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## National Mediation Board rule change draws fire

The National Mediation Board (NMB) is the independent federal agency responsible for administering union representation elections under the Railway Labor Act (RLA), 45 U.S.C. §§ 151 et seq. The RLA covers the railway and airline industries, two business sectors of critical importance to Chicago, the nation's transportation hub. The NMB's three members are appointed by the President of the United States.

The RLA expressly provides that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of [collective bargaining]." 45 U.S.C. § 152 (Fourth). This includes the employees' right to not choose any labor organization to represent them.

For some 75 years, under both Democratic and Republican administrations, the NMB conducted union representation elections in the airline and railway industries under the standard that certified a union as the collective bargaining representative only if a majority of eligible employees in the applicable craft or class voted for the union. Employees who did not vote were considered, for practical purposes, "No" votes against unionization. For example, if the applicable craft at an airline, say flight attendants, contained 100 employees, but only 40 flight attendants voted, the NMB would not certify the union, even if all 40 voters voted for the union, because the union needed 51 votes to win. The rationale for this rule is that a union lacking true majority support cannot effectively negotiate. See Chamber of Commerce, 14 N.M.B. 347, 362 (1987).

The NMB's procedure in this regard contrasts markedly from the National Labor Relations Board's (NLRB), which applies to most other private sector employers. The NLRB certifies unions that achieve a majority of votes actually cast. Obviously, railways and airlines strongly prefer the NMB rule. Railway and airline labor unions not so much.

The landscape changed radically this year. President Obama appointed to the NMB a new member and reappointed for another term an existing member. These two members, over the vociferous objections of the NMB's chairwoman, a Bush appointee, on May 11, 2010 issued a rule under which a union would be certified as a craft's or class's collective bargaining agent based on a majority of the votes cast, rather than a majority of the eligible employees in the craft or



### Labor Daze

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class. 75 Fed. Reg. 26,062. The new rule was set to become effective on June 10, 2010. Interestingly, the new rule was promulgated while the Association of Flight Attendants (AFA) and International Association of Machinists and Aerospace Workers (IAM) had representation applications pending before the NMB regarding very large employee classes at Delta Airlines, including a class containing thousands of flight attendants.

Unsurprisingly, the airline industry, which is only about 50 percent organized (compared to the railroad industry, which is almost entirely union represented), went ballistic. In less than a week from the rule's issuance, the Air Transport Association of America (ATA), the main trade association representing U.S. carriers, filed in Federal District Court in Washington, D.C. for injunctive relief to block the new rule's implementation. Following a court status hearing on May 26, 2010, the NMB agreed to postpone the rule's effective date to June 30. A hearing on ATA's motion for preliminary injunction is scheduled for June 21. Several major airlines, including Chicago's own United Airlines, declined to join the ATA's suit.

The ATA challenges the NMB's new rule on several grounds. It notes that the U.S. Supreme Court appears to have blessed the concept that, under the RLA, "no vote is a vote for no representation." *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 670 (1965). It points to the NMB's own prior declarations that only Congress, and not the NMB itself, possesses the authority to discard the prior

rule that counted non-votes as votes against the union. Minutes of NMB Board Meeting at 78 (June 7, 1978). And it argues that on at least four prior occasions, the NMB declined specific requests to scuttle the old rule.

The ATA further alleges in its suit that the NMB's new rule "must be set aside because it is both inconsistent with [the RLA's] unambiguous text and an unreasonable interpretation of that text." According to the ATA's literal reading of the RLA, a class or craft majority, whether it votes or not, must determine the outcome of a union representation election. Allowing a minority of pro-union voters to determine the outcome, which easily could happen under the new rule where large numbers of craft or class members simply do not vote, is at odds with the RLA's plan language, according to the ATA.

Prominently, the ATA also in its complaint mercilessly scores the NMB majority for the way it promulgated the rule. According to the ATA's allegations, the two Obama appointees essentially ran over the Bush-appointed chairwoman, cutting her out of deliberations on the change altogether and then attempting to quash her attempt to file a dissent. The ATA further alleges that the Obama appointees then tried to cover up their actions, pleading with their colleague to not refer in her dissent to how they had behaved. The spin and counter-spin on this point aside, should there be discovery pertaining to the NMB's deliberations on the new rule, the depositions will make for interesting reading.

The case's outcome undoubtedly will have a significant impact on the airline industry and, to a lesser extent, railroads. But for private sector employers generally, what the Obama-appointed NMB members did here may serve as a portent of things to come generally. President Obama recently made several recess appointments to the NLRB. One of those NLRB recess appointees was Craig Becker, former associate general counsel to the nation's fastest growing labor union, the Service Employees International Union (SEIU). The business community strongly objected to Becker's appointment, raising the specter that Becker will use the NLRB's rulemaking authority to impose a strongly pro-union agenda.

That remains to be seen. But the changes at the NMB seem to indicate that employers may soon face stronger unionization efforts.