7550-01

NATIONAL MEDIATION BOARD

29 CFR Part 1206

Docket No. C-7034

RIN 3140-ZA01

Representation Procedures and Rulemaking Authority

AGENCY: National Mediation Board.

ACTION: Final rule.

SUMMARY: In response to amendments to the Railway Labor Act in the Federal Aviation Administration Modernization Reform Act of 2012, the National Mediation Board amends its existing regulations pertaining to representation elections, run-off elections, and rulemaking to reflect changes in statutory language.

DATES: The final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISER].

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SUPPLEMENTARY INFORMATION:

I. Background

On February 14, 2012, the Federal Aviation Administration and Modernization and Reform Act of 2012, Public Law 112-0095 (FAA Reauthorization) was signed into law. The FAA Reauthorization contained, inter alia, several amendments to the Railway Labor Act (RLA or Act). The changes contained in these amendments require changes to the National Mediation Board's (NMB or Board) existing Rules relating to run-off elections, showing of interest requirements, and rulemaking. On May 15, 2012, the NMB published a Notice of Proposed Rulemaking

(NPRM) in the Federal Register inviting public comments for 60 days on a proposal to revise those rules to comply with the statutory language. The Board invited commenters to address the specific amendments along with any other matters they consider relevant to the changes wrought by the amended statutory language. In the NPRM, the Board also indicated its particular interest in receiving comments regarding the effect of the amendments on the Board's policies and practices with respect to representation disputes in mergers. The NPRM also stated that the NMB may incorporate any comments in a Final Rule in this proceeding. On June 7, 2012, the Board issued a correction to the text of the proposed rules. On June 19, 2012, the Board held an open public hearing to solicit the views of interested parties on the NPRM.

II. Notice and Comment Period

In response to the NPRM, the NMB received ten submissions during the official comment period from trade and professional associations, labor unions, and members of Congress. Additionally, the NMB received written and oral comments from seven labor organizations that participated in the June 19, 2012 open public hearing. The NMB has carefully considered all of the comments and analyses of the proposed changes and the impact of the amended statutory language on its merger procedures set forth in the Board's Representation Manual (Manual).

The overwhelming majority of the substantive comments addressed the applicability of the amended statutory language providing that a showing of interest of not less than 50 percent is required to support an "application requesting that an organization or individual be certified as the representative of any craft or class of employees," to representation disputes in mergers. The preamble will focus on the Board's response to the arguments raised in these comments.

III. Summary of Comments

The major comments received and the Board's responses to those comments are as follows. The Board notes that it is required to respond to significant comments and, therefore, has not addressed every issue raised in the comments. *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) ("[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern.").[1]

A. Showing of Interest

The showing of interest requirements applicable in mergers are set forth in the Board's Manual.[2] Manual Section 19.1 defines a merger as "a consolidation, merger, purchase, lease, operating contract, acquisition of control, or similar transaction of two or more business entity." The courts have long recognized that the NMB, under Section 2, Ninth, has the authority to resolve representation disputes arising from a merger involving a carrier or carriers covered by the RLA. *Air Line Employees Ass'n, Int'l v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir. 1986). An organization or individual initiates this process by filing an application supported by evidence of representation or a showing of interest. If, after an investigation, the NMB determines that a single transportation system exists, the Board will proceed to resolve the representation of the craft or class on the merged carrier. The Board's current policy in mergers requires that "[i]ncumbent organizations or individuals on the affected carrier(s) must submit evidence of

[1] There were no comments related to the proposed rules amending the Board's rulemaking procedures. In addition, there was only one comment related to the run-off election procedures under Proposed Rule 1206.1. Right to Work objects to Rule 1206.1(c), arguing that new hires should be permitted to vote in run-off elections. The language of 1206.1(c) remains unchanged from the current rule. The Board has a long-standing policy of only including employees who were eligible in the initial election in the run-off election and will not change that in this Final Rule.

[2] The Manual is an internal statement of agency policy and not a compilation of regularly promulgated regulations having the force and effect of law. *Hawaiian Airlines v. NMB*, 107 L.R.R.M. 3322 (D. Haw. 1979), *aff'd without op.* 659 F.2d 1088 (9th Cir. 1981).

representation or a showing of interest from at least thirty-five (35) percent of the employees in the craft or class." Manual Section 19.601. The Manual further states that the "rules regarding percentage of valid authorizations in NMB Rule 1206.2 (29 CFR 1206.2) and bar rules in NMB Rule 1206.4 (29 CFR 1206.4) do not apply to applications" in merger situations. Manual Section 19.6.

