



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

OFFICE OF THE CHAIRMAN
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November 2, 2009

The Honorable John L. Mica
U.S. House of Representatives
Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Kline
U.S. House of Representatives
Longworth House Office Building
Washington, D.C. 20515

Dear Representative Mica and Representative Kline:

Thank you for your letter of October 21, 2009 regarding a request from the Transportation Trades Department of the AFL-CIO (TTD) that the National Mediation Board (NMB or Board) alter its voting procedures. I share your concern about the TTD request, and I believe the only proper course of action should have been for the Board to have full comment on the TTD request – together with related issues such as decertification procedures, Excelsior list, and others – before making any proposals. A majority of the Board has chosen instead to propose to change our election rules in the manner requested by the TTD. The proposed rule is available for public inspection today at the Federal Register. I have dissented from this proposal, and the substantive reasons for my disagreement are discussed in my dissent.

In addition to my substantive concerns, I dissented because I believe the process by which the proposed rule was drafted and issued was flawed. The proposal was completed without my input or participation, and I was excluded from any discussions regarding the timing of the proposed rule. As I do not believe the Board should be making this proposal without first hearing comment on all related issues (including decertification), it was not a surprise that I was not included in the initial crafting of the proposed rule. However, I should have, at a minimum, (1) been given drafts along the way for consideration and comment; (2) been included in discussions regarding the timing of the proposal; and (3) been given ample time to review a draft and prepare a dissent if necessary. Instead, on Wednesday, October 28 at 11 am, my colleagues informed me that they had prepared a “final” version of the proposed rule and intended to send it to the Federal Register that day. They initially told me I had one and a half hours to consider their proposed rule. They also told me that I would not be permitted to publish a dissent in the Federal Register and would have to air any disagreement some other way. Publication of my dissent is not prohibited by any agency policy, and their decision to forbid it in this particular case was arbitrary

and ad hoc. After several requests from me, they agreed to give me an additional twenty-four hours – until noon on Thursday, October 29 -- to review and determine my position on the rule. They continued to insist that I would not be permitted to publish my dissent. The next day, an hour and a half before my “deadline,” I informed my colleagues that I intended to dissent and again asked for more time to digest the rule and draft my dissent. My request for more time was rejected. I was then told I would be permitted to publish my dissent, but only if I could have it completed by the noon deadline – an hour and a half from the time of the conversation. The dissent I originally submitted included a discussion of these process flaws as one of the reasons for my dissent. I was told by my colleagues that if I did not remove the discussion of the process flaws from my dissent, they would not consent to its publication in the Federal Register. I have attached to this letter the full dissent I originally submitted.

Under normal circumstances, I would have preferred not to discuss Board process so publicly. However, in light of the complete absence of any principled process or consideration of my role as an equal Member of the Board, I feel compelled to bring these issues to your attention. I am also troubled by my colleagues’ attempt to prevent me from raising these concerns as a part of my published dissent.

This sort of exclusionary behavior is not the way the Board has conducted itself previously during my tenure. In my past experience, Board Members who wished to dissent from a proposed decision have been given a role in the substantive and procedural discussions related to the decision and ample time to prepare their dissent. I believe this is the better way to conduct agency business.

I also query – why the rush to publish the proposed rule? The election rule in question has been in place for 75 years; why not wait one more day in the interest of ensuring a fair rulemaking process and accommodating the reasonable request of a colleague. Such an obvious rush to put out a proposed rule gives the impression that the Board has prejudged this issue, and it will contribute to the growing perception that the majority is attempting to push through a controversial election rule change to influence the outcome of several very large and important representation cases currently pending at the Board.

Thank you for your interest in this matter.

Sincerely


Elizabeth Dougherty