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THE EMPLOYEE'S "FREE AND CLEAR CHOICE"

By EVERETT M. GOULARD†

THERE is a saying that "an object in possession seldom retains the same charm that it had in pursuit." During the years since the airline industry has been under the coverage of the Railway Labor Act (hereinafter cited as Act or RLA), carriers have pursued, perhaps with changing tempos but with a fixed determination, an extremely elusive object in the representation area—the allowance of a "no-union" slot on the ballot form. As we all know, this object has never been "possessed" and it appears at the moment not to be within easy reach. Nevertheless, I believe that we will learn within the next few years whether this object in possession does have charm. The "charm" of a "no-union" slot concept is the belief that the "free and clear choice" of the employees will be recorded accurately, efficiently and speedily. I believe its realization would not tarnish that "charm." Therefore, the purpose of my remarks is simple. It is to show that the absence of a "no-union" slot on the ballot creates confusion which will persist until employees are able to record their "free and clear choice."

The right of an employee within the coverage of the RLA to choose his own collective bargaining representative is provided in section 2, Fourth of the RLA. The machinery for this selection is in section 2, Ninth of that Act. Section 2, Fourth states that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class" Section 2, Ninth authorizes the National Mediation Board, upon request, to investigate disputes over representation to "designate" those who were affected, to use a secret ballot or any other appropriate means of ascertaining the choice of the employees, to establish rules governing elections and to certify representatives chosen to represent employees in negotiations.

Coexistent with the employees' statutory right to select their own collective bargaining representative is the corresponding right of the employees to reject collective representation. The legislative history of the RLA supports the view that employees under the Act have the right to reject collective representation. The House Report on the bill H.R. 9861 states:

2. It [H.R. 9861] 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 and forbids interference by the carrier's officers with the exercise of said rights.¹

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¹ H.R. REP. NO. 1944 TO ACCOMPANY H.R. 9861, COMM. ON INTERSTATE AND FOREIGN

Testimony by Commissioner Joseph P. Eastman, Federal Coordinator of Transportation and the principal draftsman of the legislation, reflected contemporary thoughts on the bill:

Commissioner Eastman: No, it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be.²

Likewise in the Senate, Senator Robert Wagner, supporter of this legislation, expressed an equal belief as to the purpose of the bill:

Senator Wagner: . . . I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not join any union or to remain unorganized.³

From the above, the legislative history clearly reflects the prevailing consensus at the time of the 1934 amendments to the RLA that the employee under the Act did indeed possess the right to reject collective representation. In addition, the Supreme Court in the case of *Brotherhood of Railway Clerks v. Association for the Benefit of Non-Contract Employees*,⁴ (hereinafter referred to as the *ABNE* case) acknowledged in a footnote that "the legislative history supports the view that the employees are to have the option of rejecting collective representation."⁵

Regrettably, the National Mediation Board (hereinafter cited as NMB), the official body established to resolve questions arising out of disputes over representation, has not considered itself a vehicle through which the employees may express their desire *either* for or against collective representation. Rather, the NMB has played a partisan role designed to encourage employees to choose collective representation, as is amply evident from its statement in *Twenty Years Under the Railway Labor Act, Amended, and the National Mediation Board*:

According to the act, such representatives may either be a person or persons, or a labor union or organization, designated either by the employees of a single carrier or the employees of a group of carriers, to act for them. The thing of importance in this connection is that the interests of the employees, like the interests of the carriers, shall be looked after by representatives of their own choosing. In other words, the act does not contemplate that its purposes shall be achieved, nor is it clear that they can be achieved, without employee representatives—that is to say, by carriers treating separately with each employee.⁶

Consequently, the NMB has shaped the form of the ballot to its own purposes.

COMMERCE, 73d Cong., 2d Sess. 2 (1934). H.R. 9861 was enacted into law on June 21, 1934 as the 1934 amendments to the Railway Labor Act.

² *Hearings on H.R. 7650 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 57 (1934).

³ *Hearings on S. 3266 Before the Senate*, 73d Cong., 2d Sess. (1934).

⁴ 380 U.S. 650 (1965).

⁵ *Id.* at 669, n.5.

⁶ NATIONAL MEDIATION BOARD, *TWENTY YEARS UNDER THE RAILWAY LABOR ACT, AMENDED, AND THE NATIONAL MEDIATION BOARD*, (1953) at 14.