In the oral and written statements received at the June 19, 2012 public meeting and in written comments submitted pursuant to the NPRM, commenters including the Transportation Trades Department, AFL-CIO (TTD), Brotherhood of Locomotive Engineers and Trainmen (BLET), International Association of Machinists and Aerospace Workers (IAM), Association of Flight Attendants – CWA (AFA), Transportation Workers Union of America (TWU), and the International Brotherhood of Teamsters (IBT) state that neither the plain language of Section 2, Twelfth nor the legislative history indicate that Congress intended the 50 percent showing of interest requirement should apply to mergers. Thus, in effect, these commenters suggest that the amendments do not affect the Board's existing merger policy and procedures. This position is also supported in the written comments from Democratic Senators Harry Reid, Tom Harkin and John D. Rockefeller IV urging the Board to leave its current merger procedures in place. The opposite view, namely that Section 2, Twelfth unequivocally applies to all representation elections and disputes including those arising as a result of a merger, is urged in written comments submitted pursuant to the NPRM by Republican House Members John L. Mica, Thomas E. Petri, John J. Duncan, Sam Graves, Bill Shuster, Jean Schmidt and Chip Crevaqack, the National Right to Work Legal Defense Foundation (Right to Work), Airlines for America and the Regional Airline Association (A4A/RAA), and the National Railway Labor Conference (NRLC).

The TTD, along with other labor organizations, asserts that the language and structure of Section 2, Twelfth indicates that Congress did not intend for it to apply to merger proceedings. TTD argues that the language used in Section 2, Twelfth to refer to a representation dispute, namely "upon receipt of an application requesting that an organization or individual be certified as the representative," does not describe a representation dispute resulting from a merger. According to TTD, the Board's process in a merger "focuses on determining the impact, if any, of a merger of two or more carriers upon existing representation certifications." TTD also argues that if Congress had intended Section 2, Twelfth to apply to every representation dispute under Section 2, Ninth, it would have explicitly stated as much or added the new statutory language directly into Section 2, Ninth. Instead, TTD argues, Congress chose different language and and Section 2, Twelfth should be read as narrower than Section 2, Ninth.[3]

The TTD and other commenters opposed to applying the new showing of interest to mergers also point to statements made by Senators Harkin, Reid, and Rockefeller in a colloquy in the Congressional Record. In particular, Senator Reid made the following statement:

> And I would also like to explain that it is not intended to apply to the unique situation in mergers. The text of the amendments apply to all applications for representation elections, but not to the entirely different circumstance where a labor organization or employees petition the National Mediation Board for a determination as to whether a merger or other transaction has altered an existing representational structure as a result of a creation of a single transportation system. In those cases, it is our intent that the National

[3] The TTD also requests that the Board retain the current language in Rule 1206.2(a) (requiring a showing of interest of a majority of employees in a represented craft or class), while changing the language in 1206(b) as proposed in the NPRM. The result of this change would be that the showing of interest for represented crafts or classes would be one more card than for unrepresented crafts or classes. The TTD does not provide a justification for making this minor distinction. Congress has amended the statute to require a minimum 50 percent showing of interest in any craft or class and the Board sees no reason to make such a distinction.

> Mediation Board's existing merger procedures, as modified from time to time by the National Mediation Board, shall determine the percent of the craft or class to establish a showing of interest. Otherwise, employees could lose their representation simply by merging with a slightly larger unit without even having the opportunity to vote, which is unacceptable.

TTD argues that this language plainly indicates that Section 2, Twelfth was not intended to apply to mergers.

In contrast to the TTD's arguments regarding statutory interpretation, several members of Congress, in their written comment to the Board,[4] stated that "[h]ad Congress wished to exclude merger-related representation elections from the scope of Section 2, Twelfth, such an exception could have easily been written into the amendment: clearly it was not." These members of Congress further argue that there is no reason why Congress would have excluded mergers from the amendment when a majority of airline workers involved in recent representation elections were participating in elections that resulted from mergers. NRLC argues that the Board must apply the showing of interest requirements to any application for representation because there is nothing in Section 2, Twelfth to suggest that all applications are not covered. The title of Section 3 of the FAA Reauthorization was "Bargaining Representation Certification." According to the NRLC, "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."

A4A/RAA, in a joint written statement, also argue that the text of Section 2, Twelfth, along with the title l of the section "Showing of interest for representation elections," does not

[4] On August 2, 2012, Representatives John L. Mica, Thomas E. Petri, John J. Duncan, Sam Graves, Bill Shuster, Jean Schmidt, and Chip Cravaack submitted a comment in response to the Notice of Proposed Rulemaking.

leave any doubt that showing of interest requirements apply in all representation elections. They summarize their argument in the following way:

> In light of (a) the unequivocal language of Section 2, Twelfth, (b) the absence of any exception for mergers, (c) the reality that excluding merger-related elections would effectively gut the amendment, and (d) the fact that the Merger Procedures in the Board's Representation Manual require that an application be supported by a showing of interest, A4A submits that all merger-related applications must be subject to the 50% showing of interest.

