Rules and Regulations

Federal Register
Vol. 84, No. 144
Friday, July 26, 2019

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2018–0984; Airspace Docket No. 18–ASW–8]

RIN 2120–AA66

Expansion of R–3803 Restricted Area Complex; Fort Polk, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects a final rule published in the **Federal Register** of July 16, 2019, that expands the R–3803 restricted area complex in central Louisiana by establishing four new restricted areas, R–3803C, R–3803D, R–3803E, and R–3803F, and makes minor technical amendments to the existing R–3803A and R–3803B legal descriptions for improved operational efficiency and administrative standardization. This action corrects a typographical error listed in the effective date of that rule.

DATES: Effective date: 0901 UTC September 12, 2019.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule in the **Federal Register** (84 FR 33845; July 16, 2019) for Docket No. FAA–2018–0984 expanding the R–3803 restricted area complex in central Louisiana by establishing four new restricted areas, R–3803C, R–3803D, R–3803E, and R–3803F, and making minor technical amendments to R–3803A and R–3803B; Fort Polk, LA. Subsequent to publication, the FAA identified a typographical error for the date listed in the effective date; the correct effective date is September 12, 2019. This action corrects that error.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, Expansion of R–3803 Restricted Area Complex; Fort Polk, LA, published in the **Federal Register** of July 16, 2019 (84 FR 33845), FR Doc. 2019–15119, is corrected as follows:

On page 33845, in the second column, line 28, remove the text ''September 13, 2019'' and add in its place ''September 12, 2019.''

Issued in Washington, DC, on July 22, 2019.

Rodger A. Dean Jr.,

Manager, Airspace Policy Group.

[FR Doc. 2019–15930 Filed 7–25–19; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL MEDIATION BOARD

29 CFR Parts 1203 and 1206

[Docket No. C–7198]

RIN 3140–AA01

Decertification of Representatives

AGENCY: National Mediation Board.

ACTION: Final rule.

SUMMARY: The National Mediation Board (NMB or Board) is amending its regulations to provide a straightforward procedure for the decertification of representatives. The Board believes this change is necessary to fulfill the statutory mission of the Railway Labor Act by protecting employees' right to complete independence in the decision to become represented, to remain represented, or to become unrepresented. This change will ensure that each employee has a say in their representative and eliminate unnecessary hurdles for employees who no longer wish to be represented.

DATES: The final rule is effective August 26, 2019.

FOR FURTHER INFORMATION CONTACT: Mary Johnson, General Counsel, National Mediation Board, (202) 692–5040, *legal@nmb.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Railway Labor Act (RLA or Act), 45 U.S.C. 151, *et seq*. establishes the NMB whose functions, among others, are to administer certain provisions of the RLA with respect to investigating disputes as to the representative of a craft or class. In accordance with its authority under 45 U.S.C. 152, Ninth, the Board has considered changes to its rules to better facilitate its statutory mission to investigate representation disputes ''among a carrier's employees as to who are the representatives of such employees.''

Under Section 2, Ninth of the RLA, it is the duty of the NMB to investigate representation disputes ''among a carrier's employees as to who are the representatives of such employees . . . and to certify to both parties, in writing . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.'' 45 U.S.C. 152, Ninth. The RLA also authorizes the NMB to hold a secret ballot election or employ ''any other appropriate method'' to ascertain the identity of duly designated employee representatives. *Id.*

Unlike the National Labor Relations Act (NLRA), the RLA has no statutory provision for decertification of a bargaining representative. The Supreme Court, however, has held that, under Section 2, Fourth, 45 U.S.C. 152, Fourth, employees of the craft or class ''have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all.'' *Bhd. of Ry., Airline & S.S. Clerks* v. *Ass'n for the Benefit of Non-Contract Emps.,* 380 U.S. 650, 670 (1965) (*ABNE*). In *ABNE,* the Court further noted that the legislative history of the RLA supports the view that employees have the option of rejecting collective representation. *Id.* at 669 (citing Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 34–35 (1934)). The 1934 House Report on the 1934 amendments to the RLA states with regard to Section 2, Ninth, ''[i]t provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire.'' H.R. Rep. 73 No. 1944 at 2. In *Int'l Bhd. of Teamsters* v. *Bhd. of Ry., Airline & S.S. Clerks,* 402 F.2d 196, 202 (1968) (*BRAC*), the United States Court of Appeals for the District of Columbia

(D.C. Circuit), stated that ''it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit.''

Nonetheless, prior to 1983, the Board would dismiss without an election an application filed pursuant to Section 2, Ninth if the NMB determined that the applicant did not ''intend to represent'' the craft or class in collective bargaining under the Act. In *Atchison, Topeka & Santa Fe Ry. Co.,* 8 NMB 66 (1980), the NMB dismissed the application filed by J.D. Blankenship because the authorization cards did not authorize him to act as the representative of the craft or class for purposes of representation under the RLA, but instead authorized him to decertify the incumbent union. The Board stated that ''such cards are not valid for purposes of Section 2, Ninth, to provide a showing of interest.'' *Id.* at 70. In *Atchison, Topeka & Santa Fe Ry. Co.,* the Board dismissed an application supported by cards authorizing Laurence G. Russell to represent the craft or class in collective bargaining under the RLA when the NMB became aware that Mr. Russell intended to negotiate an agreement to terminate the existing collective-bargaining agreement and ''thereafter refrain from engaging in further representation of employees.'' 8 NMB 469, 472 (1981). Even if an individual seeking to decertify succeeded in winning the election and attempted to disclaim representation, the Board would refuse to process the disclaimer if it was filed too close in time to the certification. In that circumstance, the Board would consider the disclaimer as ''clear and compelling evidence'' that the prior election was not a true representation dispute, was in fact ''designed to frustrate the purposes of the Act, and would void the prior election restoring the certification of the incumbent union. *See Mfrs. Ry. Co.,* 7 NMB 451 (1980).

The Board's position and refusal to act was soundly rejected as a breach of ''its clear statutory mandate'' in the Fifth Circuit's decision in *Russell* v. *NMB,* 714 F.2d 1332 (1983) (*Russell*), finding that ''employees have the clear right under the Act to opt for nonrepresentation.'' In *Russell,* the Court held that employees have complete independence under the Act to select or reject a collective bargaining representative, and the NMB could no longer refuse to process a representation application after it determined the applicant intended to terminate collective representation if certified. Since *Russell,* however, employees who no longer wish to be represented must still follow an unnecessarily complex procedure to obtain an election.

Under its current procedures, the NMB allows indirect rather than direct decertification. The Board does not allow an employee or a group of employees of a craft or class to apply for an election to vote for their current representative or for no union. Employees who wish to become unrepresented must follow a more convoluted path to an election because of the Board's requirement of the ''straw man.'' This straw man requirement means that if a craft or class of employees want to decertify, they must find a person willing to put their name up, *e.g.,* ''John Smith,'' and then explain to at least fifty percent of the workforce that John Smith does not want to represent them, but if they want to decertify they have to sign a card authorizing him to represent them. Thus, in order to become unrepresented, employees are required to first sign an authorization card to have a straw man step in to represent them. In the resulting election, the ballot options will include the names of the current representative; John Smith, the straw man applicant; ''no union;'' and an option to write in the name of another representative. To decertify, employees have to vote for John Smith, the straw man, with the understanding that if certified, he will disclaim representation, or vote for no representation.[1] Although voters selecting the straw man and the ''no union'' option may both desire nonrepresentation, their votes are not aggregated.

On January 31, 2019, the NMB published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** inviting public comment for 60 days on a proposal to amend its RLA rules to provide a straightforward procedure for decertification of representatives. 84 FR 612. Under the Board's proposed procedure employees may submit authorization cards to decertify their current representative. The wording on the card must be unambiguous and clearly state the intent to no longer be represented by the current union. The showing of interest requirement will be the same showing of interest required for a certification election—at least 50 percent of the craft or class.

The Board further proposed eliminating the straw man representation choice from the ballot in decertification elections. Once it is determined that the showing of interest is valid and that at least 50 percent of the craft or class no longer wish to be represented by their current representative, the Board will authorize an election with the incumbent and the no representation option, along with a write-in option, appearing on the ballot. The applicant's name will not appear on the ballot since the representation dispute is whether the employees in the craft or class want to continue to be represented by the incumbent union. The Board's existing run-off rules will continue to apply.

In the NPRM, the Board noted that, while employees have the ability to decertify a representative under the RLA, the current straw man process is unnecessarily complex and convoluted. There is no statutory basis for the additional requirement of a straw man where employees seek to become unrepresented. The NMB noted the legislative history and court precedent that, under the RLA, employees have complete independence to be free to reject representation, as they are free to join any labor organization of their own choosing. By failing to have in place a straight-forward process for decertification of a representative, the Board is maintaining an unjustifiable hurdle for employees who no longer wish to be represented and failing to fulfill the statutory purpose of ''freedom of association among employees.'' 45 U.S.C. 151a(2).