Prior to the *ABNE* case, the NMB adopted two major practices in representation proceedings: (1) It certified as the collective bargaining representative of the employees a union which received a majority of the votes cast, provided that in the election a majority of the eligible voters participated; and (2) it used an election ballot which did not provide a "no-union" slot for those who wanted to vote against representation.

The practice of certifying a union on the basis of a majority of votes cast (provided a majority of those eligible to vote did so) was sanctioned in *Virginia R. Co. v. System Federation No. 40*,⁷ wherein the exact meaning of the term "majority" as included in section 2, Fourth of the RLA was questioned by the carrier. System Federation No. 40 attempted to organize the crafts of the carrier's mechanical department. As to one of these crafts, the blacksmiths, the System Federation failed to receive a majority of the ballots of those eligible to vote, although a majority of the craft participated in the election. The NMB certified the System Federation as the bargaining representative on the ground that it received a majority of the votes cast. The carrier attacked the certification on the ground that less than a majority of the eligible voters had expressed a desire for union representation. The U.S. Court of Appeals for the Fourth Circuit posed the issue as being "whether, in such an election, the choice is dependent upon a majority of all those qualified to vote, or whether, in cases where a majority of those qualified to vote participate in the election, a majority of the votes cast is sufficient."⁸ The court then determined that the latter alternative was the more logical interpretation of the word "majority" as set forth in section 2, Fourth. The Supreme Court affirmed the Fourth Circuit's holding, noting that "those who do not participate are presumed to assent to the expressed will of the majority of those voting."⁹

The second major pre-*ABNE* practice of the NMB was its refusal to include a "no-union" slot on the ballot. The ballot had slots only for named unions or individuals or for "others," and a ballot marked "no representation" was considered invalid.

These two practices made the employee's right to reject collective representation illusory. This illusion arose out of the presumption, enunciated by the Supreme Court in the *Virginia R. Co.* case, that those who did not participate in the election were presumed to have assented to the will of the majority who had voted. The danger of such a presumption became apparent when viewed in connection with the absence of a "no-union" slot on the election ballot. If the employee wanted to vote against collective representation, he would not vote; yet, under the presumption of the *Virginia R. Co.* case, his vote against representation would be switched to a vote for representation.

Significantly, after the *Virginia R. Co.* case was decided, the National Labor Relations Board (hereinafter cited as NLRB) changed its ballot from one without a "no-union" slot to one with such a box in order to

⁷ 84 F.2d 641 (4th Cir.), *aff'd*, 300 U.S. 515 (1936).

⁸ 84 F.2d at 652.

⁹ 300 U.S. at 560.

protect the employee's right to reject collective representation. Unlike the NMB, the NLRB had a practice of certifying a union on the basis of a majority of the votes cast provided that those votes were representative numerically of the total eligible to vote. Had the NLRB continued to operate under such a certification policy and not included a "no-union" slot on the ballot, the employee would not have been able to cast a vote against representation, because whenever the employee abstained from voting, the *Virginia R. Co.* presumption would interpret that vote as one for representation.

The *ABNE* case arose out of a merger in 1961 between United Airlines and Capital Airlines, at which time the Brotherhood of Railway Clerks (hereinafter cited as BRC) was certified as the representative of the "clerical, office, stores, fleet and passenger service" employees at Capital. After the merger United, the dominant partner, refused to recognize this contract. In 1962 BRC filed an application with the NMB to investigate a representation dispute among these employees of United. Over the objections of the carrier and the IAM, the rival union representing the stores and fleet service personnel at United, the NMB ordered an election in the entire unit to determine which of the two unions was the bargaining representative. The carrier filed an action in the U.S. District Court for the District of Columbia, in part attacking the form of the ballot because it provided no space for voting "no-union." The court dismissed the action, and the Court of Appeals for the D.C. Circuit affirmed. Thereafter an association for non-contract employees of the carrier filed a suit in the same district court raising substantially the same claims. The district court enjoined the NMB from conducting an election without a ballot providing for a "no-union" slot. The court of appeals affirmed.

Presumably becoming uncertain about the form of its ballot, the NMB amended it after the Supreme Court granted certiorari, but before a decision was issued. At the urging of the Solicitor General, the following language was included:

No employee is required to vote.

If less than a majority of the employees cast valid ballots no representative will be certified.

This change did not alleviate the existing problem because of the *Virginia R. Co.* presumption. Even if an employee had "voted" against representation by not voting at all, his "vote" was turned into a vote for representation under the presumption.