A4A/RAA also argue that the comments by Senator Reid described above were isolated comments, part of a colloquy among a small number of senators, and "cannot override the clear directive of the amendment." In their comment, they cite Supreme Court cases for the rule of statutory interpretation that isolated comments are not a reliable indicator of Congressional intent and little or no weight is given to comments by a single legislator.

Having carefully reviewed and considered the comments, the Board believes that by enacting Section 2, Twelfth, Congress intended to apply the same showing of interest to requirement in all representations disputes under the Act. Thus, any application seeking the Board's investigation of a representation dispute under Section 2, Ninth must be supported by a showing of interest of not less than 50 percent. For the reasons discussed below, the Board believes that this includes applications filed as part of a single carrier determination in mergers.

In Section 2, Ninth of the RLA, Congress delegated to the NMB the authority to resolve disputes as to the identity of representatives of employees of airlines and railroads for purposes of collective bargaining. The Board's duty with respect to representation disputes is set forth in Section 2, Ninth: "upon request of either party to the dispute" the Board shall investigate such dispute and certify to the parties and to the carrier "the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in

the dispute." 45 USC 152, Ninth. Section 2, Ninth further provides that "[i]n such investigation" of the representation dispute,

> the Mediation Board shall be authorized to take a secret ballot of the employees involved or use any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.

Thus, the language and structure of Section 2, Ninth makes clear that the Board has an affirmative duty to investigate a representation dispute upon "request of either party to the dispute" and the Board is "authorized" to conduct an election or use any other appropriate method in connection with "such an investigation" to resolve the dispute as to the identity of the employees' representative." The Court of Appeals for the District of Columbia has previously described the limitations on the Board with regard to its representation functions,

> The (first sentence of Section 2, Ninth) imposes four significant conditions that must be satisfied as a prelude to the board's authority to investigate a representation dispute: there must be a dispute; the dispute must relate to representation; it must be among a carrier's employees; and one of the parties to the dispute must request the Board's services in resolving it.

Railway Labor Executives' Ass'n v. NMB, 29 F.3d 655, 666-67 (DC Cir. 1994) (*RLEA*) (emphasis in original).

Through Section 2, Twelfth, Congress has added an additional limitation to the Board's authority under Section 2, Ninth, namely that once requested to investigate a representation dispute ("upon receipt of an application"), the NMB cannot direct an election or use any other method to determine the representative of a craft or class of employees without a showing of interest from not less than 50 percent of the employees in that craft or class. When the Board's current showing of interest rules were enacted in 1947, mergers were not a factor in the airline industry. The Board recognizes that it did not apply Rule 1206.2 to mergers and that it was not

until the 1980s that the Board created separate procedures for dealing with mergers in the Manual. Congress is aware that mergers are a major factor in the airline industry and that the Board had separate procedures for dealing with mergers. In the Board's view, Congress amended the RLA to require a 50 percent showing of interest before the Board can authorize an election in any craft or class.

Representation disputes resulting from mergers are disputes subject to the Board's authority under Section 2, Ninth. The Board clarified this in its decision in *TWA/Ozark Airlines*, 14 NMB 218, 222 (1987) (citing Section 2, Ninth as requiring the Board to resolve the representation dispute between the merging carriers, TWA and Ozark Airlines). In response to TWA's assertion that the Board did not have statutory authority to determine the representation status of existing certifications at Ozark Airlines, the Board stated the following: "We hasten to clarify that pursuant to Section 2, Ninth the Board upon investigation has exclusive authority to grant, withhold and revoke representation certifications." *Id*. at 235 (emphasis in original). In each single carrier determination issued by the Board, the Board invokes its authority under Section 2, Ninth to investigate representation disputes, making no distinction between this type of representation dispute and the more typical case where an organization or individual files an application seeking to represent a previously unrepresented craft or class of employees.

Likewise, in *RLEA*, the court recognized that the Board's authority in that representation dispute, resulting from a merger, came from Section 2, Ninth. *RLEA*, 29 F.3d at 660-61. The court considered whether the Board's merger procedures at that time violated Section 2, Ninth. There was no argument that a representation dispute resulting from a merger was anything other than a "dispute" under Section 2, Ninth.

According to Section 2, Twelfth, the showing of interest requirement applies "upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees . . ." The language indicates that this requirement applies to all representation applications filed with the Board. Unlike representation proceedings under the National Labor Relations Act (NLRA), which provides for different types of petitions,[5] the RLA only provides for investigation of a representation dispute by the NMB "upon request of either party" to that dispute. Thus, the statutory language does not distinguish between requests to investigate where the craft or class is unrepresented, where the employees wish to change representation or become unrepresented, or where there has been a merger or other corporate transaction. Under the Board's practice, the Section 2, Ninth request is made in the form of an application and the Board has always had one application, "Application for Investigation of Representation Dispute," which requests the Board to investigate and certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth.

