BEFORE THE
NATIONAL MEDIATION BOARD

Representation Election Procedure	Docket No. C-6964 RIN 3140-ZA00

COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

These comments on behalf of the American Federation of Labor and Congress of Industrial Organizations are submitted in response to the National Mediation Board's notice of proposed rulemaking with regard to the NMB's representation election procedure. 74 Fed. Reg. 56750 (Nov. 3, 2009). The NMB has proposed amending the Board's representation election procedure "to provide that, in representation disputes, a majority of valid ballots cast will determine the craft or class representative." *Id*. at 56750. As part of this change in the representation election procedure, the Board proposes to change the representation election ballot to "provide employees with an opportunity to vote 'no' or against union representation." *Id*. at 56752. The AFL-CIO supports the proposal to change the NMB representation election procedure and ballot for the following reasons and for those stated in the comments filed by the AFL-CIO Transportation Trades Department and various TTD affiliates.

1. The NMB's current representation election procedure allows employees to select a collective bargaining representative by voting for one of the individuals

or organizations appearing on the ballot or writing-in the name of another individual or organization. *See* 29 CFR §§ 1206.2 & 1206.5 (describing the showing of interest required for an individual or organization to appear on the ballot). If a majority of eligible voters cast valid ballots, the organization or individual receiving a majority of the votes is certified as the representative of the voting craft or class. NMB Representation Manual §§ 13.304-1 & 14.305-2. If no individual or organization receives a majority of the votes cast in a "valid" election – i.e., an election in which a majority of the potential voters cast valid ballots – a run-off election is held between the two individuals or organizations receiving the most votes, without any opportunity to write-in a third choice. 29 CFR § 1206.1.

"Under the existing election procedure, there is no opportunity for an employee to vote 'no' or cast a ballot against representation." 74 Fed. Reg. at 56752. Rather than providing a place on the ballot for voting against representation, "[a]bstaining from voting, for whatever reason, is counted by the Board as a vote against representation." *Ibid*. Thus, "the failure or refusal of an eligible voter to participate in an NMB-conducted election is the functional equivalent of a 'no-union' vote." *Ibid*.

The NMB's current representation election procedure was designed to resolve representation disputes in which two or more organizations are vying to be the collective bargaining representative of a craft or class. But the current

procedure was *not* designed to resolve the increasing common representation dispute in which an organization seeks to become the collective bargaining representative of a currently unrepresented craft or class. As a result, the current procedure presents the question of whether or not the employees are to be represented at all in a convoluted manner that seems likely to confuse the potential voters and to misrepresent their true desires in that regard.

By counting all abstentions as votes against representation, the current procedure is virtually certain to exaggerate the number of employees who oppose having a representative. In any election, a certain number of potential voters will deliberately choose not to cast a ballot, because, for one reason or another, they do not feel capable of making an informed choice among the alternatives presented. Other potential voters will neglect to vote for any of a number of reasons having nothing to do with the choice they would have made if they had voted. Counting the first group as voting against representation defeats the wish of those potential voters to refrain from being counted on one side or the other in the dispute over representation. And counting the second group as voting against representation attributes a choice to those potential voters that they have not made for themselves.

The proposed change in the representation election procedure would correct this serious defect in the current procedure. That change would "specify that in secret ballot elections conducted by the Board, the craft or class representative will

be determined by a majority of valid ballots casts" in an election in which the ballot "provide[s] employees with an opportunity to vote 'no' or against union representation." 74 Fed. Reg. at 56752. There can be little doubt that this proposed procedure would provide the fairest and soundest method for presenting the choice of a representative or the choice of no representative to the group of potential voters.

2. The principal argument against the proposed change is *not* that it will result in a less fair or less sound method of determining the majority choice with regard to representation but rather that the "current election rules have a long history and are supported by important policy reasons." 74 Fed. Reg. at 56752 (Chairman Dougherty dissenting). While certain aspects of the current election rules do have a long history, those long-standing aspects were adopted in response to an industrial reality that no longer pertains.

