UNITED STATES OF AMERICA
BEFORE THE NATIONAL MEDIATION BOARD
WASHINGTON, D.C.

In the Matter of Notice of Proposed Rulemaking	)	
	)	
Amending Board Rules	)	Docket No:
29 C.F.R. § 1202 and 1206	)	No. C-6964
	)	

COMMENT OF THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

The International Brotherhood of Teamsters submits its comment on the Notice of Proposed Rulemaking issued by the National Mediation Board in Docket No. C-6964. The IBT represents more than 110,000 employees in the air and rail industries.

IBT General President James P. Hoffa wrote to the members of the Board on October 9, 2009 asking the Board to issue a proposed rule changing its current ballot procedures to enable a simple majority of voters to determine the outcome of representation elections conducted by the Board.

On November 3, 2009, the Board issued a Notice of Proposed Rulemaking that, if made final, will bring the Board into the mainstream of election procedures used in all other labor regulatory systems in our country. This new rule will also conform the Board's ballot rules to the democratic standard used throughout our society.

The Board's proposed rule will fulfill a fundamental purpose of the Act to facilitate the employees' free choice of representative. And it will ensure stability in labor relations and interstate commerce through collective bargaining between the freely-chosen representatives of employees and their carriers.

In summary, the Board's representation procedures are outmoded in important respects and their reform is essential to assure § 2, Ninth's continued efficacy. By counting non-votes as "no-union" votes, the Board effectively requires employees to achieve a super-majority in representation elections to gain representation. This super-majority requirement conflicts with the Act's purposes of ensuring the independence of employees to designate a representative, and encouraging stability in labor relations through collective bargaining between the chosen representatives of carriers and their employees. The Act's purposes are best effectuated by a balloting rule that, as in all other elections, allows the majority of voters to decide the outcome.

FACTUAL BACKGROUND

1. Board Representation Procedures

Under § 2, Ninth of the Act, it is the Board's duty 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." Upon receipt of the Board's certification, the carrier is obliged to treat with the certified organization as the employee's bargaining representative. Id.

Typically, the Board notifies the carrier when an application seeking to represent a craft or class of employees on its property is filed. If the application, on its face, complies with the Board's rules, it is assigned a case number and investigated. The investigation commences with the carrier's submission of a list of employees in the craft

or class on the eligibility cut-off date established by the Board. This list is known as the "potential list of eligible voters." Thereafter, the Board discusses various issues with representatives of the union parties and the carrier, most importantly the scope of the craft or class, and checks the applicant's showing of interest against the carrier's records.

If the applicant or any intervenor satisfies the "showing of interest" rule, [1]/ the Board will find that a representation dispute exists among employees. Normally, the Board will then hold an election using its electronic voting procedures that permit voting either via the internet or telephone. Due to the craft or class structure of representation under the Act, elections are often conducted among employees working at more than one, and frequently many, locations across the carrier's system.

The form of ballot used by the Board is unique. There is no space on the ballot for employees to vote against representation. To have a valid election, a majority of eligible voters in the craft or class must cast valid ballots in favor of representation. In a valid election where more than one union appears on the ballot, a majority of ballots actually cast will determine the identity of the craft or class representative.

The Board allows from three to six weeks for elections depending on the size and geographic spread of the electorate. Representation Manual, §§ 13.201, 14.202. To cast a valid ballot, the employee must comply with a fairly complex set of official instructions describing how employees are to use the Board's internet and telephone voting systems.

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[1] The Board's rules, 29 C.F.R. § 1206.2, require that applications be accompanied by a showing of interest, usually submitted in the form of signed authorization cards.

On the count date, the Board representative conducts the tally of votes from the electronic voting system. Final eligibility issues are resolved. The Board investigator authorizes the tally of votes. Representation Manual, § 13-305, -306. The investigator then prints and distributes a tally sheet of the ballots to the representative. If a representative is selected, the Board issues a certification the following day. Otherwise, the application will be dismissed and no application covering the same craft or class will be entertained for one year. 29 C.F.R. § 1206.4(b).

