

Comments of Allegiant Air, LLC
Regarding the National Mediation Board's Proposed
Changes in Decertification Procedures

Docket No. C-7198
84 Fed. Reg. 612 (Jan. 31, 2019)

April 1, 2019

Summary of Position

Allegiant Air, LLC ("Allegiant") respectfully submits its comments regarding the Notice of Proposed Rulemaking ("NPRM") in Docket No. C-7198, 84 Fed. Reg. 612 (Jan. 31, 2019). In the NPRM, the National Mediation Board (the "NMB") proposes to simplify the process by which employees may seek decertification of their representative under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

The NMB's adoption of a direct decertification process is long overdue. The NMB's current "straw man" decertification procedure is unnecessarily complicated, and fails to properly recognize the right of employees to decide that they no longer wish to be represented by their union. Allegiant, therefore, wholeheartedly supports the NMB's contemplated change to the decertification procedures, and urges it to finalize and adopt the proposed rule in its entirety.

Background Regarding Allegiant

Allegiant focuses on linking travelers in small cities to world-class leisure destinations, offering industry-low fares on our all-jet fleet. Allegiant began with one aircraft and one route in 1999. It has since grown to more than 75 aircraft and 400 routes across the country.

Allegiant has experienced several union organizing drives throughout its history. Allegiant's pilots, flight attendants, mechanics and dispatchers are represented by labor unions. As is discussed further below, Allegiant also has seen the NMB's "straw man" decertification process in action; on two occasions, groups of Allegiant employees have instituted efforts to decertify their representatives.

**The NMB's Proposal is Long Overdue and Finally
Places the Right of Employees to Decertify Their Union on
Equal Footing with the Right To Unionize**

Employees Have The Undisputed Right To Decertify Under the RLA

The RLA "forbid[s] any limitation upon freedom of association among employees." 45 U.S.C. § 151a(2). It also provides "for the complete independence of ... employees in the matter of self-organization." 45 U.S.C. § 151a(3). The Supreme Court has recognized that the statute guarantees employees the right to choose not to be represented by a union. *Bhd. of Ry. and S.S. Clerks v. Assoc. for the Benefit of Non-Contract Emps. ("ABNE")*, 380 U.S. 650, 670 (1965). See also *Int'l Bhd. of Teamsters v. Bhd. of Railway, Airline and Steamship Clerks*, 402 F.2d 196,

202 (D.C. Cir. 1968) (*ABNE* held that “employees under the Railway Labor Act were to have the option of rejecting collective representation entirely”). That right to be union-free does not evaporate because the employees previously have chosen to be represented. As the United States Court of Appeals for the District of Columbia Circuit has observed, “it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation ... especially taking into account the inevitability of substantial turnover of personnel within the unit.” *Id.*

The NMB’s Longstanding Hostility Towards Decertification

Despite the clear rule stated in the cases above, the NMB has in the past demonstrated an unwillingness to place the right of employees to decertify their representatives on the same footing as the right to certify a representative.

In *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), the NMB refused to process an individual’s application to investigate a representation dispute, arguing that he was “seeking a back door method of decertification, for which the Act does not provide.” *Id.* at 1336. The employees seeking decertification contended that the NMB’s decision violated their “right to choose whether or not they wish to be collectively represented,” noting that none of them had worked for their employer when the union was certified. *Id.* at 1337. The court agreed, holding that “employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well.” *Id.* at 1343. The court further observed that the “complete independence” that employees have under the RLA regarding self-organization “is inconsistent with forced representation, most especially when that forced representation is at odds with employees’ will and desires.” 714 F.2d at 1343.

The petitioner in *Russell* followed the NMB’s “straw man” procedure by petitioning to “represent” the employees to obtain decertification. Remarkably, at oral argument in the case, the NMB’s attorney suggested that this was inappropriate, and that the employee should have *directly* petitioned for an election between the existing representation and “no union” – even though no such procedure existed. The court recognized that “this suggestion is nothing more than playing games with the plaintiffs and with this court.” 714 F.2d at 1342.

Despite the position taken by its attorney, the NMB thereafter refused to adopt the direct decertification process it had described to the court as the “preferred” procedure. In 1985, just two years after the *Russell* decision, the Chamber of Commerce of the United States petitioned the NMB to amend its rules to provide for such a direct decertification procedure. The NMB rejected that request. *In the Matter of the Petitions of the Chamber of Commerce of the United States*, 14 NMB 347 (1987). Likewise, when the NMB decided in 2010 to change its rules regarding representation elections, it declined to adopt a direct decertification process, though many commenters urged it to do so as a logical corollary to the other changes it was making. *See* 75 Fed. Reg. 26062, 26078 (May 11, 2010).

There is No Justification for Continuing the NMB's Convuluted "Straw Man" Decertification Procedure

The NMB's current "straw man" process is confusing, complicated, and stacks the deck against those trying to exercise their statutory right to decertify in several ways. The NMB is right to discard it in favor of a direct decertification procedure.

