NATIONAL RAILWAY LABOR CONFERENCE

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August 6, 2012

Mary Johnson
General Counsel
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1301 K Street, N.W., Suite 250 – East
Washington, D.C. 20005

Re: NMB Docket No. C-7034: Comments of the National Railway Labor Conference

Dear Ms. Johnson:

In its Notice of Proposed Rulemaking (NPRM), 77 Fed. Reg. 28536 (May 15, 2012) and 77 Fed. Reg. 33701 (June 7, 2012), the National Mediation Board ("NMB" or "Board") proposed changes to its Representation Manual to incorporate amendments to the Railway Labor Act ("RLA") made by the Federal Aviation Administration Modernization and Reform Act of 2012 ("2012 Act.") The following comments of the National Railway Labor Conference ("NRLC")[1] respond to the Board's request for comments "regarding the effect of the amendments on the Board's policies and procedures with respect to representation disputes in mergers." 77 Fed. Reg. 28536.

In its NPRM, the Board observes that the new statutory language is "silent" with respect to mergers. 77 Fed. Reg. 28537. The NRLC submits, however, that a more accurate characterization of the amendment is that it is unqualified – the amendment requires *any* application for representation to be supported by a showing of interest from at least 50 percent of the employees in the craft or class. As discussed below, there is no exception for mergers. Thus, in accordance with the plain language of the statute, the NMB must apply the new 50 percent showing of interest requirement to any application for representation arising from a merger. Moreover, the NMB must revise its existing policies and rules that contravene this statutory mandate, include those that facilitate fractional representation and minority unions to persist following carrier mergers.

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[1] The NRLC represents the nation's major freight railroads, including BNSF Railway, CSX Transportation, Grand Trunk Corporation (Canadian National Railway), The Kansas City Southern Railway, Norfolk Southern Railway, Soo Line Railroad (Canadian Pacific Railway), and Union Pacific Railroad, as well as many smaller railroads. Together, these railroads employ more than 170,000 employees, including the vast majority of all unionized freight rail employees in the United States.

I. The New "50 Percent Showing of Interest" Requirement Applies to Representation Disputes Arising from Mergers

The 2012 amendments to the RLA circumscribed the NMB's previously broad discretion under Section 2, Ninth to resolve representation disputes. Section 1003 of the 2012 Act, now codified at 45 U.S.C. § 152, Twelfth, provides:

> "Section 3. Bargaining Representative Certification.
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> Section 2 of the Railway Labor Act (45 U.S.C. 152) is amended by adding at the end the following:
>
> 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."

There is nothing in this amendment to suggest representation applications arising from mergers are not covered by the new showing of interest requirement. As the NMB itself has recognized, its authority to resolve such a dispute arises from Section 2, Ninth, 45 U.S. C. § 152, Ninth, the same statutory source cited by the Board for its authority to resolve any representation dispute. *See, e.g.*, NMB Representation Manual, Sections 1.01-1, 19.2. Accordingly, when Congress circumscribed the Board's authority in "Bargaining Representation Certification," it necessarily did so in all circumstances in which the NMB certifies a bargaining representative, including in the merger context.

II. The Legislative History Does Not Alter the Clear Statutory Language Providing That All Applications for Representation Are Covered by the New Showing of Interest Requirement

In the June 19, 2012 public hearing on the NPRM, labor unions asserted that the legislative history of the 2012 Amendment, as reflected in floor statements by three Senators, shows that Congress did not intend the Amendment's 50 percent showing of interest requirement to apply to applications for representation arising from mergers. Putting aside the issue of whether these statements can be construed to reflect congressional intent,[2] it is well-settled that legislative history cannot alter or trump the plain language of a statute. *Exxon Mobil Corp. v. Allapattah*

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[2] The statements cited by the unions are from a colloquy among three legislators who were on one side of the debate over the amendment, and thus it is questionable, at best, whether such statements may be viewed as establishing congressional intent regarding the 2012 Amendment. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) ("[P]artisan statements [in the legislative history] . . . cannot plausibly be read as reflecting any general agreement [by Congress]."); *Bath Iron Works Corp. v. Director, Office of Workers' Comp. Program*, 506 U.S. 153, 166 (1993) ("[W]e give no weight to a single reference by a single Senator during floor debate in the Senate.")