2. The Board's Election Procedures Are Outmoded

In 1978, Congress commenced deregulation of the airline industry. And regulation of the railroad industry was significantly lessened soon thereafter. These dramatic economic initiatives exacerbated problems in the Board's election procedures. For the economic climate of the deregulatory era furnishes additional motivation for carriers to resist unionization. Declaration of Kim Keller ¶ 2. Today, organizers are routinely barred from properties. No-solicitation, no-distribution rules promulgated by carriers restrict the organizational activities of employees at the work place. Id., ¶ 5. Carrier efforts to combat organizational attempts, together with the geographic dispersion of most electorates, sharply limit union access to the voters in Board elections.

At the same time, carriers have intensified their communications to employees at the work place and at home during organizational drives. Keller Decl. ¶ 4. Captive-audience meetings, audio-visual presentations, contacts by managers with individual employees, mailings, questionnaires, psychological testing and handouts are increasingly being used by carriers to make their arguments against organization. Id., ¶ 3-4. No longer

are carriers content to refrain from influencing their employee' representation choices. Now, they are using modern opinion-shaping techniques designed by union avoidance consultants, and capitalizing on their full access to the electorate to defeat employee organization. Id.

In these circumstances, the Board's form of ballot weighs heavily against self-organization. Because employees cannot vote against organization, they are particularly susceptible to suggestions that their participation in the election will become known. Since non-participation is equated with a vote against representation, moreover, ballot destruction campaigns are now commonplace and have a powerful impact on the electorate. Keller Decl. ¶ 6. And, as noted, every error that results in a ballot not being returned, or in a ballot being voided, counts as a "No Union" vote. Although there are numerous reasons for nonparticipation among an electorate, the Board's current procedures conclusively presume that only one possible reason -- i.e., the employee does not favor organization -- is controlling.

3. Representation elections include a substantial level of nonparticipation unrelated to union opposition

There can be little doubt that NMB representation elections involve a substantial, often determinative, level of nonparticipation that has nothing to do with opposition to unionization. The NMB has used a "union/no union" ballot in its "Laker ballot" format as a remedy against carrier interference. A review of the "Laker-ballot" elections conducted by the Board shows that they have a 12 percent nonparticipation rate. See IBT Attachment A. As those cases often involve on-site ballot box elections and followed

earlier representation elections where substantial carrier misconduct occurred, it is reasonable to assume that nonparticipation rates are even higher in initial single-representative elections.

Statistics published by the National Labor Relations Board (which uses a "union/no union" ballot) over the last ten years support that conclusion. The NLRB's semi-annual reporting shows that from the six-month period ending September 2000 to the six-month period ending September 2009, there was a nonparticipation rate in NLRB representation elections of 17.37 percent. It identified an even higher nonparticipation rate in elections involving union incumbents at 21.18 percent.

NLRB Election Data	**Total nonvoter %**	**Incumbent election nonvoter %**
Apr 2000 to Sept 2009	**17.37%** (242,270 out of 1,394,953 employees)	**21.18%** (39,372 out of 185,914 employees)

IBT Attachment B. Based on the NLRB's experience, it is reasonable to assume that the rate of nonparticipation unrelated to union opposition is between 15 to 20 percent in NMB representation elections.

That nonparticipation rate can be determinative of the election outcome under the Board's current ballot rule. A review of major elections conducted by the NLRB in FY 2009 (those elections involving more than 100 employees) shows that, due to the nonparticipation rate, application of the NMB's super-majority rule in those elections

would change the outcome from certification to dismissal in almost 17 percent of elections (25 out of 148 elections). *See* IBT Attachment C.

4. There is a dramatically lower level of self-organization among employees today under the RLA compared to the early era when the Board adopted its ballot rule; indeed, organization is even lower today than in the initial period following deregulation

The Board's procedures, coupled with deregulation-induced resistance to organization, are responsible for a marked decline in self-organization among unrepresented employees in recent years. This is true compared to the early period of the Board's election process prior to 1955 and even compared to the initial period following deregulation.

The IBT surveyed the Board's election records for the period 1934-1936, 1948-1955 and 1989 to present. Declaration of Stefan Sutich ¶¶ 2-3. *See also* IBT Attachment D. These periods were selected because 1934-36 reflected the initial period of the Board's ballot rule, 1948-1955 was the period following the end of the company-union era, and 1989 to the present gives an extensive picture of the current state of representation under the Board's procedures.

That survey reflected a dramatic shift in the type of representation elections being conducted by the Board, with elections changing from mostly multi-representative elections to an overwhelming number of single-representative elections, and a dramatic change in the rate of certifications, dropping from over 90 percent to 54 percent in single representative elections.

