

NATIONAL MEDIATION BOARD

29 CFR Parts 1202 and 1206

Docket No. C-6964

RIN 3140-ZA00

Representation Election Procedure

AGENCY: National Mediation Board

ACTION: Final Rule

SUMMARY: As part of its ongoing efforts to further the statutory goals of the Railway Labor Act, the National Mediation Board (NMB or Board) is amending its Railway Labor Act rules to provide that, in representation disputes, a majority of valid ballots cast will determine the craft or class representative. This change to its election procedures will provide a more reliable measure/indicator of employee sentiment in representation disputes and provide employees with clear choices in representation matters.

EFFECTIVE DATE: The final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

Under Section 2, Ninth of the Railway Labor Act (RLA or Act), it is the duty of the National Mediation Board (NMB or Board) to investigate representation disputes “among a carrier’s employees as to who are the representatives of such employees . . . and to certify to both parties, in writing . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.” 45 U.S.C. 152, Ninth. Upon receipt of the Board’s certification, the carrier is obligated to treat with the certified organization as the employee’s bargaining representative.

The RLA authorizes the NMB to hold a secret ballot election or employ “any other appropriate method” to ascertain the identities of duly designated employee representatives. Section 2, Ninth. The Board’s current policy requires that a majority of eligible voters in the craft or class must cast valid ballots in favor of representation. This policy is based on the Board’s original construction of Section 2, Fourth of the RLA, which provides that, “[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class” 45 U.S.C. 152, Fourth.

The language of Section 2, Fourth and Section 2, Ninth was added to the RLA as part of the 1934 amendments and was directed at the continuing problem of company unions. As the Supreme Court noted:

Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided. On the other hand, a prolific source of

dispute had been the maintenance by the railroads of company unions and the denial by railway management of the authority of representatives chosen by their employees.

Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 545-546 (1937) (citations omitted). The

Report of the House Committee on Interstate and Foreign Commerce on the 1934 amendments states that

[t]he Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives. These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter.

H.R. REP. NO. 73-1944, at 1 (1934). Accordingly, the report notes that “[m]achinery is provided for the taking of a secret ballot to enable the Board of Mediation to determine what representatives the employees desire to have negotiate for them with managements of the carriers in matter affecting their wages and working conditions.” Id.

The Board originally interpreted the language of Section 2, Fourth as requiring a majority of all those eligible to vote to choose a representative rather than a majority of the votes cast. As noted in the Notice of Proposed Rulemaking (NPRM), however, this interpretation of Section 2, Fourth, was reached “not on the basis of legal opinion and precedents, but on what seemed to the Board best from an administration point of view.” 1 NMB ANN. REP. 19 (1935). That same Board also noted, “[w]here, however, the parties to a dispute agreed among themselves that they would be bound by a majority of the votes cast, the Board took the position that it would certify on this basis, on the ground that the Board’s duties

in these cases are to settle disputes among employees.” Id. In 1947, United States Attorney General Tom C. Clark, responding to a question from the NMB on its authority under Section 2, Fourth, stated his opinion that

the National Mediation Board has the power to certify a representative which receives a majority of the votes cast at an election despite the fact that less than a majority of those eligible to vote participated in the election. While the National Mediation Board has this power, it need not exercise it automatically upon finding that a majority of those participating were in favor of a particular representative.

40 U.S. Op. Att’y Gen. 541, at 544-545 (1947).

On November 3, 2009, the NMB published a NPRM in the Federal Register inviting public comments for 60 days on a proposal to amend its RLA rules to provide that, in representation disputes, a majority of ballots cast will determine the craft or class representative. 74 Fed. Reg. 56,750. In its NPRM, the Board stated its belief, based on the language of the RLA, principles of statutory construction, and Supreme Court precedent, that it has the authority to reasonably interpret Section 2, Fourth to allow the Board to certify as collective bargaining representative any organization which receives a majority of valid ballots cast in an election. While acknowledging that it has reaffirmed its policy of certifying a representative based on a majority of eligible voters on several occasions since 1935, the Board noted that this construction of Section 2, Fourth was adopted in an earlier era, under circumstances that are different from those prevailing in the rail and air industries today. Further, the Board noted that the current election procedures provide no opportunity for employees to cast a ballot against representation and presume that the failure or refusal of an eligible voter to participate in an NMB-conducted election to be the functional equivalent of a “no union” vote. Specifically, the Board proposed modifying its election procedures to determine the craft or class representative

by a majority of valid ballots cast and provide employees with an opportunity to vote “no” or against union representation. Subsequently, the NMB published a Notice of Meeting in the Federal Register inviting interested parties to attend an open meeting with the Board to share their views on the proposed rule changes regarding representation election procedures. Meeting Notice, 74 Fed. Reg. 57,427 (Nov. 6, 2009).

II. Notice-and-Comment Period

In response to the NPRM, the NMB received 24,962 submissions during the official comment period from a wide variety of individuals, employees, air and rail carriers, trade and professional associations, labor unions, Members of Congress, law firms, and others. (Comments may be viewed at the NMB’s website at <http://www.nmb.gov>) Additionally, the NMB received written and oral comments from the 31 individuals and representatives of constituent groups under the RLA that participated in the December 7, 2009 open meeting.

Nearly 98 percent of the comments received in response to the NPRM were either: (1) Very general statements; (2) personal anecdotes of experience or participation in the NMB’s election procedures; or (3) identical or nearly identical “form letters” or “postcards” sent in response to comment initiatives sponsored by various constituent groups such as the International Association of Machinists (IAM) and the Association of Flight Attendants (AFA). The remaining comments reflect strongly held views for and against the NMB’s proposed change. The NMB has carefully considered all of the comments, analyses, and arguments for and against the proposed change.

Although the Board is aware that the notice-and-comment period of the Administrative Procedure Act (APA) is not a referendum, it notes that the majority of the comments it received

supported the proposed change. In addition to agreeing with the Board's position that it has the statutory authority to make this change and that the legislative history of the RLA supports such a change, these commenters applauded the NPRM as a positive change that would ensure that the majority of those who vote in a representation election will determine the outcome of that election. Many commenters in support of the NPRM noted that the current rule is contrary to common standards of democracy where the outcome of an election is determined by the majority of those who vote. Because a number of employees will not participate in any election, they argued, the current rule handicaps unions that must achieve what amounts to a "supermajority" in order to secure representation. Some commenters supporting the NPRM stated that the Board should follow the procedures utilized by the National Labor Relations Board (NLRB) so all employees under private-sector federal labor law will be subject to uniform representation election procedures. They argue that the election procedures in NMB elections can be confusing to some employees and frustrating to others who wish to vote against union representation but have no way to do so. Congressman Glenn Nye and others state that aviation and rail workers should not be subject to a more "onerous process" than other workers when deciding whether to seek union representation. Other commenters in favor of the NPRM argue that there has been a decrease in union organizing and this change will help reverse that trend. A number of political scientists stated that "the proposed rule change represents a shift from long-established practice, but it is a shift long overdue. Since 1935, when the [original procedure] was adopted, electoral technology has improved and our perspective on good electoral practice progressed. The old rule reflects the thinking of an earlier era; the proposed change is consistent with the current state of our knowledge and understanding."¹ Some of the

¹ Professors Margaret Levi, Elinor Ostrom, Robert Keohane, Robert Putnam, Peter Katzenstein,

arguments in favor of the NPRM will be discussed in greater detail in the discussion that follows; however, the preamble will focus on the Board's response to the substantive arguments raised by those opposed to the NPRM.

III. Summary of Comments on the NMB's proposed change to its election procedures.

While the NPRM only concerns one aspect of the Board's election procedures, namely the Board's interpretation of Section 2, Fourth in determining how best to ascertain the clear, uncoerced choice of a bargaining representative, if any, by the affected employees, the commenters expressed widely divergent views of the proposed change and the Board's deliberation and process in formulating the NPRM. The major comments received and the Board's response to those comments are as follows.

A. Motions for Disqualification

Following the close of the comment period under the NPRM, by letter dated January 8, 2010, ATA² requested that Board Members Harry Hoglander and Linda Puchala disqualify themselves from further participation in the rulemaking because the "available facts give the appearance that Members Hoglander and Puchala have prejudged the specific issues." On January 15, 2010, Right to Work also filed a motion requesting the disqualification of Members Hoglander and Puchala. After careful review of the arguments presented, there is no basis for either Member Hoglander's or Member Puchala's recusal or disqualification from the rulemaking. Rulemaking requires a decision maker to choose between competing priorities in

Henry Brady, Dianne Pinderhughes, Kent Jennings, Ira Katznelson, and Theda Skocpol submitted a comment in support of the NPRM.

² ATA members American Airlines, Continental Airlines, Southwest Airlines, United Airlines, UPS Airlines, and US Airways did not join in this motion.

proposing a rule. The subject matter of a rulemaking – and this one is no exception -- is often controversial. Prejudgment and/or bias is not established by the mere fact, however, that a proposal is controversial or that the decision maker brings his or her own beliefs, philosophy and experience to bear when choosing between two competing interests to propose a policy course. As discussed below, ATA and Right to Work have failed to establish “a clear and convincing showing that [an agency member] has an unalterably closed mind on matters critical to the disposition of the rulemaking.” Ass’n of Nat’l Adver. v. Fed. Trade Comm’n, 627 F2d 1151, 1154 (D.C. Cir. 1979).

ATA and Right to Work each contend³ that “[p]ublicly available facts give the appearance that Members Hoglander and Puchala have predetermined the issues raised by the November 3 NPRM.” Neither ATA nor Right to Work, however, cites any statements by either Member Hoglander or Member Puchala concerning the subject matter of the NPRM as the basis for their assertion. Instead, they rely on the following as evidence of bias and prejudgment:

(1) An alleged inadequacy of the Board’s process for proposing changes to its election procedure rules, by publishing an NPRM in the Federal Register with a 60-day comment period and holding an open public meeting rather than a hearing similar to the one held in Chamber of Commerce, 14 NMB 347 (1987);

(2) Chairman Dougherty’s November 2, 2009 letter to Republican United States Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr in which she asserted that she was excluded from drafting of the NPRM and excluded from discussions regarding the timing of the NPRM;

(3) Inferences drawn from the timing of the NPRM and representation disputes in several large crafts or classes of employees at the post-merger Delta Air Lines. ATA and Right to Work also rely on statements by Association of Flight

³ Both motions may be viewed at the NMB’s website at <http://www.nmb.gov>.

Attendants-CWA (AFA) President Patricia Friend during an August 24, 2009⁴ interview on the Union Edge Talk Radio Show regarding the Board's composition and election rules and AFA's application regarding the Flight Attendant craft or class at Delta; and

(4) The leadership positions that Members Hoglander and Puchala previously held with the Air Line Pilots Association (ALPA) and the AFA, respectively.

It cannot be questioned that parties to an administrative proceeding have a right to a fair and open proceeding before an unbiased decision maker. In their motions, ATA and Right to Work challenge both the adequacy and fairness of the procedure chosen by the Board majority to propose a change to the election rules and the Board majority's impartiality as decision makers. As discussed below, the Board majority finds that there is no merit to either challenge.

With regard to the procedure chosen by the Board majority, ATA and Right to Work characterize informal rulemaking under the APA as a flawed process with an inadequate comment period that did not provide for a thorough evidentiary hearing that included the taking of testimony under oath and the cross-examination of witnesses. By utilizing the notice-and-comment procedures of informal rulemaking under the APA, however, the Board followed an open administrative process and interested persons were given an adequate comment period⁵ as well as access to all meeting testimony and comments received. 5 U.S.C. 553(c). Under the APA, the trial-like hearing advocated by ATA and Right to Work is required only when an agency engages in formal rulemaking. Formal rulemaking, however, is used when an

⁴ ATA's motion cites the original broadcast date of the interview as August 25, 2009, however, a search of the archives at <http://theunionedge.com> reveals the broadcast date to be August 24, 2009.

⁵ Executive Order 12,866 states that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

agency's rules are required by statute "to be made on the record after opportunity for an agency hearing." Id. The RLA contains no such provision and such formal procedures have long been disfavored when not required by statute. See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978).

ATA and Right to Work also assert that there is evidence of bias in the Agency's failure to follow a procedure similar to that used in Chamber of Commerce, 14 NMB 347 (1987), and to conduct an evidentiary hearing to consider whether to change its election rules. See also In re Chamber of Commerce, 12 NMB 326 (1985) (notice of hearing). In that case, the Board chose to not follow the APA procedures described above because it had not yet decided whether to initiate the rulemaking process in response to the United States Chamber of Commerce's (Chamber) petition to amend the Board's rules. In its decision on the format of the proceeding with regard to those petitions, the Board stated that "5 U.S.C. 553 refers to the actual rule-making process, a process which the Board has not initiated at this time, should it ever do so." In re Chamber of Commerce, 13 NMB 90, 93 (1986). The Board further stated that, "in making its determination of whether or not to propose amendments to its rules, [the NMB] has the discretion to conduct the procedures preliminary to that determination in any manner which it finds to be appropriate." Id. at 94 (emphasis added). Thus, the Board has in no way bound itself to the procedures it chose to follow in the Chamber of Commerce case. Further, in the Board's recent decision in Delta Air Lines, Inc., 35 NMB 129, 132 (2008), it stated that it would not make a change to its election procedures "without first engaging in a complete and open administrative process to consider the matter." Contrary to the assertions of ATA and Right to Work, in deciding to adopt this change through the informal rulemaking provisions of the APA, the Board has followed the appropriate procedure that provided for public participation, for

fairness to the affected parties, and for the agency to have before it information relevant to the particular administrative problem. MCI Telecommunications Corp. v. Fed. Commc'n Comm'n, 57 F.3d 1136, 1141 (D.C. Cir. 1995).

With regard to the impartiality of Members Hoglander and Puchala as agency decision makers, ATA and Right to Work contend that the facts show that they have prejudged the issues and should be disqualified from further participation. In National Advertisers, 627 F.2d at 1154, the court found that disqualification of a decision maker in a rulemaking proceeding is required “only when there is a clear and convincing showing that [an agency member] has an unalterably closed mind on matters critical to the disposition of rulemaking.” In reaching this decision, the court rejected the contention that the standard used to disqualify a decision maker in an adjudicatory hearing, namely whether “a disinterested observer may conclude that the [decision maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it,” because of the fundamental differences between the nature of adjudicatory proceedings and the nature of rulemaking proceedings. Id. at 1168 (citing Cinderella Career & Finishing Sch., Inc. v. Fed. Trade Comm'n, 425 F.2d 583, 591 (D.C. Cir. 1970)).

The court noted that:

The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.

Id. at 1160 (quoting ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947)).

Because the object of rulemaking is the implementation of law or policy to the future, the agency decision maker functions like a legislator when participating in rulemaking. The administrator is expected to bring his or her views and insights to bear on the issues confronting the agency. In requiring “compelling proof” that an administrator is unable to carry out his or her duties in a constitutionally permissible manner to compel disqualification, the court stated that:

[t]he requirements of due process clearly recognize the necessity for rulemakers to formulate policy in a manner similar to legislative action We would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency’s future action.”

Id. at 1174. For example, in National Advertisers, 627 F.2d at 1154, the court determined that the Chairman of the Federal Trade Commission (FTC or Commission) was not disqualified from participating in rulemaking proposing restrictions on advertising directed at children despite public comments in which he (1) asserted that children could not distinguish between advertising and other forms of communication; (2) cited Supreme Court precedent giving the Commission great discretion in declaring unfair trade practices; and (3) discussed the negative effects of advertising on children. The court concluded that these statements were a discussion of a legal theory by which the Commission could adopt a rule if circumstances warranted and did not demonstrate the Chairman’s unwillingness or inability to consider opposing arguments.

As noted above, ATA and Right to Work do not rely on any statements by either Member Hoglander or Member Puchala to establish bias and prejudgment. They rely only on statements in an interview given by Patricia Friend, President of AFA; the opinion of Chairman Dougherty expressed in a letter to U.S. Senators; and inferences drawn by ATA and Right to

Work from the timing of the NPRM and the Board Members' biographies. These statements, opinions, and inferences are insufficient to compel either recusal or disqualification. The transcript of Ms. Friend's interview states in relevant part:

Host: And we were talking just very briefly about the new member that has been appointed to the NMB, Linda Puchala and President Friend can you tell us a little bit about her and what her background is?

Pat Friend: Yes, Linda was – I think I mentioned this just before the break – she was from – if I get my dates right, from like 1979 to 1986 the President of the Association of Flight Attendants. So we've known her for a long time and then for the past five or six years she actually has worked at the National Mediation Board specifically doing some mediation, but mostly running the alternate dispute resolution part of the Board. Linda is in my experience, is about one of the best consensus builders that I've ever met so we were just thrilled that we were able to get her nominated and confirmed and to do it in really a timely fashion, you know, I can't take credit, full credit for this, because we had lots of help with in the labor movement and within the Obama administration, but for a second tier agency which the National Mediation Board is, to get a member nominated and confirmed before July was really an outstanding effort. There was a lot of people working on it and – but, it was very, very important to us that we have a properly, sort of fair, board in place before this election between the Northwest and the Delta Flight attendants takes place.

Exhibit A, p. 6 January 4, 2010 Written Comment in response to NPRM from Delta Airlines.

These statements have no bearing on whether or not Member Puchala has a closed mind with regard to the NPRM. Ms Friend's statement establishes only her desire for a fair administrative process and her support for Member Puchala's appointment, describing Member Puchala as a "consensus builder." She is not advocating that the Board make specific changes to its procedures. Further, Ms. Friend was not alone in making public statements in support of Member Puchala. In a May 5, 2009, Business Review article, "Delta backs Obama's labor board nominee," Mike Campbell, Delta executive vice president of human resources and labor relations, stated "Ms. Puchala has years of valuable experience, including time with the NMB. She enjoys broad support among the airline industry and labor community. We look forward to

her confirmation to become a member of the NMB.” In that same interview, Campbell also stated, “It is equally important to our employees to quickly resolve representation for those workgroups in which representation remains unresolved. To that end, we urge the Senate to confirm Linda Puchala as soon as possible.”

ATA and Right to Work also rely on the differing opinions among the Board Members as to whether and how to consider amending the Board’s election procedures. As Chairman Dougherty’s dissent to the NPRM makes clear, she advocated a different approach to the Board’s consideration of amending the election rules. The Board majority, however, followed the mandates of the APA in considering, drafting, adopting, and promulgating the NPRM. The APA requires that a NPRM must include the following: “(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b). The November 3, 2009 NPRM met these requirements. To the extent that ATA and Right to Work question the Board majority’s deliberative process, the Board notes that this process is an internal agency matter and outside the scope of the rulemaking proceedings.

It is clear that the Chairman disagreed with her colleagues on both whether any change to the current voting procedures is necessary and how such a change should be proposed. However, the Chairman’s dissenting views were published in the federal register with the NPRM and have been incorporated in many comments opposed to the NPRM. Her admittedly different policy view as a dissenting member does not establish that Members Hoglander and Puchala were not free, in theory and in reality, to change their mind upon consideration of the

presentations and comments made by those who would be affected. As the court in National Advertisers, recognized:

An administrator's presence within an agency reflects the political judgment of the President and Senate. As Judge Prettyman of this court aptly noted, a "Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes."

627 F.2d 1151, 1174 (quoting Pinellas Broadcasting Co. v. Fed. Comm'n Comm'n, 230 F.2d 204, 206 (D.C.Cir. 1956), cert. denied. 350 U.S. 1107 (1956)).

