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VIA EMAIL AND FIRST CLASS MAIL

December 28, 2009

The Honorable Elizabeth Dougherty, Chair
The Honorable Harry Hoglander, Member
The Honorable Linda Puchala, Member
National Mediation Board
1301 K Street, NW, Suite 250
Washington, D.C. 20005

Re: Representation Election Procedure, Docket No. C-6964

Dear Chairperson Dougherty and Members Hoglander and Puchala:

Southwest Airlines Co. ("Southwest") offers the following comments with respect to two specific issues related to the above-captioned Notice of Proposed Rulemaking ("NPRM") to amend the National Mediation Board's ("NMB") election procedures under the Railway Labor Act ("RLA"). While Southwest generally is supportive of the NMB's stated goal "to create election procedures that will provide a more reliable measure/indicator of employee sentiment in representation disputes and provide employees with clear choices in representation matters,"[1] we are neutral on the particular proposal the Board is now considering. However, should the Board choose to move forward in amending the RLA election procedures, the final rule should ensure that any new election procedures are applied broadly and consistently to cover representation and decertification procedures.

To accomplish its stated purpose, Southwest urges the Board to pursue amendments to RLA election procedures that more closely conform with the election procedures of the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA"). Specifically, Southwest urges the Board to amend its proposed election procedures as follows: (a) to institute a uniform showing of interest for representation regardless of whether the employees are presently represented or not, and (b) to provide for a decertification procedure that mirrors the NMB's proposed new election procedure (i.e., a "yes" or "no" ballot with an election outcome based on the majority of ballots cast) and that is consistent with the election and decertification rules under the NLRA.

Southwest requests that any further action on the NPRM be taken in a manner consistent with the comments set forth in this submission. The measures we advocate correspond fully to the stated purpose and goals of the NPRM – i.e., "to provide a more

[1] 74 Fed. Reg. 56750 (Nov. 3, 2009).

reliable measure/indicator of employee sentiment in representation disputes and provide employees with clear choices in representation matters."

Background

Under the NMB's longstanding election procedures, a labor organization seeking to represent a craft or class must receive affirmative votes from a majority of eligible employees in the craft or class. These procedures are based on the NMB's interpretation of the provision in the RLA that states that "[t]he majority of a craft or class of employees shall have the right to determine who shall be the representative of the craft or class...." 45 U.S.C. § 152. Currently, NMB ballots do not contain a choice – i.e. there is no provision on the ballot for an employee to express "no" to union representation. If an employee does not desire union representation then the employee is instructed to refrain from voting.

Contrasted with the NMB election procedures are the NLRB election procedures under the NLRA. The NLRA procedures provide that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining...." 29 U.S.C. § 159(a). Although both the RLA and NLRA require a labor organization to obtain designation by a majority of employees in order to achieve representative status, unlike the NMB, the NLRB has always certified a collective bargaining representative on the basis of the majority of valid ballots cast by eligible employees. Unlike the NMB ballot, the NLRB ballot provides employees with a "yes" or "no" choice.

The NMB is now proposing to change its voting procedures in two respects: (1) to provide employees with a "yes" or "no" choice on the ballot; and (2) to determine the outcome of the election based upon the majority of the valid ballots cast.

Standards for Showing of Interest Should be Fair and Consistent

Under existing procedures, before conducting a representation election, the NMB requires signed authorization cards from a specified percentage of the employees in the craft or class to ensure that there is a sufficient interest among the employees to justify an election. In this regard, the NMB rules provide:

> (a) Where the employees involved in a representation dispute are represented by an individual or labor organization... a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees....
>
> (b) Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made

> before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees....
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> 29 C.F.R. § 1206.2.

The NMB rules require a 35% showing of interest among employees who are unrepresented, but require more than a 50% showing of interest among employees who are already represented and covered by an existing collective bargaining agreement. Although the NMB is proposing to change its election rules as described above, the Board is not proposing to change its rules relating to showing of interest. 74 Fed. Reg. at 56752 ("The Board's proposed change will not affect the showing of interest requirements as set forth in 29 CFR 1206.2").