This requirement in Section 2, Twelfth applies to an application by an organization seeking to represent "any craft or class." Courts have considered what "any" means in a statute. For example, in *Carter v. Welles-Bowen Realty, Inc*., 553 F.3d 979, 986 (6th Cir. 2009), the court, after discussing the dictionary definition of "any," stated that when Congress included the term "any charges" in a statute, "[t]he ordinary definition of 'any' indicates that charges are neither restricted to a particular type of charge nor limited to a specific (charge)." Here, Congress'

[5] Section 9(c) of the NLRA provides for three types of petitions to the National Labor Relations Board (NLRB): 1) a petition seeking certification, 2) an employer petition seeking resolution of a question concerning representation, and 3) a petition seeking decertification of a previously recognized representative. 29 USC 159(c)(1). In addition, the NLRB's Rules and Regulations, Section 102.60(b) provides for petitions for clarification of a bargaining unit and petitions for amendment of certifications. 29 CFR 102.60(b).

language stated that the showing of interest requirements applied to applications to represent "any craft or class" and the language is not restricted as argued by TTD and other commenters.

TTD argues that Congress did not intend for Section 2, Twelfth to apply to merger proceedings because "single carrier determinations concern existing certifications," while Section 2, Twelfth applies where a representative is seeking to "be certified" as the representative of a craft or class. The Board is not persuaded by this distinction. The question before the Board in any investigation of a representation dispute is "who are the representatives of such employees" as described in Section 2, Ninth. This is the issue even if the employees are already represented, for example, when an organization seeks to "raid" an already-certified craft or class or when an individual files an application with the intention to change their representative or become unrepresented. Furthermore, after the Board makes a single carrier determination, the issue becomes who is the representative of the new craft or class created by the merger; it is not simply a question of existing certifications as stated by TTD. The applicant is seeking to "be certified" as the representative of the newly created craft or class. Prior to these amendments, the Board had one application with different showing of interest requirements. Congress is now saying, with Section 2, Twelfth, that the Board must require the same showing of interest requirement for any application.

Congress could have provided for an exception to the showing of interest requirements in Section 2, Twelfth. When interpreting statutory language, courts have noted that when Congress intends for a specific exception, it makes this intent clear. Therefore, courts are reluctant to find an exception to a provision in a statute that is not expressed. For example in *Baker v. Runyon*, 114 F.3d 668, 670 (7th Cir. 1997), a plaintiff sought to recover punitive damages from the Postal Service despite the prohibition in the Civil Rights Act from recovering damages from "a government, government agency, or political subdivision." The plaintiff

seeking damages argued that Congress' history of treating the Postal Service differently under other statutes and the legislative history of the Civil Rights Act indicated that Congress did not intend to exempt it from punitive damages. The court responded that the plaintiff was "asking this court to read into the Act an exception to Congress' blanket exemption, despite the absence of any textual support for such an exclusion . . . We therefore presume that Congress would have said that all government agencies, except the Postal Service, are exempt from punitive damages, if this is what it intended." *Id*. (internal citations omitted). Like in *Baker*, Congress did not intend for there to be an exception to the showing of interest requirements because it did not expressly provide for it. Section 2, Twelfth requires a 50 percent showing of interest whenever the Board is requested to certify a representative of any craft or class of employees.

The Board is also not persuaded that the differences in language between Section 2, Ninth and Section 2, Twelfth indicate that Congress did not intend for the showing of interest requirements to apply in mergers. The language in Section 2, Twelfth does not track the language in Section 2, Ninth exactly, but there is no language in Section 2, Twelfth that indicates that Congress intended there to be such a large exception to its provisions. The Board recognizes that courts consider whether Congress used the same phrasing in different sections of a statute to interpret its intent; however, the negative implications of different language apply most strongly when the sections in question were considered simultaneously. *Lindh v. Murphy*, 521 U.S. 320, 21 (1997). Because these sections were not constructed simultaneously and were, in fact, considered decades apart, the assumption that Congress deliberately chose contrasting language is a weak one. *Field v. Mans*, 516 U.S. 59, 75 (1995). ("As for the rule of construction, of course it is not illegitimate, but merely limited. The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects".)