ATA and Right to Work infer some bias because of the existence of representation disputes among employees at Delta. As discussed more fully below in Section III.C., the Board, however, has continued to carry out all its obligations in representation matters including investigating representation disputes, holding elections and certifying the results of those elections during the rulemaking process. Under Section 2, Ninth of the RLA, neither the Board nor carriers may initiate a representation proceeding because "Congress left no ambiguity in Section 2, Ninth: the Board may investigate a representation dispute only upon request of the employees involved in the dispute." Ry. Labor Executives' Ass'n v. NMB, 29 F.3d 655, 664 (D.C. Cir. 1994) (emphasis in original)(deciding the narrow issue of who can initiate a representation dispute under Section 2, Ninth). Therefore, the timing of when employees or their representatives file applications or withdraw those applications is not within the control of the Board.

Right to Work also contends that an inference of bias and prejudgment should be drawn from the fact that Members Hoglander and Puchala previously held leadership positions in unions. This contention has no merit. An administrative official is presumed to be objective and

“capable of judging a particular controversy fairly on the basis of its own circumstances.” United States v. Morgan, 313 U.S. 409, 421 (1941). Whether the official is engaged in adjudication or rulemaking, the mere proof that he or she has taken a public position, expressed strong views or holds an underlying philosophy with respect an issue in dispute cannot overcome that presumption. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n, 426 U.S. 482 (1976). See also C & W Fish Co. v. Fox, 931 F.2d 1556, 1564-1565 (D.C. Cir. 1991) (finding no clear and convincing evidence of an unalterably closed mind where immediately prior to appointment to position where he adopted a drift gillnet ban, agency decision maker had served as chairman of the Florida Marine Fisheries Commission, was an outspoken advocate of banning drift gillnets, and publicly stated that “this kind of gear [i.e., drift gillnets] should be eliminated.”). Thus, while the prior union positions held by Members Hoglander and Puchala may evince an underlying philosophy, it is hardly clear and convincing evidence of an unalterably closed mind.

ATA and Right to work have presented no evidence, let alone clear and convincing evidence, that establishes that either Member Hoglander or Member Puchala are unwilling to appropriately consider comments on the proposed rule or possess an unalterably closed mind on the issues in the NPRM. Accordingly, neither recusal nor disqualification is necessary.

B. Process Leading to the NPRM

In the oral and written statements received at the December 7, 2009 meeting and in written comments submitted pursuant to the NPRM, commenters including Delta Airlines, Inc. (Delta), the Air Transport Association (ATA),⁶ the Regional Airline Association (RAA), the Airline

⁶ ATA is the principal trade and service organization of the United States’ scheduled airline industry. The following members of the ATA did not join in the written statement submitted at the December 7 open meeting: Continental Airlines, Inc., and American Airlines, Inc. In

Industrial Relations Conference (Air-Con), the National Railway Labor Conference (NRLC), the labor and employment law firm of Littler Mendelson, P.C. (Littler), the National Air Transportation Association's Airline Services Council (ASC), Claude Sullivan, an RLA practitioner, the National Right to Work Legal Defense Foundation, Inc., (Right to Work)), Regional Air Cargo Carriers Association (RACCA), Bombardier Aerospace/Flexjet (Flexjet) and some Members of Congress suggest that, by proceeding with the NPRM, the Board has compromised its neutrality and surrendered the integrity necessary to carry out its representation duties under the Act. These commenters rely on statements in an August 2009 interview given by AFA president Patricia Friend, the withdrawal of pending applications involving employees at Delta by the IAM and AFA around the time of the publication of the NPRM, and two letters from Chairman Dougherty to United States Senators Johnny Isakson, Bob Corker, Jim Bunning, Robert Bennett, Saxby Chambliss, George Voinovich and Orrin Hatch as support for their belief that the Board's actions leading up to the NPRM were inadequate and improper. The commenters suggest that the Chairman's correspondence indicates that the Board majority acted with undue haste and followed an inadequate internal process in deciding to proceed with the NPRM. Other commenters, including a number of Republican Members of the United States House of Representatives,⁷ simply characterized the NPRM as "a politically motivated decision that tilts airline and rail representation elections in the favor of organized labor. This decision is too

addition, ATA member Southwest Airlines, which is neutral on the NPRM, filed a separate comment. Southwest's position is discussed in detail later in this document.

⁷ A comment opposed to the proposed change was submitted by Representatives Nathan Deal, Roy Blunt, Paul C. Broun, Gregg Harper, John A. Boehner, John K. Kline, Lynn A. Westmorland, Jack Kingston, Bob Goodlatte, Gary Miller, Pete Sessions, John Campbell, John Linder, Doug Lamborn, Jean Schmidt, Vern Buchanan, Joe Wilson, Sue Myrick, Mike Rogers, Rob Bishop, Bob Inglis, Dean Heller, Harold Rogers, Phil Gingrey, Devin Nunes, Wally Herger, Eric Cantor, Kevin McCarthy, and Jason Chaffetz.

important to be decided by two appointed and unelected Democrats who have chosen to ignore legal and policy precedents that have governed representation rules for airline and rail employees for more than 75 years.”

The Board disagrees with those comments that assert that it has abandoned its neutrality at any point during this rulemaking. The Board majority followed the mandates of the APA in considering, drafting, adopting, and promulgating the NPRM. The APA requires that a NPRM must include the following: “(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b). The November 3, 2009 NPRM met these requirements. To the extent that the dissent and other commenters question the Board majority’s deliberative process, the Board notes that this process is an internal agency matter and outside the scope of the rulemaking proceedings. In the NPRM, the Board majority expressed a view that a change should be proposed and Chairman Dougherty disagreed. Both views, however, were expressed in the NPRM and have served as a basis for comment.

Some Members of Congress suggest that the proposed change to the election procedure is too important to be entrusted to the appointed members of the NMB. For the following reasons, the Board disagrees. First, in the NPRM, the Board is proposing a change to its own interpretation of the RLA. Thus, the “legal and policy precedents” at issue are the Board’s own determinations. It is without doubt that an agency is free to change its interpretations and its policies so long as the new policy or interpretation is permissible under the statute, there are good reasons for it, and the agency believes it to be better. Fed. Comm’n Comm’n v. Fox Television Stations, 129 S. Ct. 1880, 1811 (2009). Second, there are safeguards

applicable to the Board's actions. While it is true that the Board Members are not elected officials subject to recall, they are subject to confirmation by the Senate and have limited terms. Third, acting pursuant to the notice-and-comment procedures of informal rulemaking under the APA, the Board followed an open administrative process and interested persons were given an adequate comment period as well as access to all meeting testimony and comments received. 5 U.S.C. 553(c).⁸ Fourth, under the APA, any final rule promulgated by the Board is subject to judicial review.

C. NPRM's Effect on Processing of Representation Cases

Many of the commenters who suggested that the Board followed improper procedures in formulating the NPRM also suggest, as noted above, that the NPRM has adversely affected the neutrality and integrity of the Board's representation case processing. Delta, in particular, states that it and its employees have been "singled out for discriminatory treatment" as a result of the NPRM since "[r]epresentation cases at other carriers filed in the summer of 2009 have proceeded to resolution under the existing rules; only those at Delta have been delayed, and then withdrawn, to await the new rules." Contrary to these comments, the Board has continued to carry out all its obligations in representation matters including investigating representation disputes, holding elections and certifying the results of those elections during

⁸ Under the APA, a trial-like hearing where parties can submit evidence and cross examine witnesses, advocated by some commenters, is only required when an agency engages in formal rulemaking. Formal rulemaking, however, has long been disfavored where not required by statute. The RLA does not require formal rulemaking. As the Supreme Court noted in Vermont Yankee, 435 U.S.at 547, a standard of review that would cause agencies to engage in formal rulemaking in all instances would lead to a loss of "all of the inherent advantages of informal rulemaking."

the rulemaking process. The Board has also followed its standard procedures with respect to the matters involving IAM, AFA, and Delta.

The decision to initiate a representation proceeding is not within the Board's control. As the United States Court of Appeals for the District of Columbia Circuit stated "Congress left no ambiguity in Section 2, Ninth: the Board may investigate a representation dispute *only* upon request of the employees involved in the dispute." Ry. Labor Executives' Ass'n, 29 F.3d at 664 (emphasis in original). On July 29, 2009, AFA filed an application with the Board alleging that Delta and Northwest Air Lines (Northwest) constituted a single carrier for representation purposes with respect to employees in the Flight Attendants craft or class. On August 13, 2009, IAM filed three separate applications alleging that Delta and Northwest constituted a single carrier for representations purposes with respect to employees in the crafts or classes of Plant Guards, Simulator Technicians, and Fleet Service. Consistent with the Board's standard practice, each of these applications was assigned a "CR" file number and was not docketed as an "R" case.⁹

Chairman Dougherty's October 28, 2009, letter, relied on by Delta and others, expresses her view of the relationship between the Board's policy on the use of hyperlinks and AFA's then-pending application regarding the Flight Attendants craft or class at Delta. In particular, this letter reflects the Chairman's disagreement with her colleagues over their conclusion that the

⁹ Applications invoking the Board's services in representation disputes are docketed as "R" cases. "CR" numbers are assigned to applications requiring pre-docketing investigation, such as craft or class, system, jurisdiction, or other appropriate issues. Memorandum: NMB Policy for the Assignment/Conversion of "CR" files and "R" Case Dockets, 7 NMB 131 (1979). Once the pre-docketing investigation is complete, the case will be docketed as an "R" case for resolution pursuant to an election.

Board's hyperlink policy was an issue intertwined with the pre-docketing investigation of AFA's application.

In a notice dated February 28, 2008, the Board stated that it had decided to remove the hyperlink to the voting website from the Agency's website as a precautionary measure "to prevent any outside party from possibly tracking the IP address of persons who visit the voting website." Removal of Internet Voting Hyperlink on Board's Website, 35 NMB 92 (2008). Noting that the Board may view use of hyperlinks as possible evidence of election interference, the Board requested that participants in representation elections not post a hyperlink to the Board's voting website. Id. Subsequently, the use of hyperlinks to the Board's voting website in campaign materials became an issue in a 2008 representation election among Delta's flight attendants. Delta raised concerns about potential interference after a hyperlink to the Board's voting website was included in e-mails from an AFA organizer to flight attendant employees. In a determination, the Board noted its policy regarding hyperlinks and while acknowledging that the "hyperlink in this instance was included in an email rather than on a website," it reiterated its statement that "the Board may consider hyperlinks to the voting website as possible evidence of election interference." Notice Re: Carrier and Union Conduct, 35 NMB 158 (2008). On July 22, 2009, several days before it filed its application, AFA requested the Board to reconsider its hyperlink policy "because of anticipated representation elections at Delta Airlines." In the view of the Board majority, the issue of the use of hyperlinks in representation elections had to be resolved before the Board could move forward with the investigation of AFA's application.

Shortly before the publication of the NPRM, IAM sought withdrawal of its Fleet Service application. Shortly after the publication of the NPRM, AFA sought withdrawal of its Flight

Attendant application. Similar to the decision to initiate representation proceedings, the decision whether to withdraw an application rests solely with the organization that filed the application. Upon receipt of those requests, again pursuant to its standard procedure, the Board granted the respective withdrawals. While the NMB's bar rules at 29 CFR § 1206.4(b)(3) provide for a one-year bar where a "docketed application" has been dismissed based on a withdrawal of the application, no bar applies where the application was assigned a CR file number and not "docketed" in the well-established sense of the term by conversion to an "R" case. US Airways, Inc., 27 NMB 565 (2000); Trans World Airlines/Ozark Airlines, 14 NMB 343 (1987). The IAM application with respect to Plant Guards remains under investigation. The Board issued its single carrier determination with respect to the Simulator Technician craft or class on December 23, 2009, converted the application to an "R" case, and authorized a representation election in the Simulator Technician craft or class at Delta on January 11, 2010 with a tally held on February 25, 2010.

D. The Board's Statutory Authority for the Proposed Change

Almost all of the comments received in opposition to the NPRM question whether the NMB possesses the statutory authority to make the proposed change to its election rules. For example, Delta cites "plain language" of Section 2, Fourth and Section 2, Ninth for the proposition that the choice of representative must be made by a "majority" of employees in the craft or class, and states that the Supreme Court has approved the Board's long-standing interpretation that "majority" is a majority of eligible voters rather than a majority of ballots cast. Several commenters opposed to the NPRM state that language of Section 2, Fourth which provides that "[t]he majority of the craft or class of employees shall have the right to determine who shall be the representative of the craft or class of employees for the purposes of this

chapter,” is a clear statutory mandate that the Board must certify a representative on the basis of the majority of eligible voters.

In contrast, those comments supporting the NPRM asserted that the Board has clear statutory authority and discretion to adopt the proposed change to its election process. For example, the TTD states that “[t]he language of the RLA itself dictates no particular procedure to determine the majority will, much less the election procedure currently followed by the Board.” The TTD, IAM, AFA, and others note that during the Board’s history it has used a variety of methods to resolve representation disputes, exercising its discretion as circumstances warranted.

The commenters who question the Board’s statutory authority essentially contend that the language of Section 2, Fourth is unambiguous and compels the NMB to certify representatives as it does under its existing procedures: when a majority of eligible voters in the craft or class cast vote in favor of representation. Thus, these commenters contend that “majority of any craft or class of employees” must only be interpreted to mean the majority of all eligible voters. Having reviewed these comments, the NMB, however, is not persuaded and continues to believe that the language of the statute is ambiguous and that the proposed change – to certify a representative on the basis of a majority of valid ballots cast -- is within the Board’s statutory authority and discretion under the RLA. As noted in the NPRM, the Board believes that under its broad statutory authority it may reasonably interpret Section 2, Fourth to certify a representative based on a majority of ballots cast.

As noted by many comments both opposing and supporting the NMB’s proposed change, the language of Section 2, Fourth was taken from a rule announced by the NMB’s

precursor, United States Railroad Labor Board (Railroad Board), under the Transportation Act of 1920. Virginian Ry., 300 U.S. at 561. These Railroad Board decisions submitted as part of the IAM's comment on the NPRM lend support to the NMB's proposed change. In Decision No. 119, International Ass'n of Machinists et al. v. Atchison, Topeka & Santa Fe Ry. et al., 2 Dec. U.S. Railroad Board, 87, 96, par. 15, the Railroad Board held that "[t]he majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class." This rule was interpreted by the Railroad Board in Decision No. 1971, Brotherhood of Railway & Steamship Clerks v. Southern Pacific Lines, 4 Dec. U.S. Railroad Labor Board 625, 629:

The Board had previously in principle 15 of Decision No. 119 ruled that "the majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class" in negotiating agreements.

The purpose of the Railroad Labor Board was to give all the employees to be affected the privilege of expressing their choice. The board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity. It was obviously the meaning and the purpose of the board that a majority of the votes properly cast and counted in an election properly held should determine the will and choice of the class

....

Decision – The Railroad Labor Board decides that a majority of the legal votes cast in this election will determine who shall be the representatives of the employees.

The legislative history of Section 2, Fourth also supports the NMB's position that such an interpretation is not contrary to either the language of the RLA. The report of the Senate Committee on Interstate and Foreign Commerce on the 1934 amendments, states "[t]he bill specifically provides that the choice of representatives of any craft of craft shall be determined by a majority of the employees voting on the question." S. REP. No. 73-1065, at 2 (1934).

In his comment opposing the NPRM, Rep. Darrell Issa also reminds the Board that under the tenets of statutory construction, “it is assumed that Congress expresses its intent through the ordinary meaning of its language . . . [and] where the meaning of the relevant statutory language is clear, then no further inquiry is required.” In the instant case, as discussed above, the Board believes that the language of Section 2, Fourth is open to interpretation, and would also note as, Attorney General Tom C. Clark observed that

when the Congress desires that an election shall be determined by a majority of those eligible to vote rather than by a majority of those voting, the Congress knows well how to phrase such a requirement. For example, in Section 8(a)(3)(ii) of the National Labor Relations Act, as amended by the Labor Management Relations Act, . . . the Congress has required that before any union shop agreement may be entered into, the National Labor Relations Board must certify ‘that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.’

40 Op. Att’y Gen. at 544 (emphasis in original).¹⁰

Delta also contends that the Supreme Court has “examined the statutory language at issue and [has] approved of the Board’s long-standing interpretation of the command of Section 2, Fourth as requiring majority participation in an election. “ While the Board agrees that the Supreme Court has upheld the Board’s current interpretation of Section 2, Fourth, the Board believes the Court’s decisions support the Board’s view that the current interpretation is not

¹⁰ In 1947, United States Attorney General Tom C. Clark, responding to a question from the NMB on its authority under Section 2, Fourth, stated his opinion that the Board has the power to certify a representative which receives a majority of the votes cast at an election despite the fact that less than a majority of those eligible to vote participated in the election.

compelled by the statute.¹¹ In Virginian Railway, the Court, in rejecting a challenge to a certification based on a majority of ballots cast, stated that

Section 2, Fourth of the Railway Labor Act provides: “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 for the purposes of this Act (chapter).” Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but it is silent as to the manner in which that right shall be exercised.

300 U.S. at 560. Citing its decisions in political election cases, the Court continues: “Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring a [sic] only the consent of the specified majority of those participating in the election Those who do not participate ‘are presumed to assent to the expressed will of the majority of those voting.’” Id. (internal citations omitted).

¹¹ Delta also cites Switchmen’s Union of North America v. NMB, 320 U.S. 297, 300 (1943) and Brotherhood of Railway and Steamship Clerks v. Ass’n for the Benefit of Non-Contract Employees, 380 U.S. 650, 659 (1965) (ABNE), for the proposition that the right protected by Section 2, Ninth is the “right of the majority of employees in the craft or class to determine who shall be their representative.” Once again, the Board agrees with Delta that the RLA gives the Board the power to resolve representation disputes and to certify a representative selected by a majority of any craft or class of employees. In neither decision, however, did the Court state that the language of Section 2, Fourth, referring to a “majority of any craft or class of employees,” can only be read as a “majority of eligible voters” or that the Board’s current procedures are compelled by the statute. In Switchmen’s Union, the Court addressed the standard of review of the NMB’s representation determinations and held that it was for the Board and not the courts to resolve claims involving the appropriate craft or class. In ABNE, the Court held that the Board’s current ballot form did not exceed its statutory authority, but the Court also noted that “not only does the statute fail to spell out the form of any ballot that might be used but it does not even require selection by ballot. It leaves the details to the broad discretion of the Board with only the caveat that it ‘insure’ freedom from carrier interference.” 380 U.S. at 668-669.

Delta suggests that the Court in Virginian Railway held that majority participation is required by Section 2, Fourth when it noted that “[i]f in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representative.” Id. In support of this argument, Delta also cites the Virginian Railway Court’s statement that “[i]t is significant of the congressional intent that the language of section 2, Fourth, was taken from a rule announced by the United States Railroad Labor Board, acting under the provisions of the Transportation Act of 1920 . . . where it appeared that a majority of the craft participated in the election. The Board ruled . . . that a majority of the votes cast was sufficient to designate a representative.” Id. at 561. Thus, Delta argues that “majority participation in the election was a precondition to certification” and any other reading of Section 2, Fourth “undermines Congress’ evident intent to place the authority to elect representation (or choose among representatives) to the majority of the craft or class, and not to a mere handful of individuals.”