In the NPRM, the Board also stated its belief that successful decertification, like certification, is a challenging and significant undertaking by employees with a substantial impact on the workplace for both employees and their employer. In the Board's view, changes in the employee-employer relationship that occur when employees become represented, change representative, or become unrepresented require similar treatment. Accordingly, the Board proposed extending the two year time limit on applications in Section 1206.4 to decertification as well as certifications. The other time limits on

[1] In 2010, the Board changed its representation election procedures to certify a representative based on a majority of ballots cast. 75 FR 26062 (May 11, 2010) (2010 Representation Rule). Previously, an individual or organization had to receive votes from a majority of all eligible voters in the craft or class and the only way to vote for no representation was to abstain from voting. Thus, in order to decertify, after soliciting a showing of interest from fellow employees indicating their desire to have the straw man represent them for collective bargaining under the RLA, the straw man had to convince those same employees to either abstain from voting in the subsequent election so that the union would not obtain a majority, or vote for him with the understanding he would disclaim.

applications set forth in Section 1206.4 will remain unchanged.

Subsequently, on March 1, 2019, the NMB published a Notice of Meeting in the **Federal Register** inviting interested parties to attend an open public hearing with the Board to share their views on the proposed rule changes regarding the proposed decertification procedure. 84 FR 6989.

II. Notice-and-Comment Period

In response to the NPRM, the NMB received 32 submissions during the official comment period from a variety of individuals, employees, trade associations, labor unions, Members of Congress, advocacy groups, and others. (Comments may be viewed at the NMB's website at (*http://www.nmb.gov*). Additionally, the NMB received written and oral comments from nine individuals and representatives of constituent groups under the RLA that participated in the March 28, 2019 open public hearing.

All of the comments reflected strongly held views for and against the NMB's proposed change. The NMB has carefully considered all of the comments, analyses, and arguments for and against the proposed change. The commenters supporting the Board's proposed change stated that the proposal was clearly authorized by the statute and that it would simplify an unnecessarily complex procedure. In its comment in support of the NPRM, the National Railway Labor Conference (NRLC) stated that the ''Board's proposal is modest and sensible and strikes the proper balance between stability of labor relations—which is critical to the railroads—and the statutory right of employees 'to determine who shall be the representative of the craft or class''' under Section 2, Fourth of the Act. The NRLC noted that there is ''already a decertification mechanism under the RLA. Thus, any suggestion that the Board is contemplating a significant or unprecedented change in representation is hyperbole. The change under consideration is a minor, incremental adjustment that will merely make the existing procedure clearer and simpler.'' Based on their own experience with the current procedures several individuals who had filed applications as the straw man expressed strong support for a direct decertification procedure. The National Right to Work Legal Foundation (Right to Work) stated that the proposed change is ''long overdue,'' and the NPRM is ''needed to ensure that all employees have an equal and fair choice regarding union representation. The Board has statutory authority to adopt the proposed rules, and should do so as soon as possible.'' Americans for Tax Reform stated the ''NMB's proposed rule would restore balance and ensure that all workers, whether they want union representation or not, are treated equally.'' The Competitive Enterprise Institute (CEI) stated that the proposed rule would eliminate confusion in the decertification process since employees desiring decertification would no longer have to recruit a craft or class member to appear on the ballot as the straw man or convince a majority of employees to sign authorization cards for the straw man while also explaining that this individual is not actually going to represent them. Instead, employees would simply collect cards in support of no union representation. The proposed change, in the view of the CEI, would also protect employees from harassment, citing examples of on-line bullying. Rusty Brown of RWP Labor stated that ''[a]ll Americans should have the right to unionization but should also have the right to remove these unions as their bargaining representative through a straightforward and efficient means.''

Some of the arguments in favor of the NPRM will be discussed in greater detail in the discussion that follows; however, the preamble will focus on the Board's response to the substantive arguments raised by those opposed to the NPRM.

III. Summary of Comments on the NMB's Proposed Decertification Procedure

Commenters to the Board's proposal to make its current decertification procedure more simple and direct expressed widely divergent views of the NPRM and the Board's process in formulating the NPRM. The Board's response to those comments is as follows.

A. The Board's Statutory Authority for the Proposed Change

Some of the comments opposed to the NPRM question whether the NMB possesses the statutory authority to make the proposed change. The International Association of Machinists and Aerospace Workers, AFL–CIO (IAM) [2] states that ''the Board plainly lacks statutory authority to issue this proposed rule. In fact, Congress has expressly forbidden the action now proposed.'' While conceding that the RLA neither mentions nor requires a decertification procedure, the IAM asserts that the NPRM is ''contrary to the plain language of the Act.'' The Transportation Trades Department of the AFL–CIO (TTD) asserts that the proposed change exceeds the Board's narrow statutory authority to investigate and certify employees' choice of a union representative. Since, unlike the NLRA, Congress has not amended the RLA to provide an express provision for decertification, the TTD states that the current straw man procedure is the only method for decertification allowed by Section 2, Ninth. One commenter, Deven Mantz, Brotherhood of Maintenance of Way Employes Division-IBT North Dakota Legislative Director, stated that work groups should only be allowed to change unions, not become ''not Union completely.'' The TTD, IAM, Association of Flight Attendants-CWA (AFA), and other commenters opposed to the NPRM also suggest that Congress' decision to amend the Act to set a 50 percent showing of interest requirement for representation disputes under the RLA is further evidence that the scope of representation disputes under the RLA is limited to applications ''requesting that an organization or individual be

[2] On April 24, 2019, following the close of the comment period, the IAM filed a ''Supplemental Comment'' stating that the NPRM is ''motivated at least in part by a broader political strategy,'' and requesting that the Board ''exercise its statutory authority, . . . maintain its independence from carrier and political influences, and cease this rulemaking without issuing the proposed rule.'' The basis for this request lies in the IAM's Freedom of Information Act (FOIA) Request filed with the Board shortly after the publication of the NPRM. The document produced by the NMB and relied on by the IAM is one email from a carrier representative to Board Member Gerald Fauth urging the Board to ''think bigger'' than decertification and referencing other potential rulemakings by executive branch agencies as well as the potential of rulemaking as political strategy as exercised under the Obama Administration in 2011. To the extent that the IAM is alleging bias, the single received email, which was given no reply, falls short of establishing the ''clear and convincing showing that [an agency member] has an unalterably closed mind on matters critical to the disposition of the rulemaking.'' *Ass'n of Nat'l Adver.* v. *FTC,* 627 F.2d 1151, 1154 (D.C. Cir. 1979). IAM does not point to statements by Member Fauth or any Member of the Board. Further, an administrative official is presumed to be objective and ''capable of judging a particular controversy fairly on the basis of its own circumstances.'' *United States* v. *Morgan,* 313 U.S. 409, 421 (1941).

The IAM also appears to suggest that by proposing this rule change, the Board has compromised its neutrality. This suggestion is entirely unwarranted. The Board majority followed the mandates of the Administrative Procedure Act (APA) in considering, drafting, adopting, and promulgating the NPRM. The policy and procedures at issue are the Board's own determinations. An agency is free to change its interpretations and its policies so long as the new policy or interpretation is permissible under the statute, there are good reasons for it, and the agency believes it to be better. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (*FCC* v. *Fox*). Finally, under the APA, the Board's final rule is subject to judicial review.

certified as the representative of any craft or class of employees.''

With one exception, most opposing commenters acknowledge that employees have the right under the RLA to decertify their representative so long as an employee agrees to act as the straw man and gathers the requisite showing of interest from their fellow employees authorizing the straw man to represent them even though the straw man or the employees want to become unrepresented. During the election, employees must either vote for no representation or for the straw man with the understanding that the straw man will disclaim. The commenters opposed to the NPRM essentially argue that the Act compels the filing of an application for representation even if the straw man applicant, the employees in the craft or class, the incumbent union, and the Board all know that the desire of the employees invoking the Board's services is an election on the question of whether to remain represented. If the Act prohibits decertification, then there can be no indirect decertification. But that is not the case.

As has previously been stated, the RLA makes no mention of decertification and it also sets forth no specific procedure for representation. *Air Transp. Ass'n of Am.* v. *NMB,* 663 F.2d 476, 485 (D.C. Cir. 2011) (*ATA*). Section 2, Ninth gives the Board the authority to investigate representation disputes and ascertain the identity of the employees' representative through a secret ballot election or ''any other appropriate method of ascertaining the names of the duly designated and authorized representatives.'' The Board is given broad discretion with respect to the method of resolving representation disputes with the only caveat being that it ''insure'' freedom from carrier interference. *ABNE,* 380 U.S. 650, 668–669 (1965).

