



NATIONAL MEDIATION BOARD
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43 NMB No. 1
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TO: All Carriers and Labor Organizations
FROM: Mary L. Johnson *mj*, General Counsel
RE: NMB Representation Manual Comment Period

On June 16, 2015, the National Mediation Board (Board or NMB) announced some proposed modifications and one proposed policy change to Sections 1.02, 2.3, 2.4, 3.1, 3.2, 3.6, 3.601, 7.0, 8.1, 10.2, 10.202, 13.206, 14.1, 14.206, 16.0, and 17.0 of Board's Representation Manual (Manual). *Comment Period for Proposed Changes to the National Mediation Board's Representation Manual*, 42 NMB 157 (2015). The announcement provided that the Board would accept comments regarding the proposed changes during a 30-day comment period, concluding July 16, 2015.

The Board received four responses to its request for comments from the following participants: 1) a joint comment from the International Association of Machinists and Aerospace Workers (IAM), the Transportation Communications Union/IAM (TCU/IAM), and the Transport Workers Union of America (TWU) (collectively the Organizations); 2) a joint comment from the National Railway Labor Conference (NRLC) and Airlines for America (A4A); 3) the U.S. Chamber of Commerce (Chamber); and 4) the National Right to Work Legal Defense Foundation, Inc. (Foundation).

The below discussion will provide the proposed language as outlined in the Board's June 16, 2015 Notice; the comments from participants on the relevant section; and a discussion and revision if appropriate. The other Sections outlined in the June 16, 2015 Notice will be incorporated into the final Manual as proposed. The final revised Manual will be effective October 19, 2015 and will be available at the Board's website at <http://www.nmb.gov/services/representation/>.

A. Manual Section 2.4, List of Potential Eligible Voters and Signature Samples

1. *Proposed Language*

The carrier must serve one (1) copy of a system-wide alphabetized list of potential eligible voters on the Investigator and serve one (1) copy on each participant's representative. Even if a participant is contesting single transportation status (see Section 19.0), they are required to produce a list in conformity with the section. The NMB requires the carrier to provide a copy of the alphabetized list in Microsoft Excel format to the NMB only. The carrier should send a separate alphabetized list in PDF to each of the participants.

The list of potential eligible voters must include all individuals in the craft or class with an employee-employer relationship as of the cut-off date. The list must identify each employee's full name, the job title, and the duty station or location. The carrier must also submit an attestation by a carrier officer (e.g., vice president of labor relations or equivalent) of the accuracy of the list to the best of his or her knowledge. **A carrier's failure to provide a substantially accurate eligibility list may be considered interference with the Board's election process and constitute grounds for setting aside an election.**

The carrier must also provide the NMB with one (1) hard copy of legible, alphabetized signature samples for each employee on the list. Examples of acceptable signature samples include tax-withholding forms and employment and insurance applications. The alphabetized signature samples must be in the same order as the names on the list of potential eligible voters.

2. Comments on Manual Section 2.4

a. The NRLC and A4A

The NRLC and A4A jointly submitted comments rejecting the Board's proposed policy change in Manual Section 2.4. They oppose the new language as it: 1) imposes a vague new standard on carriers; 2) proposes an inappropriate remedy for failure to meet that standard; and 3) fails to place any corresponding obligation on applicants.

First, NRLC and A4A note that the proposed language in Section 2.4 is unnecessary as the Manual already requires a carrier official to submit an attestation of the accuracy of the eligibility list. The requirement of the attestation, in their view, creates "sufficient incentive" for carriers to submit accurate lists. Further, they state that there have been no recent cases raising concerns with the quality of the eligibility list produced by a carrier.

NRLC and A4A are also concerned that this new language places an additional requirement on carriers beyond the current practice. "By singling out the carriers' eligibility list obligation and adding an undefined new accuracy standard, the Board's proposal would create confusion and additional burdens for carriers," with the only remedy of noncompliance being to overturn an election. They note that the current system of correcting the eligibility list through challenges and status changes has been workable and efficient.

