COMMENTS OF THE TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
NATIONAL MEDIATION BOARD
ON
DECERTIFICATION OF REPRESENTATIVES
DOCKET NO. C-7198

April 1, 2019

The Unions that comprise the Transportation Trades Department of the AFL-CIO ("TTD") hereby submit these comments regarding the Notice of Proposed Rulemaking ("NPRM") issued by the National Mediation Board ("NMB" or "Board") on January 31, 2019. 84 Fed. Reg. 612 (Jan. 31, 2019). These 32 affiliated unions represent employees in all modes of transportation, including railroad and airline employees covered by the Railway Labor Act ("RLA").[1] TTD welcomes the opportunity to submit comments to the NMB regarding its recent proposed

[1] Specifically, TTD aviation and rail unions covered by the RLA include: Air Line Pilots Association ("ALPA"); 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 Machinists and Aerospace Workers ("IAM"); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("IBB"); International Brotherhood of Electrical Workers ("IBEW"); National Conference of Firemen and Oilers, District of Local 32BJ, SEIU ("NCFO"); Office and Professional Employees International Union ("OPEIU"); Sheet Metal, Air, Rail and Transportation Workers ("SMART"); SMART-Transportation Division; Transportation Communications Union/IAM ("TCU"); Transport Workers Union of America ("TWU"); and UNITE HERE.

decertification procedure rule-making. TTD strongly opposes the Board's proposed rulemaking. The NPRM is inconsistent with the RLA. The proposed rules changes exceed the scope of the Board's narrow jurisdiction under Section 2, Ninth and unreasonably restrict employees' exercise of the right to choose representation under the statute. For all the reasons discussed below, the NMB should reconsider its proposed rulemaking and rescind the NPRM.

I. THE NMB'S CURRENT PROCEDURES ARE BASED UPON THE RLA'S STATUTORY LANGUAGE, WHICH DOES NOT EXPRESSLY PROVIDE FOR A DECERTIFICATION PROCEDURE.

As the federal courts have held, the NMB has a "very circumscribed role" in representation disputes under RLA Section 2, Ninth. *RLEA v. NMB*, 29 F.3d 655, 662 (D.C. Cir. 1994). Congress has given the NMB "very limited authority to investigate representation disputes." *Id.* at 658. "[T]he Board has no freewheeling authority to act as it sees fit with respect to anything denoted a 'representation dispute.'" *Id.* at 662. "While the Board enjoys exceptional latitude when acting within its proper sphere of Section 2, Ninth power, that sphere itself is exceptionally narrow." *Id.*

The NMB's limited sphere in representation matters is defined by RLA Section 2, Ninth, which provides in part:

> 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. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and

> establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. In any such election for which there are 3 or more options (including the option of not being represented by any labor organization) on the ballot and no such option receives a majority of the valid votes cast, the Mediation Board shall arrange for a second election between the options receiving the largest and the second largest number of votes.

45 U.S.C. § 152, Ninth. As the courts have held:

> In short, when read with care, it is apparent that, in enacting Section 2, Ninth, Congress was quite precise in defining what it meant by "[d]isputes as to [the] identity of representatives" – the title of Section 2, Ninth – and in codifying rules governing the resolution of such disputes."

RLEA, 29 F.3d at 665.

Unlike the National Labor Relations Act ("NLRA"), the RLA does not expressly provide a statutory procedure for decertification of a union representative. When Congress enacted the NLRA in 1935, Section 9 set forth a process for selecting a union representative, but the Act did not contain a procedure to rescind that choice through decertification. In 1947, as part of the Taft-Hartley Act amendments, Congress added to section 9(c)(1)(A) to provide that an election petition could be filed:

> . . . by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection [9](a) . . .

29 U.S.C. 159(c)(1)(A); *see also* Janice Bellace, *Union Decertification under the NLRA*, 57 Chicago-Kent L. Rev. 643 (1981).

Congress has never taken similar action with respect to the RLA to add an express procedure for decertification, despite amending the statute several times since Section 2, Ninth was first enacted in 1934. The Board has long recognized the significance of this clear difference in the two statutory schemes. As the Board wrote in its 1981 Annual Report:

> The Railway Labor Act, unlike the National Labor Relations Act, contains no statutory provision for decertification of a labor representative. The Board has always assumed that, because Congress had to amend the National Labor Relations Act in 1947 to provide for a decertification procedure under that Act, that similar legislative action would be required for creation of a similar procedure under the Railway Labor Act.

