TTD A BOLD VOICE FOR TRANSPORTATION WORKERS

Q&A on NMB Election Procedures

Q: What change is being requested?

A: The Transportation Trades Department, AFL-CIO is requesting a change to National Mediation Board (NMB) election procedures so that the majority of those voting in a union election prevail.

Q: That seems to make sense. What are the current procedures?

A: The current election procedures require a majority of all *eligible* workers to cast a vote for a union in order for those wanting a union to prevail. All workers who don't vote are counted as "no" votes for the union. This allows the expressed will of the majority of participating voters to be vetoed by the silence of those who do not vote. Under the current rules, even when 100 percent of the ballots favor unionization the vote is nullified unless an *absolute majority* of eligible voters cast votes in the election.

Q: Why is the change needed?

A: The current system is inherently undemocratic and unreliable in determining whether workers want union representation. Under today's procedures, no one can choose to abstain from participating. If an employee does not vote, his/her silence is counted as a "no" vote. If an employee wants union representation, but forgets to vote, that employee is counted as actually voting against union representation, despite the employee's true preference for the union. If an employee does not believe in voting and has never voted in an election in his/her life, that employee is treated as having voted in this election and having voted against the union.

To be truly democratic, employees must have a *choice* to vote for union representation, against union representation, or not to vote at all. That is exactly how other union elections are conducted in this country. In fact, in two decisions relating to the Board's election procedures, the United States Supreme Court has recognized that the current system favors a "no union" result.

In addition, the NMB includes as eligible voters employees on lay off, on military leave, on extended medical leave of absence and other employees who may be hard to reach. If these employees do not participate in the election because they are in Iraq, in a hospital or because they were laid off five years ago and now have another job, they are counted as voting against union representation.

Q: Why else is the current procedure flawed?

A: It gives employers a perverse incentive to pressure workers to not participate in a government-supervised election. In fact, in last year's union election among Delta flight attendants, the company instructed its employees to destroy government-issued ballots so they could not vote. This strategy is effective because again, if a worker can't vote, it is considered a vote against the union. Election procedures should not encourage and reward this type of employer conduct. In addition, by requiring a majority of eligible employees to cast ballots for representation, carriers have an incentive to stack the Official Eligibility List with as many individuals as possible, even though they may no longer be employed or have no reasonable expectation of returning to work. This is particularly true in large elections where the union, without access to an employee address list, cannot verify the employment status of many of those on the Eligibility List. As a result, the issue of representation may be determined by individuals no longer working at the carrier. Such an outcome is patently undemocratic. With a standard yes/no ballot, the carrier has less incentive to place ineligible individuals on the Eligibility List.

Q: I have been told that the change you are seeking is undemocratic. Is that true?

A: No. If you want to ascertain whether a group of workers wants a union, ask the workers to vote "yes" or "no" on the question of representation and allow a majority of those voting to prevail. That is exactly how other union elections are held in this country. This more democratic method of voting is how we elect our political leadership in this country. Most mid-term political elections fail to meet the majority participation threshold. In fact, records show that nationwide voter participation has been below 50 percent in every mid-term election since 1930. As a result, many – if not most – Representatives and Senators would not be in office today if those who did not vote were considered to have voted against the candidate (the current NMB election procedures). Three former presidents – John Quincy Adams, Warren Harding and Calvin Coolidge – would not have been elected if federal elections followed this standard. Yet, under the current NMB rules, the will of the majority of those who participated in the election can be vetoed by those who did not cast a ballot. Allowing an affirmative "yes" or "no" vote is more democratic than "veto by silence."

Q: Isn't this request unfair to workers because it could allow a minority to choose a union for the whole group?

A: No. In fact it is fairer to workers because it will allow the will of the majority of those voting to prevail. An employee will have a real choice under the proposed change to vote his/her will, rather than to have a "no" vote forced on the employee who chooses not to vote. Under our requested change, workers would still have the right to a secret ballot election. They could either vote "yes" for the union or "no" against union representation or choose to abstain, and a majority of those voting would decide the outcome.

