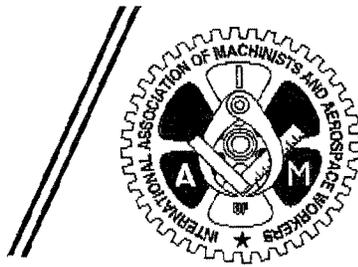


**International  
Association of  
Machinists and  
Aerospace Workers**



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OFFICE OF THE GENERAL VICE PRESIDENT

GL-2 Legal

September 3, 2008

Via Facsimile (202) 692-5085 and e-mail to [legal@nmb.gov](mailto:legal@nmb.gov)

Mary L. Johnson, General Counsel  
National Mediation Board  
1301 K Street, N.W., Suite 250  
Washington, DC 20572

SEP03'08 PM 2:42:53

Dear Ms. Johnson:

The International Association of Machinists & Aerospace Workers (IAM) hereby responds to the National Mediation Board's ("NMB" or "Board") July 15, 2008 and July 31, 2008 Notice of proposed changes to the Representation Manual. 35 NMB 235 (2008); 35 NMB 239 (2008). The IAM also joins in the comments submitted by the Transportation Trades Department (TTD) of the AFL-CIO and the Transportation Communications Union (TCU).

On July 15, 2008, the NMB proposed numerous changes to its current Representation Manual, and further amended those proposals on July 31, 2008. The Board gave the parties until September 3, 2008 to submit comments. On July 25, 2008, the IAM requested an extension until October 14, 2008 to respond to the numerous and substantive proposed changes. This would have been consistent with Board practice since the last time the Board issued changes, it gave the parties 90 days to consider them and submit responses. 34 NMB 71 (2007). Indeed, when the Board changed the procedures to allow for Telephonic voting, it initially provided a 120 day comment period that was further extended. 30 NMB 174 (2003).

Nevertheless, the Board never responded to the IAM's extension request in writing. Rather, it left a voice mail message on August 28, 2008 simply denying the request. The Board does not specify what the urgency is. Indeed, two Board members noted in an August 12, 2008 letter to members of Congress that this is the Board's first changes to the Manual in a number of years. Nevertheless, the Board has refused to give the parties more than a few weeks to consider the proposed changes.

**Proposed Change to Section 3.3:** The IAM strongly opposes this proposal. While we are aware that the Board recently followed this practice, it has not yet been challenged, and the IAM believes it will not withstand scrutiny.

This proposal allows a carrier to manipulate a representation dispute by affecting which unions will be on the ballot – something absolutely forbidden by the Railway Labor Act itself. The RLA, Section 2, Third provides that “Representatives, . . . , shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives.” Furthermore, the RLA and the Board’s own regulations charge the Board with insuring that “the choice of representatives by the employees [is] without interference, influence, or coercion exercised by the carrier.” 45 U.S.C. §152, Ninth and 29 CFR § 1202.4.

Nevertheless, the practice as recently used by carriers, and now the proposed codification of that practice, allows a carrier to decide if it wants to improve the chances for an intervenor to get on the ballot (by waiting until the last possible moment to submit the list so the intervening union can collect more cards) or if it wants to hinder the chances for an intervenor to get on the ballot (by immediately submitting the list and cutting off the opportunity for the intervenor to collect additional cards and to submit its application). For example, a carrier submitting a list of several thousand names on the same day an application is filed with the Board certainly suggests manipulation and interference with how many unions will be on the ballot. Neither the RLA itself, nor the Board’s past practice, has ever intended that the carrier could interfere in elections in such a manner.

Because this practice is now being misused to manipulate elections, the Board should not codify the carriers’ interference. Instead, the Board should maintain control of the election process by determining a reasonable number of days a carrier has to submit the list. Then, it should allow any interested party to submit cards (or an application as appropriate) until 4 p.m. on the day the list is due, even if the carrier elects to submit the list early. In other words, the Board could notify the parties that the list and the cards are due by 4 pm on March 4, for example. If the carrier submits the list early, it will not interfere with the employees’ selection of a representative because the representatives will still have until March 4 to submit cards and/or applications. If the carrier is late, and does not submit the list on time, the Board then could continue its practice that the parties have until the carrier submits the list to supplement their showing. In this way, the carrier is encouraged to comply with the Board’s rule and get the list in on time and all the parties are aware of the fixed date the cards and applications are due. This would comport with the past practice and original intent of the Board’s procedure while not allowing carriers to interfere in the selection of a representative. Providing a fixed date is also consistent with how the Board handles the submission of cards and applications in a single carrier application. NMB Representation Manual Section 19.603 (2007).