The courts have also long rejected the idea that the absence of a decertification provision means the Board has no power to decertify a union. Since employees have the right to reject representation under the RLA, inherent in the Board's authority to certify a representative is the power to certify that a particular group of employees has no representative. *BRAC,* 402 F.2d 196, 202 (D.C. Cir. 1968). In *Russell,* discussed above, the court found that the Board exceeded its statutory authority by dismissing a representation application with a valid showing of interest because the applicant did not intend to represent the craft or class for purposes of collective bargaining, contract disputes, and grievances. Rather, if certified, Mr. Russell intended to abrogate the contract and disclaim representation. Mr. Russell was the straw man and the purpose of seeking an election was the decertification of employees' incumbent union. The court found, however, that Mr. Russell did intend to represent the employees within the meaning of Section 1, Sixth which defines ''representative'' as ''any person or persons, labor union, organization, or corporation designated either by a carrier . . . or by its employees, to act for it or them,'' since a majority of the craft or class wanted Mr. Russell to take the steps necessary to terminate collective bargaining.[3] *Russell,* 714 F.2d at 1342. It is clear that the Board has the authority and the obligation to accept applications from employees where the question concerning representation is whether employees want to reject representation.

The TTD and other commenters opposed to the NPRM assert that Section 2, Twelfth limits the Board's authority under Section 2, Ninth and preclude the Board's proposal for direct decertification. The TTD argues that the language of Section 2, Twelfth requires that applications filed with the NMB under Section 2, Ninth are only those ''requesting that an organization or individual be certified as a representative of any craft or class of employees'' and that ''the proposed rule cannot be reconciled with that language.'' The IAM asserts that Section 2, Twelfth is an ''additional statutory limit on the Board's authority to carry out its authority to make a representation determination.'' The Board agrees that Section 2, Twelfth places an additional limitation to the Board's authority under Section 2, Ninth, but that limitation is simply that once requested to investigate a representation dispute, the NMB cannot direct an election or use any other method to determine the representative of a craft or class of employees without a showing of interest of not less than 50 percent of employees in the craft or class. Representation Procedures and Rulemaking Authority, 77 FR 75545 (Dec. 21, 2012) (2012 NMB Rulemaking).

In the Board's view, the language of Section 2, Twelfth must be read in the context of Section 2, Fourth, which gives the majority of any craft or class the right to determine who their representative shall be, and Section 2, Ninth, which places an affirmative duty to determine the employees' choice of a representative when a representation dispute exists; the dispute is among a carrier's employees; and one of the parties to the dispute has requested the Board's services. *See Ry. Labor Execs' Ass'n* v. *NMB,* 29 F.3d 655, 666–67 (D.C. Cir. 1994) *(RLEA*). Section 2, Twelfth does not require employees or their representative to pretend to seek certification in order to vindicate their statutorily protected right of complete independence in the choice to be represented or be unrepresented.

The FAA Modernization and Reform Act of 2012, Public Law 112–95 (2012 FAA Modernization Act), contained, inter alia, several amendments to the RLA[4] including the addition of Section 2, Twelfth. Section 2, Twelfth titled ''Showing of interest for representation elections,'' provides that the Board,

> upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.

45 U.S.C. 152, Twelfth.

Prior to these amendments, the showing of interest requirements needed to support an application under Section 2, Ninth 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 and not defined by statute. The NMB's Rules provided that 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

[3] The 5th Circuit's decision in *Russell* further notes that, at oral argument, the Board argued that rather than filing the straw man application, ''the correct course of action would have been for the employees to have petitioned the Board 'to hold an election to either vote for the current union representative . . . or, nonunion.' '' *Russell,* 714 F.2d at 1342. The court stated that it did not see why the Board's suggested procedure was any more or less objectionable than Mr. Russell's actions and it was in fact a procedure almost identical to the procedure under the NLRA which the Board had previously stated ''time and time again as not allowed by the RLA.'' *Id.*

[4] In addition to Section 2, Twelfth, the 2012 FAA Modernization Act amended Section 2, Ninth to direct a run-off election when no ballot option receives a majority in an election with three or more choices (including the no representation option). The run-off election is between the two ballot options that the largest and the second largest number of votes. The amendments also added a provision regarding the Board's rulemaking authority and provided for an audit of the NMB's programs and expenditures by the Comptroller General, discussed *infra.*

or organization needed a thirty-five percent showing of interest to get on the ballot. 29 CFR 1206.5.

The NMB has consistently interpreted the language of Section 2, Twelfth as requiring a valid showing of interest of 50 percent for any application invoking its services to resolve a representation dispute. In its 2012 rulemaking to modify its rules to reflect the amended statutory language, the Board rejected arguments that Section 2, Twelfth did not apply to applications resolving the representation consequences of mergers of two or more carriers. The Board stated the RLA

> Only provides for investigation of a representation dispute by the NMB ''upon request of either party'' to that dispute. Thus, the statutory language does not distinguish between requests to investigate where the craft class is unrepresented, where the employees wish to change representation or become unrepresented, or where there has been a merger or other corporate transaction. Under the Board's practice, the Section 2, Ninth request is made in the form of an application and the Board has always had one application, ''Application for Investigation of Representation Dispute,'' which requests the Board to investigate and certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth.

2012 NMB Rulemaking, 77 FR 75545. Prior to the 2012 FAA Modernization Act, the Board had one application with different showing of interest requirements. With Section 2, Twelfth, Congress determined that the Board must require the same showing of interest for any application.

The Board finds further support for its position in the Conference Report for the 2012 FAA Modernization Act (Conference Report). The most dispositive indicator of legislative intent is the conference report. *United States* v. *Commonwealth Energy Sys.,* 235 F.3d 11, 16 (1st Cir. 2000). With regard to the NMB, the Conference Report notes that the House bill, Section 903, provided for the repeal of the Board's 2010 Representation Rule, summarized as changing ''standing rules for union elections at airlines and railroads, which counted abstentions as votes 'against' unionizing, to the current rule which counts, only no votes as 'against unionizing, abstentions do not count either way.'' H.R. Conf. Rep. No. 112–381, at 259 (2012). The Senate bill contained ''no similar provision.'' *Id.* The conference action report states that repeal of the NMB's representation rule ''was not agreed to by the Conference, and is not included in the final bill.'' *Id.* The conference committee did agree, inter alia, to ''amend section 2 of the Railway Labor Act by raising the showing of interest threshold *for elections* to not less than fifty percent of the employees in the craft or class.'' *Id.* at 260 (emphasis added). The use of the term ''election'' without qualification does not suggest that Congress intended to limit the Board's authority to only those requests to certify a representative. The 2012 amendments were not intended to limit the types of representation disputes among carrier employees to be resolved by the Board under Section 2, Ninth. The authority of the NMB to resolve all representation disputes—disputes involving employees' right to become represented, to change representation, or to become unrepresented—is essential to preserve employee free choice. The statutory interpretation urged by the TTD, IAM, and other commenters opposed to the rule would profoundly alter the Board's core authority under Section 2, Ninth.[5] Congress, however, does not use vague schemes or ancillary provisions to alter the fundamental details of a regulatory scheme— it does not, as the adage says, hide elephants in mouse holes. *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001); *MCI Telecomms. Corp.* v. *AT&T Co.,* 512 U.S. 218, 231 (1994). The 2012 amendments were aimed at the Board's discretionary practices applicable to all applications, namely the showing of interest requirements and the run-off procedures, in response to the Board's decision to change the way it counted ballots in all representation elections.

In the Board's view, TTD's emphasis on the words ''application requesting that an organization or individual be certified as representative'' is misplaced. Section 2, Ninth gives the Board broad authority to determine employees' choice of representative. As the D.C. Circuit has noted, the right of employees to reject representation yields the corollary that the Board possesses the implied power to certify to the carrier that a craft or class of employees has rejected representation. *BRAC,* 402 F.2d 196, 202 (1968) (citing *ABNE,* 380 U.S. 650 (1965)). Following its duty under Section 2, Ninth, the result of every NMB representation elections is the official notification to the parties and the carrier as to who is the designated representative of the craft or class at issue. When employees choose to become represented or change representation, the notification is titled a ''certification.'' When the employees choose to become or remain unrepresented, the notification is titled a ''dismissal.''

Commenters opposed to the NPRM also suggest that the fact that the Government Accountability Office (GAO) did not recommend a change to the NMB's decertification process and Congress' subsequent inaction is tantamount to a Congressional limitation on the Board's statutory authority under the RLA. The TTD stated during the hearing that the Comptroller General was to make recommendations to the Board and appropriate congressional committees regarding actions that may be taken by Congress or the Board to ensure that processes are fair and reasonable for all parties, and no recommendations were made.

