UNITED STATES OF AMERICA
BEFORE THE
NATIONAL MEDIATION BOARD

NOTICE OF PROPOSED RULEMAKING	)	
29 CFR Parts 1206	)	FR Doc. No. 2012-11770
	)	NMB Docket No. C-7034

COMMENTS OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

The International Brotherhood of Teamsters submits its comments in response to the National Mediation Board's Notice of Proposed Rulemaking (NPRM) on behalf of the more than 150,000 Teamsters who work under the Railway Labor Act in both the rail and aviation industries, and are represented by the Brotherhood of Locomotive Engineers and Trainmen, the Brotherhood of Maintenance of Way Employes Division and the IBT Airline Division.

The IBT directs its comments primarily to the question asked by the Board whether the 50 percent showing of interest requirement mandated by Congress under the FAA Reauthorization Bill in applications for representation elections involving unorganized employees ought to be applied also under the Board's "Merger Policy" set forth in Section 19 of its Representation Manual. The IBT believes that the Board is not required by the recent statute to impose the increased showing of interest requirement in the merger context. We also do not believe that it is appropriate to apply that showing of interest requirement in the merger context. We will later state our position

concerning the Board's proposed amendments to its rules to conform those rules to the RLA amendment passed by Congress.

I.

The Board should not apply the showing of interest requirement of Section 2, Twelfth to its merger procedures since the statutory language does not require it and imposing such a higher showing of interest would impermissibly bring into question existing certifications of representatives

As noted in its hearing statement submitted on June 19, 2012, the IBT does not believe it is either necessary or appropriate for the Board to apply the 50 percent showing of interest requirement established by Congress under Section 2, Twelfth for unorganized employee groups to a representation election occurring under its merger procedures. The FAA Reauthorization Bill does not by its terms mandate such a result. As the analysis presented by the Transportation Trades Department of the AFL-CIO establishes, the statute only amends the RLA to require that the NMB apply a showing of interest of not less than 50 percent of valid authorizations when an organization or individual files "an application requesting that it be certified as the representative of any craft or class of employees." This does not occur under the Board's merger procedures. Rather, a representative files under Section 19.3 of the Representation Manual a request for the Board to investigate whether a single transportation system exists among two or more carriers.

This investigation unquestionably occurs under Section 2, Ninth of the RLA, as the District of Columbia Circuit Court concluded in *RLEA v. NMB. Railway Labor Executives' Ass'n. v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc),

cert. denied, 514 U.S. 1032 (1995) ("*RLEA*"). But this application does not request that the Board certify the applicant as representative of a craft or class. For example, any existing certifications issued by the Board on the pretransaction carriers continue in existence until acted upon by the Board under Section 19.7. Instead, the Board investigates to determine whether, due to a corporate transaction, the systems of formerly separate carriers have been integrated in such a manner to create a "single carrier" and a combined craft or class of employees. The mere filing of an application does not require the Board to conclude that a single transportation system exists—and the Board has concluded in some cases in response to such an application that a single system does not exist. It is only after the Board first determines that a single transportation system exists that it will proceed to consider representation issues.[1] So the express language contained in Section 2, Twelfth does not cover an application for investigation of the existence of a single transportation system. The IBT agrees with the TTD that the best construction of the statutory language and the legislative history surrounding adoption of Section 2, Twelfth supports a conclusion that that the provision has no application in the merger context.

In addition to this statutory analysis of Section 2, Twelfth, application of a 50 percent showing of interest under the Board's merger procedures would impermissibly conflict with Section 2, Ninth's mandate that only employees or their representatives

[1] Unlike where a representative files an application to be certified as representative, which may occur at a time of the putative representative's choosing up to 12 months from the date of signing of the supporting authorization cards, the NMB requires a party's showing of interest following a single carrier determination to be submitted to the Board within two weeks of the determination. This reflects that the representation aspects of a single transportation system investigation constitute another phase in a proceeding that has already been initiated before the Board on different grounds than those contemplated by Section 2, Twelfth.

may initiate a representation dispute. It also would conflict with the Board's established purpose in promulgating its merger rules of ensuring that the mere occurrence of a corporate transaction does not affect its certifications. As noted already, and as the TTD and TWU have also noted, Section 2, Ninth reserves only to employees and their representatives the ability to initiate a representation dispute under the RLA. The United States Court of Appeals for the District of Columbia Circuit held in *RLEA* that the plain language of §2 Ninth, as well as its legislative history, prohibits a carrier, as well as the NMB acting *sua sponte*, from instigating representation investigations and NMB determinations in operational merger situations "in order to further the Board's purported mandate of certifying only unions which represent the 'majority of a system-wide class of employees.'" *RLEA*, 29 F.3d at 660, 666-68 (quoting the NMB's "Merger Procedures," 17 NMB 44, 46 (1989).) The court of appeals noted, "the entire structure of Section 2, Ninth makes it plain that representation investigations and determinations are conducted only at the behest *and for the specific protection of 'employees.'*" *Id*. at 665 (emphasis added). In short, the court of appeals in *RLEA* held that the Board's interpretation of the Act to require system-wide representation did not alter the requirement that only employees or their representatives may initiate a representation dispute.