**Proposed Change to Section 13.304-2:** The IAM strongly opposes this anti-union change. It is impossible for the Board to discern “that the voter does not intend for that individual to represent the craft or class...” The RLA permits individuals to be representatives. 45 U.S.C. § 152, Ninth. Moreover, the Act expressly states that the representative need not be an employee of the carrier. 45 U.S.C. §152, Third. Therefore, the Board cannot know whether or not an employee would like for that political or “widely known” individual to be his/her representative.

Historically the Board has always accepted a vote for anyone other than the carrier or “self” as a vote for representation. The reason for this is that a person does not have to vote against representation; he or she would merely have to not vote if he or she does not want representation. Logically then, the Board has always determined that if an individual bothers to vote for *some* representation, no matter who the voter selects, the vote is a vote for representation. There is no indication that this has ever posed a problem and the Board has not presented any justification for such a sharp deviation from the Board’s long-standing precedent. The Board should withdraw this proposed change and should continue the long-standing and unproblematic precedent of counting all votes for representation regardless of whom the voter prefers to represent him or her.

**Proposed Addition of Section 19.701:** The IAM strongly opposes this additional section.

A. **Suspect Timing.** First, this proposed addition *only* applies when a carrier whose employees are unrepresented merges with a carrier whose employees are represented. This is a bill of attainder of sorts in that it reflects the precise scenario involved in the already announced Delta-Northwest merger. Labor unions have been preparing for a possible Delta-Northwest merger for months with the understanding and expectation that the existing rules would apply. Now the NMB is seeking to impose a different set of rules to this particular merger in a carefully timed proposal that would be implemented about the same time that Delta and Northwest hope to get approval for their merger.

It is an overstatement to suggest there is virtually no opportunity for the Board to issue changes when major carriers are not engaged in a merger. Indeed, the issues involving **representation** and union certification as a result of the last major airline merger (US Airways/America West) were resolved by the Board in 2006. Delta and Northwest did not announce their intent to merge until the spring of 2008. The Board chose not to revise the **representation** manual during those 1½ years when there were no pending representation matters involving mergers. The timing, coupled with the Board’s rush to push this through without giving the parties adequate time to consider the changes, is suspect and disconcerting for a Board that is supposed to maintain its neutrality above all else.

B. **Illegality of Requiring “More than a Substantial Majority, as Determined by the Board.”** In any event, the NMB is without jurisdiction to make this proposed addition. The RLA expressly provides “[t]he **majority** of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.” 45 U.S.C. Section 152, Fourth (emphasis added). Nothing in the RLA gives the NMB the authority to amend the “majority” standard. The NMB’s imposition of “more than a substantial majority, as determined by the Board,” standard is an unsustainable arrogation of power not conferred by Congress and is a gross violation of the RLA. See Railway Labor Executives’ Association v. NMB, 29 F.3d 655 (D.C. Cir. 1994). It is also arbitrary and capricious in that “more than a substantial majority” is not defined, nor do we know how that will be “determined by the Board,” or if it will change from case to case as this Board or any future Board sees fit.

Requiring “more than a substantial majority, as determined by the Board” to extend a union’s certification is also a significant deviation from the Board’s past practice. For decades

the Board has used the language “comparable” or “not comparable” when determining whether to extend certifications. It has used this language when both carriers were represented and when one merging carrier is unrepresented. By deliberately electing not to use this language, the Board is signaling a deviation from past precedent. At a minimum, a future Board could interpret this language as exacting a higher bar than has ever previously existed.

Further, the NMB’s current Representation Manual is clear that an organization or representative is certified in an election if a simple majority of the employees participate in the election for representation. NMB Representation Manual Section 13.304-1. Importantly, if there are two or more unions competing, the victorious union will be the one with the majority of votes *cast*, which is often *less* than a majority of all eligible employees, so long as the total votes for representation are over 50%. Raising the bar to “more than a substantial majority” for employees to keep representation they have had for decades is incongruous with the simple majority participation standard used in selecting a union in the first place.

The suggestion by two Board members in a letter to members of Congress that the Board intends this rule to also apply when employees are represented on both sides is at odds with decades of precedent of extending the certification whenever one union has a majority and the other union either lacks a sufficient showing of interest or declines to seek an election. See, US Airways/America West Airlines, 33 NMB 191 (2006)(TWU had showing of interest, but when it withdrew, NMB found size not comparable and extended IAM certification).