NRLC and A4A comment that in light of the recent case involving irregular authorization cards which was referred to the Department of Justice, they are surprised that the Board has chosen to create new obligations for carriers but not organizations. In their words, "there is simply no basis for increasing the burden on carriers without considering a commensurate obligation for applicants." NRLC and A4A encourage the Board to reject the proposed policy change. If not, they ask the Board to provide guidance to carriers on the new standard and impose similar accountability on organizations for the accuracy and authenticity of authorization cards.

b. The U.S. Chamber of Commerce

The Chamber strongly opposes the proposed policy change in Manual Section 2.4 as "unnecessary, vague, and unduly burdensome." It also endorses the joint comments submitted by the NRLC and A4A.

The Chamber rejects the proposed addition of language to Manual Section 2.4 for a number of reasons. For one, the Chamber contends that recent changes made to Section 2.4, requiring a carrier attestation as to the accuracy of the list, provide sufficient safeguards to ensure voter accuracy. Secondly, it contends there is no rationale for the proposed change since there is no evidence of “widespread inaccuracies” in voter eligibility lists in representation cases. In contrast, the Chamber notes that there have been several recent representation matters involving inaccuracies with authorization cards. Third, the Chamber states that the “substantially accurate” standard is undefined and not referenced anywhere else in the Manual and will leave carriers unsure of what is required of them. Finally, the Chamber contends that the proposed penalty in Manual Section 2.4 of setting aside an election is “particularly draconian” considering the vagueness of the standard.

The Chamber believes that the current process of resolving inaccuracies in the voter list through the challenges and objections process is both efficient and cost-effective for the participants and the NMB. Further, the NMB’s proposal applies a *per se* remedy without addressing whether the alleged inaccuracies with the list actually interfered with employee free choice or were determinative in the election. In sum, the Chamber believes “this is an inappropriate remedy to apply to an undefined standard,” and the proposed language in Manual Section 2.4 should be rejected.

3. Discussion

First and foremost, the Board values the comments received during this process as input from our participants is an important part of the Board’s collaborative approach to labor relations under the Railway Labor Act. The Board recognizes the legitimate concerns raised by participants on the proposed language in Manual Section 2.4.

The Board holds the integrity of its election process of paramount importance since it lies at the heart of the NMB’s statutory mission. Manual Section 2.4 outlines a critical part of the election process, requiring that carriers send a correct eligibility list and signature samples for the employees in the applied-for craft or class. The addition of the carrier official’s attestation provision in Manual Section 2.4 has improved the election system and resulted in the production of better eligibility lists. The additional language stating that “failure to provide a substantially accurate eligibility list ‘may’ be considered interference” is simply a reminder of the statutory discretion the Board has always had in representation matters. In addition, the production of an electronic

eligibility list is not an unduly burdensome request on carriers, as they already have the information readily available for compliance with many other federal regulations.

Commenters stated that there should be new obligations for organizations as well as carriers. Organizations are already under an obligation to produce accurate authorization cards, in terms of a valid signature and date. In fact, in the proposed revisions to the Manual, the Board has further clarified that its process is to check each authorization card against the provided signature sample, for date and handwriting – and implicit in this is the requirement that organizations produce accurate authorization cards.

The Board will take a reasonable approach when applying Manual Section 2.4, as it does with all of its determinations. The new language does not create a “per se” remedy of a finding of election interference and/or overturning an election. The Board will make a determination of what is a “substantially accurate” list on a case by case basis. As such, the proposed language in Manual Section 2.4 is now effective and will appear in the Board’s revised Manual.

B. Manual Section 3.1, Form and Content of Authorizations

1. Proposed Language

Each authorization must be signed and dated in the employee's own handwriting. See NMB Rule §1206.3 (29 CFR §1206.3). Although not required, it is recommended that the authorization include the employee’s job title and employee number. Petitions are not accepted.