Q: Are your requested changes akin to the Employee Free Choice Act (EFCA) and the "card check" procedure in that bill?

A: No, the proposed change has nothing to do with card check for elections under the Railway Labor Act (RLA). In fact, the proposal would only bring the basic election procedures for aviation and rail workers in line with the current procedures used for workers covered under the National Labor Relations Act and other U.S. labor laws.

Q: Is the NMB authorized to make the requested change or is an amendment to the law needed to make the change you are requesting?

A: Yes, the NMB has the authority to make this change, and no amendment of the law is necessary. The RLA gives the Board great discretion on how it conducts elections and does not require the current procedure. Specifically, the RLA states that the NMB may "take a secret ballot of employees involved" or may "utilize any other appropriate method of ascertaining" the representative in a manner that will ensure choice by the employees "without interference or coercion exercised by the carrier." Clearly, allowing a majority of those voting to decide whether to form a union is consistent with these statutory requirements. In fact, in 1947, the United States Attorney General issued an opinion letter advising that the NMB possessed the authority to make the change now requested, and there have been no subsequent changes to the RLA which would alter that conclusion. 40 U.S. Op. Atty. Gen. 541. The Supreme Court has made clear that the NMB has "broad discretion" to determine the form of its ballot. *ABNE*, 380 U.S. 650 (1965). Moreover, under certain circumstances, the Board has already decided past elections based upon the majority vote of those participating in the election. *See Laker Airways*, 8 NMB 236 (1981).

Q: But doesn't the RLA also say something about a majority of employees getting to decide whether to have a union?

A: Yes. Section 2, Fourth of the RLA states 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 ...." But that section is silent on how a majority should be determined. In fact, the Board is given the discretion to conduct elections using any appropriate method to ascertain the will of workers in terms of union representation. More to the point, the reasoning of the Supreme Court in the *Virginian Railway* case supports the notion that the RLA does not mandate that a majority of the entire workforce vote in an election in order for it to be valid. Specifically, the Court stated the following:

> Petitioner construes this section [Section 2, Fourth] as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but it is silent as to the manner in which the right shall be exercised. **Election laws**

> **providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election**. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 560 (1937) (emphasis added).

Q: So if the current election procedures are not required by statute, are they at least required by the Board's formal regulations?

A: No. While the Board has adopted some formal regulations, most representation procedures, including ballots, are not prescribed by those regulations. The Board's discretionary election procedures are summarized and referenced in the Board's current Representation Manual. The Board has made periodic changes to its election processes and its Representation Manual and usually seeks input from interested stakeholders. We would expect the Board to seek public comment when considering the suggested changes to its representation procedures.

Q: If it is not required by statute, or formal regulations, what was the original reason the Board used to justify the current election procedures?

A: In its First Annual Report (FY 1935) the Board stated the following:

> "...the Board interpreted [Section 2. Fourth of the Act] as requiring a majority of all those eligible rather than a majority of the votes only. The interpretation was made, however, not on the basis of legal opinion and precedents, but on what seemed to the Board best from an administrative point of view."

It's clear that not even the Board, soon after it started implementing this procedure, believed that it was not required by the RLA or legal precedent. Instead it cited what was "best from an administrative point of view." A great deal has changed since 1935 that would make the administrative functions of elections less difficult. Elections under the RLA must be conducted system-wide and thus workers in an election are often spread out across the country. The Board was apparently concerned that workers geographically dispersed might not be adequately informed about an election or prepared to participate. To account for this reality, requiring a majority of eligible workers to cast a vote for an election to be valid, given the limited technology and communication means in 1935, may have made some sense. But today, with internet and telephonic voting procedures that the Board has adopted and the advancements in communications in general, that concern is moot. Updating the election procedures to reflect a more democratic process makes sense and is long overdue.

Q: Why is the change being requested now?