PERIOD	SINGLE UNION %	CERT RATE (SINGLE)	MULTI UNION %	CERT RATE (MULTI)
1934-1936	9.12%	96.77%	90.88%	92.56%
1948-1955	33.72%	89.81%	66.28%	98.85%
1990-2009	79.86%	54.72%	20.14%	87.13%

See IBT Attachment D.1-3. Particularly instructive is that the certification rate has dropped more drastically among single union elections than among multi-union elections. And this occurred as the share of single-union elections and multi-union elections reversed. The presence of multiple unions on the ballot makes it far easier to satisfy the super-majority requirement imposed by the Board's current form of ballot.

In addition, the IBT reviewed the Board's annual reports for the period 1978 to 2009 for its reporting of representation statistics under "Table 2-Representation Case Disposition by Craft or Class" and Table 5-Number of Crafts or Classes Certified and Employees Involved in Various Types of Representation Cases." IBT Attachments E and F.

As noted by the IBT previously, the initial period following deregulation saw a significant decline in the rate of self-organization from the period 1971-1980 and 1981-1986. See IBT Exhibits 9, 13 from 1987 Rulemaking Proceeding. [2]/ Newly organized

[2] References to the record of the Board's 1987 Rulemaking Proceeding are designated "1987 ___."

employees averaged 836 each year during the period 1959-80, 932 each year during the period 1971-80, and 545 each year during the period 1981-84. 1987 IBT-9. In 1985, 592 unrepresented employees organized themselves. In FY 1986, 632 employees were newly organized in FY 1986.[3]/ 1987 Aircon-5; 1987 Tr. 1053. A survey of eleven major air carriers and seven large rail carriers showed a 22.6 percent organizational success rate among unrepresented employees for the period March 1976 through February 1986. 1987 IBT-13; 1987 Tr. 692. This figure compares unfavorably with the 60 percent success rate for the previous twenty-year period, March 1956 through February 1976. 1987 IBT-12, 12A; 1987 Tr. 692.

The Board's Annual Reports show that this negative trend only accelerated through the deregulation period with the last ten years producing noticeably lower rates of representation case filings, fewer employees organizing and higher rates of employees changing representatives, than the first ten years of deregulation.

	# of Cases Filed	**Employees involved (Cert)**	**Employees involved (Dism)**
1978-1987 Avg/yr	100	9141	5982
2000-2009 Avg/yr	52	7713	10894
% Change	-48%	-17%	+82%

IBT Attachment E (NMB Table 2).

[3] This figure controls for the atypical TWA passenger service election in 1986.

	Employees acquiring rep	Employees changing rep	Employees rep unchanged
1978-1987 Avg/yr	1421	2981	3100
2000-2009 Avg/yr	1013	3550	529
% Change	-29%	+19%	-83%

IBT Attachment F (NMB Table 5).

Thus, the Board's statistics show a dramatic decrease in the number of representation cases filed in the last ten years—48 percent less than in the 1978 to 1987 period. And the Board's records show the number of employees gaining (acquiring) representation declined by almost 30 percent, a continuation of the negative trend first seen at the beginning of deregulation compared to the period prior to deregulation. The number of employees covered by cases ending in certification has changed substantially compared to the number covered by dismissals, with the latter almost doubling from the earlier period. Moreover, the percentage of employees switching representation has increased even as cases ending in the continuation of the incumbent representative declined drastically—showing that, in the era of deregulation, the Board's current rule increasingly contributes to the disruption of bargaining relationships.

ARGUMENT

I. THE BOARD IS EMPOWERED TO ADOPT RULES UNDER § 2, NINTH OF THE ACT TO ASSURE THAT REPRESENTATION ELECTIONS ARE CONDUCTED IN AN ATMOSPHERE CONDUCIVE TO THE EXERCISE BY EMPLOYEES OF A FREE AND REASONED CHOICE

Under § 2, Ninth of the Act, 45 U.S.C. § 152, control of the election proceeding and determination of the procedures necessary to conduct the election are matters entrusted to the Board alone. "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." *Railway Clerks v. Non-Contract Employees*, 380 U.S. 650, 662 (1965). Overwhelming judicial authority establishes that the mechanics involved in investigating representation disputes are matters within the Board's exclusive purview. *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). [4]/ The Board itself has recognized its authority to issue substantive rules "to implement the procedure of determining employee representation." 29 C.F.R. § 1205.4.