Failure of the NMB to amend its showing of interest requirements in circumstances where employees are already represented, will result in the anomalous situation of the Board requiring a greater showing of interest (more than 50%) than would be required to win the election (majority of affirmative votes cast). It would be logical, therefore, for the NMB to amend its showing of interest rules to require a 35% showing of interest without regard to whether employees are already represented or not. This would bring NMB practice into conformity with NLRB practice of requiring a 30% showing of interest whether the employees are already represented or not.[2]

NMB Should Establish Clear Decertification Procedures

The RLA not only guarantees employees the right to union representation, it also guarantees employees the right to be unrepresented. See Railway & Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees, 380 U.S. 650, 669, n.5 (1965) ("The legislative history supports the view that employees are to have the option of rejecting representation."). Nevertheless, the NMB, unlike the NLRB, has established no decertification election procedure. It defends this lack of decertification procedure on the grounds that the NLRA, unlike the RLA, specifically provides for such a procedure. See 29 U.S.C. § 159 (c) (1) (A) (ii); see also In re Chamber of Commerce, 14 N.M.B. 347 (1987) (denying the Chamber of Commerce's request that the NMB amend its rules to provide for a decertification procedure).

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[2] NLRB Rules and Regulations and Statements of Procedure § 101.18 states as follows:

> The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.

As a consequence of the NMB's refusal to provide for a decertification procedure, some creative employees who desired to remove an incumbent union developed a technique of filing an application for representation with the NMB with no intent of representing the craft or class if successful in the election. Initially, the NMB took the position that it was contrary to the purposes of the RLA to process such an application. Atchison, Topeka & Santa Fe Ry. Co., 8 N.M.B. 469 (1981). The NMB also amended its Representation Manual to require any applicant for representation to comply with the reporting requirements of the Labor Management Reporting and Disclosure Act, 29 U.S.C. sec. 401 et seq., and to require any representative to refrain from renouncing representative status for a period of one year following certification. Lamoille Valley R.R., 8 N.M.B. 454, 455 (1981), upheld in Lamoille Valley R.R. v. NMB, 539 F. Supp. 237 (D. Vt. 1982); Transkentucky Transp. Ry., 9 N.M.B. 190 (1982).

However, the Fifth Circuit in 1983 held that the NMB's refusal to entertain an application when the applicant had no intention of representing the craft or class was contrary to the Board's statutory duty to investigate representation disputes under the RLA. Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983), cert. denied 467 U.S. 1204 (1984). The court rejected the NMB argument that its refusal was justified because the purpose of the RLA was to encourage representation. In this regard, the Fifth Circuit noted that the RLA "supports but does not require collective bargaining" and that inherent in the freedom to select a collective bargaining representative is the concomitant right to reject such representation. 714 F.2d at 1341.

In response to the Russell decision, the NMB will now process the application of a representative without regard to whether the applicant intends to represent the craft or class. In re Chamber of Commerce, 14 NMB 347, 358 (1987). But the NMB continues to refuse to establish a forthright procedure for employees to decertify an incumbent union whose representation the employees wish to end, requiring employees to engage in the charade of filing an application for representation with no intent to represent. It is time for the NMB to establish a straightforward procedure for decertification.

In summary, this rulemaking initiative provides the Board with an excellent opportunity to fully examine the fairness and reliability of its long-established representation election procedures under the RLA. Southwest therefore requests that, given the broad and substantive changes being proposed by the Board, any further action on the NPRM be taken in a manner consistent with the comments presented above. The measures described herein are fully consistent with, and will materially advance, the stated purpose of the NPRM to provide employees with clear choices in representation matters. We appreciate your consideration of this submission.

Respectfully submitted,

Robert W. Kneisley