As the Supreme Court noted almost 75 years ago in *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937), Section 2, Ninth was intended to "hit at the evil" of disputes over representation arising from "the denial by railway management of the authority of representatives chosen by their employees." 300 U.S. at 545-46. The NMB itself sought in its initial promulgation of merger procedures in *Trans World*

Airlines/Ozark Airlines, 14 NMB 218 (1987), to respond to a practice of carriers unilaterally acting to terminate certifications following merger transactions by refusing to recognize the representatives of employees at the acquired carrier. 14 NMB at 233. The Board observed that "the relative balance of rights and duties established by the Railway Labor Act between organizations and carriers has been upset and has resulted in misunderstanding." *Id.* The Board went on to state

> carriers have interpreted the Republic case to give them independent authority to extinguish existing certifications held by organizations on the acquired carriers; to choose between recognition of organizations on its property or the acquired carrier; and to choose whether or not employees on the acquired carrier will be represented. On the other hand, the organizations on the acquired carrier, some of which may have had a long and successful bargaining history with the carrier, have been eliminated from the process leading up to these decisions.

Id. It concluded, "Absent Board approval, neither the present certifications at Ozark nor any other certification may terminate by action of a carrier." As noted, the *RLEA* decision established the Board also lacked authority *sua sponte* to terminate a representative's certification.

But raising the showing of interest under the Board's merger procedures to 50 percent for an organization to either initiate such an investigation, or to later participate in a representation election following the Board's determination of the existence of a single transportation system craft or class, would have the effect of permitting corporate transactions to affect existing certifications and repudiate certified representatives. In most every transaction, only one representative will exceed the 50 percent threshold.[2]

[2] This was true even in the highly-unusual proceedings involving Republic Airways Holdings, Inc.'s acquisition of three different carriers. In those proceedings, only the

The smaller representative would then have to rely on obtaining cards from employees of the larger craft or class to participate in an election. But the smaller representative has an existing certification. Conditioning, in every conceivable transaction, the continuance of a representative's certification upon its obtaining support among employees for whom it is *not* the certified representative necessarily brings into question that existing certification.

The Board has already established, in its discretion under the Act, a thirty-five percent showing of interest for initiating a representation dispute or participating in a subsequent election following determination of a single transportation system. But that lower showing of interest does not necessarily bring into question the certification of the representative of the smaller craft or class because it does not foreordain a single representative as satisfying the showing of interest as would imposing the 50 percent showing of interest threshold. Nor does it foreordain that the certification of the smaller representative may only continue in existence if that representative obtains support among employees for which it is not the certified representative.

II.

Applying the fifty percent showing of interest requirement in the merger setting is administratively impractical and would lead to results contrary to Congress's intent in the Section 2, Twelfth amendment

It also does not make practical sense to impose a 50 percent showing of interest requirement under the Board's merger procedures. The NMB establishes two points

---

International Brotherhood of Teamsters exceeded the fifty percent threshold. *See, e.g., In re Republic Airlines, Inc.*, 38 NMB 138 (2011).

under its Merger Procedures where a showing of interest applies. It first requires that an application asking the Board to investigate whether a single carrier exists come only from a representative with at least a 35 percent showing of interest. This threshold is not mandated by Section 2, Ninth, although the requirement that the application come from a representative is required by the Act. The Board imposes such a requirement in the interest of stability in labor relations—so that existing certifications will not be prematurely affected—and to efficiently use the Board's resources. At the same time, this 35 percent showing is not so high as to effectively give the power to invoke the Board's investigation procedures to a single representative. Raising that application threshold to 50 percent, however, would in every conceivable case, limit the ability to invoke the Board's procedures to just one representative—the representative of the larger carrier's employees. Further, if a multi-carrier transaction occurred, and no one carrier was substantially larger than the other carriers, there is the potential that *no* representative could exceed 50 percent of a putative combined craft or class under Section 19.3, and so no one could invoke the Board's merger procedures. This could enable affected carriers to withdraw recognition from all organizations with impunity because the Board could not act without first receiving an application supported by the requisite showing of interest.