In fact, Section 165(b) of the 2012 FAA Modernization Act did direct GAO to review, evaluate and make recommendations to the Board and congressional committees within 180 days of enactment of the law regarding the Board's certification procedures. However, that mandate was terminated by the three congressional committees of jurisdiction within 134 days after the enactment of the law, according to GAO documentation. Revae Moran et al., U.S. Gov't Accountability Office, GAO–12–835R, ''National Mediation Board Mandates in the FAA Modernization and Reform Act of 2012'' (June 27, 2012). The congressional committees instead accepted a Congressional Research Service report (CRS Report) summarizing the differences between the three major federal labor relations laws. *See generally* Alexandra Hegji, Cong. Research Serv., R42526, ''Federal Labor Relations Statutes: An Overview'' (May 11, 2012). The CRS Report notes that Congress has enacted three major laws that govern labor-management relations in the private and federal sectors: the RLA, the NLRA, and the Federal Service Labor-Management Relations Statute. The CRS Report provides ''a brief history and overview of each of these statutes. It also discusses key statutory provisions for each statute.'' *Id.* at 1. The CRS Report's discussion of decertification states that, although the NMB does not have a formal procedure for decertifying a union, it has ''several practices that effectively remove an incumbent union's certification.'' *Id.* at 8 (citing ABA, ''Selecting a Bargaining Representative,'' *The Railway Labor Act,* 1st Edition, pp. 135–137 (1995)).

The Board believes that Congressional termination of this GAO research directive and reliance on the CRS

[5] At best, under a literal reading of Section 2, Twelfth, the 50 percent showing of interest is applicable only to applications seeking certification of an individual or organization and the Board is free to adopt a different showing of interest for applications for decertification.

Report which merely summarized then-current procedure has no effect on its statutory authority. Before and after the 2012 FAA Modernization Act, the authority to carry out the statutory mandates of the RLA was and is delegated by Congress to the Board. No other agency possesses this authority and the audit provisions added to the RLA by the 2012 FAA Modernization Act do not in any way circumscribe this authority.

45 U.S.C. Section 165(a) provides for the ''audit and evaluation'' of the programs and expenditures of the NMB by the Comptroller General. An evaluation and audit ''shall be conducted not less frequently than every 2 years . . . [or] as determined necessary by the Comptroller General or the appropriate congressional committees.'' GAO has conducted such an audit of the NMB in 2013, 2016, and 2018. At the time of this rulemaking, GAO is conducting the 2020 audit. As discussed above, section 165(b), which was terminated, provided for an ''immediate review of certification procedures.'' This review was to be separate from the biannual evaluation and audit and required the Comptroller General to review the NMB's process to certify or decertify representation to ensure that the processes are fair and reasonable for all parties by examining whether the NMB's processes or changes to those processes are consistent with congressional intent. The provision also required a comparison of the NMB's representation procedures with procedures under other state and federal labor statutes including justification for any discrepancies.

The 2013 GAO Report made no recommendations for the changes to the NMB's representation processes because it found that that the NMB had responded to industry legal challenges and stakeholder disagreements and its procedures were consistent with other federal labor relations statutes. U.S. Gov't Accountability Office, GAO–14–5, ''Strengthening Planning and Controls Could Better Facilitate Rail and Air Labor Relations'' (Dec. 3, 2013). The 2013 GAO Report concluded that the 2010 Representation Rule change ''caused disagreement among some stakeholders,'' and, with regard to decertification, the GAO Report stated

> Some stakeholders also wanted NMB, as part of the 2010 rulemaking, to clarify the process for decertifying, or removing, a union representative. The RLA does not specify a decertification process, and NMB offers minimal guidance on its website on steps to remove an employee representative. In its preamble to the 2010 rule, NMB noted that, while not as direct as some commenters might like, the existing election procedures allow employees to ''rid themselves of a representative,'' and that the 2010 change further gives these employees the opportunity to affirmatively cast a ballot for no representation. However, an airline carrier official and a former board member said the process in place remains ineffective and highly confusing. For example, a ballot currently may contain two options that are each a vote for no representation: ''no representative,'' and an applicant who is on the ballot as a ''straw man'' who intends, if elected, to step down so as to remove representation for the craft or class. This applicant seeking removal of representation has to collect sufficient authorization cards to prompt an election in order for the craft or class to make this change. A former NMB board member said that there is the potential for votes opposed to union representation to be split by votes for ''no representative'' and for a straw man. The result is that these vote counts will not be consolidated in favor of decertification, which can then happen only if either the ''no representative'' or straw man receives a majority of the votes cast.

Id. at 46. The GAO report also includes a table comparing the NMB to the National Labor Relations Board, the Federal Mediation and Conciliation Service, and the Federal Labor Relations Authority. *Id.* at 11.

Thus, GAO concluded and Congress accepted the conclusion that the NMB's certification and decertification procedures were reasonable and consistent with other federal statutes. This conclusion in no way precludes the NMB's obligation to make those procedures less complex and convoluted in order to better effectuate its statutory mandate.

Commenters including the TTD, the Southwest Airlines Pilots Association, and the AFA, also assert that the Board is exceeding its statutory authority by changing the language of 29 CFR 1203.2 to allow the investigation of an application to be filed by ''an individual seeking decertification.'' These commenters misinterpret the NPRM and the Board's intent as, in fact, the Board agrees that the Board may investigate a representation dispute only upon the request of the employees involved that dispute, or their representative. As the D.C. Circuit stated in *RLEA,* ''[f]or the Board to act otherwise is for the Board blatantly to exceed its statutory authority.'' 29 F.3d 655, 665 (D.C. Cir. 1994). The Board agrees with these commenters that only employees or their representatives may invoke the Board's services under Section 2, Ninth to resolve a dispute regarding the identity of their collective bargaining representative. To make clear the Board's intent, the text of Section 1203.2 has been clarified in the final rule to require an employee to file a decertification application.

Under the proposed rule change, an employee must file an application asserting that a representation dispute exists among the identified craft or class. This application must be supported by a valid showing of interest from 50 percent of the craft or class. The difference is that the Board will now accept authorizations that clearly and unambiguously state the employee's desire to no longer be represented by their incumbent union. Such an authorization will clearly indicate the intent of the employees and where it is clear that the petitioning employees wish to be free of the incumbent representative, the Board will authorize an election and the ballot will include the incumbent union and the no representation option, along with the write-in option. The applicant's name will not be included on the ballot because the Board is eliminating once and for all the forced pretense that employees are authorizing the applicant to represent them.

B. Justification for the Proposed Change

Almost all of the commenters opposed to the NPRM suggest that the Board has not provided an adequate justification for this change. The TTD notes that the NMB does not claim any changed circumstances that have led it to reevaluate a practice that it has stated is consistent with the statute and allows employees an ample opportunity to alter their representation. Many of the commenters opposed to the NPRM also argue that the Board is somehow bound by prior statements that the change is unwarranted. Some commenters point to the 1987 statement that it would only make such a change if it was ''required by statute or essential to the administration of the Act.'' *In re Chamber of Commerce,* 14 NMB 347, 360 (1987) (*Chamber of Commerce*). Other commenters rely on statements in the 2010 Representation Rule that the existing straw man procedure together with the option to vote for ''no representation'' allows employees to rid themselves of a collective-bargaining representative. 75 FR 26078.

Commenters discussed the various justifications for the rule change in the NPRM and provided additional policy reasons in support of and in opposition to the proposed change. Before discussing those specific issues, the Board notes, as it did in the 2010 Representation Rule, that under *FCC* v. *Fox,* 556 U.S. 502 (2009), agencies are free to adopt an interpretation of its governing statue that differs from a previous interpretation and that such a

change is subject to no heightened judicial scrutiny. *ATA,* 663 F.2d 476, 484 (D.C. Cir. 2011). Nor did the Board adopt a ''compelling reasons'' standard in *In re Chamber of Commerce. Id.* In upholding the Board's 2010 Representation Rule, when the NMB finally made a change to the way it counted ballots that it had previously considered and rejected several times, the D.C. Circuit stated that ''the fact that the new rule reflects a change in policy matters not at all'' and that ''under the APA, the question for us is whether the Board considered all the facts before it, whether it drew reasonable inferences from those facts and whether the final decision was rationally related to those facts and inferences.'' *Id.* As discussed in Section A, the Board believes it has the statutory authority to provide employees with the option to directly request a decertification election rather than making them seek decertification in the guise of certification with a straw man. As discussed below, the Board also believes that direct decertification better protects the right of free choice of representatives by eliminating a confusing and counterintuitive process that requires employees to ostensibly seek representation to vindicate their right to be unrepresented.