Servs., 545 U.S. 546, 568 (2005). As discussed above, the 2012 Act is clear and unqualified, and therefore plainly requires that *any* representation application must be supported by a showing of interest from at least 50 percent of the employees in the craft or class.

III. The Board Should Eliminate Existing Merger-Related Policies and Procedures That Are Inconsistent with the 2012 Amendment, Including Rule 19.7 of its Representation Manual

Because the 2012 Amendment clearly applies to merger-related representation applications, the Board should revise any of its current merger policies and procedures that are inconsistent with the Amendment, including Rule 19.7 of the Board's Representation Manual. This Rule provides that in the case of mergers "[e]xisting certifications remain in effect until the NMB issues a new certification or dismissal." As reflected in the comments filed on behalf of the airline industry by Airlines for America ("A4A"), this Rule facilitates the perpetuation of minority unions following a merger – an outcome wholly inconsistent with the 2012 Amendment – and must be changed. The NRLC agrees with and supports A4A's proposal.

The nature of the minority union problem is explained in detail in the comments of the air and rail industries to the NMB in 2001 when the Board first proposed what is now Rule 19.7. A copy of those comments is attached. Briefly stated, the current rule leads to situations wherein a union represents only a fraction of a craft or class on the merged carriers' combined system, contrary to the RLA's requirement of craft-wide, system-wide representation. *See* 45 U.S.C. §§ 152, Fourth; 152, Ninth; *see also, e.g., LSG Lufthansa Services*, 25 NMB 96, 1098 (1997) (reconfirming long-standing Board policy of system-wide, craft-wide representation). Such fragmentation of representation often tends to undercut the synergies that the merger was intended to produce.

The new Section 152, Twelfth, by requiring a 50 percent showing of interest in all representation cases, reinforces congressional intent that any representative must have the support of a majority of the craft or class. Accordingly, the NMB should revise Rule 19.7 to ensure that any existing certification remains in place following a merger only so long as the incumbent union continues to represent the relevant craft on a system-wide basis.

Conclusion

For the foregoing reasons, the NRLC submits that the Board's rules should adopt the 50 percent showing of interest requirement for all representation proceedings, including those arising from mergers. In addition, the NRLC agrees with the suggestion of A4A that the Board seek public comments on revisions to Rule 19.7 in order to address the fractional representation issue in merger cases.

Respectfully submitted,

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January 17, 2001

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National Mediation Board
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Subject: Proposed Revisions of NMB Representation Manual

Dear Mr. Crable:

These comments are submitted on behalf of the National Railway Labor Conference (NRLC) and the Airline Industrial Relations Conference (AirCon) in response to the Board's Notice of December 8, 2000, inviting public comments on proposed new section 19 and revised section 6.601 of the Board's Representation Manual. These comments are limited to proposed rule 19.602, which provides for survival of existing certifications after a merger until the Board issues a new certification or a dismissal.

Unlike other provisions in the proposed new rules, which appear to be procedural, proposed rule 19.602 is substantive: it would predetermine, to the extent stated in the provision, the effect of past and future mergers on "existing" certifications. It does so in a way that is contrary to the Railway Labor Act, as construed by this Board without deviation for over six decades in cases holding that the Board will certify a representative only on a system-wide basis; and it does so in the absence of any dispute among employees as to their representative, a jurisdictional prerequisite to any ruling by the Board on representation under § 2 Ninth of the Act. As such, proposed rule 19.602 would be vulnerable to a judicial challenge. Accordingly, as discussed more thoroughly below, the NRLC and AirCon urge the Board to withdraw proposed rule 19.602 and leave determinations of the effect of particular mergers on pre-existing certifications to case-by-case adjudication on the facts and circumstances of concrete cases brought by employee organizations or individuals under § 2 Ninth.

