HEARING BEFORE NATIONAL MEDIATION BOARD
DOCKET NO. C-6964, RIN 3140-ZA00

STATEMENT OF JOEL M. PARKER

My name is Joel Parker, and I am an International Vice President of the Transportation•Communications International Union and Special Assistant to the International President. I am responsible for overseeing all collective bargaining negotiations involving TCU and have testified before a number of Presidential Emergency Boards and Section 7 Arbitration Boards. I thank the Board for the opportunity to address the important issue raised by its proposed new rule.

TCU represents employees employed in the clerical craft and class. The United Transportation Union (UTU) representing employees in the conductor craft and class; the Transport Workers Union (TWU)representing employees in the carmen craft and class; the International Brotherhood of Electrical Workers (IBEW) representing electricians and communications employees; the American Train Dispatchers Association (ATDA) which represents train dispatchers; the National Firemen and Oilers District of Local 32-BJ, SEIU (NCFO) which represents shop laborers and stationary engineers; and the Sheet Metal Workers International (SMWIA) are joining in this statement. These unions and TCU are among the traditional rail labor

organizations, representing employees in the rail industry for approximately 100 years.

Each has had a long history of representing employees both prior to and after the passage of the Railway Labor Act. Today they represents over 122,000 members employed in the railroad industry. In addition, TWU represents approximately 52,000 employees in the airline industry, and the UTU represents airline employees on several commuter airlines.

I come before you today to testify in favor of the Board's proposed regulatory change providing that the Board will certify representation elections based on the majority of valid ballots cast, as opposed to the current procedure of a majority of eligible voters. In doing so, TCU and the other unions on whose behalf I'm speaking join all the other rail and airline unions who are united for the first time in active support of the new regulation.

The Board's current practice results in those failing to vote being counted as a vote against representation. As recognized by the Supreme Court in 1937 in the Virginian Railway case, 300 U.S. 515, 560, this rule is contrary to the general election procedures which require only the approval of the majority of those voting. As the Court noted therein, normally

"Those who do not participate are presumed to assent to the express will of the majority of those voting." Ibid.

As discussed by the majority opinion of this Board, there may be a number of reasons an employee does not vote, so the failure to vote should not be presumed to constitute a "no" vote. Non-voting may reflect a conscious choice not to participate, or it may reflect forgetfulness, indecision, or apathy and acceptance of whatever the majority of those voting chose. The current NMB rule is contrary to the election procedures of the National Labor Relations Board, the Federal Labor Relations Authority, and various state labor relations boards and commissions. All certify representatives based on a majority of those voting, effectively relying on the Virginian Railway presumption that an employee not voting is acquiescing in the will of the majority.

As the Supreme Court commented in its 1965 ABNE opinion, the Board's current rule favors those opposed to representation. BRAC v. ABNE, 380 U.S. 650 (1965). The Board reverses its normal rule favoring management in response to egregious carrier interferences. Under such circumstances, the union will be certified unless a majority of eligible employees vote against representation. Key Airlines, 16 NMB 296 (1989). Those

declining to vote are then presumed to favor the union. By reversing the presumption, the Board consciously gives the union the same advantage given carriers under its normal rule.

We are simply saying that it is long past time to end election rules that favor carriers and discourage representation. It's time to level the playing field. As we set forth below, the reasons previously offered by the Board in support of its current rule are no longer valid.

The Current Rule Does Not Contribute to Labor Stability

After initially saying it had adopted this procedure for administrative not legal reasons, the Board subsequently indicated that it was of the opinion that "stable relations" would be maintained by its adherence to the majority of those eligible to vote rule. 1 NMB 454, 455 (1948); Sixteen Annual Report Fiscal Year 1950 at p. 20. In its 1987 Chamber of Commerce decision, the Board stated that the rule promotes harmonious labor relations and deters strikes. The Board has never provided data or even anecdotal evidence in support of these conclusions.

The assumption underlying this theory seems to be that a union elected only by a majority of those voting would be less

strong than one elected by a majority of those eligible to vote and therefore more likely to strike. There is, however, no basis to conclude that a union elected by a majority of those voting enjoys less support given the Supreme Court's view in Virginian Railway that those not voting accept the decision of the majority. Even if the Board's assumption were valid, a union's support is not fixed and will vary over time. Normally, it will take at least a year or two from certification before a union could expect a release, and its support will likely change during that period. Unions do not rely on the results of the representation election vote to determine whether the involved employees will, in fact, support a strike. Today, virtually all unions, including TCU and the other unions on whose behalf I'm speaking, have some type of procedure in place to have a strike vote to assure majority, and often more than majority support for a strike.

