A Timely Analysis of Legal Developments

ASAP®

In This Issue:

June 2010

A federal court has upheld the NMB's new rule for RLA representation elections, in which a majority vote in favor of union representation among all eligible voters is no longer required. The decision paves the way for a drastic change in the labor relations dynamics of the air and rail industries.

District Court Clears Way for Implementation of New NMB Rules for Union Elections in Air and Rail Industries

By Jack Lambremont and Chip McWilliams

On Monday, June 28, 2010, the U.S. District Court for the District of Columbia issued its full opinion in the lawsuit initially brought by the Air Transport Association (ATA) against the National Mediation Board (NMB or "Board") seeking an injunction to delay and prevent the Board's implementation of a new policy for union elections in the air and rail industries. In its order and opinion, the court upheld the NMB's new rule, granting summary judgment in favor of the Board. The Board's new rule, casting aside more than 75 years of stable policy in the railroad and airline industries, provides that a simple majority of those who vote in a representation election will decide whether the entire craft or class becomes subject to union representation. Under the previous rule, the NMB, in most cases, required a vote in favor of representation by a *majority of the entire craft or class of eligible voters* before it would require a carrier to recognize a labor organization as the representative of the group. This change in the election rules is a significant paradigm shift and will considerably alter the delicate labor relations dynamic in both the railroad and airline industries.

Overview of the Change: the Old Rule vs. the New Rule

Throughout the 75 years that the NMB has conducted union elections in the air and rail industries covered by the Railway Labor Act (RLA), the Board has required that, in the absence of substantial carrier interference with an election, an actual majority of the entire craft or class must affirmatively cast ballots in favor of representation before the Board will certify a labor organization as the representative of the craft or class. For example, under the old rule, in a craft or class of 100 employees, 51 employees would have to cast ballots in favor of union representation for the union to be certified as the bargaining representative for the entire craft or class; if only 50 employees voted for union representation, the craft or class would remain unrepresented. Significantly, throughout this 75 years of Board precedent, employees have not had the ability to affirmatively vote "no union" in representation elections.

Despite organized labor's success in organizing employees in the rail and air industries, the three-member Board – two of whom are former high-ranking union officers – decided in November 2009 to abandon 75 years of stable election policy and implement a new election procedure that, according to the majority of the Board, is intended to make the new process more "democratic." The proposed rule was issued against the dissent of Board Chair Elizabeth Dougherty, who also protested to Congress that the two other Board members had excluded her from drafting and issuing the proposed rule.

The new rule, which is scheduled to become effective on June 30, 2010, marks a dramatic reinterpretation of the statutory requirement set forth in the RLA that an actual majority of the employees in a craft or class being organized must vote in favor of representation before the NMB will certify the union as bargaining representative. Instead of requiring an actual majority, the new rule requires the NMB to certify a labor organization in any election in which only a majority of those employees who actually vote cast ballots in favor of a union. To accomplish this, the NMB majority implemented a new ballot that includes the option of a "no union" vote. As a result, under the new rule, in a craft or class of 100 employees, if only 49 participate and vote in the election and, of those 49 employees, 25 vote in favor of a labor organization and 24 vote "no union," the NMB will find that the craft or class has opted for union representation and issue certification to the winning union, even though only 25% of the employees in the craft or class has voted for union representation—a far cry from an actual majority of the employees in the craft or class. The result would be the same in this scenario even if those 25 votes for union representation were divided amongst several different unions (which would lead to a run-off election among the unions). Under the old rule, with only 25% of the employees in the craft or class voting in favor of a union, the craft or class would have remained unrepresented.

Overview of the Lawsuit and the Court's Reasoning

The Air Transport Association (ATA) filed suit on behalf of some (but not all) of its members on May 17, 2010, asserting that the new rule violates the RLA and is "arbitrary, capricious, and not in accordance with law under the Administrative Procedures Act." ATA's suit also asked the court to enjoin the implementation of the new rule. The court heard oral arguments on June 21, 2010 and issued its Order denying an injunction on June 25, 2010. On June 28, the court issued a written opinion explaining its decision.

In its opinion, the court first addressed ATA's statutory argument under the text of the RLA itself. In relevant part, the RLA reads, "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 for the purposes of this [Act]." ATA asserted that the language meant exactly what it said and that the new rule's "majority of voters" standard contradicted the express language of the RLA. The court, however, rejected ATA's argument and instead found the relevant language ambiguous because the RLA is silent as to how employees may exercise their right to determine a representative.

The court next determined whether the Board's interpretation of the statutory language was reasonable. Applying the Supreme Court's standard from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which instructs courts to show deference to administrative agencies charged with administering and enforcing statutes, the court reasoned that the new rule was not inconsistent with or prohibited by the plain language of the RLA. As such, the court held that the Board's new rule is a reasonable construction of the statute and entitled to deference. In *dicta*, the court went on to state that, because the RLA permits the Board to use "any other appropriate method" to determine whether a union has been selected by employees, the Board could take the extraordinary step of dispensing with elections altogether.

Next, the court examined whether the Board's rulemaking process violated the Administrative Procedure Act (APA). Applying the deferential "arbitrary and capricious" standard, the court found that the Board sufficiently stated its reasons and bases for the rule change and, accordingly, complied with the APA. The court also analyzed ATA's argument that the Board's refusal to adopt a formal decertification procedure or to allow a "no union" option in a run-off election was arbitrary and capricious. The court quickly dispensed with the issue, finding that the Board considered many comments advocating decertification and run-off procedures during the rulemaking process, weighed and rejected those comments, and explained its reasons for doing so. According to the

court, this meant that the Board's process was "adequate under the APA."