The NMB's original representation election ballot provided only a *choice among* representatives without any mention of there being a choice of whether to be represented at all. The original ballot's exclusive focus on choosing among potential representatives is explained by the circumstances that faced the Board when it first began conducting representation elections and for many years thereafter. At that time, virtually the entire rail workforce was represented either by independent trade unions or employer-formed "system associations." Lecht,

Experience Under Railway Labor Legislation 75 (1955). Thus, the vast majority of representation elections conducted by the NMB during its early years involved disputes between independent national trade unions and system associations. *Id*. at 155. In that context, it made sense for the representation election ballot to focus on the employees' choice of a representative rather than on the question – not seriously in dispute – of whether to have a representative at all.

It is very much to the point here that the National Labor Relations Board, faced with a different industrial reality, established a representation election procedure that was quite different from that originally adopted by the NMB but very similar to that now proposed by the Board. By contrast with the highly organized state of rail labor relations, the organized portion of the general workforce had shrunk to levels not seen since the First World War. Bernstein, *The New Deal Collective Bargaining Policy* 2 (1950). Thus, the principal question presented in most NLRB-run representation elections was not who would be the collective bargaining representative but whether or not there would be a collective bargaining representative at all. In this context, the NLRB concluded that "a free expression of the desires of the majority of the employees in the unit found appropriate . . . demands that the ballot provide for a space in which employees may indicate that they do not desire to be represented by [any] of the named organizations." *Interlake Iron Corp.*, 4 NLRB 55, 62 (1937). In choosing a form

of ballot that included a choice of "no union," the NLRB expressly rejected "forcing employees who disapprove of the nominees to adopt the rather ambiguous method of expression involved in casting a blank ballot, when their choice can be clearly indicated by providing a space therefor." *Id*. at 61-62.

For its first thirty years, the NMB paid most attention to how employees should choose which representative to have and little, if any, attention to how employees might effectively vote on whether to have a representative at all. Indeed, the NMB explained that its "ballot was drafted to permit the employees to secure some form of representation." *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957* 19 (1958). When the original ballot was first challenged in *Brotherhood of Railway & S.S. Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), on the ground that it did not provide employees with a choice of voting against union representation, the Solicitor General – who at the time was Archibald Cox, an expert on the NLRA – persuaded the NMB to modify the ballot by adding an explanation that "[i]f less than a majority of the employees cast valid ballots, no representative will be certified." Brief for the NMB 14. *See id*. at 30 ("The Board, upon considering the representation of the Solicitor General that in his opinion the old ballot was unfair, promulgated a new form of ballot which, at the very moment of voting, plainly advises each and every employee how to express a preference for no collective

bargaining.").

The representation election context faced by the NMB today is more like that faced by the NLRB than that initially faced by the NMB. In the vast majority of representation elections now conducted by the NMB, the principal question is whether or not the employees will have a collective bargaining representative at all. *See NMB Annual Performance and Accountability Report BY 2009* Appendix B, pp. 93-96. It is, thus, time for the NMB to complete the revision of its election procedures begun during the *ABNE* litigation and adopt a ballot and voting procedure similar to that long used by the NLRB for resolving disputes over whether employees wish to be represented in collective bargaining.

3. The only other argument against adopting the proposed changes to the NMB representation election procedure is that the Board may lack "authority to certify a representative where less than a majority of the eligible voters participates in an election." 74 Fed. Reg. at 56753 n. 2 (Chairman Dougherty dissenting), citing *Virginian Railway Co. v. System Federation No. 40*, 11 F.Supp. 621, 625 (E.D. Va. 1935). That argument is without merit.

The *Virginian Railway* case did *not* concern a representation election in which employees were given the option of casting a ballot *against* having a representative. Rather, the election in that case followed the usual NMB practice of providing only a choice among the potential representatives appearing on the

ballot, with invalid ballots and abstentions effectively treated as votes against representation. *See* 11 F.Supp. at 626 n. 1. In that context, it made sense that no certification would result where a majority of the craft or class were deemed by the election authority – the NMB – to have voted against representation by refraining from casting valid ballots.