Forty-Seventh Annual Report at 21. Thus, 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." *Russell v. NMB*, 714 F.2d 1332, 1342 (5th Cir. 1983). More recently, in 2011, the Court of Appeals for the D.C. Circuit explained that "the Railway Labor Act spells out no procedures for … decertification and, for that matter, makes no mention of decertification procedures, much less requires them." *Air Transport Ass'n of America v. National Mediation Board*, 663 F.3d 476, 485 (D.C. Cir. 2011).

Congress most recently amended the RLA in 2012, following the NMB's adoption of the yes/no ballot format. During the Board's rule-making process leading to the adoption of the yes/no ballot, several carrier representatives requested that the Board adopt an express decertification process. The Board denied this request. 75 Fed. Reg. 26062, 26078 (May 11, 2010). Congress too chose not to amend the Act to include an express decertification process as part of the statutory amendments passed in the wake of the yes/no ballot rule-making.

Instead, Congress enacted Section 2, Twelfth of the RLA, setting forth a showing of interest requirement in representation disputes under the statute. That provision states:

> The Mediation Board, upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Mediation Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.

45 U.S.C. § 152, Twelfth. Notably, Congress defined the scope of representation applications filed with the Board as those "requesting that an organization or individual be certified as the representative of any craft or class of employees." This language is consistent with the Board's long-established position that the RLA only provides for applications seeking certification as a representative.

In addition, as part of the 2012 amendments, Congress tasked the Comptroller General to review within 180 days "the processes applied by the Mediation Board to certify or decertify 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." 45 U.S.C. § 165(b). Subsequently, the General Accounting Office ("GAO") obtained permission from Congress to have this statutorily mandated review fulfilled by a comprehensive study conducted by the Congressional Research Service regarding the NLRA, FLRA, and the RLA. *See* GAO letter, GAO-12-835R National Mediation Board (June 27, 2012). In the end, no recommendations for statutory changes were presented to Congress and there have been no further amendments to the RLA.

The NMB is now seeking to do what Congress has not done through amendment of the RLA, that is provide a separate and express procedure for decertification. As the NMB has long held, Section 2, Ninth only places within the Board's jurisdiction representation disputes "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements" of the RLA. Section 2, Twelfth confirms that the scope of representation disputes under the RLA is limited to applications "requesting that an organization or individual be certified as the representative of any craft or class of employees."

Thus, the straw-man process is not some arbitrary or needless procedure adopted by the Board, but rather the correct application of the statutory language delimiting the Board's authority. The NPRM is simply incorrect when it asserts that "[t]here is . . . no statutory basis for the additional requirement of a straw man where employees seek to become unrepresented" and that the process represents "an unjustifiable hurdle." 84 Fed. Reg. at 612, 613. Instead, the process is mandated by the language of the RLA, and fully justified on that basis.

II. THE PROPOSED CHANGE TO THE NMB'S RULES IS UNNECESSARY BECAUSE EMPLOYEES FREELY AND FREQUENTLY ALTER THEIR REPRESENTATION UNDER THE CURRENT RULES.

In the NPRM, the Board seeks to justify its new procedure by claiming that the straw man process is "unnecessarily complex and convoluted." 84 Fed. Reg. at 612. But the Board cites no factual support whatsoever for this characterization. In fact, the evidence shows that employees freely and frequently alter their representation under the current rules. Thus, the Board is seeking to address a problem which does not exist. Moreover, the proposed rule will not simplify the Board's procedures because the straw man option will still exist, as it must under the language of the RLA.

Under the NMB's current procedures employees can effectively decertify an incumbent union. The current rules require that an application be submitted by an organization or individual supported by a 50% showing of interest. Once the showing is made, the Board conducts an election with the following ballot choices: the incumbent union; the applicant organization or individual; a write-in option; and a "no representation" option. If the applicant organization or individual receives a majority of the votes cast, then the Board certifies the applicant, effectively decertifying the incumbent union. Where the applicant is an individual who has publicly indicated that he or she will disavow certification if he or she prevails, this person is commonly referred to as a "straw

man." A named organization can also act as a "straw man," although this is rarely done. If elected, the organization then disavows representation. Additionally, employees may become unrepresented if the "no representation" option prevails in the election.