In both the Federal Regulations and repeatedly in the representation Manual, the Board is clear that it will *only* hold an election if a union has at least a 35% showing of interest. 29 C.F.R. §1206.2(b); Representation Manual 3.601; Representation Manual §§19.601-602. The suggestion that the Board will now require an election even when one union represents a majority of employees and there is no competing union seeking an election with at least a 35% showing of interest violates the Regulations, the Manual and past precedent. The only effect of such a change is to make it significantly more difficult for employees to maintain their representation after a merger. The Board should withdraw Section 19.701.

C. Irrationality of Not Allowing Authorization Cards to Extend Certifications. Prior to this proposed addition, the NMB would have permitted a labor organization to demonstrate its majority status by relying on its certification on the one affected carrier and obtaining authorization cards from employees on the other affected carrier(s) to meet the majority requirement. In other words, if a Union represented 40% of the employees in the newly merged craft or class, it could get cards from another 10% plus 1 and *if the carrier agreed in writing*, the Union could be certified. The current proposal precludes such a certification.

Contrary to Chairman Van de Water and Member Dougherty’s predetermination in their August 12 letter, this proposal could very much impact the proposed Delta/Northwest merger. There are several crafts and classes where, once combined, the Northwest represented employees will make up a significant, but less than a majority, portion of the new craft or class. Thus, as the NMB’s procedures exist today, it is possible that the affected Union could seek certification by relying on its Northwest certification and the requisite number of authorization cards from Delta employees in that craft or class and an agreement by the newly merged carrier. However, if this

proposed change is put in place and upheld, it will be impossible for those Unions to obtain certification in that manner, even if the newly merged carrier wanted to agree. And, as the Board is aware, active campaigns are underway to organize currently unrepresented flight attendants, fleet service employees, public contact employees and others at Delta. Thus, this proposed addition would directly impact a Delta/Northwest merger.

The Board's July 31, 2008 amendment does not alleviate this problem, to the contrary, it only reinforces the dilemma. The amendment merely states that nothing precludes the use of Manual Section 7.0. By its very terms, Section 7.0 only applies when employees are "unrepresented." Further, even after bothering to issue a revision, the Board left in the language that cards "*may not be used toward getting a certification extended.*" Basic statutory construction holds that all the language must have some meaning. It must be concluded, therefore, that the Board intended that this language have some meaning if it left it in, even after revising the language.

The only way to read these two provisions together is that the Board seeks to allow a union to obtain representation of an unrepresented craft or class by a check of authorization cards, but employees who have been represented by a union for decades cannot maintain that representation by a check of authorization cards and its existing certification. Clearly no carrier will agree to extend the certification of a union based on cards if the Board's own Manual forbids the use of authorization cards to extend certification. If the Board's position is, as Chairman Van de Water and Member Dougherty advised members of Congress in their August 12, 2008 letter, that it is open to extending certifications based on authorization cards and carrier agreement, it should withdraw this contradictory and confusing language.

**Public Hearing:** The IAM respectfully requests that the Board hold a public hearing on these proposed changes before going forward. The Board has proposed many substantive revisions and additions in a hurried manner. These changes will have a significant impact on representation as already suggested by numerous members of Congress. Before the Board undertakes such significant changes that will curtail employees' rights to representation, it should hold a public hearing so that all may have adequate opportunity to address these matters.

Sincerely,

IAM&AW LEGAL DEPARTMENT

By:

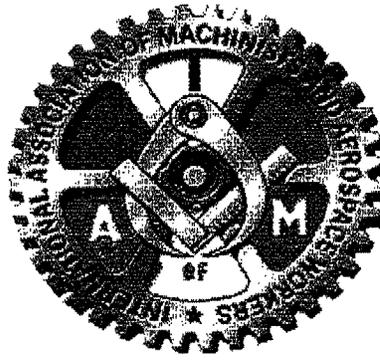


Carla M. Siegel

ASSOCIATE GENERAL COUNSEL

CMS/pt

cc: Roach, GVP  
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Brickner, AC



**INTERNATIONAL ASSOCIATION OF MACHINISTS  
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**LEGAL DEPARTMENT**

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**Fax #: 202-692-5085**

**Pages: 6**

**From: Carla M. Siegel, Associate General Counsel**

**Subject: IAM's Response to NMB's Proposed Changes to Representation Manual**

**COMMENTS:**

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**TO REPORT A PROBLEM WITH THIS TRANSMISSION, CONTACT: Patricia Tettimer**

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EMAILED COPY TO FOLLOW: YES  X  NO