The Board agrees that Virginian Railway involved an election in which a majority of eligible employees actually participated in the election. The Board, however, is not persuaded that the language cited by Delta precludes certification by a majority of ballots cast since the Court upheld the use of a presumption that non-voters concur in the wishes of the majority of voters. Nor have the courts interpreted Virginian Railway as Delta does. In National Labor Relations Board v. Standard Lime & Stone Co., 149 F.2d 435 (1945), cert. denied, 326 U.S. 723 (1945), the NLRB certified a union on the basis of a majority of ballots cast in an election in which the majority of employees in the bargaining unit did not vote. The employer refused to bargain with the union because while the union received a majority of the ballots cast, a

majority of the bargaining unit employees had not voted in the election. The United States Court of Appeals for the Fourth Circuit stated,

On the first and principal question, that presented by lack of majority participation in either of the elections, we think that the conclusive answer is found in the decision of the Supreme Court in Virginian Railway In that case both this court and the Supreme Court held that, in employees' elections under the Railway Labor Act . . . for the selection of bargaining representatives, the political principle of majority rule should be applied, viz., that those not participating in the election must be presumed to assent to the expressed will of the majority of those voting, so that such majority determines a choice.

Id. at 436 (citations omitted). The Fourth Circuit noted that in Virginian Railway, “a majority of the employees participated in the election, but the ground of the decision, the political principle of majority rule with the presumption that those not voting assent to the expressed will of the majority voting, supports the choice made in an election, whether the majority of employees has participated or not.”¹² Id. at 436 n. 1. Finally, noting that the purpose of allowing employees to choose a bargaining representative is to further the public interest of preserving industrial peace and prevent interference with interstate commerce, the court stated that

¹² The Fourth Circuit is not alone in this view of Virginian Railway. See also Int'l Bhd. of Teamsters v. Bhd. of Ry., Airline & S.S. Clerks, 402 F.2d 196, 204 n. 16 (D.C. Cir. 1968), cert. denied, 393 U.S. 848 (1968) (noting that the Virginian Railway Court's reliance on analogy to political elections served to support the NLRB's power to certify a union even where a majority of the bargaining unit did not participate and choice of whether or not to follow Virginian Railway presumption was the NMB's to make); ABNE, 380 U.S. at 670 (1965) (characterizing the “presumption of Virginian Railway” as “[i]f in a labor election an employee does not vote, he can safely be presumed to have acquiesced in the will of the majority of voters” and acknowledging that the NMB has broad discretion to decide whether or not to follow this presumption); Continental Airlines v. NMB, 793 F.Supp. 330, 333-34 n. 5 (D. D.C. 1991) (finding that no statutory language prescribes how the NMB should assess the views of voters in union elections and citing Virginian Railway and ABNE for conclusion that in election cases the NMB has the discretion to treat a nonvoter as either acquiescing in the will of the majority or voting for no representation).

[t]his being true, it would be as absurd to hold that collective bargaining is defeated because a majority of employees fail to participate in an election of representatives as it would be to hold that the people of a municipality are without officers to represent them because a majority of the qualified voters do not participate in an election held to choose such officers. In the one case, as in the other, the representative is being chosen to represent a constituency because it is in the public interest that the constituency be represented; and all that should be necessary is that the election be properly advertised and fairly held and that the settled principle of majority rule be applied to the result.

149 F.2d at 438-39.

In its comments, Delta suggests that the Board errs in citing precedent involving the National Labor Relations Act (NLRA) and discussing the similarity of the language of both statutes.¹³ Delta takes pains to remind the NMB that the NLRA “cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.” Trans World Airlines v. Indep. Fed’n of Flight Attendants, 489 U.S. 426, 439 (1989) (quoting Bhd. of R. R. Trainmen v.

¹³ Delta also argues that the Board cannot rely on precedent involving the NLRA because an employer can easily seek court review of an NLRB certification while an NMB certification is essentially unreviewable. To be sure, judicial review of the Board’s decisions has often been observed to be “one of the narrowest known to the law.” Int’l Ass’n of Machinists & Aerospace Workers v. Trans World Airlines, 839 F.2d 809, 811, amended 848 F.2d 232 (D.C. Cir. 1988), cert. denied 488 U.S. 820 (1988). This is true, however, because Congress intended the Board to have the final word in representation disputes. In Switchmen’s Union, the Court concluded that this limited role for the courts was part of the statutory scheme, noting that the Congressional intent “seems plain – the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.” 320 U.S. at 305; See also ABNE, 380 U.S. 650, 658-660 (1965). Further, unlike the NLRB, which has broad adjudicatory and remedial powers, the NMB’s mission is to help the parties to a dispute reach resolution through determination of representation disputes and mediation of collective-bargaining controversies. Finally, limited review does not mean that judicial review is nonexistent. The Board’s actions are reviewable where the NMB has committed a “gross violation” of the RLA; where it has failed to satisfy its obligations under Section 2, Ninth to investigate a dispute; where its actions are outside its delegated authority under the Act; or where it has violated a party’s constitutional rights. Further, judicial review is also available for the Board’s actions where, as here, it has engaged in rulemaking under the APA.

Jacksonville Terminal Co., 394 U.S. 369, 383 (1969)). The Board disagrees with Delta. While there are differences in history and purpose between the NLRA and the RLA, the Standard Lime case arose under Sec. 9(a) of the NLRA and the language of that section was modeled on Section 2, Fourth of the RLA. As previously discussed in the NPRM and in the 1947 Opinion of Attorney General Tom C. Clark, 40 Op. Att’y Gen. 541 (1947), Section 9(a) of the NLRA provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining” 29 U.S.C. 159(a). The legislative history of Section 9(a) of the NLRA states that “the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7(a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern.” H. Rep. No. 74-1147, at 3 (1935).¹⁴

Finally, many commenters opposed to the NPRM also suggest that the Board lacks authority for its proposed change in light of a statement by then NMB Chairman Robert Harris in the minutes of an executive session of the NMB on June 7, 1978. The minutes of that meeting state that following a discussion relative to congressional inquiries in reference to petitions for change in the ballot used in the NMB’s representation elections, the following motion by Board Member Harris was adopted by unanimous vote:

¹⁴ See also New York Handkerchief Mfg. Co. v. NLRB, 114 F. 2d 144, 149 (7th Cir. 1940)(“From a comparison of the language of the two Acts, it becomes evident that the Labor board is given precisely the same authority under the Labor Act as is the Mediation Board under the Railway Labor Act.”) The fact that the NLRB and the NMB have interpreted similar statutory language in different ways lends support to the NMB’s view that the language of Section 2, Fourth is ambiguous.

In view of the unchanged forty-year history of balloting in elections held under the Railway Labor Act, the Board is of the view that it does not have the authority to administratively change the form of the ballot used in representation disputes. Rather, such a change if appropriate should be made by the Congress.

This statement appears in meeting minutes rather than in a published decision. The only context provided by those minutes is that, after a “discussion” in which Board Members George Ives, David Stowe, and Robert Harris expressed their “opinions,” a motion was adopted. There is no record of the information considered by those Board members before they adopted the motion. In short, there is nothing to suggest that this “motion” was intended as a final definitive statement of Agency policy. Assuming, *arguendo*, that this statement was a final, definitive statement of policy, an administrative agency, such as the NMB, is free to change a view it believes to have been grounded upon a mistaken legal interpretation. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993).

While it places great emphasis on the statement by the 1978 Board, Delta suggests that the NPRM’s “heavy” reliance on a 1947 Opinion of Attorney General Tom Clark is misplaced since the opinion “has no legal force.” The NMB, an independent executive agency, disagrees. Congress created the Office of Attorney General in the Judiciary Act of 1789, assigning that office the duty of giving “advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.” Judiciary Act of 1789, ch. 20, 35, 1 Stat. 73, 93 (1845)(codified as amended in 28 U.S.C. § 511). It is generally understood that the opinions of the Attorney General, and, more recently the Office of Legal Counsel, will become

the controlling view of the executive branch. Randolph D. Moss, Executive Branch Legal Interpretation, 52 ADMIN. L. REV. 1303, 1318-1319 (2000). “Few, however, dispute the proposition that, whether for legal reasons, to promote uniformity and stability in executive branch legal interpretation or to avoid the personal risk of being ‘subject to the imputation of disregarding the law as officially pronounced,’ executive branch agencies have treated [these] opinions as conclusive and binding [since the early nineteenth century].” Id. at 1319-1320 (citations omitted). Accordingly, based on the language of the RLA, its legislative history, and legal precedent, the Board believes that the proposed change to its election procedures does not exceed its statutory authority.

E. Comments Regarding Procedural Deficiencies

Chairman Dougherty, in her dissent, and most commenters opposed to the rule change criticized the procedure used by the Board in initiating the rulemaking process, arguing that the Board should have followed the procedure it set for itself when considering changing election procedures in the past. In 1985, the Board received a petition from the Chamber requesting that rules be amended to include decertification procedures. That petition was followed by a petition from the IBT requesting that the Board consider making additional changes to election procedures, including the change proposed in the current rulemaking process. Instead of initiating rulemaking at that time, the Board chose to consolidate both requests and held a hearing to determine whether to propose any of the changes at issue. Several commenters have referred to those procedures as the “Chamber procedures” and argued that the Board is bound to follow those procedures. ATA and Air-Con describe the procedures in place in 1985 as including “pre-hearing opening and response briefs, evidentiary hearings, and post-hearing briefs.” ATA and other commenters, citing the Board’s more recent opinion in Delta Air Lines,

Inc., 35 NMB 129 (2008), suggest that by publishing the NPRM, the Board has deviated from its promise that it would not make a change in the election procedures without a “complete and open administrative process.”

In the Chamber decision cited by these commenters the Board noted that it had the discretion to conduct those proceedings in “any manner which it finds to be appropriate.” Chamber of Commerce, 13 NMB 90, 94 (1986). The prior Board’s choice of procedure in 1985 in no way binds the current Board to the “Chamber procedures.” Neither does the 2008 Delta decision, promising an open administrative process. In this matter, the Board it has chosen to comply with the requirements of the APA in deciding to move ahead with proposing changes through the rulemaking process.¹⁵

The Board is free to amend its rules at any time, even in the absence of a rulemaking petition, and has in no way precluded itself from utilizing the notice-and-comment procedures of the APA. 29 CFR §1206.8(a). The Board did not receive an official rulemaking petition to make these changes in the election procedure. The Board received a request from TTD to make changes to its Representation Manual to allow for the election procedures described in the NPRM. Concluding that the change could not be made by simply amending the Representation Manual, the Board decided to engage in informal rulemaking under the APA to consider the changes. Under the APA, when an agency decides to initiate the informal rulemaking process, it must draft a proposed rule and submit it to the notice-and-comment process of Section 553 of the APA. 5 U.S.C. 553. An agency must give interested parties “an opportunity to participate in

¹⁵ TTD and other commenters in support of the proposed rule have suggested that the Board is not required to follow the rulemaking procedures in the APA to make such a change to its election procedures. Because the Board has complied with the requirements of Section 553 of the APA, this preamble will not discuss the issue of whether the Board was required to do so.

the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.” Id. § 553(c). The APA does not require hearings or oral arguments and does not specify the length of the notice-and-comment period. Executive Order 12,866 states that “each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” Exec. Order No. 12,866, 58 FR 51735 (1993). By following the requirements of the APA and providing a public meeting and a 60-day comment period, the Board believes that it followed a process that allowed all interested persons to participate.

The Supreme Court has long rejected the view that an agency can be required to provide procedures greater than those outlined in the APA when engaged in rulemaking. See, e.g., Vermont Yankee, 435 U.S. 519 (holding that agencies are free to grant additional procedural rights, such as discovery and evidentiary hearings, but courts cannot impose these procedures). According to the Supreme Court, it is a basic “tenet” of administrative law that agencies be free to create their own rules of procedure, provided that the minimum requirements of the APA are met. Id. at 543.

In 1985, the Board chose not to follow the APA procedures described above because it had not yet decided whether to initiate the rulemaking process in response to the Chamber’s petition. In defending this decision, the Board stated that “5 U.S.C. 553 refers to the actual rule-making process, a process which the Board has not initiated at this time, should it ever do so.” Chamber of Commerce, 13 NMB 90, 93 (1986). The Board has in no way bound itself to the procedures it chose to follow in response to the Chamber’s petition in 1985. Upon the receipt of a rulemaking petition, the Board has discretion in how to proceed. According to the Board’s regulations, it shall, upon receiving a petition, “consider the same, and may thereupon either

grant or deny the petition in whole or in part, conduct an appropriate hearing thereon and make other disposition of the petition.” 29 CFR 1206.8(c). In fact, in 1985, the Chamber itself appealed the decision that there be a full evidentiary hearing. As noted in the Board’s Determination of Appeals in that matter,

The Chamber had proposed instead that the Board receive written submissions and schedule subsequent oral argument, if necessary. The Chamber bases its arguments on the premise that ‘a trial-type hearing will . . . degenerate into an extended free-for-all replete with protracted procedural quarrels and hours of irrelevant testimony.’ It is the Chamber’s position that an oral hearing is not required by the [APA].

Chamber of Commerce, 13 NMB at 91. In 1985, the Board was free to respond to the Chamber’s petition by entering the rulemaking process but it chose not to and announced another procedure. The Board has discretion in how it chooses to respond to rulemaking petitions.

Related comments opposing the NPRM suggest that the Board showed bias and predetermination by providing a brief legal justification for the election change in the NPRM. According to ATA, “the NPRM announces and defends a particular outcome as opposed to issuing a neutral invitation for participation and comment” as it had done in 1985. The Board provided such a justification because it decided to propose a rule change following the rulemaking procedures of the APA. A NPRM must include the following: “(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b). The NPRM published on November 3, 2009 complied with these requirements. The request for comments in 1985 was not part of rulemaking proceedings under the APA and did not require such explanation. Providing this explanation allowed interested parties to respond to the Board’s

reasoning either through a written comment or during the public meeting. Interestingly, other commenters opposed to the rule, such as Delta Airlines and Flexjet, argued that the NPRM did not provide enough legal justification for the change. They argue, for example, that the Board did not adequately describe the changed circumstances that justify the proposed rule. Courts have held that notice of a proposed rule must “fairly appraise interested persons of the subjects and issues the agency was considering.” See, e.g., United Steelworkers of Am. v. Schuylkill Metals Corp., 828 F.2d 314, 317 (5th Cir. 1987) (internal citations omitted). The Board believes that its NPRM has provided information necessary for the parties to understand the agency’s rationale and have a fair opportunity to respond and that its explanation for the change is not evidence of bias or predetermination. As discussed below, the Board believes that it has provided a sufficient justification for this rule change.

Other comments questioning the Board’s procedure suggest that the notice-and-comment process did not provide an opportunity to cross examine witnesses and respond to evidence presented at the public meeting held on December 7, 2009. According to ATA,

[t]he Board’s one-day ‘meeting’ on December 7, 2009 was an inadequate substitute for the taking of testimony under oath and the cross-examination of witnesses. . . . several persons spoke to alleged facts of potential relevance to the issues under consideration and even offered what purported to be expert testimony. The Board cannot rely on such informal and untested factual assertions and satisfy the APA.

As noted above, the APA does not require the sort of trial-like hearing that these commenters advocate. Such procedures are only required when an agency participates in the formal

rulemaking procedures of the APA. Formal rulemaking is used when “rules are required by statute to be made on the record after opportunity for agency hearing.” 5 USC § 553(c). The RLA contains no such provision and the Board is not required to engage in formal rulemaking.¹⁶ In addition, courts have determined that due process does not demand evidentiary hearings when agencies promulgate rules. See, e.g., Nat’l Advertisers, 627 F.2d 1151. The evidentiary requirements in informal rulemaking are no greater than those required by Congress in passing legislation. According to the court in National Advertisers, “Congress is under no requirement to hold an evidentiary hearing prior to its adoption of legislation, and ‘Congress need not make that requirement when it delegates the task to an administrative agency’” 627 F.2d at 1166 (citing Bowles v. Willingham, 321 U.S. 503, 519 (1944)).

Although there was no opportunity for cross examination during the December 7, 2009 public meeting, interested persons did have the opportunity to publically respond to statements made at that meeting and many did so. The transcript of the meeting and all public comments were made available to the public via the NMB website within a few days. Comments received following the public meeting did address evidence presented during that meeting. For example, Delta provided a lengthy response to data on voter suppression presented by Dr. Kate Bronfenbrenner at the public meeting, arguing that Dr. Bronfenbrenner’s study was biased and outdated. Delta also responded with its own discussion of voter suppression based on data received from the Board. The Board has reviewed these comments and their relevance to the

¹⁶ Sections 556 and 557 of the APA describe formal rulemaking procedures, including a trial-type hearing where parties can submit evidence and cross examine witnesses. 5 U.S.C. 556(d). Such formal procedures have long been disfavored where not required by statute. In Vermont Yankee, the Supreme Court stated that a standard of review that would cause agencies to engage in formal rulemaking would lead to a loss of “all the inherent advantages of informal rulemaking.” 435 U.S. at 547.

Board's justification for the change in election procedure is addressed elsewhere in this preamble.

In summary, after considering the issues raised in TTD's letter the Board decided to utilize the notice-and-comment procedures of the APA to propose changes to its election process. Interested persons were given an adequate comment period and access to all meeting testimony and comments received. The Board followed an open administrative process and the volume and quality of the comments received indicates that interested persons had the information they needed to appropriately respond.

F. Justification for the Proposed Change

Several commenters opposed to the NPRM as well as Chairman Dougherty in her dissent have suggested that the Board has not provided adequate justification for this change in election procedures. These commenters argue that because the Board has adhered to the current representation rules for decades, it needs a particularly compelling justification to change these rules. For example, Flexjet commented that "[t]he Board's NPRM does not provide any persuasive reason for changing a rule that has been in place for 75 years." Other commenters, such as Delta, cited case law for the argument that the rule change requires greater justification and must pass stricter legal scrutiny because the current rule has been in place for a long time. In her dissent to the NPRM, Chairman Dougherty also suggested that the Board is subject to greater scrutiny because it is changing a long-standing policy.

Commenters discussed the various justifications for the rule change outlined in the NPRM and provided additional policy reasons in support of and in opposition to the proposed change. Before addressing these specific issues, the Board would like to first address the

standard of review applied by courts in a review of a change in agency regulations. While the Board, of course, believes that there are compelling reasons to make this change to the representation election procedure at this time, it notes that the fact that the current procedures have been in place for decades does not compel it to provide a greater justification than would be required if it were creating representation rules for the first time or greater than those relied upon when the current procedures were set in place.

In its recent decision in Fox, the Supreme Court found that the Federal Communications Commission (FCC) did not violate the APA when it changed its policy towards isolated uses of expletives in television broadcasts by issuing notices of apparent liability to Fox Television after a Golden Globes broadcast that included “fleeting expletives.” 129 S.Ct. 1800. The facts of that case are relevant here, because the FCC changed a long-standing policy when it decided that the single, non-literal use of certain words was actionably indecent under the statutory ban on indecent broadcasts. Id. at 1807. Previously, the FCC had determined that “deliberate and repetitive” use of an expletive was required for a finding of indecency. Id. The Court determined that the FCC’s actions were not arbitrary and capricious under the APA, rejecting the Court of Appeals’ determination that the FCC was required to explain “‘why the original reasons for adopting the [displaced] rule or policy are no longer dispositive’ as well as ‘why the new rule effectuates the statute as well or better than the old rule.’” Id. at 1810 (internal citations omitted).

Justice Scalia, writing for the plurality in Fox, held that the fact that an agency is changing course does not require a court to apply a higher standard of review to the agency’s actions. An agency must, however, provide a reasoned explanation for a rule change. Justice Scalia described the appropriate standard as follows:

[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.

Id. at 1811 (emphasis in original, citations omitted).