Invalidity on Merits

Proposed rule 19.602 is contrary to §§ 2 Fourth and 2 Ninth of the Railway Labor Act, under which representatives are certified only when they represent an entire craft or class of employees on a carrier, i.e., a single transportation system.

Under the proposed new rule, a certification would survive a merger and the disappearance of the carrier to which it applied even after the merging carriers become a single transportation system and each craft on the merging carriers becomes part of a larger craft or class. The certification would continue in effect indefinitely, unless a labor organization sees fit to invoke the Board's jurisdiction under the merger rules and the Board issues a new certification or a dismissal. Thus, in situations in which representation differs on the merging carriers and the labor organization or organizations involved are content not to invoke the Board's jurisdiction, a union certified to represent what has become only a minority fraction of a system-wide craft or class could insist on representing that part of the craft or class indefinitely, no matter how relatively small the group it represents may be.

Since the enactment of § 2 Ninth of the RLA, the Board has held consistently that it can certify representatives only for an entire craft or class of employees on a single transportation system. See, e.g., LSG Lufthansa Services, 25 NMB 96, 108 (1997); Seaboard System R.R. - Clinchfield Line, 11 NMB 217, 224 (1984); New York Central R.R., 1 NMB 197, 209-10 (1941); Pennsylvania R.R., 1 NMB 467, 470 (1937). If a carrier to which a craft or class certification applies ceases to exist as a result of merger into a larger or different single transportation system, the certification no longer has any application; and the merged carrier is obligated to treat with the organization that represents a majority of the members of each craft or class of its employees, not with organizations that were certified as the representatives of groups that no longer constitute a craft or class of a carrier's employees. That is evident from the plain terms of §§ 2 Fourth and 2 Ninth of the RLA. In these circumstances, the pre-merger certifications are "extinguished by operation of law." Republic Airlines/Hughes Air Corp., 8 NMB 49, 56 (1980). As the Board observed, "uneven representation" within a craft or class after a merger would lead to "duplication of effort and confusion," and significantly reduce "the ability of [carriers] to integrate operations and manage a single transportation system." Id. at 54-55.

In Trans World Airlines/Ozark Airlines, 14 NMB 281, 251-42 (1987), the Board established interim procedures for determining representation in merger situations, under which air carriers

were allowed to seek a Board determination of the effect of a merger on representation of employees. In those circumstances the Board took the position that while merger into a single transportation system extinguished earlier certifications "by operation of law" (Republic/Hughes), only the Board should make that determination; it had exclusive authority to determine whether and when a merger has terminated pre-merger certifications. Id. at 233-35. The interim airline merger procedures were applicable to railroads, Missouri Pacific Railroad (Union Pacific), 15 NMB 95 (1988), and the Board eventually published a separate set of railroad merger procedures. 17 NMB 44 (1989). However, the U.S. Court of Appeals for the D.C. Circuit held that the Board has jurisdiction to determine representation under § 2 Ninth "only upon request of the employees involved in the dispute"; the Board's merger procedures were invalid insofar as they purported to authorize the Board to determine representation on its own motion or at the request of a carrier. RLEA v. NMB, 29 F.3d 655, 664 (D.C. Cir. 1994) (emphasis in original).