Employees regularly invoke the NMB's current procedures either to elect a new representative or become unrepresented. The frequency of such applications belies any claim that the Board's current procedures are confusing or unwieldy. Some recent examples illustrate this point. In May 2018, the Board conducted an election among 551 employees at Flight Options/FlexJet in response to an application filed by an individual. In the election, the "no representation" option prevailed, resulting in one of the largest decertification votes in the Board's history. *Flight Options/FlexJet*, 45 NMB 95 (2018). In addition, in February 2018, the NMB conducted an election among 424 employees at Kalitta Air in response to an application from an individual. As a result of the election, employees changed their representative by selecting a different organization through the use of the Board's write-in option. *Kalitta Air*, 45 NMB 21 (2018).

A smaller matter involving the Eastern Illinois Railroad illustrates yet another way in which employees can become unrepresented under the NMB's current processes. In that case, an individual filed a representation application with the NMB. Before the NMB had issued a notice of election, the incumbent union filed a request for the Board to revoke its certification, which was granted. *Eastern Illinois R.R.*, 45 NMB 112 (2018). It is not uncommon for unions to request revocation when faced with an application seeking to initiate an election intended to decertify, essentially acknowledging that the organization lacks majority support on the property. *See, e.g.*, *Newburgh & South Shore R.R.*, 45 NMB 8 (2017); *Stillwater Central R.R.*, 37 NMB 201 (2010). Contrary to what some may believe, labor organizations do not seek to impose themselves on

unwilling employee groups since strength in contract negotiations and grievance administration is ultimately derived from a supportive and engaged membership.[2]

Overall, since 1998, a total of 43 individuals have filed representation applications with the Board, presumably for the purpose of acting in a straw man capacity. In 27 of those matters, the incumbent union representative was effectively decertified, either through certification of the individual or an election resulting in no representative. In addition, since 1998, 51 small unaffiliated organizations have filed representation actions with the Board. In 11 of these matters, the election triggered by the application resulted in no representative being certified. In another 19 such cases, the incumbent union was decertified when the small organization was certified in its place.[3] Attachment A to these comments provides a complete listing of these decertification cases. Thus, the NPRM's claim that the Board's current rules somehow operate as an impediment to decertification is simply not borne out by the facts. Instead, it is common for employees to alter their representation under the Board's current procedures. To the extent that such matters constitute a smaller percentage of the Board's cases than applications seeking to obtain union representation, this is not a reflection of any defect in the Board's processes, but rather a reflection of employees' desire to have representation in the workplace.

[2] Attachment A to these comments provides a complete listing of NMB cases in which an incumbent union has sought to have its own certification revoked.

[3] In some of those cases, the small organization may have acted in the capacity of a straw man, but in other cases the organization may have continued as a representative at least for some time. There is no way to know based on NMB records whether such an organization continues to represent employees, since the NMB's role is limited to issuing the certification, not tracking whether a representative continues to act on behalf of employees post-certification.

Employer groups have repeatedly petitioned the NMB to adopt express decertification procedures. The Board has formally considered adopting such procedures on at least two occasions – in 1987 and again in 2010. After careful consideration (including an extensive fact-finding proceeding in 1987), the NMB has rejected these past petitions explaining that its current procedures are consistent with the RLA and sufficient to ensure employee choice in representation matters. In the 1987 *Chamber of Commerce* proceeding, 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." *Chamber of Commerce*, 14 NMB 347, 356-357 (1987). The Board concluded the high standard of persuasion was not satisfied, finding the proponents of additional decertification procedures "failed to establish that formal decertification rules are essential to the well-ordered management of the Board's representation function" particularly in light of the fact that the Board had at the time "two procedures whereby employees may become unrepresented." *Id.* at 358.

