



Airline Legal Alert: NMB Publishes Final Rule

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On May 11, 2010, the Federal Register will publish the Final Rule of the National Mediation Board (NMB) regarding the process it will employ in determining the outcome of representation elections. When the rule goes into effect, it will replace the NMB's historic majority rule, under which a majority of the entire craft or class had to vote for representation before a union would be certified to represent that craft or class, in favor of a process that is based on the majority of votes cast.

In large part, the new voting rule will mimic the process used by the National Labor Relations Board (NLRB), under which a union will be certified as the representative of the employees if it receives a majority of the votes cast in the election, regardless of whether a majority of eligible employees cast votes for representation. For example, assume there are 200 eligible employees in a craft or class and only 50 employees vote in the election. If 26 of those employees cast ballots for representation, the NMB will certify the union as the bargaining representative for the entire craft or class even though only 13% of employees voted for the union. If a majority of employees voting cast votes for "no union," however, the NMB will dismiss the union's application.

One marked departure from the NLRB's process (and from the proposed rule) is that the new NMB ballot will include an option to "write-in" other unions. Votes received by other unions in the "write-in" process will be aggregated with the votes cast for the union on the ballot to determine whether a majority of those voting want representation, thus making it even easier for unions to win elections. For example, if Union A (the union on the ballot) receives 15 votes, Union B receives 5 "write-in" votes, Union C receives 1 "write-in" vote, and 20 employees cast votes for "no union," the NMB will conduct a run-off election between Union A and Union B – the two unions receiving the most votes – because a majority of the votes cast were for representation, even though the option that garnered the most votes was "no union." In the run-off election, employees would not have the option of voting for "no union" nor would there be a write-in option on the ballot.

The Final Rule also clarifies the showing of interest requirements. Consistent with the Board's past rule, for unrepresented employees, a union must present authorization cards from at least 35% of the craft or class. For represented employees, a union wishing to challenge an incumbent union must present authorization cards from at least 50% of the craft or class.

In response to criticisms from commenters that the NMB should have considered a decertification process simultaneously with the changes to the

voting rule, the Final Rule notes that employees continue to have the ability to decertify a union even though the decertification process is "not as direct as some commenters might like." The Final Rule acknowledges that employees will still have to have a "strawman" appear on the ballot, and that the strawman must present authorization cards from at least 50% of the craft or class in order to appear on the ballot. Employees wishing to decertify the incumbent union then must either (1) cast a majority of votes for the strawman knowing that, upon certification, the strawman will disclaim interest in the craft or class, or (2) cast a majority ballots for "no union" causing the craft or class to revert to an unrepresented state.

Several commenters on the NPRM asked that Members Linda Puchala and Harry Hoglander disqualify themselves from further participation in the rulemaking because the process used to prepare and publish the NPRM gave the appearance that Members Puchala and Hoglander had prejudged the issue. Members Puchala and Hoglander declined to recuse themselves, writing that they had not prejudged the issue, that the NMB had properly followed the informal rulemaking procedure under the Administrative Procedure Act, and that none of the commenters presented any evidence of bias on their part.

Chairman Elizabeth Dougherty dissented from the Final Rule. Chairman Dougherty's dissent focuses on four areas: (1) the timing and process surrounding the preparation of and publishing of the NPRM, which Chairman Dougherty believes suggests that Members Puchala and Hoglander prejudged the issue; (2) the failure of Members Puchala and Hoglander to articulate a rational basis for the rule change; (3) the failure of Members Puchala and Hoglander to include a formal decertification process, which Chairman Dougherty believes "reveals a bias in favor of representation and is fundamentally unfair"; and (4) the inclusion of a write-in option in the Final Rule, when such an option was not contemplated by the NPRM, violates the notice and comment requirements of the Administrative Procedure Act.

The Final Rule will become effective on June 10, 2010, 30 days after being published in the Federal Register. The Final Rule will apply only to applications filed by a union on or after June 10th. We anticipate that litigation challenging the Final Rule will likely be filed. Full text of the Final Rule can be found at http://federalregister.gov/inspection.aspx#reg_N.