The problems created by the "straw man" process start from the beginning.

First, an employee has to be brave enough to stand up to the union by becoming the "straw man" in the first instance. That is not an easy thing to do; as the "face" of the decertification effort, the straw man inevitably faces backlash from pro-union employees, particularly in these days where union elections are discussed and debated on social media. Ronald Doig, an Allegiant Dispatcher, has submitted comments on the NMB describing the retaliation that he encountered when he served as the "straw man" in a successful effort to decertify the Dispatchers' union in 2015. He states in his comments that it is "almost as if the process is set up to be a deterrent to decertification efforts by making a target out of the Straw Man." Allegiant shares Mr. Doig's concerns.

Second, the straw man has to collect authorization cards from the employees stating that they wish the straw man to "represent" them, even though he has no intention of doing so. That is not an easy concept for employees to grasp, further complicating their efforts to exercise their right to choose not to be represented by a union.

The issues continue in the election process itself. Under current policy, both the straw man and "no representative" are options on the ballot. That is confusing to employees who support decertification, as it is unclear which of those two options they should choose to express that preference. That uncertainty could lead to the votes for decertification being split between the straw man and "no representative"; because those votes are not aggregated, that helps the incumbent.

This concern about the votes for decertification being split is real, not hypothetical, as Allegiant has seen first-hand. In July 2015, Allegiant flight attendants, through a straw man, petitioned the NMB to decertify their representative, the Transport Workers Union of America ("TWU"). The TWU prevailed in the election over the "no representative" option by just 16 votes (289-273) out of 751 eligible voters. One other employee voted for the straw man, rather than "no representative"; under the NMB's procedures, that vote did not count for decertification. *See Allegiant Air*, 43 NMB 84 (Feb. 26, 2016). The same phenomenon has occurred in other "straw man" elections. *See, e.g., Endeavor Air, Inc.*, 46 NMB 29 (Feb. 15, 2019); *Flight Options, LLC/FlexJet, LLC*, 45 NMB 95 (May 31, 2018).

The confusion over how employees should vote in a "straw man" election if they support decertification could change the outcome of an election. NMB elections can be decided by a single vote, something Allegiant also has experienced. In February 2015, Mr. Doig petitioned the NMB to decertify the dispatchers' representative. Out of 17 eligible voters, 7 voted for the incumbent and 7 for "no representative." Because the IBT had not received a majority of the votes cast, the NMB decertified the representative. *See Allegiant Air*, 42 NMB 124 (May 6, 2015). The outcome of that election was dictated by a single vote.

The NMB's Proposal to Adopt a Direct Decertification Process
Is Sensible and Should be Adopted in its Entirety

The direct decertification process proposed by the NMB eliminates the unnecessary fiction of the “straw man” representative and allows employees to express their right to decertify in a clear and straightforward manner. No longer will an employee have to face threats and retaliation for being the “straw man” running against the union. No longer will employees be asked to sign authorization cards to have someone “represent” them when their goal is to become unrepresented. And, most critically, no longer will employees have to guess how to vote in order to express their preference for decertification.

Unions undoubtedly will oppose the NMB's efforts to simplify the decertification process. There is no principled argument in support of that position, particularly given that a virtually identical decertification process has been used for decades under the NLRA. Indeed, when the unions successfully lobbied the NMB in 2010 to change its rules so that elections are now determined by a majority of the votes cast, they relied heavily on the fact that the same method is used to determine the outcome of elections under the NLRA, and led to a more accurate determination of the representation wishes of the employees. The same is true of the NMB's proposed direct decertification process.

The NMB also proposes to apply its two-year certification bar in the decertification context. Allegiant supports that proposal as well.

As noted in the NPRM, decertification – like certification – is a “challenging and significant undertaking by employees with a substantial impact on the workplace for both employees and their employer.” 84 Fed. Reg. at 613. Thus, the rationale underlying the two-year bar – to allow the ramifications of the decision on the employee-employer relationship to play out – applies equally once employees choose decertification. As Mr. Doig has accurately pointed out in his comments, after the Dispatchers voted to decertify, they “never really got the chance to fully enjoy the benefits of a direct relationship with our company” – something that would have been avoided if the same two-year bar had applied.

Indeed, Allegiant believes that this reasoning would support adoption of a single, uniform bar following *all* representation elections, regardless of their outcome. Every representation election has a substantial impact on the workplace, whether employees choose to be represented or to retain their direct relationship with the employer. The parties should be given the same period of repose following the election regardless of its outcome.

CONCLUSION

For the reasons stated in this comment, Allegiant supports the NMB's proposed adoption of a direct decertification procedure. It is a sensible rule that eliminates an anachronistic and unnecessarily complicated step in the decertification process. Allegiant applauds the NMB's effort to place the employees' right to choose self-representation on even footing with their right to choose union representation.

Respectfully submitted,



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