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1899 L Street, NW • 12<sup>th</sup> Floor • Washington, DC 20036  
202.331.1010 • [www.cei.org](http://www.cei.org)

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## **The Case for Reform of the Railway Labor Act End Unionization through Regulation and Allow Workers to Decertify Unions**

By Russ Brown and Ivan Osorio\*

Changing election rules to favor one party is something we associate with dictatorships. Yet it is happening in this country, at this moment. The scenario involves the union election process in a series of elections involving a U.S. airline. However, the ramifications involve fundamental changes in federal labor policy that could severely affect America's transportation sector. If those changes are allowed to stand, the future for labor relations at America's airlines and railroads may turn into one of long, drawn-out election campaigns and re-running of elections when unions do not get their way.

Labor relations in America's railroad and airline industries are regulated under the Railway Labor Act (RLA). The Act was passed by Congress in 1926 and expanded in 1936 to include airlines.<sup>1</sup> In order to avoid disruptions to America's transport network through strikes and other kinds of work stoppages, the Act imposed mandatory mediation and gave the president the ability to order workers back to work. Like the National Labor Relations Act (NLRA), the RLA allows for unions to organize workers for the purpose of negotiating a collective bargaining agreement as the workers' exclusive representative.

However, while the NLRA allows unions to organize on a location-by-location basis, under the RLA, a bargaining unit must include all the workers of the same classification throughout an entire company. Railways and airlines are network industries, with capital investments stretching across several states or even the entire nation. By requiring unions to organize on a companywide basis, the RLA helps to avoid the creation of a patchwork of work rules that piecemeal unionization at specific facilities would bring. Balkanized work rules detract from the standardization and economies of scale upon which network industries rely.

Under the RLA, union organizers must obtain signed authorization cards from at least 35 percent of the employees in a given bargaining unit—also known as “class” or “craft”—across the entire

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\* *Russ Brown is a Vice President for the Labor Relations Institute and an Adjunct Analyst for the Competitive Enterprise Institute (CEI). Ivan Osorio is Editorial Director and Labor Policy Fellow at CEI.*

organization, rather than the 30 percent required under the NLRA. This requirement is supposed to show interest in union representation by the employees.

The National Mediation Board (NMB) oversees union elections under the RLA. It consists of three members appointed by the President of the United States. Currently, two of the NMB's three members are former union officials.<sup>2</sup> The agency is now trying to aid the unions in their dispute with Delta. Here is how.

**Changes to Railway Labor Act Voting Rules.** Until a recent rule change, in a RLA election the union needed to receive a majority of the votes from *all eligible bargaining unit members*, not just a majority of votes cast. Thus, a union trying to organize a bargaining unit of 100 employees would need to gain at least 51 votes to become certified as monopoly bargaining representative.

However, on July 1, 2010, the Obama NMB made some changes to the RLA's voting rules—which had stood for 75 years—to require for a union to win only a majority of votes cast. Thus, under the new rules, if the union is trying to organize a 100-employee bargaining unit but only 80 show up to vote, then the union would only need 41 votes to win the election. In other words, the new rules could make it possible for a union to become certified as the monopoly bargaining representative of a group of workers with only minority of the workers having voted for union representation. It is worth noting that the NMB made absolutely no effort to educate eligible voters of the changes.

To further complicate the voting process—and skew the process in unions' favor—there is more than one way for a union to receive “yes” votes under the new rules. First, the new NMB ballot includes a “write in” section in which any vote cast counts as a vote for the union, because “no union” votes may only be entered in the section so labeled. Second, the runoff may only include the top two union vote getters. For example, take a union election at a bargaining unit of 100 workers, in which “petitioning union” gets 30 votes, “write-in union” gets 20, and “no union” gets 40, with 10 workers not voting. Clearly, “no union” won a plurality, but under the NMB's new rules, only the petitioning union and the write-in union will appear on the runoff ballot.<sup>3</sup>

**Decertification Must Be a Feasible Option.** Also in need of reform is the RLA's lack of a straightforward decertification provision. The NLRA, by contrast, allows employees to hold an election to decertify a union if 30 percent of workers in a bargaining unit show interest. Under the RLA, however, union contracts never expire; they only have amendable periods.

It is technically possible for workers unionized under the Railway Labor Act to decertify a union, but it is extremely difficult. The workers have to wait two years after the union is certified to launch what is called a “straw man” election. Worse, an option for outright decertification may not be placed on the ballot. Instead, following the two-year wait, the workers seeking decertification then have to put up an individual or create a fictitious organization—the straw man—to challenge the incumbent union.

