

Latest NMB Rulemaking — Shape Of Things To Come?

Publication

11.18.09

For 75 years, the National Mediation Board ("NMB") has been guided by the principle that representation decisions in the airline and railway industries should be determined by a majority of eligible voters (as opposed to votes cast) in the applicable "craft or class." Consequently, employees register their union support merely by submitting ballots that offer the single choice of union representation. An affirmative submission constitutes a vote for representation. Those who decline to vote are deemed to oppose representation. On Nov. 3, the NMB took the unusual step of engaging in rulemaking for purposes of undoing that precedent.

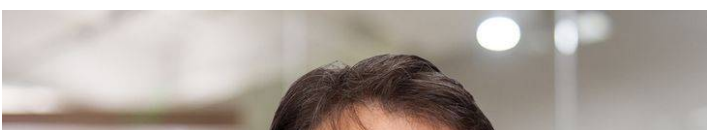
By virtue of an announcement (with a rare open dissent), the NMB issued notice of a proposed rule that would effectively do away with strict majority representation in favor of a system mirroring the National Labor Relations Act model, which is dictated by a majority of valid votes cast. The majority further called for the adoption of "Yes/No" ballots that for the first time would require those who oppose representation to affirmatively vote against it.

Over the course of seven double-spaced pages, 75 years of precedent was seemingly put at risk. The proposed rule was urged by a number of transportation unions that were asserting that change was long overdue. Opponents of the measure, however, characterize it as a radical departure from well-established precedent, motivated by political expediency.

Given the severity in recent pendulum shifts, practitioners may be forced to adapt to these doctrinal changes at a rapid pace. Other far-reaching changes have been looming on the horizon, not the least of which involves the proposed substitution of card check for secret ballot under the NLRA, pursuant to the Employee Free Choice Act. For the labor law practitioner, these tumultuous times present a number of unique challenges, chief of which is the compromised ability to counsel a client by reference to regulatory precedent.

This article appeared in the November 18, 2009 issue of *Employment Law* 360.

Related People





Steven M. Bernstein
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
[Email](#)