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August 28, 2008

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SEP08'08 4-10:30:35

Re: Comments of IBT Rail Conference to NMB's Proposed Revisions to Its Representation Manual

Dear Ms. Johnson:

On behalf of the IBT Rail Conference, comprised of the Brotherhood of Locomotive Engineers and Trainmen and the Brotherhood of Maintenance of Way Employees, who represent 70,000 men and women employed in the railroad industry, I am submitting the following comments concerning the Board's proposed revisions to its Representation Manual.

Section 2.4 Eligibility List

The Board has proposed to revise Section 2.4 with the addition of the following language:

The carrier's failure to provide a substantially accurate list of potential eligible voters may be considered interference with the NMB's election process and therefore grounds for setting aside the election.

The Rail Conference supports the addition of this language to the Manual as it will clarify the obligation of carriers in providing eligibility lists to the Board. It is appropriate to place carriers on notice of their duty to ensure that all affected employees in the unit are identified at the outset of the representation case. We believe the rule should be read to preclude overinclusiveness as well as underinclusiveness. The Rail Conference also believes that this requirement of accuracy should run both to the carrier's

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obligation to identify eligible individuals in the craft or class and to accurately identify classifications within the craft or class. Finally, this "substantially accurate" standard should be applied to the carrier's obligation to provide an address list for eligible voters since the accuracy of that list is essential if eligible employees are to have a meaningful opportunity to participate in the election process.

Section 3.3 Acceptance of additional authorizations/Deadline for intervening

The Board proposes adding the following language to Section 3.3:

An applicant or intervenor may present the Investigator with additional authorizations up until 4 p.m., Eastern Time, on the day the Investigator receives the applicable list and signature samples. **The delivery of an applicable list and signature samples ends the opportunity for the applicant to supplement its authorization cards.**

The Investigator will not accept applications or additional authorization cards from intervenors after 4 p.m., Eastern Time, on the day an applicable list of potential eligible voters and signature samples are delivered.

We read these changes as seeking to clarify the deadline for submission of additional authorization cards and applications to intervene. But the current language of the Representation Manual fails to clearly establish the status of intervenors. We recommend the Board first establish the standing of intervenors under Section 1.2 of the Manual by adding a subsection that reads, "An organization or individual may intervene upon a 35 percent showing of interest following the submission of an application." Having addressed the standing of intervenors under Section 1.2, the Board may then revise Section 3.3 to address only additional authorizations (as it does now). The second sentence of Section 3.3 could add "or intervenor" after "applicant"; and the third sentence could be deleted.

These changes would make clear the status of intervenors under the Manual, as well as the filing deadlines for supplementing a showing of interest.

Section 8.2 Challenges and objections

The Board proposes to revise Section 8.2 by adding:

same job titles, etc. should be listed together. All challenges or objections **will be resolved by** substantive evidence. **Examples of substantive evidence include, but are not limited to: official carrier records; payroll statements; human resources forms; and, sworn declarations attesting to specific facts. When considering eligibility of employees and personnel matters, substantial weight will be given to the carrier's evidence as it maintains the official records relating to benefits, salary, payroll records, and job descriptions. Unsupported allegations will not be considered.** Questions or issues concerning craft or

The Rail Conference opposes the suggested language to the extent it purports to grant "substantial weight" to the records of a carrier. Granting a presumption in favor of a nonparty is inappropriate and possibly contrary to law. Further, we do not understand the meaning of the language to the extent it asserts that a carrier "maintains the official records relating to benefits, salary, payroll records and job descriptions." Official records of whom? Organizations similarly maintain records in the course of their business (for example, in the recent representation matter involving the mechanics and related employees of United Airlines, the Board considered the IBT's TITAN system records as official records.) There is no reason to grant a nonparty's business records greater weight than those of a party. There is also no reasonable basis for granting a nonparty's records greater weight than direct evidence from an employee pertaining to that employee's eligibility.