The Supreme Court did not resolve the inconsistency between the ballot form and the *Virginia R. Co.* presumption, even though the Court noted that the NMB had not followed the presumption. It held that the Board's choice of its proposed ballot did not exceed its statutory authority. At the same time, in stating that the form of the ballot is a matter for Congress and the NMB rather than the courts, and in venturing "no opinion as to whether the Board's proposed ballot will best effectuate the purpose of the Act,"¹⁰ the Court hinted rather broadly that the NMB could

¹⁰ 380 U.S. at 671.

put an end to the confusion. In addition, the Court pointed out that the employees clearly have the "option of rejecting collective representation."¹¹

In his dissent, Mr. Justice Stewart, who, incidentally, had first hand exposure to the administration of the Railway Labor Act, expressed the view that even the Solicitor General's revised ballot did not meet the statutory requirement of conveying to each employee the choices available to him under the law. He pointed out that the ballot lies at the heart of the Board's certification mechanism, and that the Board should confront the question of its precise form with a correct understanding of the law.

Mr. Justice Stewart's view that the NMB form of ballot denied the employee his "free and clear choice" was quickly supported by the court of appeals in *Aeronautical Radio, Inc. v. National Mediation Board*,¹² (hereinafter cited as the *ARINC* case). There the International Brotherhood of Teamsters (hereinafter cited as *IBT*) sought to organize a 400 member craft of *ARINC*'s employees. The Air Line Dispatchers Association (hereinafter cited as *ALDA*) was made a party to the dispute upon its request. In the ensuing election *ALDA* collected 74 votes, and *IBT* obtained 147 votes. One hundred and seventy-nine employees did not vote or submitted void votes. The NMB certified the *IBT*, and *ARINC* sought to set aside the certification in the district court. *ARINC*'s action was dismissed for lack of jurisdiction. In affirming, the court of appeals said: "[S]ince a majority of the employees obviously had voted for some representation, the union which became the choice of a majority of those thus voting should be certified."¹³ Thus the NMB's test for determining "the free and clear choice" of the employees became an outright presumption that all employees favoring representation by some union would prefer representation by any union rather than being unrepresented. Such a presumption is fallacious. While it is true that a majority of employees did vote for some sort of representation, it does not follow that those who voted for *ALDA* would want the *IBT* to represent them rather than not being represented at all.

The NLRB recognizes the dangers of such a presumption. In a situation where none of the choices receives a majority, and the "no-union" vote is one of the two highest vote-getters, the NLRB orders a run-off election in which the ballot affords the employees an opportunity to vote for or against collective representation. However, the NMB, once it has determined that a majority has voted, utterly disregards the fact that votes not cast constitute votes against representation under the *ABNE* decision, and that employees may not want a certain union to represent them. As a result, the NMB does not use its run-off procedure under its rule which provides "if in an election . . . no organization or individual receives a majority of the legal votes cast, . . . a second or run-off election shall be held forthwith"—a procedure obviously appropriate in the *ARINC* situation. By completely ignoring the choice of a major segment of the em-

¹¹ *Id.* at 669, n.5.

¹² 255 F. Supp. 466 (D.D.C. 1966), *aff'd*, and *rev'd in part*, 380 F.2d 624 (D.C. Cir.), *cert. denied*, 389 U.S. 912 (1967).

¹³ 380 F.2d at 626-27.

ployees as it did in the *ARINC* case, the NMB is disregarding the Supreme Court's finding that employees do indeed have the "option to reject collective representation."

The long protracted debacle—the Pan American election (Case R-3781)—illustrates anew the danger of attempting to determine the desires of the employees without a "no-union" slot on the ballot. The challenging union, the IBT, filed an application with the NMB on 5 August 1965 requesting an investigation of a representation dispute among the Pan American World Airways (hereinafter cited as Pan Am) clerical employees. A mail ballot election was scheduled in August, 1966 after a lengthy proceeding to determine whether certain employees were members of the unit. However, the incumbent, the BRC, refused to have its name put on the ballot. Presumably convinced of its inability to prevail under the NMB rules by standing for reelection, the BRC's strategy was to remain off the ballot in hope that less than a majority of the eligible voters would cast valid ballots for the IBT or any other organization or individuals, and that the NMB thereupon would dismiss the IBT petition. It then planned to claim that the *status quo ante* (the 1946 certification of the BRC) remained in effect. The BRC election campaign was highlighted by "tear up the ballot" parties and other tactics designed to persuade employees to refrain from voting, not for the purpose of expressing their "free and clear choice" not to be represented by a union, but to keep a particular union in power irrespective of the employees' wishes. This approach would not have been possible under a clear cut election procedure such as that of the NLRB. Ironically, the effectiveness of this strategy was never fully tested, not because of the intervention of advocates of law, order or clarity, but because of the circulation of letters over the forged signatures of George Meany and C. L. Dennis, President of the BRC, stating that the BRC's name had been erroneously omitted from the ballot, and that a write-in campaign was being conducted in its behalf. The NMB impounded the ballots and never counted them, presumably deciding that the forged letters sufficiently compounded the existing confusion to justify starting things all over again.

