



NATIONAL MEDIATION BOARD

29 CFR Part 1206

Docket No. C-7034

RIN 3140-ZA01

Representation Procedures and Rulemaking Authority

AGENCY: National Mediation Board

ACTION: Proposed rule with request for comments

SUMMARY: This proposal amends the National Mediation Board's (NMB or Board) existing rules for handling representation disputes to incorporate statutory language added to or amending the Railway Labor Act (RLA) by the Federal Aviation Administration Modernization and Reform Act of 2012. This document proposes changes to the existing regulations pertaining to run-off elections, showing of interest for representation elections, and the NMB's rulemaking proceedings.

DATES: The NMB will accept written comments that are received on or before
[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Docket Number C-7034 by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Agency Web Site:* www.nmb.gov. Follow the instructions for submitting comments.
- *E-mail:* legal@nmb.gov. Include docket number in the subject line of the message.
- *Fax:* (202) 692-5085.

- Mail and Hand Delivery: National Mediation Board, 1301 K Street, N.W., Ste. 250E, Washington, DC, 20005.

Instructions: All submissions received must include the agency name and docket number. All comments received will be posted without change to www.nmb.gov, including any personal information provided.

Docket: For access to the docket or to read background documents or comments received, go to www.nmb.gov.

FOR FURTHER INFORMATION CONTACT: Mary Johnson, General Counsel, National Mediation Board, 202-692-5050, infoline@nmb.gov.

SUPPLEMENTARY INFORMATION:

On February 14, 2012, the President signed the Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. No. 112-095 (FAA Reauthorization) into law. The FAA Reauthorization contained, inter alia, several amendments to the RLA. The changes contained in these amendments impact the Board's current Rules relating to run-off elections, showing of interest requirements, and rulemaking. These Rules are being revised to comply with the statutory language. As discussed below, the Board invites commenters to address specific questions below, along with any other matters they consider relevant to the changes wrought by the amended statutory language. The Board is particularly interested in receiving comments regarding the effect of the amendments on the Board's policies and practices with respect to representation disputes in mergers. The NMB may incorporate any comments in a Final Rule in this proceeding. The NMB will hold an open public hearing during the comment period. A notice will be published containing the dates of the open public hearing and related information.

Run-Off Elections

Prior to the enactment of the FAA Reauthorization, under its previous practice in representation elections, the Board aggregated all votes cast for representation, including write-in votes.¹ Where a majority of employees have cast valid ballots for representation but no individual or organization received a majority of the ballots cast, the issue to be determined was which of the individuals or organizations would be the representative. Thus, the run-off election, once authorized, would be between the two individuals or organizations that received the highest number of votes. 29 CFR 1206.1. The amendments to the RLA now require that the Board no longer aggregate votes for representation and that any run-off election will be between the two ballot options that receive the most votes. This can include the “no” option.

The Board’s Rules also required that a participant initiate a run-off election with a written request. 29 CFR 1206.1. The amended language now requires the Board to “arrange for” a second election when no ballot option receives a majority of the ballots cast.

Showing of Interest

Prior to these amendments, the showing of interest requirements needed to support an application under Section 2, Ninth of the RLA invoking the Board’s services to investigate a representation dispute among a carrier’s employees were established by the exercise of the Board’s discretion under Section 2, Ninth, and by the NMB’s Rules. 29 CFR 1206.2, 1206.5. The showing of interest requirements were not defined by statute. The NMB’s Rules provided that

¹ The NMB has a longstanding practice of allowing write-in votes for representation. International Total Services, 16 NMB 231, 233 (1989) (rejecting union objection to inclusion of write-in option since the provision for write-in votes in NMB elections has remained largely unchanged for over 50 years).

an individual or organization needed to support their application with authorization cards from thirty-five percent of the craft or class if those employees were unrepresented and authorization cards from more than fifty percent of the craft or class if those employees were already represented. 29 CFR 1206.2. An intervening individual or organization needed a thirty-five percent showing of interest to get on the ballot. 29 CFR 1206.5. The amended statutory language provides that a showing of interest of not less than fifty 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.” 45 U.S.C. 152, Twelfth.

The amended language is silent with regard to mergers. 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. After the NMB determines that a single transportation system exists, the Board’s investigation will proceed to address the representation of the craft or class. The Board’s current policy in mergers requires that “[i]ncumbent organizations or individuals on the affected carrier(s) must submit evidence of representation or a showing of interest from at least thirty-five (35) percent of the employees in the craft or class.” NMB Representation Manual (Representation Manual) Section 19.601.² The Representation 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.

² The Representation 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 Manual Section 19.6. The amended RLA, however, now requires at least a fifty percent showing of interest for applications to certify a representation of any craft or class. The Board's merger procedures include the filing of an application to certify a representative of the newly merged craft or class. The Board seeks comments regarding the impact of the amended language on the Board's policies and procedures with regard to mergers.

Rulemaking Authority

The FAA Reauthorization also amends the RLA to specifically provide rulemaking under the Administrative Procedure Act (APA) with the added requirement of a hearing in addition to the notice and comment provisions of Section 553 of the APA.

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 proposed rule affects only the Board's election process, the method used by the NMB to determine the outcome of a self-organization vote by employees, and internal NMB procedures. The proposed rule imposes no requirements upon carriers or derivative carriers subject to the RLA. The proposed rule would not directly affect any entities that are small businesses under the Regulatory Flexibility Act. Accordingly, the National Mediation Board certifies that it will not have a significant impact on a substantial number of small entities.

National Environmental Policy Act

This proposal 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 proposes to amend 29 CFR part 1206 as follows:

PART 1206-HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

1. The authority citation for part 1206 continues to read as follows:

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

2. Section 1206.1 is revised to read as follows:

§ 1206.1 Run-off elections.

(a) If in an election among any craft or class 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. Section 1206.2 is revised to read as follows:

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

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.

4. Section 1206.5 is revised to read as follows:

§ 1206.5 Necessary evidence of intervenor's interest in a representation dispute.

In any representation dispute under the provisions of section 2, Ninth of the Railway Labor Act, an intervening individual or organization must 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.

5. Section 1206.8 is revised to read as follows:

§ 1206.8 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 U.S.C. 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.

Dated: May 10, 2012

Mary Johnson

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[FR Doc. 2012-11770 Filed 05/14/2012 at 8:45 am; Publication Date: 05/15/2012]