Several commenters and Chairman Dougherty would hold the Board to the higher standard of review endorsed by the Second Circuit Court of Appeals and explicitly rejected by the Supreme Court in Fox. For example, Delta, although citing the Supreme Court's decision in Fox, demands that the Board provide "a cogent explanation for this about face" and an explanation of the changed circumstances that justify a change in policy at this time. Delta also cites Motor Vehicle Manufacturers Ass'n of United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), for the proposition that the Board has not adequately justified this change in policy even though the Supreme Court rejected the Second Circuit Court of Appeals' reading of State Farm when it said that "our opinion in State Farm neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance." Fox, 129 S.Ct. at 1810.¹⁷

¹⁷ The Supreme Court in State Farm set aside the Department of Transportation's rescission of a recently-promulgated safety standard because the agency "failed to supply the requisite reasoned analysis in this case." 463 U.S. at 57 (internal quotation omitted).

To return briefly to the facts in the Fox decision, one of the primary reasons cited by the FCC for its change in policy toward the single use of expletives was what it referred to as the “first blow theory” that “[e]ven isolated utterances can be made in ‘pandering . . . vulgar and shocking’ manners . . . and can constitute harmful ‘first blows’ to children.” Id. at 1812 (internal citations omitted). The Court of Appeals, in its decision that was overturned by the Supreme Court, held that the FCC’s action was arbitrary and capricious under the APA because it did not explain why it changed its view about the “first blow theory” in the 30 years since it first adopted the policy that fleeting expletives were not indecent. Fox Television Stations, Inc. v. Fed’l Commc’n Comm’n, 489 F.3d 444, 458 (2d Cir. 2007), overruled by Fox, 129 S. Ct. 1800. The Second Circuit Court of Appeals stated:

For decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent. The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the Golden Globes decision, it had never banned fleeting expletives. While the FCC is free to change its previously settled view on this issue, it must provide a reasoned basis for that change.

Id. at 461. This view, that an agency must provide a greater justification when it’s changing course than it does when it acts in the first instance, is precisely what the Supreme Court overruled in Fox. The FCC did not explain why exposure to fleeting expletives was more damaging to children today than it was thirty years ago, but it was not required to do so in order to make the policy change that it did.

The Fox opinion has been cited by courts in subsequent reviews of agency decisionmaking. See, e.g., Handley v. Chapman, 587 F.3d 273, 282 (5th Cir. 2009) (“[A]n agency effecting a policy change is not required to show a more convincing rationale for the new policy than for the old.”); Westar Energy, Inc. v. Fed Energy Regulatory Comm’n, 568 F.3d 985, 989

(D.C. Cir. 2009) (holding that the agency provided an adequate justification for its policy and the fact that it was a change in policy “required no additional or special explanation.”). Judicial review of an agency’s change in policy includes a consideration of whether the agency recognizes that it is changing policy (as opposed to simply ignoring current policy), has statutory authority for such change, has a good reason for the change, and believes that the new policy is better than the previous policy.

A discussion of the Board’s statutory authority to make this change is in Section III.D.

The Board believes that this change will more accurately measure employee choice in representation elections. The current election procedures do not allow employees to vote “no” or to cast a ballot against representation.¹⁸ In addition, any voter who abstains from voting, for any reason, is counted by the Board as a vote against representation.

¹⁸ In its comment, Littler suggests that the Supreme Court in ABNE, 380 U.S. at 669 n.5, observed “that the Board’s current election procedures ‘might well be more effective’ at determining the representational desires of the majority of the craft or class” than the procedure proposed by the NPRM. This overstates the Supreme Court’s view of the Board’s current election procedures. ABNE involved a challenge to the form of the Board’s ballot, namely the failure of the ballot to provide employees with the option to vote against representation. The Court recognized that the RLA left the details of the ballot to the “broad discretion” of the Board, 380 U.S. at 668-669, and that the Board’s decision on this matter was not subject to judicial review without a showing that the Board exceeded its statutory authority. Id. at 669. In the footnote cited by Littler, after noting that the legislative history of the Act supports the view that employees have the right to representation, the Court stated that

[u]sing the Board’s ballot an employee may refrain from joining a union and refuse to bargain collectively. All he need do is not vote and this is considered a vote against representation under the Board’s practice of requiring that a majority of the eligible voters in a craft or class actually vote for some representative before the election is valid. The practicalities of voting – the fact that many who favor some representation will not vote – are in favor of the employee who wants ‘no union.’ Indeed, the method proposed by the Board might well be more effective than providing a ‘no union’ box, since, if one were

The Board is not persuaded by commenters who suggest that everyone who does not vote in an NMB election is opposed to representation. The NLRC asserted that there is no evidence to suggest that employees abstain from voting in NMB elections for any reason other than to maintain the status quo of no representation. In fact, in representation elections where individuals do have the ability to explicitly vote against representation, such as in NLRB-sponsored elections or Laker ballot NMB re-run elections,¹⁹ some individuals do not cast ballots. In support of the NPRM, IBT provided evidence that there is a 12 percent nonparticipation rate in Laker ballot elections and an even higher nonparticipation rate in NLRB-sponsored elections. In those elections, individuals have a clear method of making their support for the status quo of no representation known and yet some individuals choose to not do so. It cannot be assumed that those who do not participate are uniformly opposed to representation. Although many individuals who do not participate in NMB elections may be opposed to representation, providing a clear method of registering that choice would provide the Board with a more accurate measure of employee sentiment.

There are many reasons why individuals chose not to vote in any election. Commenters discussed some of these reasons. Americans for Democratic Action cites several reasons

added, a failure to vote would then be taken as a vote approving the choice of the majority of those voting. This is the practice of the National Labor Relations Board.

Id. at 669 n.5. The Court then concluded that “[w]e venture no opinion as to whether the Board’s proposed ballot will best effectuate the purposes of the Act. We do say that there is nothing to suggest that in framing it the Board has exceeded its statutory authority.” Id. at 671.

¹⁹ A Laker ballot is a “yes” or “no” ballot with no write-in option. It is sometimes administered by the Board after a finding of election interference. See Laker Airways, Ltd., 8 NMB 236 (1981). Laker ballots will be discussed further below.

individuals do not vote in political elections, such as travel, illness, or apathy. The political scientists expressed concerns that nonvoters' preferences are not accurately measured by treating them as "no" votes, stating that "[t]here is absolutely no reason to presume non-voters wish to cast a negative vote." Reasons for failing to cast a vote include indifference, neutrality, a belief that their vote will not be counted for some reason, or pressure to not vote. A comment in favor of the proposed rule from a number of United States House Representatives notes that the current rule "is all the more flawed in a setting where voter rolls include significant numbers of furloughed employees who are not in communication with other voters."²⁰ According to

²⁰ On December 7, 2009, Representatives James L. Oberstar, George Miller, John Dingell, John Conyers Jr., David Obey, Fortney "Pete" Stark, Henry Waxman, Edward J. Markey, Norman Dicks, Dale Kildee, Nick Rahall, Ike Skelton, Barney Frank, Howard Berman, Rick Boucher, Marcy Kaptur, Sander Levin, Solomon Ortiz, Gary Ackerman, Paul Kanjorski, Peter Visclosky, Peter DeFazio, John Lewis, Jerry Costello, Frank Pallone Jr., Eliot Engel, Nita Lowey, Donald Payne, Jose Serrano, Neil Abercrombie, David Price, Rosa DeLauro, James Moran, Collin Peterson, Eleanor Holmes Norton, Ed Pastor, Jerrold Nadler, Xavier Becerra, Sanford Bishop Jr., Corrine Brown, James Clyburn, Bob Filner, Raymond "Gene" Green, Luis Gietierrez, Maurice Hinchney, Tim Holden, Eddie Bernice Johnson, Carolyn Maloney, Lucille Roybal-Allard, Bobby Rush, Robert "Bobby" Scott, Bart Stupak, Nydia Velaquez, Melvin Watt, Lynn Woolsey, Bennie Thompson, Sam Farr, Lloyd Doggett, Michael Doyle, Sheila Jackson-lee, Patrick Kennedy, Zoe Lofgren, Jesse Jackson Jr., Elijah Cummings, Earl Blumenauer, Jane Harman, Marion Berry, Leonard Boswell, Danny Davis, William Delahunt, Carolyn Kilpatrick, Dennis Kucinich, Carolyn McCarthy, James McGovern, Bill Pascrell Jr., Steve Rothman, Loretta Sanchez, Brad Sherman, Adam Smith, John Tierney, Robert Wexler, Lois Capps, Barbara Lee, Robert Brady, Brian Baird, Tammy Baldwin, Shelley Berkley, Michael Capuano, Joseph Crowley, Charles Gonzalez, Rush Holt, Dennis Moore, Grace Napolitano, Janice Schakowsky, David Wu, Joe Baca, Susan Davis, Mike Honda, Steve Israel, James Langevin, Rick Larsen, Betty McCollum, Adam Schiff, Diana Watson, Stephen Lynch, Diana Watson, Stephen Lynch, Timothy Bishop, Dennis Cardoza, Raul Grijalva, Kendrick Meek, Michael Michaud, Brad Miller, Tim Ryan, Linda Sanchez, David Scott, Chris Van Hollen, Stephanie Herseth Sandlin, Russ Carnahan, Jim Costa, All Green, Brian Higgins, Daniel Lipinski, Gwen Moore, Doris Matsui, Albio Sires, Jason Altmire, Michael Arcuri, Bruce Braley, Christopher P. Carney, Kathy Castor, Yvette D. Clarke, Steve Cohen, Joe Courtney, Keith Ellison, John J. Hall, Phil Hare, Mazie K. Hirono, Paul Hodes, Henry "Hank" Johnson, David Loebsack, Christopher Murphy, Patrick Murphy, Joe SesTak, Zachary Space, Betty Sutton, Timothy Walz, John A. Yarmoth, Laura Richardson, Niki Tsongas, Andre Carson, Donna F. Edwards, Marcia L. Fudge, John Boccieri, Gerald E. Connolly, Alan Grayson, Deborah "Debbie" Halvorson, Mary Jo Kilroy, Larry Kissell, Eric J.J. Massa, Gary C. Peters, Chellie Pingree, Mark H. Schauer, Harry Teague, Dina Titus, Paul Tonko, Mike Quigley, Judy Chu, John Garamendi, Louise Slaughter, Tom S. P. Perriello, John

some commenters, voters should have the right to be neutral or indifferent about a representation election. Congressman Jerry F. Costello comments that it is unfair to assign a “no” where no vote has been cast. A comment in support of the NPRM submitted by 39 United States Senators states that “[e]mployees must have a choice to vote for union representation, against union representation, or not to vote at all.”²¹

In his comment, Professor Jamin Raskin notes that some individuals are bound by religious principle to refrain from voting in any type of election. At the Open Meeting, Reginald “Willy” Robinson, a member of the IBT, spoke about his personal knowledge of many individuals who do not participate in representation elections due to religious beliefs. As noted by Professor Raskin, these individuals have the right to refrain from the duties of full union membership due to religious objections yet when they choose to refrain from taking a position in a representation election, the current procedure treats their nonparticipation as a “no” vote, taking the choice away from employees who are willing and able to take on the duties of representation. Several commenters suggest that ignoring these factors and attributing a “no” vote to everyone who does not participate in an election creates an unfair bias against

Sarbanes, Edolphus Towns, Maxine Waters, Madeline Bardallo, Wm. Lacy Clay, Steve Driehaus, and Eni F. H. Faleomavaega submitted a comment in support of the proposed rule.

²¹ On December 7, 2009, Senators Tom Harkin, Barbara A. Mikulski, Jack Reed, Sherrod Brown, Jeff Merkley, Christopher J. Dodd, Patty Murray, Bernard Sanders, Robert P. Casey Jr., Al Franken, Robert C. Bryd, Carl Levin, John F. Kerry, Barbara Boxer, Ron Wyden, Tim Johnson, Debbie Stabenow, Frank R. Lautenberg, Benjamin L. Cardin, Patrick J. Leahy, Arlen Specter, Daniel K. Akaka, Russell D. Feingold, Richard Durbin, Charles E. Schumer, Maria Cantwell, Robert Menendez, Amy Klobuchar, Sheldon Whitehouse, Jeanne Shaheen, Roland W. Burris, Paul G. Kirk, Claire McCaskill, John D. Rockefeller IV, Tom Udall, Edward E. Kaufman, Kirsten E. Gillibrand, Jon Tester, and Daniel Inouye submitted a comment in favor of the proposed rule.

representation. The Association of Professional Flight Attendants (APFA) states that “individuals should be able to abstain without skewing the election results.”

The Board agrees with those commenters who argue that this proposed rule will allow the Board to determine each individual’s true intent with regard to representation. Under Section 2, Ninth of the RLA, the Board is required to investigate representation disputes and designate the employees’ choice of representative. This change will allow the Board to more accurately determine the employees’ true choice. The Board will no longer impose a position on those who abstain from participating in a representation election by treating nonparticipation as a vote against representation. Employees who are opposed to representation will have the opportunity to vote according to that view. Employees who have no opinion about a representation dispute or wish to abstain from voting for any reason will no longer be counted as a vote against representation.

Although the Board is aware that under Fox it is not required to provide an explanation as to “why the original reasons for adopting the [displaced] rule or policy are no longer dispositive,” 129 S.Ct. at 1810, it notes that there is little evidence that there were strong policy reasons for the prior Board’s adoption of the current representation rules. As Justice Kennedy noted in his concurring opinion in Fox, the amount of explanation required when an agency changes policy may depend on whether the previous policy was based on factual or scientific findings and the reliance interests of the public. Id. at 1822-23 (Kennedy, J., concurring). Justice Scalia, in his plurality opinion, also stated that, although justification is not “demanded by the mere fact of policy change,” a greater justification can be necessary when a change disregards “facts and circumstances that underlay . . . the prior policy.” Id. at 1811. That is not the case here. As noted in the NPRM, the 1934 Board initially adopted the current representation

election rules based “on what seemed to the Board best from an administration point of view,” and did not articulate a rationale for the current rule. 1 NMB Ann. Rep. 19 (1935).

Further, there is evidence that the current procedures were adopted in response to an era of widespread company unionism within railroads, a factor that has ceased to be an issue in the railroad industry. As described by one court:

[T]he company union had the following attributes: employees of the railroad were permitted to spend considerable time on union affairs without deduction by the company from their pay; the company would pay expenses incurred by union members or supporters in recruiting new members; the company would expect and receive reports from the union supporters concerning recruitment efforts; and the company would discharge or discriminate against supporters of rival unions.

Aircraft Mechanics Fraternal Ass’n v. United Airlines, Inc., 406 F.Supp. 492, 497 (N.D. Cal. 1976).

Company unions became common following the passage of the Transportation Act of 1920, the predecessor to the RLA that included no prohibitions against employers interfering in the selection of employee representatives and relied on voluntary collective bargaining. Frank N. Wilner, Understanding the Railway Labor Act 50-51 (2009). By the time the RLA was passed in 1926, “carriers had ‘broken the backs’ of many unions by the device of company unions on individual’s properties.” Hearing Before the Subcomm. of the S. Comm. On Labor and Public Welfare, 81st Cong. 12 (1950) (testimony of George Harrison, Int’l VP, Transportation Workers of America). The RLA failed to restore power to independent unions and when the 1934 amendments to the RLA were passed, there were over 700 agreements between carriers and company unions, representing 20 percent of the total number in the industry. Id. at 13.

The Board was given its statutory mandate to investigate representation disputes in part because of these company unions, which the 1934 amendments also outlawed. “It was this carrier influence over self-organization, as it has been exercised over the years, that was the

principal target of the 1934 amendments.” Id. After the 1934 amendments gave the Board authority to certify representatives, the Board likely concluded that requiring a majority of eligible voters to vote in favor of representation by an independent union would more effectively demonstrate employee intent to those carriers who had just previously refused to voluntarily recognize these independent unions. Employers could not claim that the independent unions did not have the support of employees when the Board required an absolute majority of votes in favor of representation in order to certify. When carriers agreed to be bound by a majority of votes cast, the Board would certify on that basis rather than on the basis of a majority of eligible voters. In its First Annual Report the Board stated that “[w]here, however, the parties to a dispute agreed among themselves that they would be bound by a majority of the votes cast, the Board took that position that it would certify on that basis.” 1 NMB Ann. Rep. 19 (1935).

During this period, almost all railway workers were represented by either an independent union or a company union. Because almost all employees were already organized and most elections involved disputes between unions, the NMB’s early election ballots provided a choice among representatives without the option to vote against representation. The high degree of organization in the railroad industry at that time led to the assumption that all class or crafts would be organized and for this reason, there was likely no consideration given to the possibility that employees would vote against representation. These factors no longer exist today. The majority of NMB elections list only one employee representative. Providing employees with the option to vote against representation was likely not a pressing concern to the Board during an era when most employees were already represented. There is no longer

the assumption in either the railroad or airline industries that all class or crafts will be organized, yet there remains no way for employees to vote against representation.

Although the problem of company unions and the high degree of representation in the railroad industry likely led to the current representation procedure, there is little concrete evidence of the 1934 Board's process for adopting that procedure. As stated in the Board's First Annual Report, the current procedures developed for administrative reasons during a time when most employees covered by the Act were already members of some type of union. Another indication that the current procedure was merely the result of circumstances as they existed in the 1930s was the fact noted above that the early Board did not utilize this procedure exclusively. When the parties agreed, the Board would certify based on the majority of votes cast, indicating that the earlier Boards did not believe that certifying based on the majority of eligible voters was necessary for it to fulfill its statutory obligations. Early Boards recognized that they had the discretion to utilize either procedure in representation elections.

Many commenters provided additional arguments for and against the NPRM. Commenters in favor of the rule change argue that there have been additional changed circumstances since the current rules were first put into place. The APFA noted that increased technology and communication allows all employees to be adequately informed about the election process and there is no longer the risk that "an informed minority will overwhelm an oblivious majority," a risk that might have existed in prior decades due to lack of communication among nationwide class or crafts. Further expanding on the changes in technology, along with a more educated workforce, Frank N. Wilner included the following analysis in his comments in favor of the rule change:

During the 1930s, there was a communications challenge – in employee reading comprehension as well as the ability to communicate by electronic means (including telephone). . . By requiring that a majority of eligible employees vote in favor of representation, the procedure better assured that the majority would be aware of the election and for what they were voting.

The Board notes that these changes in technology, along with its own recent changes in election procedures, make it unlikely that a majority of employees in a craft or class will be inadequately informed about either organizing efforts or how to vote for their preference in an election.²²

IAM argues that changes in technology have provided employers with increased methods of intimidating employees and preventing them from voting in favor of representation. The Communication Workers of America (CWA) argue that rather than encouraging all employees to vote their preference, the current rule encourages employers to take actions that undermine the election process. According to CWA, these actions include inflating the lists of eligible voters and intimidating prospective voters. Comments and public meeting testimony

²²Commenter Watco Companies, Inc. and Genesee & Wyoming, Inc. (Watco) suggests that the Board adopt a quorum requirement in representation elections. In their view, the Board should require a certain level of participation in any election before certifying a bargaining representative on the basis of a majority ballots cast. As discussed in section III.D., Congress has not mandated any such requirement for elections under the RLA and the Board has the discretion to conduct elections based on a majority of votes cast despite the fact that less than a majority of eligible employees choose to participate in the election. Further, as discussed in Section III.D., the presumption of Virginian Railway is that if “an employee does not vote, he can safely be presumed to have acquiesced in the will of the majority of voters.” ABNE, 380 U.S. 650, 670 (1965). There is also no evidence that there will be “*de minimus*” participation in NMB elections following the rule change as suggested by Watco. If, however, the Board was presented with a situation in which the Board itself believed or a participant contended that the election was unrepresentative because eligible employees were denied or prevented from exercising their right to vote, the Board would investigate and impose an appropriate remedy.

from CWA, Dr. Kate Bronfenbrenner, the ALPA, and others included discussions of employer intimidation techniques and tactics.