The Act authorizes the Board to hold a secret ballot election or to employ "any other appropriate method" to ascertain the identities of duly designated employee representatives, "in such manner as shall insure the choice of representatives by the

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[4] See also, *America West Airlines v. NMB*, 119 F.3d 772 (9th Cir. 1997); *PCCA v. NMB*, 870 F.2d 733 D.C. Cir. 1989); *IAM v. Trans World Airlines*, 839 F.2d 809 (D.C. Cir. 1989); *Teamsters v. Railway Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968); *Aeronautical Radio, Inc. v. NMB*, 380 F.2d 624 (D.C. Cir.) *cert. denied*, 389 U.S. 912 (1967); *World Airways, Inc. v. NMB*, 347 F.2d 350 (9th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 386 U.S. 913 (1964); *WES Chapter v. NMB*, 314 F.2d 234 (D.C. Cir. 1962; *UNA Chapter, FOIA v. NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962); *Air Line Stewards & Stewardesses v. NMB*, 294 F.2d 910 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 810 (1962); *Decker v. Venozolana*, 258 F.2d 153 (D.C. Cir. 1958). Compare, *Horizon Air Indus. V. NMB*, 232 F.3d 1126 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2519 (2001), with *USAirways, Inc. v. NMB*, 177 F.3d 985 (D.C. Cir. 1999).

employees without interference, influence, or coercion exercised by the carrier . . . ." 45 U.S.C. § 152, Ninth. Obviously, it is the Board's duty to conduct representation elections under circumstances free of carrier interference, influence or coercion. *Laker Airways, Ltd.*, 8 N.M.B. 236, 243 (R-5131, Feb. 24, 1981); *TransKentucky Transp. R.R.*, 8 N.M.B. 495, 497 (R.-5213, Jun. 8, 1981).

Yet the Board's concern with employee free choice is not limited to assuring non-involvement by carriers in the representation choices of their employees. Under its authority to "establish the rules to govern the election," id., the Board can and does insist that elections be conducted under "laboratory conditions" reflecting "the free and clear choice of the employees affected." *Teamsters v. Railway Clerks*, 402 F.2d at 200. See also, *Trans World Airlines, Inc.*, 8 N.M.B. 298, 300 (R-5163, Mar. 13, 1981). Like the NLRB, the Board possesses ample authority to issue rules for the conduct of elections so that:

> Employees have the opportunity to cast their ballots . . . under circumstances that are free not only from interference, restraint and coercion violative of the Act, but also from other elements that prevent or impede a fair and reasoned choice . . . . [*Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240 (1966) (footnotes omitted).]

II. THE BOARD IS EMPOWERED BY THE ACT TO MODIFY ITS BALLOTING PROCEDURES SO EMPLOYEE REPRESENTATION CHOICES ARE DETERMINED ON THE BASIS OF A MAJORITY OF VALID BALLOTS CAST

The current form of ballot used by the Board, Form NMB-R-2, permits employees to vote for representation by an incumbent, or by one or more applicants, intervenors or write-in candidates. Employees do not vote against representation. An election is valid

only if a majority of eligible employees vote for representation. Otherwise, the application is dismissed and the Board will not entertain an application covering the same craft or class for one year. 29 C.F.R. § 1206.4(b). Thus, any ballot which is not returned to the Board by the count date, or which is voided for non-conformity with election rules, counts as a vote against representation.

The Board's proposed rule would change the current procedure by adding a "No Union" choice to the ballot and providing that elections are to be determined by a majority of votes actually cast by eligible employees. Two purposes will be served by adoption of the proposed change: first, it will facilitate administration of § 2, Ninth by limiting needless controversy in the election procedure; second, it will provide a partial solution to the problems caused by sweeping, recent changes in rail and air industrial relations.

Early in the Act's administration, the form of ballot used by the Board underwent several changes. See generally, *System Federation No. 40 v. Virginian Ry.*, 11 F. Supp. 621 (E.D. Va. 1935), *aff'd*, 84 F.2d 641 (4th Cir. 1936), *aff'd*, 300 U.S. 515 (1937). In *Nashville, Chattanooga & St. Louis Ry.*, No. R-170 (NMB, Nov. 22, 1935), the Board made the following ruling relative to the form of ballot:

> In some elections heretofore held the Board has ruled, for administrative reasons, that it would not certify as the choice of representative by employees any individual or organization which failed to receive a majority of the eligible votes. By judicial decision and opinion of competent counsel, the Board is constrained now to hold that where a majority of the eligible voters participate in the election and all are given opportunity so to vote, a majority of the legal votes cast will determine the right to the certification by the Board of the representation chosen by the class or craft.

