NATIONAL MEDIATION BOARD
29 CFR Parts 1202 and 1206
[Docket No. C-6964]
RIN 3140-ZA00
Representation Election Procedure

Re: Docket Number C-6964 National Mediation Board

I am writing in support of the proposed amendment to Railway Labor Act rules that would provide in representation disputes that a majority of valid ballots cast will determine the craft or class representative.

The freedom of association is a human right as well as a statutory right. I have attached a few paragraphs from my book, The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947 to show how the NLRB adopted a definition of "a majority of employees" identical to the proposed RLA rule change. The NLRB adopted that definition because it was most consistent with the promotion and protection of the freedom of association.

Professor James A. Gross
Cornell University

In a series of case decisions, the Board also liberalized its original interpretation of the meaning of the words "by a majority of the employees" used in Section 9(a) of the Act,[1] thereby making it much less difficult for unions to win representation elections. Prior to July, 1936, when an election had been held, the Board would not certify a labor organization as the exclusive bargaining agent of the employees unless *a majority of those eligible to vote* had voted for that labor organization. In the *Chrysler* case, decided on May 12, 1936, for example, the Board refused to certify a labor organization where 700 employees were eligible to vote and only 125 voted—even though that labor organization received 121 of the 125 ballots cast.[2] Under that approach non-participation was a vote against collective bargaining.

The Fourth Circuit Court of Appeals, on June 18, 1936, ruled in the *Virginian Railway Co.* case that, under the Railway Labor Act, a labor organization could be certified by a majority of the votes cast, provided a majority of those eligible to vote participated in the election.[3] NLRB General Counsel, Charles Fahy, noting the similarity in the pertinent provisions of the Railway Labor Act and the Wagner Act, urged the Board to adopt the Circuit Court's reasoning.[4] On July 3, 1936, the Board, in the *Associated Press* case, certified the American Newspaper Guild as exclusive bargaining agent on the basis of 81 favorable ballots of the 117 cast, where 188 employees were eligible to vote,[5] a certification that would have been denied under the Board's ruling in the *Chrysler* case.

Even under this approach, however, non-participation remained a negative force against collective bargaining whenever a majority of those eligible to vote did not participate in the election. This loomed as a serious problem as the split in the labor movement developed in 1936 and "unions discovered that they could prevent a competitor from winning by boycotting an election."[6] In the *RCA* case, decided on November 7, 1936, for example, the Employees' Committee Union, two days before a scheduled NLRB election, voted not to participate and "waged an unceasing campaign to boycott the election,"[7] a campaign which included the distribution of circulars predicting that the election would be marked by "violence, bloodshed, and

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[1] Section 9(a) of the Wagner Act reads; "Representatives designated or selected for the purposes of collective bargaining by a 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."

[2] Chrysler Corp., 1 NLRB 164 at 172.

[3] Virginia Ry. Co. v. System Fed'n No. 40, 84 F.2d 641 (1936), affirmed 300 U.S. 515 (1937).

[4] NLRB files, memorandum from Charles Fahy to the Board, "The Associated Press Election," June 25, 1936, pp. 1-2.

[5] Ibid., p. 1; The Associated Press, 1 NLRB 686 at 697-98; NLRB, *Second Annual Report,* pp. 114-15.

[6] D. O. Bowman, *Public Control of Labor Relations* (New York: Macmillan, 1942), pp. 141-42.

[7] R.C.A. Mfg. Co., Inc., 2 NLRB 159 at 171.

perhaps loss of life, rioting, street fighting, and general disorder, and a threat of taking pictures of employees who voted."[8] Only 3,163 of the eligible 9,752 employees cast ballots, with 3,016 favoring the United Electrical and Radio Workers.

The Fourth Circuit Court in *Virginia Railway Co.* had remarked that "we need not now decide" the question of whether the majority of those voting would control even if a majority of eligible voters did not participate in the election. " The NLRB was forced to decide this question in the *RCA* case and certified the U.E.W. The Board found that its previous "quorum" interpretation of the election provisions of the Act provided employers and rival labor organizations with a weapon which could easily defeat the collective bargaining sections of the Act.[9] After the *RCA* case, the labor organization receiving a majority of the votes cast was certified as the exclusive bargaining representative. The change in Board election policy had been substantial. Those eligible but not voting were now presumed to have acquiesced in the choice of the majority of those who did vote, most of whom voted for collective bargaining.

[8] NLRB, *Second Annual Report,* p. 115.
[9] R.C.A. Mfg. Co., Inc., 2 NLRB 159 at 169, 175-76.