Again in 2010 as part of the rulemaking process leading to the Board's adoption of the yes/no ballot, National Right to Work and several employers asserted that the Board should adopt formal decertification procedures. As in the past, the NMB explained that the RLA, unlike the NLRA, was never amended by Congress to include a specific provision for decertification. 75 Fed. Reg. at 26078. The NMB also found that "the Board's existing election procedures allow employees to rid themselves of a representative." *Id.* The Board further explained that the adoption of the yes/no ballot would actually allow employees to cast a vote in favor of "no union":

> Under the current election procedures, there is no opportunity to vote "no" or against representation entirely. Employees who want to vote "no" must instead abstain from voting. The proposed change will give these employees the opportunity to affirmatively cast a ballot for "no union."

75 Fed. Reg. at 26078-26079. Thus, the Board's adoption of the yes/no ballot provided further justification for rejecting the proposal for a separate decertification procedure.

In proposing to now add decertification procedures, the Board does not claim that any new or different circumstances have arisen since 2010 which have caused the NMB to re-evaluate its most recent conclusion that its current procedures adequately allow for employees to become unrepresented if they so choose. Despite the frequency with which the current procedures are used by employees to alter their representation, the NPRM proclaims that the current process is "unnecessarily complex and convoluted" and imposes an "unjustifiable hurdle for employees." 84 Fed. Reg. at 612. But the Board fails to present any facts to support these characterizations, much less evidence that would tend to show that procedures previously deemed adequate are now no longer sufficient. Instead, the Board appears content to proceed without any empirical showing whatsoever that employees' desires are thwarted in any way by the NMB's current processes.

In the NPRM, the Board also asserts that its aim is to "provide for a straightforward" procedure for decertification. However, the "strawman" process will continue to exist even if the proposed rule is adopted. Section 1, Sixth of the RLA defines a "representative" as "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees to act for it or them." 45 U.S.C. § 151, Sixth. Individuals are entitled to act as a representative under the RLA, even if their ultimate intent is to disavow representation. Therefore, the NMB will be obligated to continue to accept representation applications submitted by individuals even if the new rule is adopted. So, instead of simplifying the Board's processes, the NPRM is simply adding an additional process, while the process which it characterizes as "complex and convoluted" will continue to exist as it must under the language of the RLA.

In fact, if the NPRM is adopted, the Board will have three avenues for employees to become unrepresented, as opposed to only one procedure for employees to obtain representation. Not only does adding an additional procedure increase the complexity of the Board's processes, it also further tilts the system by expanding the means to become unrepresented without any offsetting expansion of procedures to become represented. The NPRM does not acknowledge, much less meaningfully address, this imbalance in the Board's rules.

III. THE NPRM WOULD IMPERMISSIBLY ALLOW NON-PARTIES TO FILE REPRESENTATION APPLICATIONS WITH THE NMB.

The Board's NPRM proposes that current Rule 1203.2 relating to applications for investigation of representation disputes be revised as follows (revisions in italics):

> The applications should show specifically the name or description of the craft of class of employees involved, the name of the invoking organization *or individual seeking decertification*, the name of the organization currently representing the employees, if any, and the estimated number of employees in each craft or class involved. The applications should be signed by the chief executive of the invoking organization, *some* other authorized officer of the organization, *or an individual seeking decertification*.

Compare 84 Fed. Reg. at 613, *with* 29 C.F.R. § 1203.2. Thus, the NPRM would allow "an individual seeking decertification" to file an application for investigation of a representation dispute. The NPRM does not further define or describe "an individual seeking decertification." Under the plain language of the proposed rule, any individual could file an application with the Board provided that the objective is decertification.

The RLA, however, only permits a "party to the dispute" to request an investigation. 45 U.S.C. § 152, Ninth. In *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), the District of Columbia Circuit addressed at length the issue of who is considered a "party" under Section 2, Ninth. The *RLEA* case resulted from the NMB's adoption of merger procedures allowing the Board to investigate a representation matters following a merger

either *sua sponte* or pursuant to a petition from a carrier. The court gave this description of the Board's merger rule-making:

> For more than fifty years following its creation, the Board unvaryingly conducted representation elections only at the behest of employees or their representatives. In 1987, however, with no direction from Congress, the Board decided that existing procedures under Section 2, Ninth were "inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger." *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218, 241 (1987).

RLEA, 29 F.3d at 659. The court struck down the Board's sudden departure from its long-established practice.