Except for an amendment in 1964, which added language advising that no representative will be certified if less than a majority of eligible employees cast valid ballots, the ballot normally used by the Board has remained essentially unchanged. *Railway Clerks v. Non-Contract Employees*, 380 U.S. at 672 n.1 (Stewart, Jr., dissenting). And, it has withstood numerous challenges by disappointed parties and carries. "[T]he selection of a ballot is a necessary incident of the Board's duty to resolve disputes," and well within its purely discretionary authority under § 2, Ninth. *Id.* at 669. See also, *Zantop Int'l Airlines, Inc. v. NMB*, 732 F.2d 517 (6th Cir. 1984); *Aeronautical Radio, Inc.*, 380 F.2d 624; *Rose v. Railway Clerks*, 181 F.2d 944 (4th Cir.), *aff'd*, 340 U.S. 851 (1950); *Radio Officers Union v. NMB*, 181 F.2d 801 (D.C. Cir. 1950); *Droggos v. NMB*, 227 F. Supp. 61 (N.D. Ohio 1963).

This is not to say, however, that the Board's standard form of ballot best effectuates the Act's purposes. *Non-Contract Employees,* 380 U.S. at 671. It means only that the form of ballot, like other details for selecting representatives, is a matter for the Board alone to decide. As Attorney General Clark concluded in 1947, "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 . . . ." NMB, *Administration of the Railway Labor Act 1934-1970,* at 801.

Beginning with its landmark decision in *Laker Airways, Ltd.*, 8 N.M.B. 236, the Board has handed down a series of decisions affecting both the rail and air industries, in which it modified its standard ballot to enable employees to select a representative on the

basis of a majority of valid ballots actually cast. *Metroflight*, 13 N.M.B. 178 (R-5634, July 11, 1986); *Mid Pacific Airlines*, 13 N.M.B. 178 (R-5607, Apr. 18, 1986); *Key Airlines*, 13 N.M.B. 153 (R-5597, Mar. 27, 1986); *Rio Airways, Inc.*, 11 N.MB. 75 (R-5432, Nov. 23, 1983); *Sea Airmotive, Inc.*, 11 N.M.B. 87 (R-5447, Dec. 12, 1983); *Mercury Services, Inc.*, 9 N.M.B. 312 (R-5250, Mar. 16, 1982); *Transkentucky Transp. R.R.*, 8 N.M.B. 495. More than anything else, this line of authority demonstrates the Board's discretionary power over the form of ballot, as well as certain developments in the rail and air industries that call for reform of its balloting procedure.

In *Non-Contract Employees*, 380 U.S. at 669 n.5, the Supreme Court observed:

> The legislative history supports the view that the employees are to have the option of rejecting collective representation. The ballot that the Board proposes to use in future elections fully comports with this conception of the Act. Using 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 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.

The ultimate question for resolution in this rulemaking proceeding is whether, in today's industrial relations climate where carriers regularly ignore their duty not to "influence" their employees' representation choices, the Board's standard ballot unduly emphasizes

the right to reject representation at the expense of the equally important right of employees to select the representative of their choice. [5]/

Appropriate resolution of this issue should not be confounded by the notion elaborated in *Chamber of Commerce*, 14 N.M.B. 347 (C-5757, July 24, 1987), "that those seeking rule changes bear a heavy burden of persuasion." Id. at 356. No authority was cited for that proposition. And, with deference, we must insist that the Board was mistaken. No such burden of proof or persuasion is called for in rulemaking proceedings. "Regulatory 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. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'n v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397, 415 (1967).

Under the Administrative Procedure Act, 5 U.S.C. § 500, *et. seq.*, an agency may depart from an existing policy by providing "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." *FCC v. Fox TV Stations,* 129 S. Ct. 1800, 1811 (2009) (emphasis in original). "The Administrative Procedure Act . . . sets forth the full extent of judicial authority to review executive agency action for

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[5] See *Alitalia Airlines*, 10 N.M.B. 331 (CR-5432, May 18, 1983).

procedural correctness . . . The statute makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action." Id. at 1810, 1811.