Commenters opposed to the NPRM, including Delta, argue that issues related to carrier conduct raised in the public meeting and in comments submitted by unions are irrelevant because carriers have the right to encourage employees to not participate in an election. These commenters also point out that the Board has expertise in determining whether there has been election interference and providing appropriate remedies in those situations.

Several commenters note that the current representation procedures have not been an obstacle to union organizing and the proposed change is, therefore, unnecessary. The American Short Line and Regional Railroad Association commented that over 65 percent of non-management employees in short line and regional railroads have union representation. Delta and Littler pointed out that unions enjoy greater success under NMB elections than under the voting procedure used by the NLRB. Since 1935, unions have achieved certification in 68 percent of NMB elections but in only 58 percent of NLRB-sponsored elections. Delta further noted that in 2009, certification was the outcome of 73 percent of NMB elections.

In contrast to the commenters opposed to the rule change, many in favor of the change argue that unions have become less successful in winning representation elections in recent years. IAM notes that NMB elections resulted in certification in the vast majority of instances during the early years of the RLA. For example, in 1935, 94 percent of elections resulted in certification while this is no longer the case.

The Board is aware that these issues, union success and carrier interference in representation elections, are ones that many of the commenters feel very strongly about. The

decision to change the current representation procedures and publish the NPRM, however, was not based on these factors. The Board cannot speculate as to the effect of this change in either of these areas. Regarding election interference, the Board has always investigated allegations and provided appropriate remedies when it has found that a carrier engaged in election interference. It is the Board's statutory duty to investigate representation disputes and ensure that elections are free from carrier interference. Nothing in the NPRM alters the Board's commitment to its duty under the RLA. The Board has not taken the position that current procedures need to change because carriers have been engaging in higher levels of voter suppression or election interference. In fact, commenters such as Delta are correct when they note that some of the testimony regarding voter suppression inaccurately portrayed some carrier conduct that the Board has in the past determined is not election interference. The Board has repeatedly stated that accurately portraying the way an employee can vote is not interference. Delta Airlines, Inc., 30 NMB 102 (2002); Express Airlines I, 28 NMB 431 (2001); Delta Air Lines, Inc., 27 NMB 484 (2000); American Airlines, 26 NMB 412 (1999).

Likewise, the Board has not proposed this change to increase the rate of union success in representation elections. The Board is of the opinion that there is no way to determine the exact effect that this change will have on union organizing efforts; however, the Board believes that this change will allow it to more accurately determine employee sentiment in representation elections. Any predictions about whether unions will be more successful under the procedures outlined in that NPRM are mere speculation, as demonstrated by the conflicting viewpoints presented by the commenters about union success rates. Many factors beyond the control of the Board affect whether a union will be successful in an election, including the economy, the culture among employees in the craft or class, resources utilized by unions and

carriers during the election process, and the reputation of the union. While commenters opposed to this rule are correct that those who are opposed to union representation do not need the option of voting “no” because they can currently “vote” against representation by choosing not to cast a ballot, this method does not provide a measure of those employees who do not wish to vote either for or against representation or those who fail to vote for any other reason. The Board continues to believe that assigning a “no” vote to everyone who does not participate in an election does not provide the most accurate measure of those employees’ views about representation.

Despite the contention by commenters such as Delta that the Board is bound by its prior declaration that this change is unnecessary, the Board believes that the proposed change is essential to fulfilling its statutory mission to ascertain employee preference with regard to representation. Delta cites the Board’s statement in 1987 that it would only make such a change if mandated by the RLA or if doing so was “essential to the Board’s administration of representation matters.” Chamber of Commerce, 14 NMB at 360. The Board does believe this change is essential but also notes that it is not bound by its prior statements on this issue and is free to consider changed circumstances, such as those discussed above, in determining whether to change representation procedures, despite refusing to do so in the past. According to the Supreme Court, “[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.” American Trucking Ass’n v. A.T. & S.F. R. Co., 387 U.S. 397, 416 (1967). Agencies are free to reconsider past interpretations and overturn past rulings. Id. As stated by the court in National Advertisers, “a [c]ommission’s view of what is best in the public interest may change from time to time.

Commissions themselves change, underlying philosophies differ, and experience often dictates changes.” 627 F.2d at 1174. (citing Pinellas Broadcasting Co. v. Fed. Comm’n Comm’n, 230 F.2d 204, 206 (D.C.Cir. 1956)). Despite the arguments of many commenters opposed to the NPRM, the Board is not bound by the statements or policy views expressed by the Board in the past.

The proposed change will ensure that all employees in a class or craft have the opportunity to register their support for or opposition to a union, as well as allow individuals the right to abstain from participating without that choice being treated as a compulsory vote against representation. The Board is statutorily mandated to investigate disputes over representatives and to utilize an “appropriate method of ascertaining” the authorized representative of the employees. According to the Supreme Court, it is “the duty of the Mediation Board, when any dispute arises among the carrier's employees, ‘as to who are the representatives of such employees,’ to investigate the dispute and to certify, as was done in this case, the name of the organization authorized to represent the employees.” Virginian Ry., 300 U.S. at 544. This proposed change will allow the Board to more accurately ascertain employee desires regarding representation.

G. Effect of the Proposed Change on Stability in Labor Relations

Several comments and Chairman Dougherty’s dissent express concern that the rule change could destabilize labor relations in the industries covered by the RLA. These comments address two types of stability in the industries. First, the comments address stability as measured by incidents of strikes, lockouts, or other work stoppages. Second, comments addressed concerns about continuity of representation among the classes and crafts

represented by unions. They raise concerns that the proposed changes will lead to union raiding, more frequent elections, and increased changes in representation.

ASC, in its comment in opposition to the rule change, argues that the “proposed change will lead to certification of minority representatives. This will foster instability in contract negotiations and may adversely affect the stability of carrier operations resulting in a potential increase in interruptions to commerce.” According to Littler, the current rule “quells any doubt about the authority of the selected representative.” Littler argues that carriers who are aware that the majority of the craft or class supports the representative are more likely to understand the need to work cooperatively with the employee representative.

Commenters also voice concern that the proposed rule will lead to an increase in raiding and inter-union conflicts. They argue that changes in representation may become commonplace if the proposed rule is instituted and unions will be “constantly concerned” about rival unions. NRLC argues that the certification of representatives with broad support among employees results in long-term and stable relationships between carriers and unions. TTX Company, a freight rail services company, argues that the current rule contributes to stability and that union raiding and decertification efforts occur rarely. According to TTX, unions currently do not need to worry about potential challengers to their status as representatives and this could change with the proposed rule. These commenters expressed concern that the rule change could be, as stated by NRLC, an “invitation to rival unions” to file representation petitions and seek to replace current representatives.

Commenters who support the rule change argue that representation procedures are not the source of stability within labor relations in the railroad and airline industries. IAM noted that the Board has on many occasions certified unions who do not receive a majority of votes

cast in an election. This occurs when there are two unions seeking to represent a craft or class. If a majority of all eligible employees vote for representation, the Board certifies the union receiving more votes. In its First Annual Report the Board stated that it would sometimes certify unions based on majority of votes cast. 1 NMB Ann. Rep. 19 (1935). The Board has on many occasions held Laker ballot elections, where certification is based on the majority of votes cast. The Board has on occasion held Key Ballot elections, resulting in certification unless the majority of votes cast are opposed to representation. There is no evidence that any of these measures have led to instability in the airline or railroad industries.

In its comment in support of the rule change, the Transportation Communications International Union (TCU) noted that unions do not rely on the results of representation elections to determine whether employees support a strike. Employee support of a union will vary over time. Additionally, TCU argues that the idea that less union support will lead to more strikes is counterintuitive. A union that is not supported by its members will be unlikely to convince them to support a strike, while a union that enjoys a great amount of support is more likely to gain authorization for a strike from its members. IAM cites its own requirement that two-thirds of its voting membership authorize a strike. A union will only strike when it has the strong support of its members.

The Board notes that no concrete evidence has been presented in support of the argument that the proposed rule change will lead to instability in the form of increased strikes or work stoppages in the industries. The specific procedure at issue in the NPRM is not linked to the stability cited by the commenters. Although many commenters cited the Board's own statements regarding stability, the Board did not provide any evidence for its assertion that this change in election procedures would lead to instability when confronted with the issue in 1987. Chamber of Commerce, 14 NMB 347, 362 (1987). Aside from the possibility that the current

procedure was instituted in response to the problem of company unions, which themselves caused strife in labor relations, there is little or no evidence that the current procedures were instituted to prevent strikes or work stoppages. Like many other arguments presented in opposition to this proposed rule, the argument that it will lead to labor instability is based on mere speculation.²³

Stability, defined as a lack of disruptions caused by strikes and work stoppages, has been attributed to the existence of collective bargaining agreements and the mediation processes outlined in the Railway Labor Act. In its First Annual Report, the Board itself attributed the absence of strikes during the prior two years to the mediation procedures in the Act and by the existence of collective bargaining agreements. 1 NMB ANN. REP. 36 (1935) ("The extent to which labor relations are governed by such agreements is the measure of the extent to which law, democratically made by employees as well as employers, has been substituted for the rule of economic force and warfare in the railroad industry"). In Detroit & Toledo Shoreline Railroad v. United Transportation Union, 396 U.S. 142, 149 (1969), the Supreme Court described the Board's bargaining process as "almost interminable" but considered this a positive description of a process that prevented disruptions in commerce. The Court said that

The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that

²³ In her dissent, Chairman Dougherty criticizes the Board for dismissing some concerns about instability as mere speculation. In fact, some of the concerns raised by commenters and by our dissenting colleague are based on speculation born from the unproven assumption that there will be little participation in representation elections. We have no reason to believe that this rule change will lead to the parade of horrors, such as unlawful work stoppages, envisioned by these commenters. None of the comments, nor the dissent, point to any examples of this type of action occurring and it would be imprudent for the Board to make policy determinations based on speculation.

would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worth-while for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

Id. at 150.

Even prior to the 1934 amendments giving the Board the authority to certify representatives, the RLA was known for its conciliation process. According to a 1926 New York Times editorial, “[a]s a last resort a strike is possible; but it can come only after every other resource, including long delay, has been exhausted.” Railway Labor and the Public, N.Y. Times, March 17, 1926 (as cited in Frank N. Wilner, Understanding the Railway Labor Act 55 (2009)). A 1936 Harvard Law Review article did not list the Board’s representation procedures as one of the several factors leading to stable labor relations:

This Act assumes that the basis for stable, amicable labor relations is the periodic negotiation of collective agreements between carriers and strong, independent unions representing the employees. It is made unlawful for a carrier to interfere in any way with the organization of its employees, as by promoting and financing company unions, by influencing or coercing employees to join or not to join any labor organization; and, specifically carriers are forbidden to require any person seeking employment to sign an agreement promising to join or not to join a labor organization.

Calvert Magruder, A Half Century of Legal Influence upon the Development of Collective Bargaining, 50 HARV. L. REV. 1071, 1087 (1936). These discussions of stability in railway labor relations make no mention of the Board’s representation procedures or definition of majority under the Act. Stability in the industries has been attributed over the years to the Act’s mediation process, the existence of collective bargaining agreements, and the restriction on

carrier interference in representation matters. The proposed rule would not change any of these factors.²⁴

The Board notes that extraneous factors beyond its control have also apparently had an impact on the number of strikes or work disruptions. The number of strikes has decreased in recent years, with no change in the representation process in NMB elections. Union commenters attribute this decrease at least in part to the Supreme Court's decision in Trans World Airlines v. Independent Ass'n of Flight Attendants, 489 U.S. 426 (1989), permitting carriers to hire permanent replacements for striking workers. This also indicates that the current representation election procedures are not a contributing factor to the incidents of work stoppages in the railroad and airline industries.

The argument that carriers have better working relationships with unions that have greater support among employees overlooks the fact that carriers are required by law to treat with Board-certified representatives of employees. This duty is found in Section 2, Ninth of the RLA, which states that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." The Supreme Court has reiterated this obligation, affirming that carriers have the

²⁴ In regards to comments about whether it will be more difficult for unions to ratify tentative agreements under the proposed rule, the Board notes that contract ratification is an internal union matter. Whatever a union's internal procedure is for ratifying a tentative agreement, this process generally occurs months or years after certification. A union's support among its members is constantly in flux. Even under the current election procedure, a union that is certified with the support of a majority of the class or craft could find itself unable to convince its membership to support a tentative agreement. Additionally, difficulty in ratifying rarely leads to a work stoppage. The Board's mediation procedures, including the maintenance of the status quo, the cooling-off period, and the possibility of a Presidential Emergency Board, will remain the same, ensuring the NMB will continue to assist the parties in reaching agreements and avoid disruptions in air or rail transportation.

obligation to bargain exclusively with the certified representative and this obligation is mandatory and enforceable in the courts. Virginian Ry., 300 U.S. at 544-45. The Supreme Court has also stated that the Act requires that carriers “meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable efforts to compose differences” ABNE, 380 U.S. at 658. Whether a carrier feels that the representative has sufficient support among employees should not affect that carrier’s willingness to bargain with or work cooperatively with a representative. Carriers are legally obligated to treat with any representative certified by the Board.

The Board would also like to remark on several commenters’ use of the expression “minority union” or “minority representative,” a repeated theme in comments opposed to the NPRM. A representative certified under the proposed rule would not be a “minority union.” A “minority union” is a union that does not represent all employees and only bargains on behalf of its members. The Board does not certify minority unions and will not do so under the proposed rule. The Board requires certified representatives to bargain on behalf of all members of a systemwide class or craft and this requirement will not change under the proposed rule.²⁵ Part of the principle of exclusive representation under the RLA is the obligation of certified representatives to represent all employees fairly and without discrimination. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). Under the proposed rule, certified representatives will remain the exclusive representative of all members in a craft or class and the duty of fair representation will obligate them to represent all employees, even those who vote against

²⁵ Minority unions are also not certified by the NLRB. Unions have argued, in seeking NLRB recognition of minority unions, that there was a practice, common in the 1930s, of companies bargaining with unions representing only a minority of employees at a workplace. Steven Greenhouse, Seven Unions Ask Labor Board to Order Employers to Bargain, N.Y. Times August 15, 2007.

representation. Attempts to characterize a certified representative under the proposed election rule as a “minority union” are misleading and inaccurate.

With regard to concerns about union raids and stability in employee representatives, the Board notes that it is not changing its showing of interest requirements. Any individual or organization seeking to represent employees who are already represented will still need to provide authorization cards from more than fifty percent of the class or craft in order to file a representation petition. For this reason, it is unlikely that there will be a great increase in “raiding” among unions. The Board recognizes that some commenters, such as Southwest Airlines (Southwest), request that there be a uniform showing of interest requirement regardless of whether the employees are currently represented by a union. Southwest argues that this change would bring these rules in to conformity with the procedures of the NLRB. Southwest referred to the “anomalous situation” where the showing of interest requirements for a class or craft that is already represented is higher than the number of voters that would be required to win a representation election under the proposed rules.

In the Board’s view, maintaining the higher showing of interest requirement for crafts or classes that are already represented will prevent the types of disruptions in representation that several commenters express concern about. While it is true that the showing of interest requirement would often be greater than the number of votes that a challenging union will need to win an election, an authorization card does not bind an employee to vote in favor of representation. Based upon the showing of interest and the Board’s investigation, an election is authorized. During this critical period, unions and employers conduct campaigns to inform employees about the pros and cons of representation. Maintaining this strong showing of interest requirement will ensure that representation elections only occur where a significant number of employees are open to the possibility of changing representatives.

In summary, there is no evidence that the proposed rule change will create instability in labor relations. The NPRM does not affect the numerous factors that contribute to stability in the airline and railroad industries, such as the mediation process and the existence of collective bargaining agreements. The Board has diverged from the current election procedure in many instances, including using other forms of ballots to carry out its statutorily-mandated duty to prevent carrier interference in representation elections, without threats to stability.

H. Decertification under the RLA

The majority of comments opposed to the NPRM as well as our dissenting colleague suggest that any change to the Board's interpretation of "majority of the craft or class" must also re-examine decertification under the RLA. These commenters suggest that the two issues, certification based on a majority of ballots cast and decertification are inextricably linked because (1) under the NLRA, bargaining representatives are certified based on a majority of ballots cast and the NLRA explicitly provides for decertification petitions; and (2) in 1985, the Board consolidated the IBT's request to change existing rules regarding election procedures to allow employees to vote "no" and to certify representatives on the basis of majority of ballots cast with an earlier-filed request from the Chamber of Commerce that the Board amend its rules to include formal decertification provisions. Int'l Bhd. of Teamsters, 13 NMB 1 (1985). For example, ATA and AIRCON assert that the

Board historically has recognized the close relationship between the "minority rule" ballot and decertification and the wisdom for the two issues to be addressed in tandem. Accordingly, when the Board last considered the same proposed voting rule change on an industry-wide basis, it simultaneously considered a proposal to adopt a formal decertification procedure.

As an initial point, the Board disagrees with the comments' supposition that the NPRM will inevitably lead to "minority unions" or "minority rule," and also that all requests to change its election procedures must be addressed in the same proceeding. Under the proposed rule, the employees will cast votes either for or against representation or refrain from voting altogether and acquiesce in the will of the voting majority. The choice is theirs. It is certainly possible that in some elections the number of employees who actually cast a ballot may be less than a majority of those eligible to vote, but it is not the preordained outcome of every election. What is certain is that under the proposed rule, the Board will no longer substitute its presumption for an employee's intent.

The Board believes that the method it uses to measure employee intent in representation elections is not intertwined with decertification. The commenters point to the NLRA, but it must be noted that the NLRA specifically provides for a decertification process. The 1947 Taft-Hartley Amendments to the NLRA added not only the union shop provisions discussed below in Section III.I., but also a provision allowing an employee, group of employees, or any individual or labor organization acting on their behalf to file a petition asserting that the currently certified or recognized bargaining representative no longer represents the employees in the bargaining unit. 29 U.S.C. §159(c)(1)(A)(ii). No similar provisions were included in the RLA of 1926 or any subsequent amendments.

The Board also does not believe that it must consider all requests to change its election procedures in the same proceeding. To be sure, in 1985, the Board chose to consolidate all requests for changes to its rules into a single proceeding. The Board, however, is not required to follow that procedure in every instance.

Other commenters simply state that the Board should provide for a more direct means of decertifying an incumbent union. For example, Flexjet states that “the Board must also change the rules to allow a majority of employees to vote the union out if they are displeased with the union.” Similarly, Right to Work suggests in its written comment submitted prior to the December 7, 2010 open meeting that it is inappropriate for an exclusive bargaining representative to be certified on the basis of a “mere majority of employees voting in an election” because “it is extremely difficult for employees to remove a union once it is certified as their exclusive bargaining agent, particularly because the NMB has not established a formal process for decertification.” ATA and AIRCON state that it “would not be merely imprudent for the Board to abandon the “majority rule” while failing contemporaneously to adopt a straightforward decertification process. “ Southwest states that, while it is “neutral” on the NPRM, it believes “the final rule should ensure that any new election procedures are applied broadly and consistently to cover representation and decertification procedures.”