Further, the Board's premise is counterintuitive since a union enjoying less support would be less likely to strike than a union enjoying more support. The Board's view is based on the concern over a hypothetical, irresponsible labor organization not enjoying full majority support, engaging in a strike not supported by the employees it represents. The theory ignores

the Board's significant control through its mediation process over a union's ability to strike. Further, this theory ignores the fact that the Board has, in certain circumstances, certified a union based on a majority of those voting, with no noticeable increase in strikes. *See*, *e.g.*, Laker Airways, 8 NMB 236 (1981).

In determining whether to strike, the stakes for the union, and the members it represents, which were always high, have since 1989 become even higher with the issuance of the Supreme Court's decision in IFFA v. TWA, 489 U.S. 426, permitting carriers to hire permanent replacements for its striking employees. Not coincidentally, a review of the NMB's Strike Reports for Railroads and Airlines shows a significant decrease in recent years in the number of strikes, their duration, and the size of the involved carrier.[1] These Reports show that since 1995 there have not been any rail strikes, and during that same period the strikes among major airlines were limited to one carrier.

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[1] *See* http://www.nmb.gov/publicinfo/airline-strikes.html; http://www.nmb.gov/publicinfo/railroad-strikes.html.

In short, the fear that an irresponsible union elected by less than a majority of those eligible to vote would be more likely to strike is belied by the NMB's own authority through the mediation process to avoid such results; the fact that virtually all unions have votes to assure at least majority support of a strike; the strong disincentive to strike without majority support given the risk of strikers being permanently replaced; and the NMB's own statistics showing a marked decrease in strikes, even while the Board's election rule has remained unchanged.

The Board in its Chamber of Commerce decision linked the theory that a union not elected by a majority of those eligible to vote is more likely to strike, with the claim that such a union is less likely to be as effective in negotiations. Once again the Board has provided no data or anecdotal evidence for this assumption, which suggests that unions certified by the NLRB and public employee labor boards and authorities are not as effective as those certified by the NMB. As someone who has spent a career representing labor in collective bargaining both under and outside the scope of the Railway Labor Act, I can say that there are many factors in any given negotiations that influence the effectiveness of the union, but in my judgment the

method of the union's certification is not one of them. The various unions on whose behalf I'm speaking join TCU in this view.

It seems perverse that the Board interprets a statute whose purpose is to protect employees' rights to engage in collective bargaining in such a way as to make it more difficult for employees to select a union to represent them in bargaining. Indeed, it seems to me that my management friends who claim that this rule is necessary so that they can bargain with an effective union are actually not interested in promoting collective bargaining, but rather in avoiding it altogether. In any event, for the reasons previously stated, there is simply no longer, if there ever was, a nexus between the procedure used in a representation election and either the likelihood that a union will strike a carrier or the effectiveness of the union in bargaining.

The Board's Procedure Handicaps Unionization

In addition to labor stability, the Board has given as the second basis for its rule the fact that it had not "seriously handicapped" unions' ability to win elections. 1 NMB at 455 (1948). In that opinion, the Board noted that between 1934 and

1948 only one-fourth of one percent of employees voting for union representation were denied such representation because of a lack of majority participation in the election. Clearly, the Board's experience up to that time showed that as a practical matter its election rule did not hamper employees' ability to select a representative. Since unions were winning an overwhelming number of elections in that era, it was clear that the Board's interpretation of "majority" mattered little as a practical matter. While as Chairman Dougherty suggests employee participation in representation elections may have increased over the last decade, the fact is that employee participation is not at the very high levels relied on by the Board in its earlier explanation of its rule.

Plainly, and from my perspective unfortunately, unions no longer enjoy anywhere near that overwhelming success rate. In the Board's earlier view, labor stability attained via collective bargaining was not affected by its rule. This is no longer the case. Election rules are tilted to favor management by counting those who fail to vote as effectively voting against unionization, and unions are no longer winning the overwhelming number of elections. The right to collective bargaining is now often denied by the continued application of the rule.