The APA standard of judicial review is more demanding than the standard applicable to the proposed balloting rule under consideration. The judicial review provision of the APA does not apply if "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). It is settled law that the NMB's decision on a form of ballot is committed to the "broad discretion" of the NMB and "is not subject to judicial review." *Railway Clerks v. Non-Contract Employees*, 350 U.S. at 668-69; *accord, Virgin Atlantic Airways, Ltd. v. NMB*, 956 F.2d 1245, 1250 (2d Cir.), *cert. denied*, 506 U.S. 820 (1992).

III. THE BOARD'S TRADITIONAL FORM OF BALLOT IS NO LONGER A RELIABLE INDICATOR OF EMPLOYEE REPRESENTATION DESIRES; A SIMPLE "YES OR NO" BALLOT SHOULD BE ADOPTED

A. The Board's current form of ballot grew out of the early period in which Company unionism undermined the RLA's purposes

The Board's form of ballot was adopted in an earlier era, under circumstances that differ markedly from those prevailing today, and was designed to accomplish purposes that no longer seem relevant. As the Board itself has noted in other contexts, modern transportation is carried on in an increasingly competitive environment using techniques and equipment unheard of when § 2, Ninth was enacted. Industrial relations in the industries subject to the RLA also have changed dramatically over the last half century. Yet the Board's tools for ascertaining the representation choices of employees remain

essentially unchanged. The Board's form of ballot no longer serves as a reliable indicator of employee sentiment for or against representation. Reform is necessary.

Although the Board has made some modifications in its traditional ballot, the essential form has remained unchanged since 1935. [6]/ The form of the ballot was developed in partial reliance on a district court decision that took an overly restrictive view of the Board's discretionary authority under § 2, Ninth, *System Federation No. 40 v. Virginia Ry.*, 11 F. Supp. 621, and one that has since been repudiated by the Supreme Court. *Non-Contract Employees*, 380 U.S. at 662. More fundamentally, the Board's ballot is traceable to informal elections held by the Board of Mediation before § 2, Ninth was enacted. The overriding problem faced by the Board of Mediation before the Act's 1934 amendments was company unionism. *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

Section 2, Third of the Railway Labor Act of 1926, 44 Stat. 577, did not provide for majority representation.[7]/ Instead, it embodied a "free representation" philosophy under which groups of employees could be represented by representatives of their own selection, whether they constituted a majority or minority.[8]/ The question of what group

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[6] See, *Nashville, Chattanooga & St. Louis Ry.*, No. R-170; NMB, Administration of the Railway Labor Act 1934-1970, at 69-71.

[7] Section 2, Third provided:
> Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

[8] Hearings on H.R. 7180 Before the House Comm. On Interstate and Foreign Commerce, 69th Cong., 1st Sess. 125 (1926).

the carrier would contract with was left to managerial policy, to "be exercised in a way that would commend itself to the Government board of mediation if there should be any threatened interruption of commerce." Id. at 82. In other words, the identity of the representative with which the carrier would deal was committed to the voluntary processes of mediation and conciliation.

For a carrier intent on dealing with a company union, instead of a standard labor organization, the only relevant consideration was whether the organization's strike call would be supported by employees. The task faced by the Board of Mediation was to convince the carrier that the standard labor organization enjoyed majority support, and that, absent agreement, a crippling strike would ensue. To aid in this task, the Board of Mediation sometimes held informal elections under § 5 of the 1926 Act. Though not binding on the carrier unless it had agreed to be bound, the results of the election were used to demonstrate the organization's support. Obviously, the results of an election in which less than a majority of craft or class employees participated would be useless for the intended purpose of convincing the carrier that it had to seek a resolution of a major dispute through voluntary agreement.