The courts have recognized, and the Board agrees, that employees have the right to reject representation. ABNE, 380 U.S. 650. Implicit in that right is the Board’s power to certify that there is no representative. Teamsters, 402 F.2d at 202 (D.C. Cir. 1968); Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983) (finding that since employees have right under the RLA to opt for non-representation, the Board could not refuse to process a representation application after it determined that applicant intended to terminate collective representation if certified) . While not as direct as some commenters might like, the Board’s existing election procedures allow employees to rid themselves of a representative. Currently, an individual employee or group of employees who no longer desire to be represented by a union must solicit a showing of interest from their fellow employees and file an application with the Board. In the resulting election,

employees have the opportunity to vote for the incumbent or for the applicant with the understanding that the applicant if certified will subsequently disclaim interest in the craft or class extinguishing the certification. Under current election procedures, there is no opportunity to vote “no” or against representation entirely. Employees who want to vote “no” must instead abstain from voting. The proposed change will give these employees the opportunity to affirmatively cast a ballot for “no union.” Thus, in these circumstances, the NPRM would give employees an opportunity to vote for the incumbent, for the applicant, or to cast a ballot for no representation.

Southwest also suggests that the Board should amend its showing of interest requirement to require a 35% showing of interest regardless of whether the employees in the craft or class at issue are represented or unrepresented. The Board’s current election rules require a 35% showing of interest among employees who are unrepresented and a more than 50% showing of interest among employees who are already represented and covered by an existing collective bargaining agreement.

The Board does not believe that its showing of interest requirements should be changed. In carrying out its obligations under the RLA, the Board must balance competing statutory goals and the current showing of interest requirements are justified in the Board’s view by the benefit these requirements provide to preserve stability in collective bargaining relationships.

It is well-settled that a major objective of the RLA is “avoidance of industrial strife, by conference between the authorized representatives of employer and employee.” ABNE, 380 U.S. at 658 (quoting Virginian Ry., 300 U.S. at 547). The Russell court recognized that

[i]t cannot be gainsaid that the Act does in fact encourage collective bargaining as the mode by which disputes are to be settled and work stoppages avoided. Under the Act, Congress gave unions “a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry.” . . . The Board is therefore correct when . . . it argues that one of the Board’s purposes is to support collective bargaining.

714 F.2d 1332, 1342-43 (internal citations omitted). Thus, the Board must also foster stability in collective bargaining relationships to maintain industrial peace. As many commenters point out in opposition to the NPRM, representation elections and organizing campaigns which necessarily precede them cause unsettled labor conditions and foster instability. As previously discussed, the Board believes that changing its showing of interest requirements would more likely lead to instability than the proposed change to how it measures employee intent. For this reason, the Board has long required a majority showing of interest before authorizing an election that will disturb an existing collective bargaining relationship and it will continue to do so.

I. Impact of the Proposed Change on Section 2, Eleventh of the RLA

In their comment, U.S. Senators Lamar Alexander, Robert Bennett, Richard Burr, Saxby Chambliss, Bob Corker, Michael Enzi, Orrin Hatch, and Johnny Isakson state their concern that

[i]f minority unions are indeed permitted, both we and many of our colleagues will also be concerned with the impact of the mandatory union shop provisions which are permitted nationwide under Section 2, Eleventh of the Railway Labor Act. Unlike, the NLRA, the RLA has no carve-out or exclusion permitting the operation of state “right-to-work” laws. If the unions which are seeking mandatory dues payments do not have the active support of a majority of employees as shown in a secret-ballot election, it would not be appropriate to require employees who do not support the minority union to pay dues to that organization where state law is intended to protect their right to refuse to do so.

The Board believes that the proposed change will not affect Section 2, Eleventh for two reasons: first, the Board does not believe that its proposed change will lead to the certification of representatives that lack the support of a majority of employees; and second, the difference

between the union security provisions of the NLRA and RLA are premised not on whether majority of the craft or class means majority of eligible voters or majority of ballots cast but rather on a recognition of the interstate nature of air and rail transportation.

As discussed in Section III.D., the Board believes it has the statutory authority to certify a collective bargaining representative based on a majority of ballots cast whether or not there is majority participation in that election. Thus, the Board disagrees with the Senators' characterization of the NPRM as permitting the certification of "minority unions." There is no basis to believe that certification based on a majority of ballots cast results in a representative supported by a minority of employees in the craft or class. As previously stated, under the proposed change, employees will be able to vote for or against representation or refrain from voting and acquiesce in the will of the majority. The Board does not certify minority unions under its current election procedures and will not do so under the proposed rule. The Board requires certified representatives to bargain on behalf of all members of a class or craft and this requirement will not change under the proposed rule. Once certified by the Board as exclusive representative of a craft or class, the union has an obligation to represent fairly all employees in that craft or class.²⁶ Under the proposed rule, certified representatives will remain the exclusive representative of all members in a craft or class and the duty of fair representation will obligate them to represent all employees, even those who vote against representation. Attempts to characterize a certified representative under the proposed election rule as a "minority union" are misleading and inaccurate.

²⁶ Although the duty of fair representation is not explicitly set forth in the RLA, the courts have found that implicit in the principle of exclusive representation is the obligation to represent employees fairly and without discrimination. Louisville & Nashville R.R., 323 U.S. 192 (1944).

Section 2, Eleventh provides that, notwithstanding the law of “any State,” a carrier and an organization may make an agreement requiring all employees within a stated time to become a member of that organization provided there is not discrimination against any employee and that membership in the organization is not denied or terminated for “any reason other than failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.” 45 U.S.C. 152, Eleventh. Section 2, Eleventh, or the “union shop” provision of the RLA was added in 1951. Union shop agreements had been outlawed under the 1934 amendments when union shop agreements were used by employers to establish and maintain company unions “thus effectively depriving a substantial number of employees of their right to bargain collectively.” S.Rep. No.81-2262, at 3 (1951). By 1950, company unions in this field had practically disappeared. Id.

The legislative history also indicates that Section 2, Eleventh was intended to extend to “railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act.” 96 Cong. Rec. 17,055 (1951) (remarks of Rep. Brown). The RLA’s union shop provision was “substantially the same as those of the Labor-Management Relations Act [of 1947 or Taft-Hartley] as they have been administered and that such differences as exist are warranted by experience or by special conditions existing among employees of our railroads and airlines.” Id.

The legislative history notes that these “special conditions” were the federal nature of regulation of rail and air carriers and the system-wide representation and bargaining required under the RLA. In the floor debate in the House, in response to a question about whether

Section 2, Eleventh would recognize the validity of State right to work laws or supersede those laws, Rep. Biemiller stated:

We must recognize that all aspects of the economics of the railroad industry are under national control, not under State control. Since the passage of the Interstate Commerce Act in 1887, it has been wisely recognized that all matters relating to railroads whether they be rates or labor problems are much better handled by the Federal Government than they are by the various State governments. If we were to break down this Federal control in the field of railway labor we would be setting a precedent that could only lead to chaos in the entire railroad industry, because certainly the question of rates and other problems must stay in Federal hands. I think that point should be recognized very clearly when one talks about the possibility of trying to have State labor legislation apply to problems of railroad labor. After all we must also recognize that the contracts that are made between railroad management and railroad labor are made on a system basis; they are not made on a State-wide basis; some will cover as many as thirteen or fourteen States in their various terms. To try to break those down in terms of the conflicting laws of the thirteen or fourteen States covered by a particular railroad system would lead inevitably only to chaos.

96 Cong. Rec. 17,236 (1951). The differences in the union shop provisions of Section 2, Eleventh and the provisions of the NLRA were based on the recognized differences between the industries at issue. Representative Heselton stated that the House Committee on Interstate and Foreign Commerce specifically rejected adding language that would exclude union shop coverage in right to work states:

The second difference is the omission of the requirement contained in section 14(b) of the Labor-Management Relations Act [of 1947], which reads as follows:

Nothing in this act shall be construed as authorizing the exclusion or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Again, the committee [the House Committee on Interstate and Foreign Commerce] considered this carefully but decided not to include it. I think no one will dispute the fact that if any of our business units is primarily interstate in character, it is the transportation business and particularly railroads and airlines. Under the Railway Labor Act, agreements must be system-wide, and in an overwhelming number of instances, cross many State lines. Seniority districts

lap over from one State to another. Therefore any requirement which would exclude union shop coverage in those State prohibiting union shop agreements would be both illogical and unworkable.

96 Cong. Rec. 17238 (1951).

Thus, the decision by Congress to pre-empt state laws that would otherwise ban union shops is due to the interstate nature of air and rail transportation, the history of federal rather than state regulation of those industries, and the system-wide bargaining required under the Act. It is not premised on an interpretation of the “majority of craft or class” language of Section 2, Fourth.

J. Cost of the Proposed Change to the Board’s Election Procedures

In their comments, Littler and WestJet each raise the issue of the potential additional cost of the Board’s proposed change to its election rules. Littler suggests that costs “which may flow from the rule change” will affect both the Board itself as well as the regulated entities in the air and rail industries. Littler states that

the Board has not analyzed whether and how the new rule will increase the number of elections conducted by the Board in a given fiscal year, and whether the Board will need to increase its staff to conduct those additional elections within the required statutory timeframe. Carriers and unions will also bear additional costs if elections are more frequent due to the administrative requirements the Board places on them during the elections, not to mention the costs associated with conducting, organizing and election campaigns more frequently.

WestJet, a Canadian company, expressed its concern that the proposed rule would negatively affect any future decision to invest in the U.S. market because

[f]rom a financial standpoint, the likelihood of immediate unionization without support from a true majority of employees represents a substantial cost increase that WestJet could not ignore when making a decision to employ U.S. workers. This is not because of an increase in wages and benefits, which

WestJet sets at competitive levels. Rather, it would be the immediate costs associated with union elections, negotiations and grievances/arbitrations that would dissuade WestJet from expanding and creating jobs for U.S. citizens.

Both Littler and WestJet assume that implementing the proposed change must inevitably lead to more applications, more elections, and, as WestJet characterizes it, “immediate unionization.” Neither Littler nor WestJet, however, offers any factual support for their assumptions. The decision to invoke the Board’s services in a representation dispute rests entirely with an individual union or the affected employees. It is not a matter for the Board or for the carrier. The decision to proceed with an election depends upon the Board’s investigation of the dispute and a determination that certain threshold requirements have been met such as the showing of interest needed to trigger an election. See, e.g., 29 C.F.R. 1206.2, 1206.5; NMB Representation Manual §§ 3.601, 19.6, 19.601. Further, holding a representation election does not automatically result in a union victory. This has certainly been the Board’s experience under its current procedures and it is also true under the NLRA where bargaining representatives are certified based on a majority of ballots cast. For example, in its comment, Littler states

Our review of Board election data since 1935 shows that the union win rate in Board-conducted elections approaches sixty-eight percent (68%). By comparison, the union win rate in elections held during the same period under the NLRA, utilizing the election process currently being proposed by the Board, was only fifty-eight percent (58%).²⁷

The proposed change does not add a fee, require a payment or impose new burdens on either the Board or the participants in the election. The proposed rule would provide for

²⁷ In its comment, Delta provides similar statistics, stating that “[r]eview of NMB decisions reveals that the union success rate in NMB-conducted election under the RLA has been approximately 67.23% from 1935 to date. In contrast, the union success rate in NLRB elections has been approximately 54% from 1948 to date. (Data prior to 1948 is limited).”

certification of an employee representative based on a majority of ballots cast rather than a majority of eligible voters. Thus, the proposed change affects only one part of the Board's election procedure: the method used by the NMB to determine the outcome of a self-organization vote by employees after an application has been filed, and an election has been authorized. The Board believes that, regardless of the method used to determine the outcome of a representation election, it will continue to function within the budget appropriated by Congress and expeditiously resolve representation disputes under the RLA by investigating all applications filed and, when appropriate holding elections, as it has since 1934.²⁸ Further, as discussed below, the Board also believes that the proposed change to its election procedures will not impose any additional requirements or costs than are already necessary to effectuate the Congressional intent to guarantee employees in the air and rail industries the right to organize and chose a collective bargaining representative free from any carrier interference or influence.

The NPRM does not alter the limited role prescribed by statute for carriers in representation disputes. From its inception, the NMB has understood that Congress intended to eliminate the carrier, as a party, from any representation dispute. 1 NMB ANN REP 4 (1935). Under Section 2, Ninth of the Act, the Board is authorized to resolve disputes between

²⁸ It should also be noted that the "required statutory timeframe" noted by Littler refers to the language of Section 2, Ninth that provides that "it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days" the name of the individual or organization authorized to represent the affected employees. It is well-settled that this time provision is directory rather than mandatory. See, e.g., Air Florida v. NMB, 534 F. Supp. 1, 11 (S.D. Fla. 1982)(citing System Fed'n v. Virginian Railway, 11 F. Supp. 621, 627 (E.D. Va. 1935), aff'd. 84 F.2d 641 (4th Cir. 1936), aff'd. 300 U.S. 515 (1937)); In re Continental Airlines, Corp., 50 B.R. 342, 348 n. 3 (S.D.Tex. 1985).

employees as to whom, if anyone, shall represent them in collective bargaining. The dispute is not between employees and the carrier. Thus, as the courts have long recognized, the only proper parties to the NMB's representation proceedings are employees and their potential bargaining representatives. ABNE, 380 U.S. at 667. As has been previously discussed, carriers cannot invoke the NMB's services in a representation dispute. Ry. Labor Executives' Ass'n, 29 F.3d at 664-66 (D.C. Cir. 1994). Carriers have no vote in representation elections and the Act forbids them from interfering or influencing their employees' organizational efforts and choice of representative.²⁹ Littler refers to the "administrative requirements" demanded by the Board during the election, but the only direct burden provided by the RLA is authority to have access to carrier records when necessary. Thus, the Board requires the carrier to supply the information needed for holding an election, such as a list of eligible employees in the craft or class.

The carrier's limited role in representation proceedings has long been recognized by the courts. In ABNE, the Court rejected the carrier's claim that it should be accorded a greater role in the Board's representation investigations, noting that "while the Board's investigation and resolution of a dispute . . . might impose some additional burden upon the carrier, we cannot say that the latter's interest rises to a status which requires the full panoply of procedural protections." 380 U.S. at 668. In In re Continental Airlines, Corp., 50 B.R. 342 (S.D. Tex. 1985), the bankruptcy court rejected Continental's argument that a representation election among its

²⁹ 45 U.S.C. Section 151a. The second and third general purposes of the Act are "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; [and] (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter. . . ."

employees should be stayed because the substantial costs of responding to any union campaign would irreparably harm its reorganization efforts. The bankruptcy court stated that

At best, that argument is irrelevant – for Continental’s anti-union activity is a purely voluntary undertaking. At worst, the substantial expenditures contemplated could possibly be illegal – for the RLA repeatedly prohibits carriers from in any way interfering with or influencing employees’ organizational efforts or choice of a bargaining representative.

50 B.R. at 354. Likewise, the NPRM does not alter the role or obligation of the union in a representation dispute. The Board once again notes that decision to undertake an organizing campaign and file an application with the Board rests entirely with the union. The union applies its own cost benefit analysis to make that decision and the Board has no basis for concluding that the change proposed by the NPRM will outweigh every other consideration that goes into such a decision. Once a union has invoked the Board’s process, it has surely determined that the costs of seeking an election are worth bearing.

Finally, the Board notes that the proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA)³⁰ and, pursuant to Section 605 of the RFA, the Board has certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. Clarification to NPRM, 74 FR 63,695 (Dec. 4, 2009).

K. Effect of the NPRM on other Election Procedures

³⁰ Under the RFA, a federal agency must prepare a regulatory flexibility analysis and assessment of the economic impact of its proposed rule on small business entities, unless the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, and provides a factual basis for that certification. 5 U.S.C. 601, et seq.

In its comments in opposition to the NPRM, ASC suggests that the Board has created uncertainty for its constituents by failing to undertake a global overhaul of its election procedures.³¹ The Board does not believe that the NPRM creates uncertainty regarding its election procedures. As has been previously discussed, the proposed change affects only one part of the Board's election procedure: the method used by the NMB to determine the outcome of a self-organization vote by employees after an application has been filed, and an election has been authorized.

1. Second Elections/Run-Off Elections

ASC expresses its concern that the NPRM does not address how the change in interpretation of "majority of the craft or class" will affect multi-union elections. While the Board acknowledges that its Representation Manual, which provides procedural guidance to

³¹ ASC, in its comment, also asks whether the Board has left in "limbo" a request from the IBT that the Board change its policies and require carriers in representation disputes to provide the applicant organization with a list of employee names and addresses (comparable to the Excelsior list required in NLRB representation cases). This request was made in the context of a representation case involving Continental Airlines with the IBT requesting that the "Board provide the organization with a list of employee names and addresses in this case." During the pre-docketing investigation of this case, the IBT, by letter dated December 7, 2009, withdrew the request in that case and asked to proceed to an immediate election under the existing election procedures. The Board granted the request, an election was authorized, and the tally was held on February 12, 2010.

ASC also states the Board should not ignore the impact of the NPRM on "critical standards that the Board has consistently and historically applied. For instance, the Board has long recognized the propriety of system-wide crafts or classes." While the Board appreciates ASC's concerns, the change proposed in the NPRM is limited to modifying the method used to determine the craft or class representative based on a majority of valid ballots cast rather than a majority of eligible voters and to provide employees with an opportunity to vote "no" or against union representation. The NPRM has no impact on the Board's policies and case law with respect to craft or class or system determinations.

participants,³² will have to be modified once the proposed change becomes effective, the Board's existing rule regarding run-off elections continues to apply and addresses ASC's concerns. The Board's rule provides:

(a) If in an election among any craft or class no organization or individual receives a majority of the legal votes cast, or in the event of a tie vote, a second or run-off election shall be held forthwith: Provided, That a written request by an individual or organization entitled to appear on the runoff ballot is submitted to the Board within ten (10) days after the date of the report of results of the first election.

(b) In the event a run-off election is authorized by the Board, the names of the two individuals or organizations which received the highest number of votes cast in the first election shall be placed on the run-off ballot, and no blank line on which votes may write in the name of any organization or individual will be provided on the run-off ballot.

(c) Employees who were eligible to vote at the conclusion of the first election shall be eligible to vote in the run-off election except (1) those employees whose employment relationship has terminated, and (2) those employees who are no longer employed in the craft or class.

29 CFR 1206.1. Applying the existing run-off rule to the hypothetical election tally proposed by ASC, namely that where 100 ballots are cast with 20 for Union A, 45 for Union B, and 35 for no representation, a run-off election will be held between union A and union B provided one submits a timely written request to appear on the ballot as required by 1206.1(a). It is equally clear under the existing rule, that where a majority of employees have cast valid ballots for representation, the appropriate choice once a run-off election is authorized is between the two individuals or organizations that received the highest number of votes. The Board disagrees with ASC's assertion that, under the NPRM, there is no basis for aggregating votes cast for representation. To the contrary, where a majority of employees indicate a preference for

³² The Representation Manual is an internal statement of agency policy and not a compilation of regularly promulgated regulations having the force and effect of law. Hawaiian Airlines v. NMB, 107 LRRM 3322 (D. Haw. 1979)., aff'd without op. 659 F.2d 1088 (9th Cir. 1981).

representation, the Board's duty is to determine which individual or organization is the ultimate employee choice through a run-off election.³³

2. Election Interference Remedies

The ASC raised a concern over the fact that the proposed rule would result in what is currently referred to as a Laker ballot being used in all NMB elections. Currently, a Laker ballot is sometimes used in a re-run election following the Board's determination of carrier election interference. In recent years, it has been used on occasions when the Board has determined that a standard re-run election would not allow it to ascertain the desires of employees regarding representation. *See, e.g., Aeromexico*, 28 NMB 309 (2001) (determining that carrier's post-election interviews of members of the craft or class interfered with laboratory conditions, violated the secrecy of the ballot, coerced employees in the exercise of their rights, and interfered with Board's investigation).