Commenters opposed to the NPRM state there is no evidence to support the Board's statement that the straw man process is ''unnecessarily complex and convoluted.'' The Board, however, received many comments regarding the confusion that is inherent in the straw man process. Many commenters supporting the NPRM, including Allegiant Air, CEI, NRLC, Gregg Formella, and the U.S. Chamber of Commerce (Chamber), noted that the Board's straw man procedure is inherently confusing because employees must authorize a representative to trigger an election to remove their representative. As the Chamber stated in its comment, ''[i]n order to achieve decertification, employees have to collect authorization cards in support of electing a representative they do not actually want and even though the vote is about declining further representation.'' Right to Work, which provides free legal services to individual employees, stated that its attorneys regularly receive calls from employees seeking information about their right to disassociate from unions and that a ''result of the inquiries is that RLA-covered employees are often left confused and disheartened when the straw man rules are explained to them.'' Right to Work described the NMB's current decertification procedure as ''daunting'' to employees and stated that ''many RLA-covered employees simply give up when the straw man obstacles are explained to them.'' Many comments in support of the NPRM noted the potential for confusion because both the straw man and the ''no representation'' option appear on the ballot. The CEI noted that under the current procedure, ''employees are faced with a ballot with the straw man and a no union option which causes confusion. Some employees who wish to remove union representation will reason they should vote for the straw man because that is the ballot option for which they signed an authorization card. However, other employees who similarly desire to reject union representation will vote for the no union option. This splits the vote for decertification.'' Rebecca Smith of Rock Creek House Consulting, LLC stated that she had assisted pilots in decertification efforts and ''no matter how well I explain it to those who ask, on voting day there is still confusion over the 'straw man.' This confusion leads to people voting for the 'straw man' because they believe it reflects their choice not to be represented.'' Ms. Smith added that, in her view, making the process more straightforward ''also clarifies for those who want to be represented where to cast their vote since the current ballot gives them what appears to be several choices for representation.'' The Board takes notice that in both successful and unsuccessful straw man elections employees cast votes for both the straw man and ''no representation.'' Jeremy Dalrymple of the Heritage Foundation noted that not only is the straw man procedure ''counterintuitive because it requires employees that are seeking to divest themselves of representation first petition for a strawman to represent them, but, given the nationwide system of representation under the RLA, there are significant barriers to communicating the convoluted concept of the 'strawman' to employees spread across multiple geographic locations.''

The comments from individuals who had been a straw man supported the view that the current procedure is confusing. Steven Stoecker, who filed an application as the straw man in *Allegiant Air,* 43 NMB 84 (2016), stated that he had to convince ''half of my work group . . . to sign an authorization card that stated that I wanted to represent them, even though I didn't want to. Trying to explain to the rest of the work group that in order to decertify and become unrepresented, they have to sign a card authorizing me to represent them was confusing to say the least.'' Following the Board's authorization of the election, Mr. Stoecker stated that ''I had a short window of time to campaign and remind my colleagues to not vote for me but rather to vote 'no representation.'" Ronald Doig, another employee who served as the straw man in *Allegiant Air,* 42 NMB 124 (2015), commented,

> [w]e had to start with an education process that explained to my fellow Dispatchers that in order to get the Teamsters out we had to sign an authorization card wanting me as the Straw Man to represent them. Then we further explained, that when the election comes around, do not vote for the Straw Man but vote for the ''No Representation Option.'' Although we were successful quite frankly some of the Dispatchers never got it. The process as it exists today is confusing and not straightforward. From my experience as a former Straw Man, employees should have a clear path that states we want an election to decertify our union.

Firsthand accounts from straw men also revealed the hostility, threats, and retaliation directed at them by union supporters. The comments from Mr. Stoecker, Mr. Woelke, straw man in *Flight Options, LLC/FlexJet, LLC,* 45 NMB 95 (2018), and Mr. Doig described the burden borne by the straw man. According to Mr. Stoecker, ''[t]he straw man also has a target on his back since his name is on all the authorization cards and on every election ballot . . . Elimination of the straw man will be beneficial from the standpoint that no one individual will have to bear the brunt of union attacks during a decertification effort.'' A comment from Frank Woelke, who also filed an application as the straw man, described his own experience, including the exposure of personal information on the internet, online personal attacks, and vulgar post cards and suspicious packages sent to his home. Mr. Woelke stated that ''[n]obody in his right mind would want to stand up as a Strawman'' knowing the intimidation, slander, and harassment they will be exposed to because of the NMB's procedures. Mr. Doig stated that he was subject to retaliation from the union and its supporters and expressed the view that it ''is almost as if the process is set up to be a deterrent to decertification efforts by making a target out of the Straw Man. Again, a straight forward [*sic*] process will remove the Straw Man's name form the ballot and give employees the freedom to exercise their rights without that fear.''

The TTD argues that the straw man will still exist and that nothing has been simplified by the NPRM. The Board disagrees. Under the current procedures,

an individual employee files an application supported by valid cards from 50 percent of the craft or class authorizing that individual to represent the employees for purposes of collective bargaining under the RLA. Following the *Russell* decision, the Board does not inquire into whether the individual actually intends to represent the craft or class or the individual is the straw man. The Board simply authorizes the election and conducts a tally. Sometimes the individual is certified. Sometimes the incumbent representative is decertified. Under the proposed change, employees who want to become unrepresented will express that desire for decertification in their showing of interest and the individual applicant's name will not appear on the authorization cards or the ballot. If, however, 50 percent of employees in a given craft or class want one of their co-workers to represent them instead of their incumbent representative and that individual files an application with a valid showing of interest indicating that 50 percent of the craft or class want that individual to represent them in collective-bargaining under the RLA, the Board will still authorize an election and conduct a tally. The ballot will include the applicant's name, the incumbent union, the no representation option, and the write-in option. In that circumstance, the individual applicant will no longer be a straw man. Under the rule change, employees will now have the ability to directly express their desire to become unrepresented instead of hiding it behind a straw man. The intent to decertify will be clear through authorization cards stating that they no longer wish to be represented by their incumbent union and the individual who filed the application will not appear on the ballot.

The IAM states the NPRM is a ''solution in search of a problem.'' Other commenters like the TTD, SWAPA, and IBT state that the straw man process is adequate as employees currently use it and succeed in decertifying their union. In her comment, Senator Patty Murray stated that there already is ''a well-established process for aviation and rail workers to remove their union representation or change union representation should they choose to do so.'' The comments received from individuals who have used the current procedure, however, demonstrate that it is confusing, counterintuitive, and often unduly burdensome for the employee who acts as straw man. The Board's own experience with calls and inquiries from employees seeking to become unrepresented bears this out. The Board believes the current straw man procedure requires employees who wish to become unrepresented to take an additional, unnecessary, and counterintuitive step to get an election to determine whether the majority of employees in their craft or class desire to become unrepresented. When employees who are currently unrepresented want representation, they file an application supported by a showing of interest for the organization they want to represent them. When employees who are currently represented want to change their representation, they file an application supported by a showing of interest for the new organization they want to represent them. When employees no longer wish to be represented, they file an application supported by a showing of interest for someone who they don't want to represent them but they must say they want as a representative to get an election to vote against the incumbent representative they no longer want. The Board's proposal will simply allow employees who no longer want representation to directly state that to the Board, in both their application and on their showing of interest and to get an election to resolve the representation dispute they actually have.

The Board is not adopting this proposal to promote decertification. The Board has no stake in the outcome of a representation dispute. Its statutory role is to act as a neutral ''referee'' in representation matters. *Switchmen* v. *NMB,* 320 U.S. 297, 304 (1943). The Board ''simply investigates, defines the scope of the electorate, holds the election, and certifies the winner.'' *ABNE,* 380 U.S. 650, 667 (1965). The Board believes that the proposed change is necessary to fulfil its statutory mission to protect employees' right to free choice in representation, including the choice to be unrepresented. The choice in every representation dispute belongs to the employees of the craft or class involved, not to the Board. And employees who no longer want collective representation have the right to bring that dispute directly to the Board and have it resolved.

Commenters opposed to the NPRM referenced and supplied statistics regarding the number of applications that resulted in no representation. The TTD states that employees freely and frequently alter their representatives and submitted a chart showing elections in which, after an application was filed by an individual or ''small unaffiliated organization,'' some incumbent unions were decertified, some incumbent unions remained certified, and some individual/small unaffiliated organizations were certified. Some incumbent unions chose to disclaim representation when faced with a potential challenge rather than go to an election.

Based on its chart, the TTD states since 1998, a total of 43 individuals or ''likely straw men'' filed applications and in 27 of those elections, the incumbent representative was ''effectively decertified'' since either no representation won or the individual was certified.[6] The TTD also states that since 1998, 51 small unaffiliated organizations, which it terms ''potential straw men'' have filed applications and of those elections, 11 resulted in no representative being certified and 19 resulted in the small unaffiliated organization being certified. The TTD also concedes that some of those small unaffiliated organizations ''may have continued as a representative.'' The Board agrees that these statistics show that employees change representation or successfully use the straw man procedure to become unrepresented.[7] However, these statistics provide no evidence regarding how many employees find the straw man process too confusing, or are unable to find someone willing to face hostility from union supporters and be the straw man or can convince enough of their fellow employees to sign cards authorizing an

[6] From 1998 to 2018, the Board held 695 representation elections.