That takes us back to the statute and Republic Airlines/Hughes Air Corp. Under §§ 2 Fourth and 2 Ninth, certifications on previously separate carriers that merge into a single transportation system have no continuing application; they terminate "by operation of law." This creates no difficulty where the same national labor organization represents the same crafts on both merging carriers; the merged carrier will recognize that organization as the representative of the combined craft or class -- not by force of preexisting certifications applicable to entities that may no longer exist, but because it is clear that the organization is the chosen representative of the majority of the combined craft or class. But when representation is not the same on both merging carriers, the surviving carrier cannot apply to the Board to determine who represents its employees. If one group is much larger than the other, the Board's rules should not prevent the carrier from recognizing the representative chosen by the larger group. On the other hand, where the question is not so clear, the carrier should not be forced to recognize a labor organization that does not represent a majority of a craft or class of its employees. The unions would suffer no harm because they (unlike the carrier) have the right to petition the Board for a clarification of the representation issue. Requiring carriers to treat with organizations that represent groups that are only a part of a craft or class, as the proposed rule does, would be contrary to §§ 2 Fourth and 2 Ninth. Its effect would be post-merger certification of representatives for only part of a craft or class.

Jurisdiction

The proposed rule should be discarded not only because it impermissibly extends a certification after the carrier to which it applies has merged into a larger or different transportation system, but also because it is outside the Board's jurisdiction. RLEA v. NMB squarely held that the Board lacks jurisdiction to make representation determinations in the absence of a representation dispute initiated by individual employees or employee organizations under § 2 Ninth. In so holding, the Court said that the Board can make representation determinations under § 2 Ninth "only upon the request of the employees involved in the dispute," and therefore by making such a determination in the absence of such a request the Board would "blatantly exceed its statutory authority." 29 F.3d at 664 (emphasis in original). That is precisely what proposed rule 19.602 would do -- predetermine representation after a merger, in the absence of a representation dispute, unless and until a labor organization or an individual sees fit to make an application to the Board for a superseding determination with a proper showing of interest.

Judicial Review

In these circumstances, it seems to us that proposed rule 19.602 would be vulnerable to a challenge in court. (1) On the merits, it is contrary to §§ 2 Fourth and 2 Ninth; and (2) in any event, the Board lacks jurisdiction under § 2 Ninth to adopt a rule that predetermines representation in the absence of a request by an employee or employee group.

RLEA v. NMB held that rules (as distinguished from adjudications in cases where a certification is sought by an employee or employee organization) are subject to review under the Administrative Procedure Act, and should be set aside if contrary to the RLA. Id. 659 n.1, 671-73. We have demonstrated above that proposed rule 19.602 is contrary to §§ 2 Fourth and 2 Ninth, insofar as it would give continuing effect, potentially in perpetuity, to a certification that covers only a part of a craft or class of a merged carrier's employees and that did not apply to that carrier when it was originally issued. Therefore, we do not see how the proposed rule could survive a challenge under the APA.

Moreover, RLEA v. NMB held squarely that the NMB lacks power to determine representation in the absence of an application by an employee or employee organization under § 2 Ninth. Proposed rule 19.602 would do precisely that: it would extend certifications that apply to a craft or class of employees on one carrier, to part of a craft or class of employees on another

carrier to which the certification did not originally apply. The Board therefore lacks jurisdiction to adopt the rule.

Appropriate Action

In these circumstances, the appropriate action for the Board to take is to withdraw proposed rule 19.602 and leave this matter to case-by-case adjudication in representation proceedings.

Many different factual situations could present themselves. Under the RLA, a "merger" that does not involve integration of operations into a new single transportation system may not affect representation. On the other hand, as we have pointed out, in a merger that produces a new single transportation system, the effect on representation depends on the facts and circumstances. If the same national union represents the same craft on both merging carriers, no issue is likely to arise; the union will be voluntarily recognized. If that is not the case, then either organization or an individual is free to invoke the Board's jurisdiction. But where no organization or individual has initiated Board review, the carrier should not be forced to recognize an organization that does not represent a majority of the craft or class.

The issues concerning representation in the wake of a merger can best be sorted out in case-by-case adjudication where the Board can evaluate the relevant facts and where its jurisdiction is not in doubt. Accordingly, the NRLC and AirCon urge the Board to withdraw proposed Section 19.602, leaving these issues to such adjudication, as they arise.

Respectfully submitted,

Ralph J. Moore, Jr.

RJM/daw