It is inaccurate to describe the rule in that way because the Board has never indicated that it was changing its ballot to remove the write-in option. The Laker ballot is a yes/no ballot and does not include a write-in option. In the NPRM, the Board proposed a narrowly focused change to its election procedures to allow that a majority of valid ballots cast will determine the craft or class representative. The NPRM did not describe the new election procedures as

³³ Contrary to our dissenting colleague's contention, the Board has never suggested that the purpose of the NPRM is to conform the NMB's voting procedures to those of the NLRB. As the Board has repeatedly noted, the aim of the Board is to more accurately ascertain the clear, uncoerced choice of a bargaining representative, if any, by the affected employees. Further, in the hypothetical Chairman Dougherty poses in her dissent, a majority of those casting ballots have indicated a preference for a bargaining representative. Accordingly, the only question left to be determined is which of the two organizations will ultimately be chosen as the affected employees' representative. A run-off election under the Board's existing rules will resolve that question.

identical to either NLRB election procedures or to the Board's Laker ballot procedures. Nor did it describe the proposed rule as resulting in a yes/no ballot. Under the new rule, the Board will provide an opportunity for employees to vote "no" or against union representation. This change is required where certification is based on a majority of ballots cast, because to ensure employee freedom of choice, voters need to be able to choose not to be represented. Under the new rule, the Board will no longer presume that the failure or refusal of an eligible employee to vote is a vote against representation. Instead, employees who do not wish to be represented will affirmatively vote "no." The rule does not alter the Board's practice of allowing write-in votes.³⁴ Write-in votes are a common characteristic of all NMB elections except where a run-off or Laker election is conducted. International Total Services, 16 NMB 231, 233 (1989) (rejecting union objection to inclusion of write-in option since the provision for write-in votes in

³⁴ Since under the rule, the Board is maintaining its practice of allowing write-in votes there is no substantive change requiring additional comment as suggested by our dissenting colleague. Chairman Dougherty states that "this rulemaking violates the 'logical outgrowth test'" because interested parties could not have reasonably anticipated the final rule from the draft rule in NPRM. To be sure, "logical outgrowth" test applies where an agency changes its final regulation in some way from the proposed regulation for which it provided notice and requested comment, as required under the APA. City of Waukesha v. EPA, 320 F.3d 228, 245 (D.C. Cir. 2003). In the instant rulemaking, however, the Board is adopting the proposed rule as the final rule. The NPRM described the proposed changes to the election procedures with the required specificity. The Board proposed to certify representatives based on a majority of ballots cast and, as an inherent part of this change, to provide eligible voters with the opportunity to vote "no" or against representation. The Board did not propose to depart from its longstanding write-in practice. The Board did not propose other changes to its election rules. There is no basis to assert that interested parties did not understand what changes to comment upon since the Board sought comment on the only changes it is proposing to make. Further, since the Board has always counted valid write-in votes as votes for representation and will continue to do so, there is no potential effect on the outcome of elections. Valid votes for the applicant organization or any other organization or individual will be counted as votes for representation. The change under the rule is that only "no" votes will be counted as votes against representation. This change was clearly set forth in the NPRM, commented upon by interested parties, and adopted as part of the final rule.

NMB elections has remained largely unchanged for over 50 years). Moreover, the Board's experience has shown that the write-in vote is an effective means for permitting employee freedom of choice, as in some cases write-in candidates have received sufficient votes to be certified by the Board. Id. See also, Zantop Int'l Airlines, Inc., 9 NMB 70, 77 (1981) (The write-in option "allows the eligible voter to indicate whether he desires representation by the applicant organization or any other organization or individual. Such a ballot allows the Board to ascertain the name of the duly designated and authorized representative of the employees.").³⁵

ASC, in its comment, expressed concern that the Key ballot, currently used as a remedy only in egregious instances of election interference, will become more widely used because, in its view, the Laker ballot remedy is no longer an option. When the Key ballot is used, an election results in union certification unless a majority of eligible voters return votes opposing representation. Key Airlines, 16 NMB 296 (1989). It has been used rarely by the Board except in cases of most egregious carrier interference. See, e.g., Washington Central Railroad, 20 NMB 191 (1993)(carrier polled employees about union support, discharged union supporters, and tried to coerce an employee to withdraw a lawsuit based on the carrier's violations of the RLA).

The Board has sole authority to determine the remedy for election interference. See, e.g. LGS Lufthansa Serv. v. NMB, 116 F.Supp.2d 181 (D.D.C. 2000) (holding that the Board's decision to hold a Laker ballot election was unreviewable by the court); Aircraft Mechanics Fraternal Ass'n v. United Airlines, Inc., 406 F.Supp. 492 (N.D. Cal. 1976). Unlike the NLRB, the Board does not have the power to issue unfair labor practices charges; however, under Section 2, Ninth of the

³⁵ In affirming the Board's determination in Zantop, the court of appeals held that the RLA gives the Board the discretion to select the form of ballot and such a selection is not subject to judicial review. Zantop Int'l Airlines, Inc. v. National Mediation Bd., 732 F.2d 517, 521 (6th Cir. 1984).

Act, the Board has the duty to ensure that employees' choice of representative is made without carrier influence, interference or coercion. See United Airlines, 406 F.Supp.at 498 n.5, 502-03. ("Thus the 1934 amendments gave plenary power to the Board to deal with employer influence in the designation of representatives, rendering judicial intervention unnecessary.") The test in any case of alleged interference in a Board election is whether the laboratory conditions which the Board seeks to promote have been contaminated. Zantop International Airlines, 6 NMB 834 (1979). In order to remedy such interference and ensure that employees are able to choose their representative without carrier interference, the Board has on occasion fashioned an election with rules differing than those under what has been its standard ballot. In response to carrier interference in Laker Airways, Ltd., 8 NMB 236 (1981), the Board held a ballot box election with a yes/no ballot. In Laker, the majority of those employees actually casting ballots determined the outcome of the election, regardless of whether a majority of employees participated in the election. Id. at 257.

While the Laker ballot has been used in instances of carrier interference, the most common remedy for election interference has been a re-run election using the Board's standard election procedures. In recent years, a standard re-run election has been the Board's remedy in even very serious instances of election interference. See, e.g., Stillwater Central Railroad, Inc., 33 NMB 100 (2006)(carrier conducted frequent meetings, interrogated employees about their union views, and granted wage increases and improved working conditions during the laboratory period); Pinnacle Airlines Corp., 30 NMB 186 (2003)(carrier wrongfully terminated a union supporter and engaged in surveillance of employees during the laboratory period).

The Board has the discretion to respond to allegations of election interference as it sees fit according to the unique facts of each case before it. See Switchmen's Union, 320 U.S. 297.

Under the rule, the Board will continue to investigate allegations of election interference and determine when laboratory conditions have been tainted. The Board will consider appropriate remedies, including the Key ballot remedy, on a case by case basis, determine what is most appropriate, and explain its rationale in each case.

IV. Conclusion

Based on the rationale in the proposed rule and this rulemaking document, the Board hereby adopts the provisions of the proposal as a final rule. This rule will apply to applications filed on or after the effective date.

Dissenting Statement of Chairman Dougherty

Chairman Dougherty dissented from the action of the Board majority in adopting this rule. Her reasons for dissenting are set forth below.

For 75 years, through twelve Presidential administrations, the National Mediation Board (NMB or Board) has conducted representation elections by requiring that a majority of eligible voters in a craft or class vote in favor of representation in order for a representative to be certified. This method of voting provides the most certain way of determining whether the majority of the craft or class affirmatively desires to change the status quo, and, as the Board has stated many times, it serves the Board's primary statutory mandate of maintaining labor stability in the airline and railroad industries.

I dissent from the rule published today for the following reasons: (1) the timing and process surrounding this rule change harm the agency and suggest the issue has been prejudged; (2) the Majority has not articulated a rational basis for its action; (3) the Majority's failure to amend its

decertification and run-off procedures in light of its voting rule change reveals a bias in favor of representation and is fundamentally unfair; and (4) the Majority's inclusion of a write-in option on the yes/no ballot was not contemplated by the Notice of Proposed Rulemaking (NPRM) and violates the notice-and-comment requirements of the Administrative Procedure Act (APA).¹

I also note the conflicting nature of several portions of this rule and preamble. As discussed further below, in several instances the Majority arbitrarily favors a rationale when it advantages the cause of representation, and then rejects the identical rationale when it supports the right of employees to be unrepresented. These strategic inconsistencies contribute to the appearance that this rulemaking has been a premeditated attempt to advantage certain interests over others.

Procedural Concerns

In my dissent to the NPRM, I voiced concerns about the negative perceptions this rule change and its process have created for the NMB. I renew those concerns here. For decades, the Board consistently upheld the current election rule and repeatedly promised its constituents that any consideration of a rule change would follow the procedures used in 1985 following petitions from the International Brotherhood of Teamsters (IBT) and the Chamber of Commerce (Chamber). Delta Air Lines, Inc., 35 NMB 129 (2008); Chamber of Commerce, 14 NMB 347 (1987). The Board has also consistently stated that it would require a heightened standard of

¹ I do not address the Board's statutory authority to make the rule change because my strong view that this rulemaking is bad public policy and violates the APA gives me sufficient cause to dissent from the action of the Majority and makes it unnecessary for me to reach the question of statutory authority.

proof. Delta, 35 NMB at 132; Chamber, 14 NMB at 356. Even if my colleagues believe they are not legally obligated to comply with the Board's previously established standards, the Board should have carried through on the promises made to its constituents. An agency should not always act simply because it thinks the law does not prohibit it from acting. I believe independent agencies have an obligation to avoid even the appearance of impropriety. The Board's failure to do so in this instance has damaged the Board's reputation. This damage could have been prevented had the Board chosen to follow a more participatory procedure.

My colleagues have provided absolutely no reason for their failure to comply with the Board's past promises except that they believe they are not legally bound. This leaves the impression that they rejected the more searching procedure because their minds were already made up about the outcome. The Majority's failure to follow the procedures and standards the Board had set for itself – so soon after a majority-changing Presidential election and in the midst of several large representation elections² – creates the perception that the Board prejudged the issue and is acting out of political motivation. My concerns about political motivation and prejudgment are deepened by the fact that, as I previously discussed in a letter to several United States Senators,³ I was excluded from the process of crafting the NPRM and given bizarre and arbitrary deadlines for drafting a dissent – actions which defied any reasonable, innocent explanation. In the interest of preserving the good reputation of this independent agency and

² That some view this rule change as intertwined with large elections at Delta is made clear by the fact that both the International Association of Machinists (IAM) and the Association of Flight Attendants (AFA) withdrew representation applications either shortly before or on the day the NPRM was published. The AFA's withdrawal letter dated November 3, 2009, in NMB Case No. CR-6957 plainly stated it was withdrawing its application in anticipation of the rule change.

³ The letter was sent on November 2, 2009 to United States Senators Johnny Isakson, Bob Corker, Jim Bunning, Robert Bennett, Saxby Chambliss, George Voinovich and Orrin Hatch.

avoiding the appearance of predetermination, we should have followed the Chamber of Commerce procedures and been mindful of appearances relating to the current representation landscape.

Two entities, the Air Transport Association (ATA) and the National Right to Work Legal Defense Foundation (Right to Work), filed motions to disqualify Members Hoglander and Puchala from consideration of this rule change because of alleged prejudgment. In denying the motions for their own recusal, my colleagues claim “[t]he Board majority followed the mandates of the APA in considering, drafting, adopting, and promulgating the NPRM.” However, the Majority has failed to address or explain my exclusion and other procedural defects in the filing of the NPRM, including the censorship of my dissent from the NPRM. These defects should be explained, and their impact on the issue of prejudgment and inconsistency with the APA should be addressed. Because the Majority has not addressed these issues, I do not join my colleagues in rejecting the motions for disqualification.

Insufficient Justification for the Rule Change

The Majority’s stated justification for the rule change is that “this change will more accurately measure employee choice in representation elections.” This justification fails the APA’s arbitrary and capricious test because the assertion that the new rule will be better than the old rule at measuring employee choice is incorrect. Additionally, the Majority has failed to provide a rational basis for the timing of the change and has ignored the complexities of the RLA and the Board’s frequently-affirmed reasons for its current election rule. The capriciousness of the Majority’s stated justification is further demonstrated by its decision to ignore the RLA’s

labor stability mandate in making this rule change while simultaneously relying on it as an excuse for not making another change.

As an initial matter, the Majority's assessment of the burdens placed on it by the APA is incorrect. The Majority suggests that Federal Communication Commission v. Fox Television Stations, 129 S. Ct. 1880 (2009), allows it to change 75 years of precedent without providing a reason why this change is necessary at this time. In the preamble, the Majority takes the position that Fox requires only the barest minimum justification and does not require explanation of its rejection of the reasons for the existing rule. This ignores Justice Scalia's statement in Fox that "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." Id. at 1811. Also, Justice Kennedy's concurrence clearly states: "an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so," and "[a]n agency cannot simply disregard contrary or inconvenient factual determinations it made in the past. . . ." ⁴ Id. at 1824 (Kennedy, J., concurring).

Fox also does not overrule the significant body of APA law requiring that an agency "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfr. Ass'n of the United States v. State Farm Auto. Ins. Comp., 463 U.S. 29, 43 (1983) (internal citation

⁴ When, as in Fox, there is no majority opinion, the Court's holding is the position taken by those justices "who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (internal citation omitted). Both Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion agree that agencies cannot simply ignore prior determinations. See Fox, 129 S. Ct. at 1811.

omitted). Moreover, “an agency changing its course must supply a reasoned analysis. . . . [I]f it wishes to depart from its prior policies, it must explain the reasons for its departure.”

Panhandle E. Pipeline Co. v. Fed. Energy Regulatory Comm’n, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (internal citations omitted). Thus, the Majority must give a rational explanation for the new rule, and it must also give a rational explanation for the decision to make the change and reject the facts and circumstances underlying the old rule.

I first dispute the Majority’s contention that the new rule will more accurately measure employee choice. The most accurate way to measure whether a majority of a craft or class affirmatively desires representation is to require that a majority of eligible voters vote in favor of representation. Anything short of this does not determine whether a majority of voters truly desires to change the status quo. As the National Railway Labor Conference (NRLC) stated in its comment, “there is no evidence for the assumption that any significant percentage of employees who do not vote do so because of reasons other than a desire to maintain the status quo.” The Board has very clear voting instructions, and there is no evidence employees are unable to understand that a failure to vote is not an affirmative vote for representation. As aptly stated in 2003 by the Air Line Pilots Association (ALPA) in response to the Board’s request for comments on the implementation of Telephone Electronic Voting (TEV), “the Board’s successful balloting process . . . allows a voter to effectively cast a vote against any and all representation by simply not submitting a ballot.” (Emphasis in original)

The Majority claims that this rule does not accurately measure the intent of those who do not vote because of illness, travel, religious reasons, apathy, or a desire to abstain from voting. The plight of those who are unable to vote due to illness, travel, or religious objections is of equal concern under either voting rule and does not support a rule change. For example, in

an election under the new rule if a majority of votes cast are for “no union,” a religious objector who prefers representation but could not vote in the election would be just as disenfranchised under the new rule as he or she hypothetically would be under the current rule.⁵ The same is true for someone who is unable to vote because of illness or travel.⁶ The argument made by several commenters that the new rule is better because it is appropriate to assume those who do not vote wish to “acquiesce in the will of the majority” simply does not apply to individuals who are somehow prevented from voting even though they may have a preference in the election. Thus, the new rule is no better measure of the intent of these individuals, and these hypotheticals do not provide a rational basis for the new rule. As for those who do not vote due to apathy or a desire to abstain from voting, their votes are appropriately measured as not affirmatively desiring a change in the status quo.⁷ Moreover, the current rule is a much better

⁵ Although I am sympathetic – under either rule – to the argument that there are employees who may not be able to vote due to religious reasons, we received only anecdotal, second-hand accounts that this occurs, and there is no evidence it is widespread. In the rare case where someone is unable to vote due to religious objections, surely the Board could find a way to accommodate these employees without changing an important 75-year-old rule that serves a critical function in carrying out the Board’s statutory mandate.

⁶ I also note that concerns about inability to vote due to travel or illness are purely speculative. The Board always allows at least three weeks (and frequently longer) for voting to take place. Employees are able to vote (or not vote) from a telephone or computer anywhere in the world. There is no evidence in the record that travel or illness is preventing anyone from expressing choice under the NMB’s current rule.

⁷ As discussed below, in addition to providing a good measure of intent, requiring affirmative votes for representation plays an important role under the RLA. Requiring everyone who wants a change in the status quo to register an affirmative vote ensures true majority support for certified representatives and furthers the RLA’s statutory mandate of maintaining labor stability. The interests of apathy or a theoretical “right” to abstain from voting – mentioned nowhere in the RLA – cannot possibly trump the explicitly articulated statutory mandate of avoiding interruptions to commerce, which is best served by the current rule.

measure of the intent of non-voters than the new rule.⁸ Under the current system, the NMB, unions, and often carriers spend a great deal of time and resources making sure employees know exactly what it means if they do not vote. Thus, when an employee chooses not to vote under the current rule, there is far more certainty of his or her intent than there will be under the new rule. The new rule does not provide a better measurement of the intent of those who do not vote, and the Majority has not sufficiently supported this rationale.

Even assuming the new rule provides a better measurement of employee intent than the current rule, the Majority has failed to articulate any valid reason for making this arbitrary change at this time. To be sure, “an agency must be given ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’” State Farm, 463 U.S. at 41 (internal citation omitted, emphasis added). However, this assumes some changed circumstances underlie the rulemaking. As discussed above, an agency must articulate and support a rational basis for making a change. The Board articulated its rationale for the current rule 60 years ago (see Sixteenth Annual Report, discussed below) and has consistently confirmed it ever since, including as recently as 2008. Delta Air Lines, Inc., 35 NMB 129, 132 (2008). Moreover, the

⁸ The analogy to political elections made by some commenters in favor of the rule is misplaced. As several opposing commenters noted, union elections under the NMB often address the threshold question of whether there is to be representation at all. That question is already settled in political elections. Moreover, elected officials stand for re-election after a set period of years. Clearly no such re-certification requirement applies to unions. Quite the contrary, once they have been elected, Board procedures make it extremely difficult for unions to be removed. Quorum requirements, cited by several commenters, including NRLC, labor and employment law firm Littler Mendelson, P.C. (Littler), and Watco Companies, Inc. and Genesee & Wyoming, Inc. (Watco), are also prevalent in voting procedures around the world and provide the more appropriate analogy in the RLA context where it is particularly important to ensure that a small faction does not dictate the outcome of the elections. The issue of decertification and the importance of true majority support under the RLA are discussed more fully later in my dissent.

Board has never before expressed concern about whether the current rule provides a sufficient measurement of employee choice. To the contrary, the manner in which the NMB has conducted elections has for 75 years been considered an excellent method of measuring employee choice. As the Supreme Court stated in Brotherhood of Railway and Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees, (ABNE), “the fair and equitable manner in which the Board has discharged its difficult function is attested by the admirable results it has attained.” 380 U.S. 650, 668 (1965). In the words of ALPA in its 2003 TEV comments, “[t]he Board’s balloting procedures are well-established, time-tested and should be maintained.” ALPA also described the Board’s election history as “balanced and successful.” As recently as 2008, the Board rejected a request to change its voting procedures and affirmed its reliance on the Chamber of Commerce decision discussed below. Delta Air Lines, 35 NMB at 132.