Just as when a union is required to show worker interest by collecting signed authorization cards from at least 35 percent of the workers in the bargaining unit, the workers need to collect signatures for the challenge to proceed—except that the burden is much higher as they must gain signatures of at least 50 percent of the workers in the bargaining unit. Furthermore, it is worth noting that most union constitutions have severe penalties for members who attempt to secede from the union. Once the “straw man” individual or organization has collected enough signatures, the employees can petition the NMB for an election, with four choices on the ballot:

1. Incumbent union
2. Straw man
3. Write-in union
4. No union

If “no union” receives more than 50 percent of the total votes cast, then the workers in that class and craft would become non-union. However, if “no union” receives a plurality of votes but not more than 50 percent, that would trigger a runoff election, with only the union and the straw man on the ballot. If the straw man choice wins the runoff, then that individual or fictitious organization could either not negotiate and make the class and craft nonunion or start collecting dues as the workers’ new representative.<sup>4</sup> Decertification of a union under the RLA is so difficult that it has never been accomplished for a class and craft of more than 145 workers.<sup>5</sup>

**The Fight over Delta.** The 2008 merger Delta Airlines and Northwest Airlines, which created the world’s largest airline,<sup>6</sup> set the stage for a major labor battle with potential ramifications that could extend well beyond this one company. The combination of Delta’s largely non-union workers and Northwest’s union workforce was bound to prove challenging.

More than 50,000 employees voted on whether to unionize—the single largest private-sector vote to unionize since the United Auto Workers organized the Ford Motor Company in 1941.<sup>7</sup> Employees voted against unionization in seven different elections.

The first two elections took place under the old RLA rules. On March 1, 2010, Delta’s simulator technicians voted on whether to join the International Association of Machinists and Aerospace Workers (IAM). IAM lost after receiving only 40 votes out of 91 in the bargaining unit.<sup>8</sup> Then, on March 5, 2010, IAM filed interference charges against Delta Air Lines with the NMB and was granted a second election.<sup>9</sup> On September 20, 2010, the simulator technicians voted down IAM again, this time the union receiving only 18 votes and the write-in union receiving 23, thus falling well short of the 50 percent-plus-one needed.<sup>10</sup>

Then, in late 2010, came a quick succession of elections, all conducted under the new RLA voting rules. In every one, employees voted against unionization.

On November 4, 2010, 94 percent of an eligible 19,877 flight attendants rejected unionization by the Association of Flight Attendant-Communications Workers of America (AFA). (This election was the first in which a union counted votes cast for “write-in union” as its own. In a news release, the AFA said it had gotten 9,216 votes, when in fact it had only received 8,786.)<sup>11</sup>

- On November 19, 2010, fleet service employees turned down the IAM, with 5,571 of the 13,104 eligible voters voting against unionization. The IAM received 4,909 votes, with the rest of the employees in the bargaining unit abstaining.<sup>12</sup>
- On November 23, 2010, 439 out of 673 stock and stores (maintenance department plane parts inventory control) employees voted against joining IAM.<sup>13</sup>
- On December 8, 2010 the 8,746 out of an eligible 15,436 passenger service employees cast “no” votes against union representation.<sup>14</sup>

Now the National Mediation Board has changed the rules to favor the unions in elections they would otherwise lose. An election at another airline illustrates the difference in outcome that the new rules would create.

On November 5, 2010, in an election under the new rules, passenger service agents at Piedmont Airlines voted on whether to join the Communication Workers of America (CWA). The union won by virtue of the rule change. CWA did not win the 50 percent-plus-one of votes of all members of the bargaining unit required under the old rules, yet was certified as monopoly bargaining agent. Out of 2,867 eligible voters, CWA won 1,107 votes, with only 638 No votes.<sup>15</sup> Thus, 1,760 employees who did not vote for CWA representation will thenceforth be required to pay dues to the union.

**Conclusion.** The National Mediation Board changed the Railway Labor Act’s voting rule, which had been in place for 75 years, without any regard to the worker at all, as evidenced by the fact the NMB made absolutely no effort to educate the workers on the rule change.

With Congress having rejected changing the law to favor unionization, the Obama administration is now pursuing unionization through regulation, which will benefit no one other than the administration’s union allies. Circumventing the people’s elected representatives is unacceptable. Congress needs to hold National Mediation Board accountable for any attempt to do so. In addition, Congress should reform the Railway Labor Act to make the election process more responsive to workers.

- Change the voting procedures back to 50 percent-plus-one of the class or craft.<sup>16</sup>
- Allow runoff elections to include the “no union” option.
- Amend the Railway Labor Act to include a clear decertification process, and make the decertification threshold of interest the same as that required for a union petition to lead on a representation election.
- Expand the jurisdiction of the Railway Labor Act to include companies, such as UPS, that operate across state lines or that perform some traditional functions of airlines or railroads.
- Guarantee the right to free speech for both employees and employers during campaigns.