Finally, the court noted ATA's argument that the Board's new rule was arbitrary and capricious because two members of the Board acted with "unalterably closed minds regarding the New Rule and predetermined the outcome of the rulemaking process." The court summarily dismissed the argument, noting that it had already considered the allegation earlier in the litigation when it rejected ATA's request for expedited discovery, finding then that the allegations were insufficient to support the theory.

The Rule Is Now Here—What Should Carriers Be Doing Now in Response?

Because the new rule presents such a paradigm shift for railroads and airlines, as well as unions, carriers should consider communicating the rule to both craft or class employees as well as front line supervisors and managers. The change is a potential boon to unions who, with declining membership ranks over the last decade, see the new rule as an opportunity to reverse the trend and add dues-paying members to their books. With this potential for new and renewed union organizing efforts, carriers must now reverse a campaign strategy that has been their mainstay for three-quarters of a century. Whereas before, carriers struggled to explain to employees that if they did not want a union they simply should not vote, now, employees opposing unionization need to "get out the vote." Carriers must be prepared to explain that if an employee does not want a union, that employee must affirmatively vote "no union" on the ballot.

Just the Facts, "Ma'am"

Although there are no "unfair labor practices" under the RLA, carriers must still be careful when explaining the rule and the Board's reasoning to avoid a carrier interference claim by a union. It is important to note that under the RLA, carrier interference charges can be claimed and adjudicated by a federal district court prior to an election count. This possibility, along with unions trying to use these claims and adjudications against a carrier to bolster their organizing campaigns by portraying the carrier as a "law breaker," should encourage carriers to remain vigilant about being as factual as possible during the earliest stages of a union organizing campaign. When explaining the Board's rationale, carriers are well-served to avoid invectives directed at the Board and simply explain the facts of the change—what the rule "was" and what the rule now "is."

Cards Have Far Greater Consequences

Carriers should also be prepared to address the subject of union authorization cards with their employees. With an expected uptick in union organizing efforts in the wake of the new rule, employees may begin to see union organizers at or near the carrier's property trying to get employees to sign these cards. The new rule fails to clarify whether cards signed under the old rule will still be valid to make a showing of interest to support an election under the new rule. Carriers and employees alike should play it safe and assume, however, that "old" cards may be considered valid in an election following implementation of the new election procedures. It will also be important for carriers to impart to their employees that, although cards typically have a shelf life of one year, during that year period the union is not required to give the card back to an employee, even if the employee demands it back; it can still be used as part of the required showing of interest to require an election under the new rule.

Finally, in light of the court's statement that the NMB could do away with elections altogether, carriers should bear in mind that authorization cards may take on far greater significance if the NMB looks to the court's opinion as a basis to expand further the scope of its authority in representation matters.

Get Out the Vote!

As noted above, the standard message to employees who did not want a union was "don't vote!" Since the old ballots did not contain a "no union" option and under the old rule an absolute majority of the entire craft or class was required to certify a union, not voting was the NMB equivalent of a "no vote." The new rule turns this strategy upside down. Now, a key component of a lawful communication strategy for carriers faced with a union election is to advise employees who do not want a union to turn

out and affirmatively vote "no union" on the ballot. Unions, under the old rule, always encouraged their supporters to participate in the election, and that message will certainly continue under the new rule. Now, however, it is likely that the union message will also focus on discouraging employees opposed to organizing from voting at all. Carriers must be prepared to counter attempts by unions to suppress likely "no" voters by emphasizing to all employees of the subject craft or class that the choice receiving the most votes, of the total of votes cast, will likely determine the winner. Apathy or ambivalence toward unionization will no longer preserve the status quo. Maintaining self-representation now requires an actual vote if an election is ordered.

Communication Is the Key

With the advent of this new rule and its "greasing of the skids" for unions to organize employees at railroads and airlines, carriers may be faced with "perpetual campaigns" as unions continually try to obtain authorization cards and bolster their pool of potential votes until they feel they can be successful in an election. Also, in the past, unions typically sought elections only after obtaining a large majority of authorization cards – anticipating some attrition of support in the process. Now, unions are likely to seek elections with fewer cards and a smaller "critical mass" of activists supporting unionization. Further, many unions are sure to see the new rule as providing them with low hanging fruit to pursue, even if the craft or class is already organized. If a union feels it can garner enough support to upset an incumbent union, it is more likely to attempt to unseat its rival, threatening unneeded disruption to a carrier's labor relations and its operations as a whole.

Carriers should consider preparing a communications plan that is synchronized with their union avoidance plans. Effective strategies should combine personal communication with extensive use of technology to reach every employee in an industry dispersed across a wide area, and further dispersed over schedules accounting for constant operations. Communications should begin with explaining the new rule and what it means for both the carrier and its employees. But in a perpetual campaign environment, good and consistent communications with employees can both reveal problems that might create an atmosphere in which a union could successfully organize an employee group and also serve as an early-warning system to alert a carrier's management when union organizing activity is beginning to take place.

Conclusion

The Board's new election rule constitutes a sea change in the delicate and time-tested interplay between carriers, unions and the Board in representation elections. This change upsets the former balance and tilts the playing field decidedly in favor of unions. Leveling the field will not be easy, but carriers can position themselves on the new field and under the new rule to ensure that their views are clearly, universally and lawfully stated to employees and that, by reacting proactively to the change, they continue to respond effectively to evolving union organizing strategies.

Jack Lambremont is a Shareholder, and Chip McWilliams is Of Counsel, in Littler Mendelson's Atlanta office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Lambremont at jlambremont@littler.com, or Mr McWilliams at cmcwilliams@littler.com.