A bold voice for transportation workers

June 4, 2010

Oppose the Isakson Resolution of Disapproval (S J Res 30)

Dear Senator:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I urge you to vote against Senator Isakson's "resolution of disapproval" of the National Mediation Board's (NMB or Board) new rule that will allow a majority of ballots cast to determine union representation. The NMB's new rule is consistent with statute, was considered in an open and transparent process, and makes union election procedures for airline and rail workers fairer and more consistent with democratic norms.

Under the old rules, the NMB counted all workers who did not vote in a representation election as a vote against a union. There are, of course, several reasons why a person may not vote in an election, and it makes no sense to automatically and arbitrarily assign a "no" vote to all non-voters. As a result, the old process was structurally tilted against union representation, despite the Board's clear mandate to promote collective bargaining. More importantly, counting all non-voters as no votes is unfair to the majority of those who choose to vote.

The new NMB rule provides workers with an opportunity to vote either for a union, against a union, or to abstain from voting and have a voting majority decide the outcome. Despite claims from the supporters of the resolution, this is not "card-check" or "minority rule." Rather, it is the same procedure that we use to elect Senators, Members of Congress and is found throughout our democratic society.

The proponents have also stated that the NMB does not have the authority to issue this rule. The Railway Labor Act (RLA) does not require the old procedure and gives the Board broad discretion on how it conducts elections. Specifically, 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 ...." This section is silent on how a majority should be determined, and the NMB is given the authority to conduct elections using any appropriate method for ascertaining voter intent – a view supported by the Supreme Court. In fact, the Board has, in the past, applied different union election procedures including rules similar to those embodied in the final rule.

Transportation Trades Department, AFL-CIO

888 16th Street NW / Suite 650 / Washington DC 20006
Tel:202.628.9262 / Fax:202.628.0391 / www.ttd.org
Edward Wytkind, President / Larry I. Willis, Secretary-Treasurer

Supporters of the resolution similarly claim that Congress must authorize any change to the NMB's voting procedure. The claim is based upon an anomalous 1978 Federal Register notice that appeared to indicate, without explanation, that the NMB is unable to make any change to its election procedures. As a matter of administrative law, such a statement is not binding, and further, the Board has never interpreted the 1978 statement as guiding its decision-making process. The charge is a baseless distraction and in no way bears any legal merit on the Board's ability to set its elections procedures.

The process the Board used to adopt this rule was fair, open and allowed all parties an opportunity to comment. The NMB published a Notice of Proposed Rulemaking in the Federal Register on November 3, 2009 that included a detailed explanation of why the Board was considering this change, allowed interested parties 60 days to comment, and provided detailed rationale for offering the proposal. As part of this comment period, the NMB held a public meeting where it heard from 34 members of the public. The final rule included a detailed response to the substantive comments offered and provided a thorough and well-reasoned explanation for the Board's final rule.

Opponents of the rule claim that the well-established notice and comment process the Board used in this proceeding is insufficient, and instead the Board should have engaged in an evidentiary hearing, with witnesses, cross-examination and submitted evidence. The sole rationale for this position is that the NMB used this process in 1987 to review requests to change union representation rules. Simply because the Board chose to use evidentiary hearing procedures more than two decades ago does not obligate subsequent Boards to follow this approach. There is nothing in the RLA or any other law that requires the Board to follow this process to change its rules or procedures. Federal agencies issue new regulations every day following the same notice and comment procedures employed by the Board in this proceeding. It makes no sense to hold the NMB to a different standard, and the allegation is simply an attempt to distract policy makers from the merits of the rule.

It is interesting that while the Air Transport Association is challenging this rule in federal court, United, Continental, American, Southwest and UPS have all opted-out from this litigation. It is clear that most of the remaining airlines challenging the rule simply want to prevent their workers from having a fair process to pursue collective bargaining.

Please oppose the Isakson "resolution of disapproval" (S J Res 30) when it is considered on the Senate floor.

Sincerely,

Edward Wytkind
President