At the least, the NMB should require carriers to demonstrate reasonable efforts to maintain the currency and accuracy of their records. And in the case when a carrier alleges an employee is employed by another subsidiary within a holding company structure, the carrier should carry a substantial burden of demonstrating the employee's change of employer was a deliberate act on the part of the employee and not simply a bureaucratic reshuffling of payroll records. Moreover, any alleged transfer of employees between corporate subsidiaries after the laboratory conditions attach should establish a presumption that the employees were transferred to deny to them the opportunity to participate in the dispute; thereby interfering in their self-organization rights under the Act.

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Section 9.2 Eligibility

The Board proposes to add the following language to Section 9.2:

All individuals working regularly **and continuously** in the craft or class on and after the cut-off date are eligible to vote in an NMB representation election. Employees may not vote in more than one election at the same time.

A trainee will be considered eligible if the Carrier provides substantive evidence that the individual is on the payroll, receives benefits, accrues seniority, and has performed work in the craft or class prior to the cut-off date. In the absence of demonstrated evidence of performance of work subject to the direction of the Carrier, accrual of seniority and receipt of pay and benefits will not be determinative of eligibility. Carriers should identify any trainees upon submission of the List of Potential Eligible Voters.

The Board does not explain its intention behind the use of the word "continuously." Where seasonal employees are in question, the Board has in prior cases decided eligibility based on an expectation of reemployment. Since nonunion employees are "at-will" (and may technically have no expectation of reemployment under a strict reading of at-will employment), the Board's proposed requirement could have the effect of disenfranchising employees from voting in the representation election if the criteria for expectation of reemployment are not carefully established.

The Board has not identified what criteria it will apply in determining whether such expectation of reemployment exists. For example, will it use fact-based criteria based on the actual practices of the employer or will it allow the employer to simply assert that no employee has an expectation of reemployment because the employees are at-will? This latter approach would be inappropriate. If a fact-based inquiry is used, there is the question of what standard is required to demonstrate an expectation of reemployment (e.g., a percentage of the workforce must be reemployed from year to year or that the individual in question must have been reemployed in the past.)

As to the requirement for trainees to have performed work in the craft or class, the Board does not indicate whether it intends to apply a uniform definition in both the rail and airline industries. We recommend, for the railroad industry, the Board establish an eligibility requirement that

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an employee be engaged in productive work in the craft or class under the rates of pay, rules and working conditions governing the craft or class.

Section 9.205 Leaves of Absence

The Board's suggested revision adds the following to Section 9.205:

Employees on authorized leaves of absence including military leave, leave for labor organization activities, or authorized sick leave **are eligible if they retain an employee-employer relationship and have a reasonable expectation of returning to work.** Employees receiving disability payments are eligible if they retain an employee-employer relationship and have a reasonable expectation of returning to work. Employees working in another craft or class, working for the carrier in an official capacity, or working for another carrier are ineligible.

For a craft or class already covered by a collective agreement, leaves of absence are established either by CBA or by statute (e.g., FMLA, USERRA, or state law.) The role of a leave of absence in the nonunion environment, however, is limited to statutory leaves of absence and any LoAs established by employer handbooks. The latter element opens the potential for employer abuse; a carrier could unilaterally change the reemployment rights of employees on LoA upon learning of an organizing campaign in an effort to expand the group of eligible voters to defeat a vote in favor of organization.

The Board does not identify its suggested criteria for establishing a "reasonable expectation of returning to work." For unionized groups, the Board has taken the position that if a collective bargaining agreement permits an indefinite right to recall, then employees on furlough or LoA remain eligible. Applying such a deferential rule however, is inappropriate for LoAs established unilaterally by an employer.