Finally, the Board does not agree that the comments in the Congressional Record cited by TTD and others provide insight into congressional intent. The most dispositive form of legislative history is the conference report. *United States v. Commonwealth Energy Sys.* 235 F.3d 11 (1st Cir. 2000). The conference report for the FAA Reauthorization did not include any discussion of this issue. In the absence of this or other legislative history indicating that Congress intended there to be an exception in mergers, the statements made by the Democratic senators in floor debates should not be given controlling weight in making this determination. The United States Court of Appeals for the District of Columbia Circuit has noted that judges must exercise caution before relying on a statement made in a floor debate or at a hearing given the interplay in Congress of political and legislative considerations that are unrelated to the interpretive tasks of a court. *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 892 (DC Cir. 1992) (quoting *Antolok v. United States*, 873 F.2d 369, 377 (DC Cir. 1989)) *cert. denied,* 511 U.S. 1068 (1994). This caution is especially warranted when it appears that a colloquy was a direct result of "a single member . . . attempting to reassure his own constituency or even to create legislative history for citation by the courts." *Id*.

B. Request to Change Representation Manual Section 19.7

The NLRC and A4A/RAA requested that the Board revise its Manual in response to the amendments. Specifically, they argue that Manual Section 19.7, part of the Board's Merger Procedures, is inconsistent with Section 2, Twelfth. Manual Section 19.7 currently states that "[e]xisting certifications remain in effect until the NMB issues a new certification or dismissal."

The practical effect of Section 19.7 is that after the Board makes a single carrier determination, current certifications remain in effect until either an election or until the Board addresses the representation consequences of the merger without an election. The NRLC and A4A/RAA's comments argue that, unlike other merger provisions in the Manual, Section 19.7 is

substantive. A4A/ RAA's comment states that the rule "pre-determines the effects of mergers on existing certifications in a way that is contrary to a basic precept of the Railway Labor Act. To the extent that Rule 19.7 permits a union to remain as the representative of a 'minority' faction of a larger system-wide craft or class on a merged airline, Section 19.7 is directly contrary to long-standing interpretations of the RLA." As the NRLC's comment notes, the NRLC objected to the precursor to Section 19.7 when the Board invited comments on changes to its merger procedures in 2001. The NRLC argued in 2001, as they do now, that Section 19.7 results in unions representing only a fraction of a merged carrier's craft or class.

The NRLC and A4A/RAA further claim that Section 2, Twelfth reinforces Congressional intent that a representative must have the support of a majority of the craft or class. According to NRLC, "Section 2, 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" and Section 19.7 may allow a union to continue representing a portion of a craft or class without the support of a majority of the craft or class.

Courts have long recognized the Board's authority over representation disputes and specifically its authority in resolving disputes in merger situations. "All the courts of appeals to have considered the issue . . .have held that the question whether a union's certification survives an airline merger is a matter within the exclusive jurisdiction of the NMB." *Ass'n of Flight Attendants v. Delta Air Lines*, 879 F.2d 906, 912 (D.C. Cir. 1989). *See also Air Line Employees Ass'n v. Republic Airlines, Inc*., 798 F.2d 967, 968-69 (7th Cir. 1986); *International Ass'n of Machinists v. Northeast Airlines*, Inc., 536 F.2d 975, 977 (1st. Cir. 1976); *Brotherhood of Ry. Clerks v. United Air Lines, Inc*., 325 F.2d 576, 579-80 (6th Cir. 1963). The commenters fail to provide an explanation as to how Section 2, Twelfth changes this basic principle. These courts based the Board's discretion on Section 2, Fourth's requirement that a representative is chosen

by "the majority of any craft or class . . ." and the Board's duty to investigate representation disputes under Section 2, Ninth. *Delta Air Lines*, 879 F.2d at 910; *Int'l Brotherhood of Teamsters v. Frontier Airlines, Inc*., 628 F.3d 402, 405 (7th Cir. 2010). The amendment does not change the definition of majority under Section 2, Fourth (which refers to employees voting in an election) nor does it change the Board's duty under Section 2, Ninth. It merely takes away the Board's discretion regarding a requirement that must be satisfied before the Board can authorize an election under Section 2, Ninth.

The Board cannot take action regarding existing certifications, including extinguishing those certifications, at merging carriers where no application has been filed by employees. The Board cannot initiate a single carrier investigation. *RLEA*, 29 F.3d at 665-69. The Board cannot extinguish a certification on its own initiative upon learning of carriers' intent to merge. Nor can it do so on the request of a carrier. *Frontier Airlines*, 628 F.3d at 406. The statute requires that the Board wait for an employee or organization to file an application before investigating and resolving the representation consequences of a merger. In its single carrier determination, the Board determines when there has been a merger for labor relations and representation purposes and immediately moves on to address the representation consequences. Generally, the representation consequences of a merger are resolved shortly following a single carrier determination. Only at that time can the Board authorize an election or extend or extinguish certifications, depending on its precedent regarding the representation status and sizes of the merging groups. Even if the Board had the authority to extinguish a certification earlier, doing so would likely lead to instability during an election campaign, confusion about what laboratory conditions are necessary during the election period, and frustrate the expectations of employees who at some point voted for representation. Courts have noted that the RLA "abhors a contractual vacuum." *Air Line Pilots Ass'n, v. UAL Corp*., 897 F.2d 1394, 1398 (7th

1990). The Board will not introduce such a vacuum and resulting instability where a representation investigation is underway.