A: Despite claims to the contrary, the current NMB practice has been contested and controversial for decades. This debate certainly did not begin in September 2009 when TTD formally requested the proposed changes. The NMB should not further delay modernizing and updating its election rules to comply with democratic principles. As we have seen recently, employers are using the current procedures to discourage worker participation in elections as a path to derailing unionization efforts by their employees.

Q: Aren't you trying to change the rules in the middle of the election/representation campaign at Delta Airlines?

A: No. There is no current election at Delta and there will be no union elections until the Board authorizes election for the flight attendants and ground workers at the company. There are always potential organizing/representation cases in the rail and aviation sectors. If the Board was precluded from making changes to its representation rules based on this rationale, it would never be able to make changes and update its procedures.

Q: Some have said that the rail and aviation industries are already heavily unionized at least compared to other sectors of the economy. Is that true and if so doesn't that prove that the current election rules are not an impairment to workers choosing a union?

A: It is true that the rail and aviation sectors are more heavily unionized than other industries. But that has to do with unique and historic factors that have nothing to do with the current NMB election procedures. In fact, the rail industry was largely unionized before the RLA was even enacted in 1926. In the past, the NMB has declined to alter its election procedures in large part because the Board reasoned that its practice of presuming that non-participants reject representation had not actually presented an impediment to unionization. Specifically, in 1948, the Board declined to change its practice because it found that only one-fourth of one percent of employees who voted for representation had been deprived of such representation for lack of majority participation in the first fourteen years of the NMB's existence. 1 NMB 454 (1948). In the last thirteen years, however, the Board's election statistics tell a far different story. From 1996 through 2008, the Board has conducted 799 elections involving 218,161 employees. Of those elections, 241 were set aside due to a lack of majority participation. In those rejected elections, 49,522 employees voted for union representation. Thus, 22% of involved employees have been denied representation due to the lack of majority participation. Obviously, this represents a dramatic increase from the one-fourth of one percent figure found by the Board in 1948. It is clear, that there are still large and small groups in the aviation and rail industries that have been unable to join a union because of the undemocratic organizing rules in place. These workers deserve the unfettered right to choose unionization regardless of the percentage of the airline and rail workforce that is currently unionized.

Q: Didn't the Board consider this change in the mid-1980's and reject it?

A: In 1987, the NMB (14 NMB 347) responded to and rejected a number of requested changes to its procedures. The matter was initiated by a request from the Chamber of Commerce to include in NMB regulations "provisions covering the handling of decertification elections..." In response, one union asked the Board to adopt a yes/no ballot with a majority of those voting to prevail. In the end, the NMB decided not to change its election or decertification procedures. In contrast, now all 32 unions of the Transportation Trades Department, AFL-CIO are requesting that the Board change its practice.

Q: So if the Board ruled on this question in 1987, why should it revisit the policy today?

A: First, that decision was rendered 22 years ago and the Board ultimately refrained from substantive changes in response to the package of proposals raised at that time. Nothing precludes a new Board from taking a new look at any issue – especially one as important as ensuring a fair process for workers to choose a union. Finally, we note that even in its 1987 proceedings, the Board agreed that the NMB has broad discretion on how union elections are conducted.

Q: How do you respond to charges that you're just trying to rig the system in your favor?

A: As the Supreme Court has noted, the system is currently rigged **against** workers who want to form a union. The "veto by silence" method undermines the principle of free choice. We are simply asking that a majority of those voting in a union election get to decide whether to have a union. We are trying to conform union election procedures for airline and rail workers to election procedures used in every other election process in American democracy.

Q: Some say the TTD's proposal will make it easier for Unions to be voted in, but that there is no way for employees to change their mind under the RLA, once a union is in, it's in forever, is this true?

A: No. The current NMB procedures permit employees to vote a union out, and nothing in TTD's proposal would modify those existing procedures.

Q: Air carriers have proposed that, if the NMB adopts TTD's proposal, it must also adopt the NLRB's decertification procedures. How do you respond?

A: TTD's proposal involves the ballot form, and its adoption would neither modify the NMB's current procedures permitting employees to reject an incumbent union, nor require the wholesale modification of those procedures.

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