We believe that the Board should not presume eligibility of those on leave of absence where such LoA is established by an employer, rather than by law or collective bargaining agreement. To the extent the Board considers the eligibility of employees on a leave of absence under an employer handbook, it should not recognize such leaves if they are of longer than 12-months duration. Further, the NMB should not grant deference to the language of employer handbooks regarding the reemployment rights of employees on leave of absence, but should require employers to show by historic practice that employees on LoA retain reemployment rights. Finally, the Board should not consider changes to

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recall or reemployment rights made by an employer during the laboratory period (i.e., after it learns of an organizing effort.)

Section 19.701

The Board proposes to revise Section 19.701 by adding the following:

Where there is a certified representative on one of the affected carriers but no certified representative on the other(s), the Board will exercise its discretion and extend the certification only where there is more than a substantial majority, as determined by the Board. Authorization cards may only be used to supplement the showing of interest necessary to trigger an election; they may not be used towards getting a certification extended.

This proposed revision applies where one carrier to a merger is nonunion in the craft or class. The Rail Conference first notes that there is no basis under Section 2, Ninth of the Act for distinguishing between represented and unrepresented employees in the question of representation. The Act refers generically to "employees" under Section 2, Ninth, a term defined in Section 1, in relevant part, to mean "every person in the service of a carrier." Put simply, the Act does not permit the Board to establish differing standards for the certification of representatives for represented and unrepresented employees.

The standard proposed by the Board is itself unsound. The phrase "more than a substantial majority" does not establish any objective basis for determining the number of employees required to support representation; representatives and employees would have no way of knowing what threshold applied in a given case. This standard is contrary to Section 2, Ninth's requirement of "a majority"—historically interpreted to mean 50 percent plus one of craft or class employees in favor of representation—since it implicitly assumes a demonstration of majority status that is nonetheless considered inadequate for certification because it is not "more than a substantial majority." Even apart from the imprecision of the term "substantial majority", Section 2, Ninth of the Act does not permit the Board to establish a requirement for certification different from that prescribed by the Act; it charges the Board only to investigate the choice of representative of the majority of employees in the craft or class. Section 2, Fourth is similarly clear, "*The majority* of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

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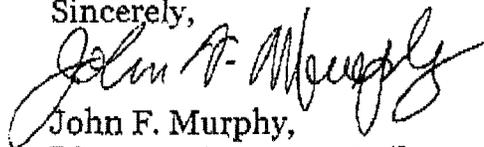
As the Board cannot contravene the Act in establishing rules for its Representation Manual (reflected in the District of Columbia Circuit's ruling in *Railway Labor Exec. Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), nullifying the Board's original merger procedures), the Board cannot establish differing standards for represented and unrepresented employees, when the Act makes no such distinction. It also may not establish a greater than majority requirement for certification in the Representation Manual contrary to Sections 2, Fourth and Ninth's express language.

Further, Section 2, Ninth only permits a person seeking to represent the craft or class to initiate a representation dispute, as made clear in the *RLEA* case. The Board only has authority to investigate the status of a representative after a dispute has been initiated. The statute nowhere permits the Board to *sua sponte* repudiate a certification previously issued. The Board's proposed change would effectively permit the Board to investigate and repudiate a valid certification even though a majority of employees in the combined craft or class have determined to be represented. It may also permit carriers to repudiate the majority status of a representative. It would put the industry in the untenable position it occupied before the Board's original merger procedures in 1987.

The IBT Rail Conference believes that conformity to the Act requires the Board to adopt a uniform rule for represented and unrepresented employees for the determination of representation questions in merger situations. The NMB should maintain its current (and historically-applied) rule that where a labor organization is the certified representative for a sufficient number of employees to constitute a majority of the combined craft or class, and no party files an application for intervention to represent the combined craft or class within the permitted period for intervention, the NMB will certify the majority union.

Thank you for your consideration of these comments.

Sincerely,



John F. Murphy,
Director, Teamsters Rail Conference

cc: E. Rodzwick, Brotherhood of Locomotive Engineers and Trainmen
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