collectively bargained, the entitlement to recall (if any) is often unclear, memorialized only in a patchwork of carrier policy pronouncements or informal communications to employees, and subject to unilateral revisions over time. In some cases, carriers have even relied solely on claims of past practice without any documentation of the asserted recall policy.

To avoid abuse of the election process, when an employer asserts its own unilateral policy as the basis for recall, the Board should require that the carrier provide compelling evidence that individual employees more likely than not will be recalled in the foreseeable future. Absent such a showing, the carrier's claim to a continuing employer-employee relationship under Section 1, Fifth of the RLA is too attenuated to be credited. 45 U.S.C. § 151, Fifth (defining "employee" as "every person in the service of the carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service)").

C. When a Carrier Refuses or Fails to Provide an Accurate List of Potential Eligible Voters or Seeks to Manipulate the List in Bad Faith, the Board Should Take Appropriate Remedial Action.

Carriers have an obligation to submit accurate information regarding voter eligibility and to produce the list in good faith. When a carrier fails to fulfill this obligation, the Board is forced to expend resources unnecessarily administering challenges and the representation proceeding is unduly delayed. Where the carrier's misconduct causes delay in the election process, the carrier

interferes with the right of employees under the RLA to select union representation. *See In re Continental Airlines Corp.*, 50 B.R. 342, 358 (S.D. Tex. 1985), *aff'd per curiam*, 790 F.2d 35 (5th Cir. 1986) ("The RLA furthers Congress's strong policy of guaranteeing employees the right to organize and collectively bargain free from any carrier interference or influence . . . delays in NMB pre-certification proceedings seriously hamper such organizational efforts . . . ."). In such circumstances, the Board should impose appropriate remedies to protect its processes and remove the taint of carrier interference.

Appropriate remedies should be determined on a case-by-case basis as warranted by the circumstances. A range of potential remedies are available to the Board. Where a carrier fails to provide necessary information or submits information that is inaccurate, the Board can properly make an adverse inference against the carrier's position on voter eligibility. The use of an adverse inference both as an evidentiary principle and as a sanction for abuse of process is well established in the law. *See* McCormick on Evidence, § 264 (6th ed. 2006); Fed. R. Civ. P. 37(b)(2)(A)(i) (adverse inference as discovery sanction). By drawing an adverse inference, the NMB can avoid further delay in the resolution of eligibility issues.

As may be appropriate in a given case, the NMB can also remedy carrier abuses of the eligibility process by extending the deadline for the receipt of authorizations cards, waiving the Board's election bar rules, or ordering that the union be provided with the addresses of eligible voters. It is well within the authority of the NMB to take such actions. *See United Airlines, Inc.*, 28 NMB 533, 575 (2001) (recognizing NMB's power to extend deadline for submission of authorizations, but declining to do so); *Air Logistics of Alaska*, 27 NMB 348, 354 (2000)

(waiving the bar rule); *USAir*, 17 NMB 377, 428 (1990) (requiring carrier to provide address list to union).

Respectfully submitted,

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ATTACHMENT A

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)
United Transportation Union (UTU)

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ATTACHMENT B

§ 1206.9 Merger Procedures

(a) Merger is a consolidation, merger, purchase, lease, operating contract, acquisition of control, or similar transaction of two or more business entities.

(b) Pursuant to Section 2, Ninth, the National Mediation Board, upon an Application, has the authority to resolve representation disputes arising from a merger involving a Carrier or Carriers covered by the Railway Labor Act. The Board will consider these representation issues on a case-by-case basis.

(c) A Carrier should notify the Board when any of the transactions described in Subsection (a) of this Rule occur, or of (1) an intent to merge, at the same time it files with the Surface Transportation Board (STB) or the Department of Transportation (DOT); and (2) a completed merger including the date of the merger and the Carriers (or business entities) involved.

(d) Any organization or individual may file an application, supported by evidence of representation or a showing of interest, seeking a Board determination that a single transportation system exists.

(e) After an application is filed, the Board will conduct a pre-docket investigation to determine whether a single transportation system exists. The investigation may take any form appropriate to the determination.

(f) The following are some indicia of a single transportation system: (1) published combined schedules or combined routes; (2) standardized uniforms; (3) common marketing, markings or insignia; (4) integrated essential operations such as scheduling or dispatching; (5) centralized labor and personnel operations; (6) combined or common management, corporate officers, and board of directors; (7) combined workforce; and (8) common or overlapping ownership.

(g) If the Board determines that a single transportation system exists, the investigation will proceed to address the representation of the proper craft or class. The rules regarding percentage of valid authorizations in Rule §1206.2 and bar rules in Rule §1206.4 do not apply to applications filed under this section.

(h) Incumbent organizations or individuals on the affected carrier(s) must submit evidence of representation or a showing of interest from at least thirty-five (35) percent of the employees in the craft or class. This evidence includes, but is not limited to, a seniority list, dues check-off list, a current collective bargaining

agreement or a certification, or other indicia of current representation. An application filed by an intervening organization or individual must be supported by authorization cards from a majority (more than fifty (50) percent) of the employees in the craft or class. If not already filed with the initial application, organizations (Incumbents and Intervenors) have fourteen (14) calendar days from the date of the Board's single transportation system determination to submit evidence of a showing of interest or to supplement the showing of interest on the single transportation system. Applications that do not meet the showing of interest requirements will be dismissed.

(i) Existing certifications remain in effect until the Board issues a new certification or dismissal.

ATTACHMENT C

2.4 List of Potential Eligible Voters and Signature Samples

The carrier must serve one (1) copy of a system-wide alphabetized list of potential eligible voters and supporting documents, as specified in Section 2.401, on the Investigator and serve one (1) copy on each participant's representative. Even if a participant is contesting single transportation status (see NMB Rule 1210, 29 CFR § 1210), they are required to produce a list in conformity with this section. The NMB requires the carrier to provide a copy of the list in Microsoft Excel format to the NMB only. The carrier should send a separate alphabetized list in PDF to each of the participants.

The carrier must also provide the NMB with one (1) hard copy of legible, alphabetized signature samples for each employee on the list. Examples of acceptable signature samples include tax-withholding forms and employment and insurance applications. The alphabetized signature samples must be in the same order as the names on the list of potential eligible voters.

2.401 Content of the List of Potential Eligible Voters and Supporting Documents

The list of potential eligible voters must include all individuals in the craft or class with an employee-employer relationship as of the cut-off date. The list must include the following information and be supported by the following documentation:

(1) Employee's full name;
(2) Employee's job title and the carrier's current job description for each title listed;
(3) Employee's duty station or location;
(4) The dates of the first and last payroll periods in which each listed employee most recently performed compensated service for the carrier;
(5) Identify all temporary employees and the anticipated duration of employment for each;
(6) Identify all terminated employees and provide documentation for each that the dismissal is being appealed through an applicable grievance procedure or that an action for reinstatement has been filed before a court or a government agency of competent jurisdiction and that the grievance or court action is not final;
(7) Identify all furloughed employees and provide documentation regarding any entitlement to recall;
(8) Identify all employees on authorized leaves of absence and provide documentation of the authorization for leave;
(9) Identify all employees receiving disability payments and documentation establishing the expected date of return from disability leave;
(10) With respect to each individual listed who last performed compensated service for the carrier in a payroll period prior to the payroll period used to determine the eligibility cut-off date, provide documentation showing that the individual's identifying

information was compared to the Social Security Administration's Master Death File and that the individual did not appear as deceased in those records.

The list and supporting documents must be accompanied by a sworn certification from a responsible carrier official attesting that the contents of the list and supporting documentation are true and correct.