[7] The TTD states that if the ''NPRM is adopted, the Board will have three avenues for employees to become unrepresented'' but only one way to get representation. The Board disagrees with this statement. These three avenues referred to appear to be the existing straw man procedure, the proposed direct decertification, and disclaiming representation. Once the NPRM is adopted, the Board believes that employees who wish to decertify will use the proposed direct procedure rather than the straw man. This will be apparent by authorizations indicating the employees no longer wish to be represented. As previously discussed, employees are free to seek to have an individual co-worker represent them under the Act. Finally, the Board has no control over when or under what circumstances a certified bargaining representative disclaims interest in the craft or class. That decision rests with the certified representative. As the TTD points out, some certified representatives do it when they realize they have lost majority support in the craft or class. In addition, in the public debate surrounding this rulemaking, some commenters have characterized one union seeking to take over an already organized work group (*i.e.* raiding) as decertification. In the Board's view this is incorrect. Unions have filed applications to represent crafts or classes that are already organized. Under the RLA, some large employee groups are represented by independent unions not covered by the AFL–CIO's anti-raiding provisions. The Board recognizes that employees can and do desire a change in representation. These elections may result in the incumbent retaining representation, the raiding union winning representation or, on occasion, the loss of representation entirely. Again, these elections outcomes are outside the Board's control and reflect the exercise of employee free choice.

individual to represent them when they really don't want representation in the first place.

In representation disputes, the Board's interest is that the dispute is resolved and the result reflects the free and uncoerced choice of a majority of the craft or class. Whether employees choose representation or reject representation is up to them, not the Board. What does matter to the Board is whether the election process allows them to freely exercise their right to choose; and the Board believes the current proposal to eliminate the straw man and allow direct decertification will better effectuate employees' right to choose.

When representation is desired by the employee group, the existence of a direct decertification process clearly broadcasts that the chosen representative does indeed hold the power to negotiate and advocate for the work group. In comments supporting the proposal, the NRLC pointed out that ''if anything, the proposed rule strengthens an incumbent union by confirming that the union continues to enjoy the support of a majority of employees.''

C. Effect of the Proposed Change on Stability

The Board agrees about the value of stability in the air and rail industry, as defined as a lack of disruptions caused by strikes and work stoppages. The Board's ''almost interminable'' mediation processes is given much of the credit for preventing disruptions to interstate commerce. *Detroit & Toledo Shore Line R.R. Co.* v. *United Transp. Union,* 396 U.S. 142, 149 (1969). The Board also notes that the statutory showing of interest requirement contributes to stability, because the statute requires a valid showing of interest from 50 percent of the craft or class to trigger a representation election and there is system-wide representation under the RLA. As the NLRC noted in its comment, ''[d]ecertification elections on the large Class I carriers have been rare, to say the least. Any suggestion that the contemplated changes to the current rules will generate a massive upsurge in decertification campaigns is, at best, speculative.'' The Board will not predict the choices employees will make in the future, but it must act to facilitate the statutory mandate of free choice of representation, rather than forced unionization for the sake of stability.

The Board's representation process is the predicate to establishing a collective-bargaining relationship, but the statute mandates that the choice to become represented or unrepresented is the employees' decision and theirs alone. The *Russell* court rejected the Board's contention the employee free choice in representation election was subordinate to the RLA's purpose of avoiding work stoppages through collective representation and bargaining. While the court agreed that the RLA encourages collective bargaining as the mode by which disputes are to be settled and work stoppages avoided, the Act does not compel employees to choose collective representation. *Russell,* 714 F.2d 1332 at 1344. Employees under the RLA have complete independence to organize or not to organize and this necessarily includes the right to reject collective representation. *Id.*

D. Effect of the Proposed Change on Interference by Carriers or Outside Interest Groups

Commenters opposed state that the NPRM creates an increased risk of carrier interference in representation disputes. The AFA stated that the NPRM will embolden an employer to inject itself into the decertification process. IAM states that the proposed rule ''would no doubt embolden outside organizations funded by employer groups or interests in ways that are opaque to both the Board and employees, to seek to decertify elected officials.'' The TTD states that, without a straw man, there will be no identified individual to be held accountable throughout the process, and carriers will be ''emboldened to interfere in the election process by hiding behind the relative anonymity of the Board's new proposed decertification applications.'' The Board's proposed rule change does not eliminate accountability. As previously discussed, the Board cannot and is not changing who is allowed by statute to invoke its services to resolve a representation dispute. Further, an employee will still be required to file an application to seek decertification under the NPRM, as is clearly stated in the new Section 1206.5. The employee filing the application will still be the responsible party during the representation process as they are now. The difference is that a straw man will no longer be required. Instead, the ballot will be limited to the incumbent representative, the no representation option, and the write-in option.

The RLA protects the right of employees to select their representatives without carrier influence or interference. The Board has long held that actions or activity by a carrier that fosters, assists, or dominates an applicant may result in dismissal of a representation application because the authorizations are tainted, *N. Air Cargo,* 29 NMB 1 (2001), or disqualify the applicant as an employee representative, *Mackey Int'l Airlines,* 5 NMB 220 (1975).[8] There is nothing in the NPRM that suggests the Board would or intends to abrogate its duty to protect the right of employee to be free from carrier interference in their choice of whether to get or reject representation, and indeed we do not do so in this final rule.

E. Time Limit on Decertification Applications

Unlike the NLRA,[9] the RLA does not place any time limits on when applications to investigate representation disputes can be filed. The Board, however, has adopted time limitations on the filing of applications for the same craft or class on the same carrier. Under Section 1206.4(a), the Board will not accept an application filed within two years of the certification of a collective bargaining representative. Under Section 1206.4(b), the Board will not accept an application filed with one year of the dismissal of an application. As discussed below, the Board has modified these time limits several times in order to strike the appropriate balance between employees' organizational rights, labor stability, and the disruptive effect in the workplace from frequent elections.

Prior to 1947, following a certification, it was ''the policy of the Board not to conduct repeat elections until the organization certified has had a reasonable period to function as the duly authorized representative of employees.'' 13 NMB Ann. Rep. 4 (1947). This reasonable period was one year. In the NMB's 1947 Rulemaking, this period was extended to two years. 12 FR 3083 (May 10, 1947). The Board stated that the ''policy of the Board in this connection derives from the law which imposes upon both carriers and employees the duty to exert every reasonable effort to make and maintain agreements. Obviously, this basic purpose of the law cannot be realized if the representation issue is raised too frequently.'' 13 NMB Ann. Rep. 4. The Board observed that many representation disputes arose out of the competition between labor organizations. *Id.* In 1954, the Board revised its rules to impose a one year

[8] *See also Great Lakes Airlines,* 35 NMB 213 (2008); *Virgin Atlantic Airways,* 24 NMB 575 (1997).

[9] Section 9(c)(3) of the NLRA precludes the holding of an election in any bargaining unit in which a valid election was held during the preceding 12-month period. 29 U.S.C. 159(c)(3).

limitation on the filing of applications for the same craft or class on the same carrier where (1) the election resulted in no representative being certified; (2) the application was dismissed by the Board on the grounds no representation dispute existed; [10] or (3) the applicant withdrew the application after it was formally docketed. 19 FR 2121 (Apr. 13, 1954). In making this change, the Board stated that ''representation campaigns and the organizing campaigns which necessarily precede them cause unsettled labor conditions and, in many cases, disturb employees substantially in the discharge of their duties. It is contemplated that the [rule change] will prevent hasty refiling of applications which have previously been dismissed by the Board.'' 20 NMB Ann. Rep. 10 (1954). The 1954 rule contained a proviso that the three conditions would ''not apply to employees of a craft or class who are not represented for purposes of collective bargaining.'' 19 FR 2121. The effect of the proviso was to exempt applications pertaining to unrepresented employees from the filing time limitations. 45 NMB Ann. Rep. 10 (1979). Thus, in cases where unrepresented employees chose to remain unrepresented, there was no time limitation whatsoever and a new election could be sought the very next day. In 1979, the Board amended Section 1206.4 to make the time limits applicable regardless of whether or not the employees covered by the application are represented for purposes of collective bargaining. *Id.* The Board did not change the existing time limits of a two year bar post-certification and a one year bar following dismissal on the three enumerated grounds. Comments opposed to applying the time limits to all NMB representation applications regardless of whether the employees involved were represented or unrepresented asserted that the bar rules could be used to frustrate employee organization, for example, if an applicant dominated by a carrier filed to frustrate a legitimate organization. In response, the Board stated that the language in Section 1206.4 providing an exception to the time limits ''in unusual or extraordinary circumstances,'' would allow the Board to remedy a company dominated union situation as well as ''an election which was improperly affected by a carrier or other interference at some stage of the proceeding.'' 44 FR 10602 (Feb. 22, 1979). Thus, the Board has expanded the time limitations placed on applications several times to balance the statutory right of freedom of choice in organizing with the need for labor-management stability and to avoid undue disruption to the workplace from continual representation elections.