What, then, has caused the Board to suddenly decide that the new rule is better than the old rule? The Majority does not offer any changed circumstances or any explanation whatsoever for why employee choice is now a dispositive concern when it was not as recently as 2008. Courts have found arbitrary and capricious an agency’s reversal where it has recently affirmed its previous policy and provided no reasons for the timing of the change. See MCI Worldcom, Inc. v. Gen. Serv. Admin., 163 F.Supp.2d 28 (D.D.C. 2001) (holding that the agency’s actions were arbitrary and capricious when it changed a policy two years after assuring the parties that it would not be making that change). Without any explanation for the newfound concern for employee choice, our constituents are left to draw unattractive inferences involving a shift in political power and the imminence of several large representation elections – the only circumstances that have changed at the Board since the current election rule was definitively articulated in 1985 and last upheld in 2008.

Not only has the Majority failed to explain the timing of the rule change, it has also failed to provide “a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy,” as required by Fox. 129 S. Ct. at 1811. In dismissing its obligation to explain its rejection of the Board’s rationale for the current rule, the Majority argues essentially that the Board had no rationale, relying on an early annual report suggesting the Board adopted the current rule based on what the Board deemed best “from an administration point of view.” The Majority also cites some commenters’ speculation that the rule was initially a reaction to widespread company unionism. The Majority’s reliance on these “justifications” is disingenuous. As the Majority knows, the Board has long viewed its current election procedure as necessary to carry out the Board’s statutory mandate of maintaining stable labor relations in the airline and railroad industries. The primary purpose of the RLA is “to avoid any interruption to commerce or to the operation of any carrier engaged therein.” 29 U.S.C. §151a(1). The Board first recognized that its current election rule was essential to carrying out this statutory duty in its Sixteenth Annual Report:

In conducting representation elections the Board has for many years followed a policy of declining to certify a representative in cases where less than a majority of the eligible voters participated by casting valid ballots. This policy is based on Section 2, Fourth of the act which provides that “the majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class.” These provisions appear to fully support the Board in declining certifications in cases where only a minority of the eligible employees participates in elections.

. . . .

Under the Railway Labor Act it is the primary duty of carriers and employees “to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes . . . in order to avoid any interruptions to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.” The Board is of the opinion that this duty can more readily be fulfilled and stable relations maintained by a requirement that a majority of eligible employees cast

valid ballots in elections conducted under the act before certifications of employee representatives are issued.

16 NMB ANN. REP. 20 (1950).

This rationale has been repeatedly affirmed in the Board's Annual Reports. Chamber of Commerce, 14 NMB at 355 (citing the NMB's 44th through 49th Annual Reports). Most significantly, the Board's rationale was emphatically articulated in 1986 when, after receiving competing requests to change its voting rules, the Board engaged in an extensive fact-finding process involving live testimony, cross examination of witnesses, and a period for comment. Chamber of Commerce, 13 NMB 90 (1986). Subsequently, the Board issued a decision affirming the current rule and providing a further discussion of the reasons for the rule:

One need look no further than to the area of potential strikes to conclude that certification based upon majority participation promotes harmonious labor relations. A union without majority support cannot be as effective in negotiations as a union selected by a process which assures that a majority of employees desire representation.

....

The level of proof required to convince the Board the changes proposed are essential is quite high, and has not been met. The IBT proposals would render Board election procedures similar to those of the National Labor Relations Board. Yet the degree of organization among employees covered by the Railway Labor Act is significantly higher than that among employees covered by the NLRA. This fact is one of many factors which persuade the Board that it should not alter its current representation election procedures.

Chamber of Commerce, 14 NMB at 362-363.

This labor stability rationale – definitively laid out after extensive fact-finding in the Chamber of Commerce decision – is the relevant yardstick against which the sufficiency of the Majority's justification for the rule change must be measured. There can be no doubt that the reason for the Board's current election rule is to effectuate the Board's mandate to maintain

stability in the airline and railroad industries, not hypothetical past concerns about company unionism or mere administrative convenience.

The Majority dismisses concerns about labor stability, stating that these concerns are “mere speculation” and that stability is related only to the existence of collective bargaining agreements and the Board’s mediation function. Thus, the Majority argues – incredibly – that every Board over the last 60 years has simply been wrong. Unfortunately for the Majority, they cannot ignore the past findings of the Board merely because they are “inconvenient.” Fox, 129 S. Ct. at 1824 (Kennedy, J., concurring). The conclusions in the Chamber of Commerce decision that the duty to make and maintain collective bargaining agreements “can be more readily fulfilled and stable relations maintained by a requirement that a majority of eligible employees cast valid ballots” and that “a union without majority support cannot be as effective in negotiations as a union selected by a process which assures that a majority of employees desire representation” were upheld after extensive fact-finding. Moreover, the record of this rulemaking contains several comments supporting these findings based on the wide-ranging experience of commenters such as Union Pacific Railroad Company (UP), TTX Company (TTX), Watco, NRLC, Littler, the National Air Transportation Association’s Airline Services Council (ASC), the Cargo Airline Association (CAA), and the Regional Airline Association (RAA). The primary statutory goal of the RLA – “to avoid any interruption to commerce or to the operation of any carrier engaged therein” – is the very first item mentioned in the general purposes section of the act and is not limited to the Board’s mediation function. Indeed, there are several examples of distinctive practices the Board employs outside of the mediation function in recognition and furtherance of the goal of avoiding labor unrest. For example, unions under the RLA must

organize across an entire transportation system⁹ – often over enormously wide geographic areas including large numbers of people. This requirement to organize system-wide crafts or classes clearly serves the goal of labor stability. See Charles Rhemus, The National Mediation Board at Fifty, 16 (1985) (“The system-wide bargaining units . . . are essential to stability and continuity of service in both transportation modes.”). Moreover, the NMB requires a higher showing of interest – more than 50 percent of the craft or class – to challenge an incumbent. This is contrasted with a 30 percent requirement at the National Labor Relations Board (NLRB). The Majority itself emphasizes the role of this representation rule in maintaining labor stability. In rejecting calls to reduce the showing of interest requirement, the Majority states: “[T]he Board must also foster stability in collective bargaining relationships to maintain industrial peace.” The Majority also states “[i]n the Board’s view, maintaining the higher showing of interest requirement for crafts or classes that are already represented will prevent the types of disruptions in representation that several commenters express concern about.” Thus, the Majority is happy to acknowledge the stabilizing role of representation procedures when it suits its purposes, but summarily dismisses it when it is “inconvenient.”

Additionally, the Majority has missed the point on several of the labor stability arguments. In dismissing the labor stability issue, the Majority focuses on authorized work stoppages as the sole source of instability. However, several commenters expressed concerns that unions without true majority support will (1) have more difficulty ratifying agreements

⁹ It is well settled that the Board applies the term “craft or class” under the RLA on a system-wide basis. Delta Air Lines Global Servs., 28 NMB 456, 460 (2001); American Eagle Airlines, 28 NMB 371, 381 (2001); American Airlines, 19 NMB 113, 126 (1991); America West Airlines, Inc., 16 NMB 135, 141 (1989); Houston Belt & Terminal Railway, 2 NMB 226 (1952).

made in collective bargaining; (2) be more susceptible to organizing drives;¹⁰ and (3) be unable to prevent unauthorized work stoppages by a membership that does not feel allegiance to the certified representative.¹¹ The Majority did not adequately address the disruptions to the public, employees, unions, and carriers caused by these specific issues, even in the absence of an authorized work stoppage. In particular, the rule's preamble is completely silent on whether it would be more difficult for a union without true majority support to prevent unauthorized work stoppages. This failure is clear evidence of the arbitrary and capricious nature of this rulemaking. See State Farm, 463 U.S. at 43 ("Normally an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem . . .").

In summary, the Majority has not provided a rational explanation for its new rule, the timing of the rule change or the rejection of the facts and circumstances underlying the current rule.

DECERTIFICATION

¹⁰ The Majority states that the concerns about union raiding are misplaced because the showing of interest requirements will remain the same. This ignores the fact that, regardless of the showing of interest requirements, a weak union is more likely to face organizing drives which, according to several commenters, are in and of themselves disruptive.

¹¹ These commenters include, RAA, UP, TTX, Watco, NRLC, Littler, ASC, and CAA. With regard to work stoppages, the Majority cites a commenter's claim that a weak union is less likely to win a strike vote for a union-approved work stoppage. The Majority also cites the Board's mediation function as the Board's primary protection against strikes. These points totally ignore the question of a weak union's inability to prevent unauthorized work stoppages. Neither a failed strike vote nor the Board's mediation function addresses this type of interruption.

My colleagues' failure to seek comment on or incorporate a decertification provision is further evidence that the Majority's action is biased and does not meet the APA's arbitrary and capricious standard. If the Board is going to elevate the cause of measuring employee intent above all else in order to overturn its longstanding election rules, those same interests – as well as basic fairness – dictate that the Board must give employees a clear means of choosing not to be represented. The Majority dismisses arguments regarding decertification, asserting only that the current "procedure" is sufficient. Given that the stated purpose of the rule change is to "more accurately measure employee choice," the Majority's position on decertification strains credulity. The most confusing and obfuscatory practice in all of the Board's representation procedures is the Board's convoluted decertification process. This process, not the current voting rule, is clearly the biggest obstacle to employee expression of choice under the RLA. Under the current decertification procedure, employees who no longer wish to be represented by a union must select an individual to stand for election (the so-called "straw man"), convince a majority of the eligible voters in the craft or class to sign authorization cards for that individual (while attempting to explain that this individual is not actually going to represent them), and then file an application with the Board. If the requisite showing of interest is met, an election is authorized, and the employees must either vote for the "straw man," with the hope that he will later disclaim interest in representing the craft or class, or abstain from voting.¹² The Majority not only ignores the obvious burdens this process places on employee free choice but also

¹² Incidentally, the "straw man" also has to explain to the voters that in this particular election, a vote for the straw man is actually a vote "for representation" and will effectively be considered a vote for the incumbent if the incumbent receives a majority of the votes cast. This problem would not be solved under the new rule because, as discussed later, without eliminating the straw man requirement, the addition of a "no union" option on the ballot will actually make things more confusing for employees.

claims the new rule will make this procedure more direct by allowing employees to vote “no union” in these circumstances. To the contrary, adding the “no union” option to the ballot without removing the straw man requirement will only make the procedure more confusing. Employees will be faced with a ballot that has both the name of the straw man and the “no union” option. Some employees desiring “no union” will think they should vote for the straw man – since that is the name for whom they signed an authorization card – and some will vote for “no union.” Yet these vote counts will not be consolidated in favor of decertification – to the contrary, the union will be decertified only if one of these options receives a majority of the votes cast – an outcome made *less* likely by the Majority’s new rule.

The Majority’s insistence that the current procedure is sufficient and its refusal to request a full briefing on the issue are mystifying. If my colleagues are truly interested in protecting employee free choice, they should eliminate the straw man and give employees a clear process for expressing their choice for no representation. I can only conclude that my colleagues do not really desire to know employees’ true intent when it comes to decertification. Apparently, employee choice only matters to the Majority when it relates to changing the status quo from no representation to representation and not the other way around. This unprincipled approach further demonstrates that the rule change lacks a rational basis and violates the APA.

The bias against allowing employees to choose to be unrepresented also violates the body of law surrounding the right to choose to be unrepresented under the RLA. There is no dispute that employees have the right to reject a bargaining representative. The legislative history of the Act supports this view. ABNE, 380 U.S. at 669 n. 5 (1965). In International Brotherhood of Teamsters v. Brotherhood of Railway, Airline & Steamship Clerks, 402 F.2d 196

(D.C. Cir. 1968)(BRAC), the court rejected the contention that the Board's statutory authority is limited to certifying unions. Citing ABNE, the court stated:

[this] argument does not and cannot vault over the hurdle erected by the Supreme Court's decision in [ABNE]. There the Supreme Court indicated that employees under the Railway Labor Act were to have the option of rejecting collective representation entirely. The decision precludes a ruling that the board's sole power is to certify someone or group as an employee representative, imposing on the carrier a duty to treat with that representative. We think that the Board has the power to certify to the carrier that a particular group of employees has no representative to carry on the negotiations contemplated by the Railway Labor Act, thereby relegating the carrier and its employees to employment relationships and contracts not presently governed by the Railway Labor Act.

Id. at 202 (citation omitted). See also Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983).

Even my colleagues acknowledge that employees have the right under the Act to be unrepresented. Thus, I cannot understand their unwillingness to respond to the requests and comments seeking a direct procedure for employees to exercise that right. Instead, the new rule, together with the tortuous straw man decertification process, creates a scheme under which a union may be certified with far less than majority support and yet employees cannot decertify without overcoming the confusion inherent in the process and gathering authorization cards from a majority of the eligible voters – a requirement far more onerous than was required to certify the union in the first place.¹³ This imbalance creates a preference for representation

¹³ The Majority insists the showing of interest to trigger a straw man decertification election must remain at over 50 percent of eligible voters. In light of the rule change allowing a union to be certified on the basis of a majority of ballots cast, the Majority should adjust the showing of interest requirements for employees who desire to be unrepresented. If, as the Majority suggests, the labor stability rationale does not support keeping the current election rule, the Majority should not be able to argue it necessitates keeping the current showing of interest requirements. The combination of the rule change and the failure to adjust the showing of interest places the rights of unions ahead of the rights of employees.

that infringes on the rights made clear by the courts in their decisions in ABNE, BRAC, and Russell.

RUN-OFF PROCEDURES

Additional imbalance is created by the Majority's position on run-off procedures in the wake of the rule change. The Majority cites with approval commenters who argue the rule change is appropriate to conform to procedures utilized by the NLRB "so all employees under private-sector labor law will be subject to uniform representation election procedures." In adjusting the Board's run-off procedures, however, the Majority rejects the NLRB's approach. At the NLRB, after an election conducted with the "majority of votes cast" standard, if no single ballot option receives a majority of the votes cast, and the "no union" option receives one of the two highest numbers of votes, the run-off is between the "no union" option and the entity with the other highest number of votes. Under the current NMB procedures, if a majority of eligible voters vote for representation, a run-off election is held between the two unions with the highest numbers of votes, and the union receiving the majority of the votes cast will be certified. Without the certainty that a majority of eligible voters desire representation, the Board would not currently hold the run-off between two unions. Under the new rule, a "no union" option would be added to the ballot for the initial election, but if no ballot option receives a majority of votes cast, the Majority would allow a run-off election only between the two organizations receiving the highest number of votes. In the run-off election, there would never be a "no union" option, and the union with the majority of the votes cast would be certified. This would be the case even if the two organizations on the ballot did not receive votes from a majority of eligible voters in the initial election. Thus, even though the new rule removes the certainty in the initial election that a majority of the craft or class desires representation, the only choice the

employees will have in the run-off election will be for representation. Consider the example of an election with 500 employees. On the ballot are Union A, Union B and “no union.” Union A receives 50 votes, Union B receives 175 votes and “no union” receives 200 votes. In spite of the fact that “no union” received more votes than Union A or B, and in spite of the fact that fewer than half of the eligible employees voted for representation, the only choice the employees will have in the run-off election will be between Unions A and B. It is impossible to see how this serves the Majority’s stated goal of better measuring employee intent. Moreover, it is perplexing that the Majority would choose to follow the analogy of the NLRB in changing the voting rule and yet reject it in this instance. As with its opportunistically inconsistent positions in the areas of showing of interest and decertification, this is another example of the Majority relying on justifications and analogies when they support procedures that facilitate representation and eschewing them when they support an employee’s right to be unrepresented.

Write In Option

The Majority’s discussion of election interference remedies mentions that the new ballot effectuating its rule change will include a write-in option in addition to the yes/no options. This casual reference – made for the first time near the end of the rule’s lengthy preamble – is the only place the Majority has indicated any intention to add a write-in option to the yes/no ballot. Neither the NLRB ballot nor the NMB’s Laker ballot has a write-in option. The NPRM did not raise the possibility that the new ballot would have a write-in option and thus differ from the NLRB or Laker ballot. Not surprisingly, therefore, none of the commenters discussed the impact of adding a write-in option to the yes/no ballot. In fact, several commenters made

references to both the NLRB ballot and the Laker ballot, demonstrating that commenters believed the ballot would have only yes/no options.

Because the Board neither sought nor received comments on the write-in option, we have had no opportunity to hear or consider the possible consequences of having both the yes/no options and a write-in option on the ballot. Assuming some voters will use the write-in option, its inclusion could affect the outcomes of elections under the revised rule. Thus, it is a substantive change that should have been aired in the notice-and-comment process. Including the write-in option on the ballot without including it in the rule text and without seeking comment on it is a clear violation of the APA and further evidence this rule is fatally flawed. See Small Refiner Lead Phase-Down Task Force v. E.P.A. 705 F.2d 506, 549 (D.C. Cir. 1983) (“Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.”). Moreover, without another round of notice and comment, this rulemaking violates the “logical outgrowth test” because “interested parties could not reasonably have ‘anticipated the final rulemaking from the draft [rule].’” American Water Works Ass’n v. EPA, 40 F.3d 1266 (D.C. Cir. 1994) (quoting Anne Arundel County v. EPA, 963 F.2d 412, 418 (D.C.Cir. 1992)).

This APA violation is not cured by the Majority’s claim that it is merely maintaining the Board’s long-standing practices of providing a write-in option and counting write-in votes as votes for representation. Both of these practices are inextricably intertwined with other elements of the current ballot and voting procedures, such as the absence of a “no union” option and the requirement that a majority of eligible voters vote in favor of representation. The decision to change the latter features necessarily calls into question the former. In light of

the fundamental transformation of the Board's ballot and voting procedures at issue in this rulemaking, interested parties could not have anticipated – and did not anticipate – that the Majority would add the write-in components to its new framework.

In conclusion, the rule change my colleagues are implementing is an unprecedented departure for the NMB and represents the most dramatic policy shift in the history of the agency. Against this backdrop, the Board should have proceeded with the utmost caution and relied only on the most settled and profound need for making such a change. Instead, the Majority has engaged in a rulemaking process that is procedurally and substantively flawed, harmful to the agency, and lacks sufficient justification.

Consequently, I strongly disagree with its decision to make this change.

Chairman Elizabeth Dougherty.

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 et seq.).

Regulatory Flexibility Act

The NMB certifies that this rule will not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The rule affects only the Board's election process and the method used by the Board to determine the outcome of a self-organization vote by employees. The rule will not directly affect any small entities as defined under the Regulatory Flexibility Act.

National Environmental Policy Act

This rule will not have any significant impact on the quality of the human environment under the National Environmental Policy Act (42 U.S.C. 4321 et seq.).

List of Subjects in 29 CFR parts 1202 and 1206

Air carriers, Labor management relations, Labor unions, Railroads.

Accordingly, for the reasons discussed in the preamble, the NMB amends 29 CFR chapter X as follows:

PART 1202-RULES OF PROCEDURE

1. The authority citation for 29 CFR PART 1202 continues to read as follows:

Authority: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

2. Section 1202.4 is revised to read as follows:

§ 1202.4 Secret ballot.

In conducting such investigation, the Board is authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. Except in unusual or extraordinary circumstances, in a secret ballot the Board shall determine the choice of representative based on the majority of valid ballots cast.

PART 1206-HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

3. The authority citation for 29 CFR PART 1206 continues to read as follows:

Authority: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

§1206.4 [Amended]

4. Amend §1206.4(b)(1) by removing the phrase “less than a majority of eligible voters participated in the election” and by adding in its place the phrase “less than a majority of valid ballots cast were for representation.”

Dated: May 5, 2010.

Mary Johnson

General Counsel, National Mediation Board

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