Where the ballot provides an opportunity to cast a vote not only on the question of which individual or organization will be the representative but also on whether or not to have a representative at all, it is proper to follow the normal rule for elections by which "[t]hose who do not participate are presumed to assent to the expressed will of the majority of those voting." *Virginian Railway Co. v. System Federation No. 40,* 300 U.S. 515, 560 (1937) (quotation marks and citation omitted). And, that is so even if less than a majority of the potential voters cast ballots, since those voting will have been allowed to cast a ballot against representation. Indeed, as the NLRB explained in an early decision, to invalidate an election in which the ballot presents an opportunity to vote on the full range of choices – both whether to be represented and which representative – on the ground that fewer than a majority cast ballots would allow a minority to thwart the will of the majority by engaging in tactical abstentions. *See RCA Mfg. Co.*, 2 NLRB 159, 176 (1936) ("Minority organizations merely by peacefully refraining from voting could prevent certification of organizations which they could not defeat in an

election.”).

The district court opinion in *Virginian Railway* could be understood to read § 2, Fourth as stating a quorum requirement by providing that the “*majority of any craft or class* of employees shall have the right to determine who shall be the representative of the craft or class.” 11 F.Supp. at 627-28, quoting with emphasis 45 U.S.C. § 152, Fourth. But that would clearly be a misreading of the statutory language.

The Supreme Court, in its *Virginian Railway* opinion found “[i]t is significant of the congressional intent that the language of § 2, Fourth, was taken from a rule announced by the United States Railroad Labor Board . . . [in] Decision No. 119, *International Association of Machinists v. Atchison, T. & S.F. Ry.*, 2 Dec. U.S. Railroad Labor Board, 97, 96, par. 15,” and that “[p]rior to the adoption of the Railway Labor Act, this rule was interpreted by the Board, in Decision No. 1971, *Brotherhood of Railway & S.S. Clerks v. Southern Pacific Lines*, 4 Dec. U.S. Railway Labor Board 625.” 300 U.S. at 561.

In Decision No. 1971, the Railroad Labor Board *rejected* the carrier’s argument that the reference to the “majority of any craft or class . . . determin[ing] who shall be the representative” in principle 15 of Decision No. 119 meant that “representation should only be definitely determined by an expression from the majority of all of the employees involved.” Decision No. 1971, *Brotherhood of*

Railway & S.S. Clerks v. Southern Pacific Lines, 4 Dec. U.S. Railway Labor Board 625, 626 (1923). Rather, the Board construed the "majority" language from principle 15 to mean that "where all employees eligible to vote have been given an opportunity to vote a majority of the total vote cast will decide the question of representation." *Id*. at 625. The Board explained its construction of the relevant portion of principle 15 as follows:

> "The board had previously in principle 15 of Decision No. 119, ruled that 'the majority of any craft or class of employees *shall have the right to determine* what organization shall represent members of such craft or class' in negotiating agreements.
>
> "The purpose of the Railroad Labor Board was to give all the employees to be affected the privilege of expressing their choice. The board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity.
>
> "It was obviously the meaning and the purpose of the board that a majority of the votes properly cast and counted in an election properly held should determine the will and choice of the class." *Id*. at 629 (emphasis in original).

Especially in light of that background, it could not be clearer that § 2, Fourth's reference to a "majority of any craft or class . . . determin[ing] who shall

be the representative" follows the general election rule by "requiring only the consent of the . . . majority of those participating in the election." *Virginian Railway*, 300 U.S. at 560.

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The NMB's proposal to modify its representation election procedure by "provid[ing] employees with an opportunity to vote 'no' or against union representation" and "specify[ing] that in secret ballot election conducted by the Board, the craft or class representative will be determined by a majority of valid ballots cast," 74 Fed. Reg. at 56752, clearly would result in a more accurate reflection of the majority will regarding the basic issue of whether to be represented at all. Since the question of whether to be represented is currently the most important issue in the vast majority of NMB elections and since there is no legal impediment in the way of adopting the more accurate voting procedure, the Board should amend its representation election procedures in the manner proposed.

Respectfully submitted,

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