Only if it determines that a single transportation system exists does the Board then address representation issues surrounding the single system. But no further application is submitted by any existing representative. Because existing certifications continue in effect at the involved carriers, and the Board already possesses jurisdiction over the case, it is not necessary for the Board to have yet another application from a

representative to turn to representation questions in considering the scope of the consolidated craft or class and its designated representative. Rather, the Board reviews the relative size of the pretransaction crafts or classes represented by the certified representatives to determine if an election is required. Only if the represented groups of the involved representatives are disproportionate will the Board extend the certification of one existing representative to the entire single system without election. Otherwise, the Board requires a necessary showing of interest of 35 percent for an existing representative, or an intervenor, to appear on a ballot in an election arising from the single carrier determination.

Increasing this showing of interest requirement at the subsequent representation phase of a single carrier proceeding would be just as impractical as at the initial application stage. Currently, the Board will conduct an election among employees unless the relative size of the involved premerger employee groups is so disproportionate that the Board believes an election is not required. That determination is made upon the 35 percent showing of interest. But increasing that threshold to 50 percent would mean that the Board could not measure the relative size of the involved premerger crafts or classes—only one representative could have more than a 50 percent showing of interest—except in the highly unlikely event that another representative is able to obtain a substantial number of valid authorizations from among the employees at the larger carrier. The Board would therefore extend a certification if a representative had more than a 50 percent showing. That would result in *fewer* elections in merger situations—a result that Congress surely did not intend to create through its recent amendment to the RLA. Or, alternatively, the Board would have to conduct an election

in every proceeding regardless of how disproportionate are the relative sizes of the involved employee groups. That would again present an outcome contrary to the Act by permitting the mere occurrence of a transaction to raise a representation dispute. It would also effectively repudiate the Board's long-standing policy that existing certifications remain in effect until acted upon by the Board and undermine the stability of labor relations by permitting even the smallest transaction to result in a representation election. And finally it would increase demand for the Board's investigative resources. We do not believe Congress intended any of these results by its amendment of the Act to address a different question of representation.

III.

The Board's proposed amendments to conform its Rules to Section 2, Twelfth are adequate

Concerning the Board's proposed modification to § 1206.1 of its Rules, governing runoff elections, the Board's proposal appears generally to implement Congress' directive concerning runoff elections. The Board's proposed modification to § 1206.2, establishing the percentage of valid authorizations required to support an application requesting certification as representative, also accurately implements Congress's directive.

Concerning the Board's proposed amendment to § 1206.5 of its Rules, the IBT agrees that the Board should apply the increased showing of interest requirement to applications of intervenors in representation elections. This change is consistent with Congress' mandate that a party applying to be certified as representative must submit

valid authorizations from at least 50 percent of the craft or class. Requiring an intervenor to make a similar showing is consistent with the statutory goal of maintaining stability in labor relations, as well as being consistent with Congress' directive. As other commenters have also noted, the Board has long required intervenors to make the same showing of interest among unorganized employees as that made by the applicant. To permit another party to intervene on a reduced showing of interest would conflict with long-established Board practice on this subject. It would also enable another organization or individual to "ride the coattails" of the real party in interest in the representation election. This would complicate the election, and potentially create confusion among employees, without the intervenor's having made the same rigorous showing of support among interested employees.

From an administrative standpoint, permitting intervention under a lesser standard would necessarily generate more multiple-party elections that, in turn, would potentially increase the number of runoff elections held by the Board. Moreover, adding parties to an election increases the likelihood of post-election protests that both introduce uncertainty to the final resolution of the dispute and affect the speed by which that resolution occurs. Additional demands on the Board's resources are inevitable. The Board's representation election rules are designed to permit the Board to promptly, accurately and finally resolve representation disputes. Maintaining the Board's uniform application of the showing of interest requirement among the parties to disputes, including intervenors, is necessary to achieve that goal.

IV.

Suggested additional rules and procedures actions

The IBT agrees with the TTD and TWU that the Board should incorporate its merger policy into its Rules under 29 CFR Part 1206. We also join in the TTD's suggestions for enhancing the Board's rules for conducting its representation investigations to enable the Board to more promptly and accurately resolve such disputes. Finally, whether or not the Board incorporates its merger policy under its Part 1206 regulations, the IBT suggests that the Board revise the rule presently contained under Section 19.3 of the Representation Manual to reflect that an NMB-1 application is not utilized by a representative requesting an investigation into the existence of a single transportation system.

Respectfully submitted,

/s/ John F. Murphy
John F. Murphy

International Vice-President and Director, Teamster Rail Conference