Authorizations submitted to the NMB must be in alphabetical order on a system-wide basis. Failure to provide authorization cards in alphabetical order on a system-wide basis may result in the return of authorizations to the submitter. Duplicate authorizations should not be submitted.

The language on authorization cards must be unambiguous and the NMB must be able to determine the employee’s intent **to seek an election or be represented by the applicant(s) or intervenor(s). Authorizations should not contain unnecessary or**

superfluous language that could create ambiguity or confusion for the signer. The following are examples of acceptable language used on authorizations submitted to the NMB:

a) **“I, the undersigned, an employee of (Carrier) authorize the (Organization) to apply to the National Mediation Board to hold a representation election.”**

b) **“I want the (Organization) to represent me at (Carrier).”**

c) **“I, the undersigned, hereby authorize the (Organization) to represent me for purposes of collective bargaining and to negotiate all agreements as to hours of labor, wages, and other conditions of employment.”**

In an accretion application, the authorization cards must be unambiguous and state clearly the sole purpose of the card. **See language in b) and c) above.** The NMB will not accept authorization cards requesting a representation election as support for accretion applications or certification by card check. Cards which both request an election and authorize the applicant(s) to represent the employees will also not be accepted as support for accretion applications or certification by card check.

2. Comments on Manual Section 3.1

a. IAM, TCU/IAM, and TWU

With respect to Manual Section 3.1, the Organizations disagree with the Board’s language that dual-purpose authorization cards are invalid. The Organizations contend that dual-purpose authorization cards, appropriate for either certification by card check or for a representation election, are neither ambiguous nor confusing; rather, they “provide two alternative paths to representation in the same authorization card.”

The Organizations also seek clarification as to which of three provided examples of authorization card language are appropriate for requesting an election, certification by card check, or accretion.

b. NRLC and A4A

NRLC and A4A request that the Board amend the final paragraph of Manual Section 3.1 as follows: “In an accretion application **or an application for certification on the basis of check of authorizations cards**, the cards must be unambiguous and state clearly the purpose of the card.”

c. The National Right to Work Legal Defense Foundation, Inc.

The Foundation supports the proposed change in Manual Section 3.1, as it believes that authorization cards should use simple and understandable language.

3. Discussion

The Board appreciates the constructive comments from participants on Manual Section 3.1. The Board has revised this section, the additional language is underlined in bold, to further clarify what language is appropriate for requesting an election, certification by card check or accretion. The Board will continue to allow authorization cards that seek representation through an election or through other methods. The language below is now effective and will appear in the Board’s revised Manual.

Each authorization must be signed and dated in the employee's own handwriting. See NMB Rule §1206.3 (29 CFR §1206.3). Although not required, it is recommended that the authorization include the employee’s job title and employee number. Petitions are not accepted.

Authorizations submitted to the NMB must be in alphabetical order on a system-wide basis. Failure to provide authorization cards in alphabetical order on a system-wide basis may result in the return of authorizations to the submitter. Duplicate authorizations should not be submitted.

The language on authorization cards must be unambiguous and the NMB must be able to determine the employee’s intent **to seek an election or be represented by the applicant(s) or intervenor(s).** **Authorizations should not contain unnecessary or**

superfluous language that could create ambiguity or confusion for the signer. The following are examples of acceptable language used on authorizations submitted to the NMB:

a) "I, the undersigned, an employee of (Carrier) authorize the (Organization) to apply to the National Mediation Board to hold a representation election."

b) "I want the (Organization) to represent me at (Carrier)."

c) "I, the undersigned, hereby authorize the (Organization) to represent me for purposes of collective bargaining and to negotiate all agreements as to hours of labor, wages, and other conditions of employment."

d) "I, the undersigned, hereby authorize the (Organization) to represent me at (Carrier), or to apply to the National Mediation Board to hold a representation election."