Commenters opposed to the two year limitation following decertification, including the IBT, the IAM, the TTD, the AFA, the Association of Professional Flight Attendants, the Allied Pilots Association, and some Members of Congress, contend that the proposed change is an unwarranted, unjustified, and impermissible restriction on employees' right under the RLA to organize and bargain collectively through representatives of their own choosing. The Board disagrees. As the foregoing discussion establishes, the NMB has both placed time limitations on the filing of applications and expanded those limitations based on considerations of labor stability and disruption to the workplace. All of these limitations—including the current two year limitation post-certification—represent a degree of restriction on employees' exercise of their right to choose or reject collective bargaining representatives. And all of these limitations reflect an exercise of the Board's discretion to balance competing interests. The proposed change reflects the Board's belief that both certification and decertification are significant undertakings by employees with a substantial impact on the workplace and employees' relationship with their employer. This belief is supported by the comments of Ronald Doig, an employee who successfully led a decertification effort using the current straw man procedure. According to Mr. Doig,

> [w]hen we were successful in the election and voted the Teamsters out [the NMB's time limits on applications] only allowed one year before there could be another election. If the Teamsters had prevailed and won the election, they would have been granted two years before another election could take place. The difference [in time limits] is unfair. The Teamsters never let up, continuing their campaign and we never really got the chance to fully enjoy the benefits of a direct relationship with our company. Our workplace remained in a state of distraction the entire year after the election which led to another election that the Teamsters won. To this date we are still in a state of distraction and I believe had we had the same two years the unions get we would have achieved a stability through a direct relationship.

Employees who have exercised their right to reject representation deserve a period of repose to transition to that direct relationship and experience their workplace without a collective representative. This period of time allows employees to judge the advantages and disadvantages of their decision without the turmoil of an immediate organizing campaign.

Commenters opposed to the proposed change to have the two year limitation in Section 1206.4(a) apply to decertification as well as certification assert that the change is unwarranted and the Board draws an improper parallel between certification and decertification. The commenters opposed state that the two year limitation post-certification is justified by the need for a newly certified representative to be afforded an insulated period to bargain for an initial contract and if necessary participate in mediation before its representative status is challenged. [11] The Board has not sought to alter this two year period post-certification and views it as an appropriate balance between the goal of labor stability and the statutory obligation to facilitate free choice in representation or rejection of representation. The proposed rule change does not affect this limitation. Rather the proposed change recognizes that the transition from represented to unrepresented has a significant impact on the employees and their workplace. The current two year limitation gives the union a chance to demonstrate the value of its services to the employees who elected it. After decertification wherein the majority of employees chose to reject representation, it is only fair to give employees a chance to experience the effects of their choice on their workplace.

If a union has become decertified, it is because a majority of the employees in the craft or class have decided that that they no longer want that representative. The RLA encourages collective bargaining between employee representative and the employer, but it gives employees the absolute right to choose to reject representation. The Board is simply giving employees who have rejected representation an additional year to experience their workplace and their direct relationship with their employer before another representation dispute can be raised in their work group. The two year

[10] Generally, when the applicant had failed to support the application with a sufficient valid showing of interest.

[11] The Board does note that the two year limitation applies not only to newly certified representatives negotiating first contracts, but to all certifications, even to an incumbent union surviving a raid by another union, *Pinnacle Airlines,* 35 NMB 1 (2007), or a decertification attempt, *Youngstown & N. R.R. Co.,* 7 NMB 132 (1979). The two year limitation also applies to certifications without an election as a result of a merger of carriers, *United Air Lines/Cont'l Airlines,* 39 NMB 167 (2011); *Tex. Mexican Ry. Co.,* 27 NMB 302 (2000).

limitation is on the time to file an application. Since the authorization cards can be dated by employees up to one year from the date of the filing of the application, employees, if they so choose, can begin organizing a year after decertification. Commenters in support of the rule noted that without this rule change, organizing can begin the day after an election which results in a decertification, and employees are afforded no period of repose at all.

A former practitioner and advocate before the NMB opposed to the proposed change states in his comment that a two year limitation ''neither applies to the NMB 'indirect' decertification process nor to any decertification provisions in other federal statutes or regulations.'' The Board does not find these arguments persuasive. As previously discussed the RLA makes no provision regarding limitations on applications. These rules have been, and remain, an exercise of the Board's discretion. The Board notes that it is equally true that a two year limitation following certification is not provided in other federal statues or regulations. Under the NLRA, the period of repose is at least one year for certification or decertification. Under the FLRA, the election bar is also one year for certification or decertification. NMB also applies a two year limitation regardless of whether the certification is a newly certified representative or the certification of an incumbent union following a raid or merger. Further, under the current indirect decertification, if a straw man is certified, the Board applies the two year limitation. If that straw man does not formally disclaim interest, an application for that same craft or class of employees at the same carrier would not be accepted by the Board for two years following the certification.

Under the proposed rule change, the additional time limit on applications will be limited to applications seeking to decertify an incumbent representative. It would be clear upon filing of the application that the intent of employees is to seek decertification. As discussed above, such an application filed by an employee or group of employees will be supported by a showing of interest stating that employees no longer wish to be represented by their incumbent union. A decertification election will be held where only the incumbent union, the no representation option, and the write-in would appear on the ballot. If a majority of employees vote for representation or if a majority of employees vote for no representation, there will be a two year limitation on applications seeking to represent the same craft or class at the same carrier. If the incumbency of an organization is challenged in a raid—by another organization or individual seeking to represent that craft or class—and, in the election a majority of employees fail to vote for representation, the one year limitation will continue to apply as it will if a currently unrepresented employee group does not vote for representation.

IV. Conclusion

Based on the rationale in the proposed rules and this rulemaking document, the Board hereby adopts the provision of the proposal as a final rule with the clarification in the text of Section 1203.2 in the final rule to require that an employee may file a decertification application. This rule will apply to applications filed on or after the effective date.

Dissenting Statement of Chairman Puchala

Chairman Puchala dissented from the action of the Board majority in adopting this rule. Her reasons for dissenting are set forth below.

Congress enacted the Railway Labor Act (RLA or Act), 45 U.S.C. 151, *et seq.,* to create a comprehensive statutory scheme to prevent disruptions of interstate commerce through the prompt resolution of labor disputes between rail and air carriers and their employees. In *Virginia Railway Co.* v. *System Federation No. 40,* the Supreme Court articulated the purposes and objectives of the Act in terms of the duty to bargain, noting that the RLA's ''major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee,'' and its ''provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representatives of their employees.'' 300 U.S. 515, 547–548 (1937). Thus, the RLA is a collective bargaining statute and its underlying philosophy is almost total reliance on collective bargaining for the settlement of labor-management disputes.

I dissent from the rule published today because the changes my colleagues have adopted are unnecessary and contrary to the purposes of the Act. In my view, these changes will impede rather than support the mission of the Agency and the objectives of the Act.

The National Mediation Board (NMB or Board) administers the RLA, the oldest extant labor relations statute in the United States and it has been remarkably successful in fulfilling its statutory mission of insuring the right of railroad and airline employees to organize into free and independent labor organizations, of assisting labor representatives and carrier management in the prompt settlement of disputes over rates of pay and terms of work, of resolving grievances over the terms of existing contracts, and of accomplishing these aims without the interruption of transportation services essential to interstate commerce.

As an initial matter, I note and my colleagues concede, the RLA does not have an express statutory provision for decertification like the National Labor Relations Act (NLRA). From 1935 to 1947, the NLRA also lacked a statutory procedure for decertification. Congress, through the Taft-Hartley Act, provided a statutory mechanism for employees to seek decertification of their current bargaining representative. 29 U.S.C. 159(c)(1)(A). Congress has taken no similar action with regard to the RLA. Not in the 1950 amendments, when Congress referenced the Taft-Hartley Act in adding Section 2, Eleventh to permit the negotiation of union shop agreements. H.R. Rep. No. 81–2111, at 4 (1950). Not in 2012, when Congress provided for a 50% showing of interest in representation applications and mandated specific provisions for run-off elections. FAA Modernization and Reform Act of 2012, Public Law 112–95 (2012 FAA Modernization Act). There have been no changed circumstances since 2012 that would necessitate or justify Board or Congressional action with respect to a decertification rule. In my view, the addition of a direct decertification procedure to the NMB's representation procedures is a step to be taken by Congress through legislation and not by the Board through rulemaking.

While the RLA lacks a statutory decertification procedure, the existing representation procedures allow employees to get representation, change representation, and reject representation. As many of the commenters opposed to the rule observed, the Board already provides a method for employees to decertify their incumbent union. In the 2010 Representation Rulemaking, the NMB declined to reexamine its decertification procedures and noted that its ''existing election procedures allow employees to rid themselves of a representative.'' 75 FR 26,078. The 2010 Rulemaking allowed employees to affirmatively cast a ballot for ''no union'' and eliminated the most confusing step in the ''straw man'' process. 75 FR 26079. The election statistics submitted with the comments of the Transportation Trades

Department of the AFL–CIO (TTD) demonstrate that employees can and do utilize the existing decertification process to become unrepresented. As the TTD further observed, while Board clearly receives more applications seeking the certification of a representative than the decertification, this represents a longstanding desire of employees in the air and rail industry to have union representation in the workplace rather than a problem with the NMB's election process.

