



BEFORE THE NATIONAL MEDIATION BOARD

Representation Election Procedure

Docket No. C-6964

COMMENTS OF THE TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

On behalf of the Transportation Trades Department, AFL-CIO (TTD) and our 32 affiliated unions¹, we want to express our support for the National Mediation Board's (NMB or the Board) proposed revisions in 29 CFR Parts 1202 and 1206 to reflect contemplated changes in the Board's representation election procedure. 74 Fed. Reg. 56750, 56754 (Nov. 3, 2009).

Specifically, the Board proposes that in secret ballot representation elections conducted by the NMB, the choice of collective bargaining representation will be determined by the majority of valid ballots cast by the eligible employee voters. 74 Fed. Reg. at 56750, 56751-2, 56754. Instead of presuming that all employees who fail to cast a ballot oppose representation, the Board will now allow all eligible voters a fair and equal opportunity to cast a deliberate vote that *registers their own choice* for ("yes") or against ("no") collective bargaining representation. 74 Fed. Reg. at 56751-2. As the notice explains:

¹ TTD is the transportation umbrella organization of the AFL-CIO and our member unions represent thousands of workers covered under the RLA. Attached at 1 is a complete list of TTD's affiliated unions.

Transportation Trades Department, AFL-CIO

888 16th Street, NW • Suite 650 • Washington, DC 20006 • tel: 202.628.9262 • fax: 202.628.0391 • www.ttd.org
Edward Wytkind, President • Patricia Friend, Secretary-Treasurer

The Board's primary duty in representation disputes is to determine the clear, un-coerced choice of the affected employees and the Board believes that this duty can be better fulfilled by modifying its election procedures to rely on the choice of the majority of valid ballots cast in the election. *This process will ensure that each employee vote, whether for or against representation, will be regarded with equal weight. The Board will no longer substitute its opinion for that of the employee and register the lack of a vote as a "no" vote.*

74 Fed. Reg. at 56752 (emphasis added). This proposed change would afford employees voting in NMB representation elections the same ballot choices that are available in secret ballot representation elections conducted by other labor agencies, such as the National Labor Relations Board ("NLRB"), and would align the NMB's standard with the familiar democratic majority-vote standard prevailing in federal, state and local political elections throughout the nation. 74 Fed. Reg. at 56751, 56752.

As the Board has noted, the Supreme Court and other federal courts have consistently emphasized that the Railway Labor Act ("RLA" or "Act") gives the NMB clear authority and broad discretion to decide the procedures it will follow and the form of ballot to use in resolving representation questions – including discretion to use the majority-vote standard and "yes"/ "no" ballot now proposed by the Board. The Board's original use of a different standard admittedly relied on no legal analysis or precedents and instead was justified as an administrative convenience. The Board's subsequent explanations for retaining that standard do not withstand scrutiny. In any event, whatever administrative and logistical considerations may have prompted the Board's choice seventy years ago no longer pertain. Under current circumstances, there is no legitimate justification for biasing NMB elections against those workers who desire union representation by counting all non-participants as "no" votes, and there is no arguable injury or

unfairness in providing all eligible employees a full, fair and equal opportunity to vote “yes,” vote “no,” or abstain entirely.

For all the reasons discussed below, and at the Board’s public meeting, and those set forth in the NMB’s formal notice of proposed rulemaking, the TTD supports this proposal and urges the Board’s prompt adoption of final rules implementing the “yes”/ “no” form of secret ballot together with the majority-vote standard for deciding NMB representation elections.²

DISCUSSION

When conducting representation elections among a craft or class of railway or airline employees, the Board’s current practice is generally to certify a bargaining representative only if a majority of eligible voters actually cast ballots for a labor organization. The ballot ordinarily used by the Board lists only the name(s) of the labor organization(s) seeking certification as collective bargaining representative; that ballot does not give voters a choice to register a “no union” vote. Instead, employees who oppose union representation are instructed not to cast a ballot, i.e. to do nothing. The result of this anomalous scheme is that all eligible employees who do not vote are conclusively presumed to oppose representation, regardless of the many and varied reasons why an employee may fail to vote in an election. In other words, every eligible employee begins as a “no” vote unless he or she affirmatively casts a ballot; anyone who does not vote is counted as a “no” vote; and no one has the opportunity to abstain from voting in the election.

The NMB proposes to change this practice by using a straightforward “yes”/ “no” ballot and determining the outcome of its elections based on the majority of valid votes cast, just as in

other union representation elections and political elections conducted throughout the United States. Under the Board's proposal, all eligible voters will have a chance to register their own deliberate choice for or against representation, and to have that actual choice counted. The Board will not presume the intent of employees who fail to vote, whether they are undecided, indifferent, forgetful or unable to participate for whatever reason. All votes will have equal weight, and the NMB election process will no longer embody a structural bias against representation.

As the Board explained in its notice of proposed rulemaking, the NMB's current policy was originally adopted as an administrative convenience, not because of any mandate by Congress in the RLA. 74 Fed. Reg. at 56751. Indeed, the Board itself acknowledged early on that it acted "*not on the basis of legal opinion and precedents*, but on what seemed to the Board best from an administration point of view." 1 NMB Ann. Rep. 19 (1942), quoted in 74 Fed. Reg. at 56751 (emphasis added). Nothing in the governing statute or its legislative history requires a secret ballot vote, or any other form of election at all, much less the anomalous process currently used by the Board. Even Chairman Dougherty's dissent from the proposed rulemaking recognizes that the current NMB ballot and election process is merely a long-standing Board "tradition." 74 Fed. Reg. at 56753.

Against this background, we demonstrate below that the Board has clear statutory authority and discretion to adopt the proposed change in its election process; that the Board has

² The TTD relies on, reiterates and incorporates herein, both expressly and by reference, the written statements submitted to the rulemaking record on December 7, 2009 by Edward Wytkind, TTD's President, and by attorney Carmen Parcelli on behalf of the TTD.