All of the above examples are appropriate for requesting a representation election. In an accretion application, or an application for certification by card check, the authorization cards must be unambiguous and state clearly the sole purpose of the card. **See language in b) and c) above.** The NMB will not accept authorization cards requesting a representation election as support for accretion applications or certification by card check. Cards which both request an election and authorize the applicant(s) to represent the employees will also not be accepted as support for accretion applications or certification by card check.

C. Manual Section 3.6, Check of Alphabetized Authorizations

1. Proposed Language

The Investigator compares the list of potential eligible voters with the names of the employees who signed authorizations to determine if a sufficient percentage of authorizations have been submitted to require checking the validity of the authorizations. **The employee signature on**

every authorization card is checked against the signature sample provided by the carrier, and the Investigator also checks that the date is valid. If there are insufficient authorizations submitted, the Investigator may, in his/her discretion, allow adjustments to the list prior to checking the validity of the individual authorizations.

2. Comments on Manual Section 3.6

a. NRLC and A4A

With respect to Manual Section 3.6, A4A and NRLC suggest adding “and in the employee’s own handwriting” to end of the Board’s proposed language.

3. Discussion

The Board will implement the suggested language by A4A and NRLC, underlined below, as it further clarifies the requirements for valid authorization cards and is stated in the Board’s rules. See 29 CFR § 1206.3 (“Authorizations must be signed and dated in the employee’s own handwriting or witnessed mark.”). The below language is now effective and will appear in the Board’s revised Manual.

The Investigator compares the list of potential eligible voters with the names of the employees who signed authorizations to determine if a sufficient percentage of authorizations have been submitted to require checking the validity of the authorizations. **The employee signature on every authorization card is checked against the signature sample provided by the carrier, and the Investigator also checks that the date is valid and in the employee’s own handwriting.** If there are insufficient authorizations submitted, the Investigator may, in his/her discretion, allow adjustments to the list prior to checking the validity of the individual authorizations.

D. Manual Section 3.601, Percentage of Authorizations Required

1. Proposed Language

Applications must be supported by valid authorizations from at least 50 percent of individuals

in the craft or class. **Accretion applications must be supported by at least 50% of the employees covered by the application.** See also NMB Rule § 1206.2 (29 CFR § 1206.2).

2. Comments Received on Manual Section 3.601

a. IAM, TCU/IAM, and TWU

With respect to Manual Section 3.601, the Organizations' comments are directed at the requirement of an at least 50 percent showing of interest in accretion elections. The Organizations state that the Board has never previously required that any specific percentage of authorizations accompany an accretion application, and further that this new authorization requirement is "directly contrary" to the Board's policy against fragmenting crafts or classes.

b. The National Right to Work Legal Defense Foundation, Inc.

The Foundation supports the proposed revisions to Manual Section 3.601, as the requirement of at least 50 percent of valid authorizations in accretion applications better promotes employee free choice.

3. Discussion

The requirement of at least 50 percent of valid authorizations in accretion applications is not "new" as the Organizations' state; instead it was mandated statutorily with passage of the FAA Modernization and Reform Act of 2012. See 45 U.S.C. 152, Section 2, Twelfth, *Showing of interest for representation elections* ("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.") This 50 percent requirement applies to all applications for representation, including in cases of accretion. See also *Frontier Airlines*, 41 NMB 202, 220 (2014).

Accordingly, the proposed language in Manual Section 3.601 is now effective and will appear in the Board's revised Manual.

E. Manual Section 7.0, Disposition of Dispute by Check of Authorizations

1. Proposed Language

If the employees involved in the craft or class are unrepresented and only the applicant organization is involved, certification on the basis of a check of authorizations may be appropriate provided the participants agree in writing. **The NMB will not accept authorization cards requesting a representation election as support for certification by card check.**

2. Comments on Manual Section 7.0

a. The National Right to Work Legal Defense Foundation, Inc.

The Foundation supports the Board's proposed changes in Manual Section 7, as it believes this change promotes honesty and ameliorates one of the problems associated with certification by card check.

3. Discussion

The proposed language in Manual Section 7.0 is now final and will appear in the revised Manual.