Furthermore, the courts that have addressed this issue were not unaware that in some situations, a merger will result in a minority of employees being temporarily represented by an organization. In this situation, the Board maintains the authority to determine the representation consequences of the merger. *Int'l Brotherhood of Teamsters v. Texas Int'l Airlines, Inc*., 717 F.2d 157, 164 (5th Cir. 1983) ("After a merger that makes the employee group hitherto represented by the Union a minority of the craft, the question of employee representation inevitably arises. When this happens, resolution of that question is the function of the National Mediation Board.")

The Board also disagrees with these comments' supposition that "minority unions" result from Section 19.7. Without an investigation, it cannot be determined whether an incumbent union or any other organization represents the employees in the combined craft or class on a merged carrier. This finding is the purpose of the investigation of representation consequences following a merger. As one court noted, "the merger created real doubts about whether plaintiffs represent the majority of . . . employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board." *Int'l Ass'n of Machinists and Aerospace Workers v. Northeast Airlines*, *Inc*., 536 F.2d 975, 977 (1st Cir. 1976).

Neither NRLC nor A4A/RAA explains the connection between Section 2, Twelfth and Manual Section 19.7. These commenters simply state that Section 2, Twelfth reinforces Congressional intent that a representative must have the support of a majority of the craft or class and that Manual Section 19.7 undermines this intent but do not explain how this is so. In the Board's view there is no conflict. The showing of interest is a threshold requirement that enables the Board to determine whether or not there is sufficient interest among employees to

justify holding an election without the needless expenditure of Government time, efforts, and funds. *Compass Airlines*, 35 NMB 14 (2007). In Section 2, Twelfth, Congress has decided that the Board should require the same showing of interest for any application. Congress, however, has not required a showing of interest from a majority of employees in the craft or class to trigger an election. Rather, Section 2, Twelfth requires only a showing of interest from "not less than 50 percent of employees in the craft or class" to proceed to an election in which the majority of employees participating in the election will then choose their representative in accordance with Section 2, Fourth. *Air Transport Ass'n v. National Mediation Board*, 719 F.Supp.2d 26 (DC Cir. 2011). Likewise, the fact that, in the interests of stability, the Board requires that existing certifications remain in effect until the representation dispute is resolved does not impair the Congressional intent. The representation dispute will end with the employees in the merged craft or class casting ballots for or against representation and the choice of the majority of votes cast in that election will prevail.

The Board cannot take action with respect to crafts or classes at merging carriers where no application has been filed and Section 2, Twelfth does not change the Board's duties under Section 9, Ninth. Accordingly, in the Board's view, Manual Section 19.7 is not inconsistent with the RLA and the Board will not change it.

C. Request to Maintain Current Showing of Interest Requirements for Intervenors

AMFA asks the Board to reconsider proposed Rule 1206.5, regarding the showing of interest for an intervenor. AMFA argues that the FAA amendments do not require that the 50 percent showing of interest be extended to intervenors and that "[a]bsent express language in the RLA to the contrary, the Board should not pursue a policy of according inferior organizing rights to workers in the airline and railroad industries." AMFA argues that Section 2, Twelfth

does not require intervenors to also satisfy the 50 percent showing of interest requirement because the Board can hold an election once the 50 percent showing of interest requirement is satisfied by the initial applicant. AMFA requests that the Board maintain its current 35 percent showing of interest for intervenors in both merger and non-merger situations and argues that changing the showing of interest requirement for intervenors would serve no other purpose than to "limit democratic choice" by limiting the choices on the ballot.

In contrast, IBT, in its comment, contends that the Board's proposed Rule 1206.5 is appropriate because allowing a party to intervene with a lower showing of interest than the initial applicant would allow that party to "ride the coattails" of the initial applicant. According to IBT, it would be inconsistent to allow an intervenor to have their name on the ballot with a showing of interest lesser than that required of the initial applicant. In addition, IBT contends that allowing a lower showing of interest for intervenors may result in more multi-party elections and a greater number of run-off elections. TWU, in its comment, also approves of the Board's proposed rule, which adjusts the showing of interest for intervenors. According to TWU, "it would be inappropriate and inconsistent with Board practice for the Board to allow intervenors who seek certification to piggyback on an applicant's 50% showing of interest but produce only a 35% showing of interest on their own."