In adopting a two year bar to representation applications following decertification, the majority ignores well-settled Board precedent recognizing the complexities unions face in establishing collective bargaining relationships and concluding labor agreements. The Board has long recognized that labor stability is enhanced by providing a reasonable period of time to establish a collective bargaining relationship. *Jet Am.,* 11 NMB 173 (1984). Instead, my colleagues rely on a false equivalence between certification of a collective bargaining representative and decertification resulting in the return to at will employment.

My own experience in various labor-management capacities has allowed me to witness firsthand the monumental tasks unions face in establishing and maintaining quality representation for their members. This task is compounded by the fact that, under the RLA, unions represent nation-wide crafts or classes, namely all the employees performing the same work for the same employer regardless of their geographic location. This system-wide representation automatically expands the number of regional issues the union must be prepared to address in collective bargaining. Once certified, the union must continue to generate system-wide employee interest in establishing a template of representation that is reflective of member priorities and gives voice to member concerns. The union's constitution and bylaws, which reflect the rights of individual members, are reviewed and explained. Volunteer employees are appointed and elected to leadership positions on numerous committees including bargaining committees and health and safety committees.

Once certified, the union assumes the responsibility to initiate collective bargaining—often counted in years under the RLA—by training volunteers to work with union staff to set the bargaining agenda through a series of member surveys, meetings, and round table discussions. Even before bargaining commences, an elaborate communications system is launched to insure internal communications keep members at all work locations informed of the status of collective bargaining. Once a tentative agreement is reached, it must be reviewed and approved by the members. The ratified contract is enforced by a grievance procedure with an arbitration clause designed to protect individual and collective rights. In the rail and airline industries, a safety culture is promoted by the union through joint labor and management initiatives as well as separate union sponsored health and safety programs. Union activities are designed to promote the workers' agenda by creating opportunities for management to hear members' voices on workplace issues. This dialogue at labor-management meetings creates opportunities for both labor and management to improve the relationship and create ideas that further the goals of both parties. These obligations of bargaining and resolving grievances are all part of the statutory framework that Congress created. Section 2, First of the RLA states,

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. 152, First. The Act's emphasis is on the full acceptance of that bilateral relationship and the free exercise of both parties' rights in determining rates of pay, rules, and working conditions with the duty imposed to seek to avoid interruptions to commerce.

What happens when an incumbent union is decertified? The carrier develops and implements the rules of the workplace. It may voluntarily seek employees' views and participation on workplace issues, but is not required to do so. The union and its former members lack standing to bargain and maintain contracts and initiate and progress grievances. All rights reflected in the collective bargaining contracts are extinguished unless required by law or regulation.

Following decertification, obligations are removed rather than assumed. There is no longer an obligation to bargain. There is no longer an obligation to administer or enforce a collective bargaining agreement. There is no role for the NMB in mediation. And in my view, there is no statutory basis for imposing an administrative restriction of two years on employees' freedom to choose a representative following a decertification election that results in no representative. A one year election bar is sufficient for employees to witness the loss of their collective bargaining rights and the loss of stability that accompanies that forfeiture.

I believe it is punitive to deny access to RLA election procedures for two years given the increasing number of furloughs in the freight rail industry as carriers move to a new business model and as airline employees contend with the residual effects of widespread bankruptcies, mergers, and reorganizations. The negative consequences of decertification and stripping employees' collective bargaining rights goes beyond the potential loss of wage growth [12] to a lack of ability to protect negotiated provisions for health and retirement benefits, seniority rights that determine work hours and location, and furlough protections that give employees rights to return to their former positions. The rail and airline industries have a union density rate of 60–80% that I believe is largely due to a long history of negotiating protections for those actively employed as well as retirees.

The two year election bar which dictates a two year break in collective bargaining is also bad public policy. The RLA is designed to avoid interruption of interstate commerce. The primary tool the NMB uses to protect the public from interruptions of service is mandatory mediation of collective bargaining agreements between unions and air and rail carriers. This is why the RLA is predisposed to promote collective bargaining. This governmental exercise of control over the labor-management relationship requires disputing parties to enter NMB mandatory mediation for an ''almost interminable'' amount of time before either party can exercise self-help. *Detroit & Toledo Shore Line R.R. Co.* v. *United Transp. Union,* 396 U.S. 142, 149 (1969). A series of additional steps, a 30 day cooling-off period, a potential Presidential Emergency Board that recommends settlement terms followed by additional cooling off periods, and finally intervention by Congress under the Commerce Clause of the Constitution are all designed to promote the public's interest to avoid interruption of interstate commerce.

[12] According to the Bureau of Labor Statistics non-union workers only make 82% of what union workers are paid. U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, USDL–19–0079 (Jan. 18, 2019), *https://www.bls.gov/news.release/union2.htm.*

Consequently, I disagree with the Board majority's decision to make this change.

Chairman Linda Puchala.

Executive Order 12866

This rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

As required by the Regulatory Flexibility Act, the NMB certifies that these regulatory changes will not have a significant impact on small business entities. This rule will not have any significant impact on the quality of the human environment under the National Environmental Policy Act.

Paperwork Reduction Act

The NMB has determined that the Paperwork Reduction Act does not apply because this interim regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects

29 CFR Part 1203

Air carriers, Labor management relations, Labor unions, Railroads.

29 CFR Part 1206

Air carriers, Labor management relations, Labor union, Railroads.

For the reasons stated in the preamble, the National Mediation Board amends 29 CFR parts 1203 and 1206 as set forth below:

PART 1203—APPLICATIONS FOR SERVICE

■ 1. The authority citation for part 1203 continues to read as follows:

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

■ 2. Revise § 1203.2 to read as follows:

§ 1203.2 Investigation of representation disputes.

Applications for the services of the National Mediation Board under section 2, Ninth, of the Railway Labor Act to investigate representation disputes among carriers' employees may be made on printed forms NMB–3, copies of which may be secured from the Board's Representation and Legal Department or on the internet at *www.nmb.gov.* Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by signed authorization cards from the employees composing the craft or class involved in the dispute. The applications should show specifically the name or description of the craft or class of employees involved, the name of the invoking organization or employee seeking certification, or the name of the employee seeking decertification, the name of the organization currently representing the employees, if any, and the estimated number of employees in each craft or class involved. The applications should be signed by the chief executive of the invoking organization, some other authorized officer of the organization, or by the invoking employee. These disputes are given docket numbers in the series ''R''.

PART 1206—HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

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

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

■ 4. Amend § 1206.1 by revising paragraph (b) to read as follows

§ 1206.1 Run-off elections.

* * * * *

(b) In the event a run-off election is authorized by the Board, the two options which received the highest number of votes cast in the first election shall be placed on the run-off ballot. No blank line on which voters may write in the name of any organization, individual, or no representation will be provided on the run-off ballot.

* * * * *

■ 5. Amend § 1206.2 by revising paragraph (a) to read as follows:

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

(a) Upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, or to decertify the current representative and have no representative, 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.

* * * * *

■ 6. Amend § 1206.4 by revising paragraph (a) to read as follows:

§ 1206.4 Time Limits on Applications.

* * * * *

(a) For a period of two (2) years from the date of a certification or decertification covering the same craft or class of employees on the same carrier, and

* * * * *

§ § 1206.5 through 1206.7 [Redesignated as §§ 1206.6 through 1206.8]

■ 7. Redesignate §§ 1206.5 through 1206.7 as §§ 1206.6 through 1206.8 and add new § 1206.5 to read as follows:

§ 1206.5 Decertification of representatives.

Employees who no longer wish to be represented may seek to decertify the current representative of a craft or class in a direct election. The employees must follow the procedure outlines in § 1203.2.

Dated: July 23, 2019.

Mary L. Johnson,

General Counsel.

[FR Doc. 2019–15926 Filed 7–25–19; 8:45 am]

BILLING CODE 7550–01–P

DEPARTMENT OF LABOR

29 CFR Part 1952

Occupational Safety and Health Administration

[Docket ID. OSHA 2014–0019]

RIN 1218–AC92

Arizona State Plan for Occupational Safety and Health

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Reconsideration of final approval of state plan; withdrawal.

SUMMARY: OSHA is withdrawing its proposed reconsideration of the Arizona State Plan's final approval status.

DATES: July 26, 2019.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Francis Meilinger, OSHA Office of Communications, U.S. Department of Labor, Washington, DC 20210; telephone (202) 693–1999; email: *meilinger.francis2@dol.gov.*

For general and technical information: Douglas J. Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, U.S. Department of Labor, Washington, DC 20210; telephone: (202) 693–2200; email: *kalinowski.doug@dol.gov.*

SUPPLEMENTARY INFORMATION: On August 21, 2014, OSHA published a **Federal Register** document proposing to reject Arizona's residential construction fall