The choice of whether to join a union or not should belong to the workers, not union organizers or government bureaucrats.

## Notes

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<sup>1</sup> Charles M Rehmus, *The Railway Labor Act at 50*, Chapter 1, National Mediation Board website, <http://www.nmb.gov/documents/rla50-chapter01.pdf>.

<sup>2</sup> The former union officials currently on the National Mediation Board are: Linda Puchala, (NMB bio: [http://www.nmb.gov/directory/puchala-linda\\_bio.html](http://www.nmb.gov/directory/puchala-linda_bio.html)), former International President of the Association of Flight Attendants (AFA)—which became insolvent in 2004 and merged with the Communication Workers of America—and Harry Hoglander (NMB bio: [http://www.nmb.gov/directory/hoglander-harry-r\\_bio.html](http://www.nmb.gov/directory/hoglander-harry-r_bio.html)), a former International Vice President of Air Line Pilots Association (ALPA) and a TWA pilot. Puchala’s presided over her former union, now known as the AFA-CWA, which was the largest of the elections representing nearly 20,000 flight attendants.

<sup>3</sup> On February 16, 2011, the National Mediation Board further modified the new voting procedures. The modification concerns the “write in” option, for which either silence or the selection of “any other organization or individual” will not count as “voter intent” for representation. In other words, the voter must clearly state—via phone—or enter—via Internet—the name of a real individual or organization for “voter intent” to be counted as a vote for representation. This modification does not go into effect until March 21, 2011, and will not affect any elections that have already taken place. Revised Materials for the National Mediation Board’s New Voting Procedures – Procedures for Write-in Votes and Run-off Elections, 38 N.M.B. No. 31, (2011), <http://www.nmb.gov/representation/deter2011/38n031.pdf>.

<sup>4</sup> This would be very unlikely, since the purpose of running a straw man in the first place is to decertify the incumbent union, but legally it is possible.

<sup>5</sup> Delta Air Lines, Inc., 29 NMB 408 (2002) (145 eligible voters).

<sup>6</sup> Chris Isidore, “Delta acquires Northwest in \$3.1 B deal,” CNNMoney.com, April 15, 2008, [http://money.cnn.com/2008/04/14/news/companies/delta\\_northwest/index.htm?cnn=yes](http://money.cnn.com/2008/04/14/news/companies/delta_northwest/index.htm?cnn=yes).

<sup>7</sup> Mike Esterl, “Barbs Fly in Union Fight,” *The Wall Street Journal*, October 21, 2010, <http://online.wsj.com/article/SB10001424052702303339504575566490276252822.html?KEYWORDS=barbs+fly+i+n+union+fight>.

<sup>8</sup> Delta Air Lines, Inc., 37 N.M.B. No. 29 (2010) <http://www.nmb.gov/representation/deter2010/37n029.pdf>.

<sup>9</sup> Delta Air Lines, Inc., v. International Association of Machinist and Aerospace Workers, AFL-CIO, 37 N.M.B. No. 53 (2010) <http://www.nmb.gov/representation/deter2010/37n053.pdf>.

<sup>10</sup> Delta Air Lines, Inc., Simulator Technicians, 37 N.M.B. No. 68 (2010), <http://www.nmb.gov/representation/deter2010/37n068.pdf>.

<sup>11</sup> Taylor Leake, “Delta Flight Attendants Union Grounded... for Now,” Change.org, November 5, 2010, <http://news.change.org/stories/delta-flight-attendants-union-grounded-for-now>.

<sup>12</sup> Delta Air Lines, Inc., Fleet Service Employees, 38 N.M.B. No. 14 (2010), <http://www.nmb.gov/representation/deter2011/38n014.pdf>.

<sup>13</sup> Delta Air Line, Inc., Stock and Stores Employees, 38 N.M.B. No. 15 (2010), <http://www.nmb.gov/representation/deter2011/38n015.pdf>.

<sup>14</sup> Delta Air Lines, Inc., Passenger Service Employees, 38 N.M.B. No. 16 (2010), <http://www.nmb.gov/representation/deter2011/38n016.pdf>.

<sup>15</sup> Piedmont Airlines, Fleet and Passenger Service, 38 N.M.B. No. 11 (2010), <http://www.nmb.gov/representation/deter2011/38n011.pdf>.

<sup>16</sup> The Restoring Democracy in the Workplace Act (H.R. 548), introduced by Rep. Phil Gingrey (R-Ga.) would do this.