As discussed above, there is only one application that an individual or organization files to invoke the Board's services. The Board requires all organizations, whether initial applicant or intervenor, to file the same application. Congress has stated that an application must be supported by a 50 percent showing of interest and the Board sees no reason to make a distinction between initial applicants and intervenors at this point. While the language of Section 2, Twelfth does not specifically refer to intervenors, the Board recognizes that it is unlikely that Congress intended for an organization or individual to get their name on the ballot

with less than a 50 percent showing of interest after another organization has complied with the 50 percent requirement.

In addition, the Board notes that it has not prevented employees from signing more than one authorization card. *See Wisconsin Central Trans. Corp*. *RR*, 24 NMB 307 (1997). In a merger situation, a union could collect signatures from employees who are represented by another union. If 50 percent of the craft or class is either already represented by that union or willing to sign an authorization card for that union, the showing of interest requirement will be satisfied. In a merger situation, there is no reason to hold the union who files the first application to a higher standard than unions who file subsequent applications.

D. Request to Include Merger Procedures in CFR

TTD requests that that the Board include the current merger procedures in the Code of Federal Regulations (CFR) to provide clear guidance to labor and management and in order to enjoy the high level of deference afforded under the *Chevron* standard. TTD asked the Board to "incorporate existing merger procedures" into the CFR and provided proposed language.

Because Congress has removed the Board's discretion with regards to showing of interest requirements in merger procedures, the existing merger procedures in the Manual will be amended to reflect that change. The Manual provides procedural guidance to the Board's staff in processing representation disputes. While these provisions are not mandatory for the Board or its staff, they do provide guidance to labor and management during representation disputes. It is not a compilation of regularly promulgated regulations having the force and effect of law. *Hawaiian Airlines v. NMB*, 107 L.R.R.M. 3322 (D. Haw. 1979), *aff'd without op.* 659 F.2d 1088 (9th Cir. 1981).

The Board has made changes to the Manual in the past and may do so in the future. These changes are communicated to labor and management. *See e.g. Revised Materials for NMB's New Voting Procedures*, 38 NMB 83 (2011). By maintaining discretion where Congress has not required specific action by the Board, the Board is able to change the Manual as required by changes in the industry, Board practice, or the law. For example, the Board amended the write-in procedures in the Manual after determining that new voting procedures clarified voters' choices, making a write-in vote for "Any Other Organization or Individual" unnecessary. *Id.* The Board will not codify merger procedures that are not required by Congress into the CFR in order to maintain this flexibility.

E. Request to Provide Greater Protection Against Carrier Interference in the Manual

The TTD requests that the Board amend its Manual to require carriers to provide information verifying voter eligibility when providing the initial List of Eligible Voters and impose remedies on a case-by-case basis where a carrier has failed to provide accurate information necessary to determine eligibility. It also requests that the Board ensure that carriers do not abuse the election process by claiming that terminated employees are furloughed. According to TTD, the new showing of interest requirements will "incentivize carriers to pad voting lists with hard-to-reach workers or individuals no longer employed at the company in an effort to prevent employees from even having an opportunity to vote in an election."

The Board has the authority under Section 2, Ninth to implement measures to insure that an election is free from carrier interference at any stage of a representation dispute. The Board has in place a procedure to ensure the accuracy of the list. Manual Section 3.6 provides the parties with an opportunity to review the Eligibility List if it appears that the showing of interest requirement has not been met. *See also American Airlines*, 39 NMB 341 (2012)

(providing a schedule for challenges and objections to the Eligibility List prior to showing of interest determination).

The Board will not change its Manual at this time but will continue to request information from carriers when it is necessary to make eligibility determination and remains free to take appropriate measures as necessary on a case-by-case basis. The Board can also investigate allegations of election interference prior to the tally in extraordinary circumstances.

The Board has always investigated allegations of election interference and addressed related issues in its determinations. If there are allegations of carrier or union interference following the change in showing of interest requirements, the Board will address these changes. Following prior changes to the election rules, the Board addressed how these changes influenced interference allegations following a subsequent election and interference investigation. *See, e.g. Delta Air Lines*, 39 NMB 53, 73 (2011) (discussing how changes to election procedures to allow employees to affirmatively vote against representation mean that the fact that a carrier is aware that an employee voted no longer carries as great a risk of reprisal or coercion). As discussed above, the Board seeks to maintain its flexibility in responding to changes in the airline and railroad industries. The Board will continue to address changes in the industry, communications, technology, and whether these new showing of interest requirements change interference investigations as part of its statutory duty to ensure that elections are free from carrier interference.

F. Request to Change Decertification Procedures

Right to Work requested that the Board "provide an explicit decertification procedure." It notes that employees under the NLRA have a straightforward process for decertifying a union

and that the lack of such a process under the RLA deprives airline and railroad workers of a right that other employees in the private sector have.