TWU's experience during the last decade at Continental Airlines, where three elections (2005, 2006 and 2008) were held in response to TWU petitions by the NMB for the class or craft of Fleet Service, serves as an example of the way in which the current rule frustrates the desire of thousands of employees for union representation. In 2005, 3,122 employees of 6879 eligible voted for union representation; in 2006 it was 3,524 of 7.641; and in 2008, 3,473 of 7,660. In each case, nearly 100% of the non-voters have to be thought of as consciously anti-union in order to argue that there was not a real majority of Fleet Service employees that desired union representation; it more than strains credulity to imagine such unanimity of the silent group. Thus, the desire of thousands of employees, who are plainly the majority of eligible employees who hold active opinions on the issue, has been frustrated.

ATDA has had similar experience in its efforts to represent Union Pacific Railroad train dispatchers. In 1997, 232 of 474 UP dispatchers voted for union representation. In 2006, it was 252 of 588; and in 2008, 252 of 605. In every instance, these employees' desires were thwarted by the Board's presumption that all of the non-voters were against the union and consciously expressed that position by discarding their ballots and

intentionally withholding their votes. This presumption is frankly illogical.

The Effect of Defining the Craft as Encompassing a System

Chairman Dougherty has stated that requiring a union to have the support of a majority of those eligible to vote is important under the RLA because the certified representative must represent employees in a craft over an entire transportation system, covering a wide geographic area and including a large numbers of employees. The Board had not previously cited its requirement of system-wide representation as one of the bases for its election rule.

Notwithstanding, to the extent this concern informed the Board's adoption of this rule, the specter of a committed minority of employees from a single geographic location effectively hijacking the election process from a less committed majority has been significantly reduced, if not eliminated, by the Board's recent change permitting telephonic and internet voting. These more accessible methods of voting were simply not available when the Board first gave its reasons for its current election procedures in 1948.

The Longevity of the Current Rule Does Not Support Its Continued Application

The election rule that is the subject of this hearing has been in place for about 75 years. This longevity alone is not a reason in and of itself for the Board not to modify the current rule.

To be sure, I agree that a long standing rule should not be changed without reason. But there are significant reasons for change. The two reasons originally cited by the Board for the adoption of this rule are no longer valid. First, as discussed above, the rule is no longer needed for stable labor relations by discouraging strikes, which have significantly decreased in recent years. Today, unions assure that any strike will be supported by at least a majority of employees by holding strike votes. Second, while the rule did not hinder unionization during the 1934-1948 period, it clearly does so today. The Board's original reasons for this rule which have been reiterated over the years without analysis no longer are supported by current experience. An election procedure that favors management and denies the employees their right to representation can no longer be justified by the theories and assumptions articulated by the Board in 1948. They have not withstood the test of time.

The Board Has Appropriately Limited Its Focus to the Majority Vote Rule

Finally, TCU and the other unions on whose behalf I'm speaking do not agree that, in order for this Board to consider a change in the majority of those eligible to vote rule, the Board must consider a variety of other election issues, including decertification process and a change in the showing of interest necessary to challenge an incumbent union. In making a determination to consider one representation issue, the Board is not required to consider all such issues. Moreover, while the Board does not have a decertification procedure like the NLRB's, the Railway Labor Act unlike the National Labor Relations Act provides no statutory basis for the adoption of such a process. However, there is a procedure for represented employees to attain an election to determine whether they wish to continue representation. See Chamber of Commerce, supra, and Alitalia Airlines, 10 NMB 331 (1983).

While the NLRB permits an election petition challenging an incumbent with only a 30% showing of interest, such a petition may only be filed during limited periods under the NLRB's contract bar rule. But under the Railway Labor Act contracts do not expire. A reduction of the required showing of interest

would endanger the very labor stability which Chairman Dougherty has cited as the principal justification for the current rule.

These differences between the statutes support the different practices of the NLRB and NMB in this regard and further support Chairman Dougherty's admonition that the practices of the NLRB are not to be adopted wholesale by the NMB. The Board is well advised not to enter the thicket of attempting to compare its various election rules with those of the NLRB. The NMB's proposed rule change does not require such an exercise, since in our view the focus of the inquiry should be whether the Board's prior justifications for a rule that discourages unionization remain valid. The earlier justifications for this rule are no longer supported by experience, and an election rule favoring carriers should no longer be the policy of this Board.

Once again, thank you for the chance to address this issue.