The NMB ordered a second election which was conducted in December, 1966. Again the BRC remained off the ballot, and its campaign strategy remained unchanged. This time the ballots were counted, and out of 6936 eligibles, the IBT received 3091 votes. There were 137 write-ins for the BRC, and the Transport Workers Union received 284 write-ins. Under NMB rules, the IBT would have been certified had the write-ins been declared valid. After many months of deliberation over objections to rulings made by the mediator in charge of the election, the NMB on 12 September 1967, set aside this second election because it was disturbed that the confusion still remaining from the incidents surrounding the first election was such that the results of the second election might not reflect the "free and clear choice of the employees affected." Whether this concern was directed at the freedom guaranteed by the statute or merely at the opportunity to choose between unions was left in doubt! The NMB in its opin-

ion also recited that much of the confusion delaying the case was attributable to the BRC's absence from the ballot. Thus, in ordering a third election it invoked what it alleged to be a long-standing and consistently applied policy of requiring an incumbent to go on the ballot or forswear representation of the employees involved. This allegation was bitterly contested by the BRC.

The third election was delayed both by a district court order granting the BRC's application for a preliminary injunction restraining the holding of an election, and by a stay granted by the court of appeals of its order reversing the district court. Finally, on 14 October 1968, the Supreme Court denied certiorari and the NMB was free to conduct its election, which commenced on 27 November 1968. The results were conclusive. The IBT received 4821 votes of a total of 8071 eligibles, the BRC received 1092. On 14 February 1969, the NMB issued its certification in Case R-3781, and the IBT became the recognized bargaining agent for Pan Am's clerical employees some three years, six months and nine days after the date of its application—far in excess of the thirty days contemplated by section 2, Ninth of the Act!

The remarks of the court of appeals concerning the confusion and inconsistencies of the *Pan Am* case¹⁴ are most interesting. Commenting on the NMB's on-the-ballot policy, the court said:

Although we find the Board has statutory power to adopt the on-the-ballot policy outlined, we confess considerable uneasiness whether the Board has, with attention to the possible ramifications, evolved a general policy which it intends to apply in all further representation disputes.¹⁵

The court then outlined the BRC's complaint noting that the NMB's allegation of a "consistent policy" was not supported by its own case law. The court found "unsettling" the NMB's reliance on the confusion which surrounded the first two elections and the confusion resulting from its failure to put the BRC on the ballot as justification for requiring BRC to go on the ballot in the third election. It was equally disturbed at the NMB's apparent view that the *ABNE* decision required the BRC to be on the ballot. More significantly, the court expressed its concern at the NMB's tendency to profess itself required by dicta in opinions of courts which themselves emphasize the nearly unlimited powers of the Board:

The choice of what policy to follow is essentially for the Board to make. It is, however, for that very reason disturbing that on the one hand the courts refuse to involve themselves deeply in the substance of these questions, emphasizing the nearly unlimited powers of the Board, while on the other, the Board is heard to protest that its answers are mandated by the need for application of dictum in judicial opinion. This Alphonse-Gaston interplay is disquieting, with all due allowance for the possibility that the Board has given full consideration to the considerable problems, and uses court precedent as a palliative against pressures rather than as a prime mover of Board action.¹⁶

¹⁴ 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968).

¹⁵ *Id.* at 203.

¹⁶ *Id.* at 204.

These nearly unlimited powers of the NMB carry concomitant responsibilities. Its policies and actions are unreviewable unless they are "so plainly beyond the bounds of the Act, or . . . so clearly in defiance of it, as to warrant the immediate intervention of an equity court," as the Court of Appeals for the District of Columbia has said.

Faced with the inescapable conclusion that it has not provided a "free and clear choice" by employees in representation proceedings, the awareness of the delay and confusion which this failure can produce, as illustrated by the Pan Am clerical situation, should force the NMB to realize its responsibility to carry out statutory intent by promulgating on its own motion rules to provide a "no-union" slot on the ballot.