The Board has in the past considered comments on the issue of changing its decertification procedures when it was considering changing its voting rules. *See Chamber of Commerce*, 14 NMB 347 (1987). The Board recognized that the close relationship between the form of the ballot and the issue of decertification called for the issues to be addressed together. Here, however, Right to Work has not even explained how this issue is relevant to the changes to the RLA by the FAA Reauthorization. The change in showing of interest requirements in Rules 1206.2 and 1206.5 will apply to all representation elections, including those resulting from an application filed by an individual or organization seeking to decertify a union, equally. The Board currently has a procedure for decertification and the amendments and the proposed rules do not substantively change that procedure because the showing of interest requirement where the craft or class was represented was greater than 50 percent under the prior rule.

While not as direct as Right to Work might prefer, the Board's current election process allows employees to decertify a union and has been utilized for that purpose. The Board previously had a higher showing of interest requirement where a craft or class of employees was already represented. As noted during the Board's prior rulemaking proceedings, this policy was based on the Board's desire to preserve stability in collective bargaining relationships. 75 Fed. Reg. 26062, 26078 (May 11, 2010). The Board has required a majority showing of interest before authorizing an election that would disturb an existing collective bargaining relationship. Consistent with Congressional intent, the Board will require a 50 percent showing of interest for any application, leaving current decertification procedures virtually unchanged. Because the proposed rules will not affect the decertification process, this is not an issue that the Board will

address at this time. Furthermore, Right to Work points to the NLRA's decertification procedure. As the Board noted the last time this issue was raised in rulemaking proceedings, the NLRA specifically provides for a decertification process. The 1947 Taft-Hartley Amendments to the NLRA added a provision allowing an employee, group of employees, or any individual or labor organizations acting on their behalf to file a petition asserting that the currently certified or recognized bargaining representative no longer represents the employees in the bargaining unit. 29 U.S.C. 159(c)(1)(A)(ii). No similar provisions have been included in the RLA.

IV. Conclusion

Based on the rationale in the proposed rule and this rulemaking document, the Board hereby adopts provisions of the proposal and clarification as a final rule.

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 et seq.).

Regulatory Flexibility Act

The NMB certifies that this rule will not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The rule will not directly affect any small entities as defined under the Regulatory Flexibility Act.

National Environmental Policy Act

This rule will not have any significant impact on the quality of the human environment under the National Environmental Policy Act (42 U.S.C. 4321 et seq.).

List of Subjects in 29 CFR Part 1206

Air carriers, Labor management relations, Labor unions, Railroads.

Accordingly, as set forth in the preamble, the NMB amends 29 CFR part 1206 as follows:

PART 1206-HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

1. The authority section for 29 CFR Part 1206 continues to read as follows:

Authority: 44 Stat. 577, as amended; 45 U.S.C. 151-163

2. Revise § 1206.1 to read as follows:

§ 1206.1 Run-off elections.

(a) In an election among any craft or class where three or more options (including the option for no representation) receive valid votes, if no option receives a majority of the legal votes cast, or in the event of a tie vote, the Board shall authorize a run-off election.

(b) In the event a run-off election is authorized by the Board, the names of the two options which received the highest number of votes cast in the first election shall be placed on the run-off ballot, and no blank line on which voters may write in the name of any organization or individual will be provided on the run-off ballot.

(c) Employees who were eligible to vote at the conclusion of the first election shall be eligible to vote in the run-off election except:

(1) Those employees whose employment relationship has terminated; and

(2) Those employees who are no longer employed in the craft or class.

3. Revise § 1206.2 to read as follows:

§ 1206.2 Percentage of valid authorizations required to determine existence of a representation dispute.

(a) Upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least fifty (50) percent 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 under the provisions of section 2, Ninth, of the Railway Labor Act.

(b) Any intervening individual or organization must also produce proved authorizations (checked and verified as to date, signature, and employment status) from at least fifty (50) percent of the craft or class of employees involved to warrant placing the name of the intervenor on the ballot.

§ 1206.5 [Removed]

4. Remove § 1206.5.

§§ 1206.6 and 1206.7 [Redesignated as §§ 1206.5 and 1206.6]

5. Redesignate §§ 1206.6 and 1206.7 as §§ 1206.5 and 1206.6.

6. Add § 1206.7 to read as follows:

§ 1206.7 Amendment or rescission of rules in this part.

(a) The Board may at any time amend or rescind any rule or regulation in this part by following the public rulemaking procedures under the Administrative Procedure Act (5 USC 553) and after providing the opportunity for a public hearing.

(b) The requirements of paragraph (a) of this section shall not apply to any rule or proposed rule to which the third sentence of section 553(b) of the Administrative Procedure Act applies.

(c) Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation in this part. An original and three copies of such petition shall be filed with the Board in Washington, D.C., and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

§ 1206.8 [Removed]

7. Remove § 1206.8.

Dated: December 18, 2012

Mary Johnson

General Counsel, National Mediation Board

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