The *RLEA* court ruled that the Board lacked jurisdiction to investigate representation matters except in response to an application from a party, stating that "the Board has no threshold jurisdiction to act at all in the absence of a request from the employees involved in the representation dispute." *Id.* at 662.

> The Board's authority is exclusive only with respect to the precise matters delimited by Section 2, Ninth. If employees have not sought an "investigation" under Section 2, Ninth, none can be initiated because the statute limits action to cases initiated by employees.

Id.

Despite the clear holding of the court in *RLEA*, in the current NPRM, the Board proposes to allow any individual seeking decertification to invoke its jurisdiction, without regard to whether the individual is a "party" under Section 2, Ninth. This aspect of the NPRM violates the plain language of the RLA. If the Board proceeds to adopt a new rule, it should expressly provide that only employees or their representatives may submit applications under Section 1203.2.

IV. THE BOARD'S PROPOSED RULE INCREASES THE RISK OF CARRIER INTERFERENCE WITH EMPLOYEE FREE CHOICE IN REPRESENTATION MATTERS.

The NMB's proposed rule opens the door to carrier interference with employee choice in representation matters. 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. The new proposed rule would remove the individual accountability which currently attaches in the straw man process, where the authorization cards and application must be in the name of a specified individual and the named individual appears on the ballot. Under the proposed rule, with no identified individual who can be held accountable throughout the process, carriers will likely be emboldened to interfere in the election process by hiding behind the relative anonymity of the Board's new proposed decertification application.

The RLA strictly forbids 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." 45 U.S.C. § 152, Fourth. Under Section 2, Ninth, Congress also specifically directs the NMB to "insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." 45 U.S.C. § 152, Ninth. Nevertheless, even under the Board's current procedures, there have been instances when carriers have unlawfully supported and directed decertification campaigns, most often by tainting the card collection process.

For example, in a case involving Great Lakes Airlines, the Board investigated allegations that managers distributed authorized cards later used by a strawman applicant seeking decertification and encouraged employees to sign the cards. *Great Lakes Airlines*, 35 NMB 213 (2008). Upon finding that the incumbent union had made a *prima facie* showing of carrier interference, the NMB conducted an extensive investigation. The Board found that the straw man applicant offered inconsistent statements regarding how he obtained the cards used, first asserting that they had been provided by the Board itself, but later claiming that he obtained a sample card

from a rival union website. Ultimately, however, the Board found that the strawman applicant had solicited co-workers to sign blank authorization cards and subsequently filled in his own name only after the cards were signed. The NMB rejected the patently defective cards and dismissed the application.

Similarly, in a case involving Northern Air Cargo ("NAC"), the NMB investigated whether the carrier assisted in the formation of an in-house association and the collection of authorization cards on behalf of the association in an effort to decertify the incumbent union. *Northern Air Cargo*, 29 NMB 1 (2001). After conducting a thorough investigation, the Board found that the carrier "canvassed members of the craft or class to start an association in order to decertify" the incumbent union. *Id.* at 25. The Board also found that the carrier had given material support to the association, "including free access to NAC property, and the use of the NAC bulletin board, in-house mail system and fax machine," as well as covering the cost of mailing the authorization cards in favor of the association to the NMB. *Id.* "[W]hen the facts tend to show that an organization's A-cards were the product of carrier influence, the Board will not take cognizance of the cards for directing an election under 45 U.S.C. § 152, Ninth." *Id.* at 24. Accordingly, the NMB dismissed the carrier-supported application.[4]

Plainly, the Board's statutory mandate is to insure that employee representation matters are decided free from carrier interference. The weakened accountability for decertification applications now proposed by the Board runs counter to that statutory mission. To the extent that

[4] *See also Virgin Atlantic Airways*, 24 NMB 575 (1997) (dismissing application where carrier required employees to attend meetings conducted by in-house association seeking to decertify the incumbent union and supported employee committees associated with applicant); *Southwest Airlines*, 21 NMB 332 (1994) (dismissing application where carrier engaged in discussion and correspondence favoring applicant over the incumbent union and tainting the collection of cards); *Mackey Int'l Airlines*, 5 NMB 220 (1975) (dismissing application because filing organization was "fostered, assisted and dominated by the carrier").

adoption of the proposed rule-making results in increased carrier support for decertification efforts, the NMB will end up devoting more of its limited resources to investigating such matters.

V. THE PROPOSAL FOR A TWO-YEAR BAR ON ELECTION APPLICATIONS FOLLOWING A DECERTIFICATION CONSTITUTES AN UNJUSTIFIABLE RESTRICTION ON EMPLOYEES' FREEDOM OF CHOICE AS GUARANTEED UNDER THE RLA.

In the NPRM, the Board has proposed to apply its current two-year certification bar to cases in which a decertification occurs under the new rules. In this regard, the proposed rule goes well beyond any prior decertification proposals addressed by the Board. Indeed, we are not aware of any other instance in which the Board has previously sought to expand its bar rules. Thus, the NPRM is extraordinary in this regard in seeking to curtail the exercise of workplace democracy. Most significantly, this aspect of the NPRM lacks any rational basis. It is simply an unwarranted restriction on employees' "right to organize and bargain collectively through representatives of their own choosing" as guaranteed under Section 2, Fourth of the RLA. 45 U.S.C. § 152, Fourth.

The Board has long applied a two-year bar on representation applications following the issuance of a certification covering the same craft or class. The rationale for the two-year bar is to give a newly certified representative a two-year period in which to negotiate a new collective bargaining agreement free from the distraction and uncertainty of a challenge to the new representative's certification. The selection of the two-year period was informed by the Board's experience in its mediation capacity, recognizing that collective bargaining under the RLA is often a lengthy process, particularly in the case of a first contract where the parties do not start with any existing terms of agreement. The two-year bar also aids the Board's mediation function, by ensuring a period of stability in which to assist in reaching a first contract. In these circumstances,

there is a solid rationale for imposing a bar limiting employees' exercise of their rights under Section 2, Fourth.

No similar rationale exists with respect to decertification. Obviously, no contract negotiations follow once an employee representative is removed. Therefore, there is no need to provide breathing room for negotiations to occur. Instead, employees simply return to a state of at-will employment, where the employer is free to impose terms and conditions.

Unable to apply its current rationale for the two-year certification bar, the Board asserts instead that:

> Successful decertification, like certification, is a challenging and significant undertaking by employees with a substantial impact on the workplace for both employees and their employer. In the Board's view, the changes in the employee-employer relationship that occur when employees become represented, change representative or become unrepresented require similar treatment.

84 Fed. Reg. at 613. The Board offers this "view" without the benefit of any factual support. Indeed, the Board has no experience in working with employee groups following decertification since its mediation function is limited to contract negotiations between employee representatives and carriers. Therefore, it is unclear how the Board could form any opinion regarding the "challenges" for employees or employers following decertification. In any event, the NPRM offers no evidence to support the finding that returning to at-will employment involves any "substantial undertaking" and we are hard-pressed to see how it does.

The Board's choice to extend the existing certification bar also cuts against the purported rationale for adopting an explicit decertification procedure in the first place. On the one hand, the Board asserts that its new rule is necessary to "fulfill the statutory purpose of 'freedom of association among employees,'" citing to RLA Section 151a(2). 84 Fed. Reg. at 612; *see also id.* at 613 ("It is the NMB's statutory mandate to protect employees' freedom to choose a

representative."). Then, on the other hand, the Board seeks to restrict employees once they have decertified a representative from choosing another representative for a period of two years. This restriction is inconsistent with the Board's statutory mandate and, in fact, calls into question the Board's objectives in seeking to install an explicit decertification process.

CONCLUSION

In conclusion, TTD urges the NMB to reconsider its proposed rulemaking and rescind the NPRM. The proposed rule is contrary to plain statutory language, delimiting the Board's narrow role in representation disputes. Even under the deferential standard applied by the federal courts in reviewing agency rulemaking, acts in contravention of an agency's governing statute cannot survive judicial scrutiny. In addition, the NMB's proposal for a two-year ban on representation applications following decertification under the proposed rule constitutes an egregious departure from the democratic principles underlying the RLA without any legitimate justification. Employees are able to freely alter their representation status under the Board's current rules, and would actually be less able to do so under the NPRM. That is not a sound exercise of the Board's rule-making authority.

Respectfully submitted,

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