B. The original purpose of the Board's form of ballot no longer applies; contrary to the Board's earlier conclusions that its ballot did not inhibit employee representation, the form of ballot now undermines employee efforts at self-organization

Perhaps because the problem of company unionism persisted into the 1940's, [9]/ the National Mediation Board adopted a version of earlier used ballot forms as its official ballot in elections conducted under § 2, Ninth. This was so even though the 1934 amendments expressly authorized the Board to conduct representation elections, and its certifications could be judicially enforced. *Virginian Ry.*, 300 U.S. 515. Well into the 1940's and later, the Board clung to the notion that § 2, First duties, 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—although it offered neither empirical data to support this conclusion nor any reasoning beyond the conclusion itself.[10]/

Significantly, the Board's choice in 1948 to continue the form of ballot was premised on its finding that the standard form of ballot did *not* interfere with employees' ability to organize. After reciting its assertion that the purposes of the Act can be more readily accomplished through the original form of ballot, the NMB stated in *Pan American Airways*, 1 N.M.B. 454 (1948):

> Since the enactment of the Railway Labor Act in 1934 nearly 2,000 cases involving 742,000 employees in which only 1,891 employees or approximately one-fourth of 1 percent voting for representatives were

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[9] D. Eischen, Representation Disputes and Their Resolution In the Railroad and Airline Industries, in "The Railway Labor Act at Fifty" 23, 26 (1976).

[10] NMB, supra note 6, at 70.

> deprived of representation by reason of [a] lack of majority participation in elections. Many of the employees in this latter group have subsequently secured representation. Thus, it will be seen that the establishment of representatives by employees for purposes of the Act has not been seriously handicapped under the Board's long established policy.

Pan American Airways, Inc., 1 N.M.B. at 455. This is no longer true.

The rationale for the Board's ballot has long since disappeared. Decades ago, the Board's discretionary authority to adopt a "Yes or No" ballot was authoritatively settled. *Non-Contract Employees*, 380 U.S. 650. And, except in isolated instances, company unionism in the railroad industry has not been a problem for over sixty years. Board certifications are freely enforced by the courts under § 2, Ninth. E.g., *IAM v. Alitalia Airlines, Inc.*, 600 F. Supp. 268 (S.D.N.Y. 1984), *aff'd* 753 F.2d 3 (2d Cir. 1985). Likewise, § 2, First duties are mandatory and enforceable, not by the Mediation Board as once supposed, but by the courts. *Chicago & N.W. Ry. v. UTU*, 402 U.S. 570 (1971).

The Board's abandonment of its outdated rationale for the traditional form of ballot is demonstrated by *Laker Airways, Ltd.*, 8 N.M.B. 236, and its progeny. Certainly, it makes no sense to use a "Yes or No" ballot as a remedy for serious carrier interference if, in fact, a requirement that a majority of eligible employees cast valid ballots facilitates good-faith bargaining and stable labor relations. The point is that, today, mandatory carrier duties are enforced through orderly legal processes and not through voluntary mediation and conciliation. The supposed relationship between the rate of participation in representation elections and carrier compliance with § 2, First duties, if it existed after 1934, is no longer a relevant consideration.

In the deregulated environment, those concerned with harmonious labor relations in the rail and air industries face entirely new problems. At least since 1978, carrier resistance to employee organization has grown far more intense. Keller Decl. ¶¶ 2-5. Increasingly sophisticated means are regularly employed to influence employees in the exercise of their selection rights under the Act. Captive-audience and one-on-one meetings exploit carrier access to employees on the job. Id., ¶ 3. Elaborate antiunion videos target employees. Id., ¶ 4. Carriers increase supervisory surveillance of employees during organizational attempts. Id., ¶¶ 3-5. Employees are bombarded with anti-union propaganda at the workplace and their homes. Id., ¶ 4.

Carriers employ outside consultants specializing in influencing employee representation choices. Keller Decl. ¶ 4. Motivational surveys and psychological profiles assure that carriers' anti-union messages have the greatest impact. Id. Carriers successfully exploit the uncertain economic climate that arose in the wake of deregulation to influence their employees. One of the more recent innovations employed in anti-union campaigns is the video. Employer consultants provide stock antiunion videos. Id. Some carriers develop their own videos so employees receive a personal message. Id. Carriers mandate that employees see these productions during captive-audience meetings. Keller Decl. ¶¶ 3-4.

Non-voting and ballot destruction constitute the central theme of all modern, anti-union campaigns conducted by carriers. Id., ¶ 6. Thus, carrier attempts to influence their employees' organizational choices build on those deficiencies in the Board's election procedure directly attributable to the form of the ballot. A carrier need not convince

employees to reject self-organization; it need only induce fear and uncertainty, or mitigate enthusiasm for organization, in order to cause employees not to vote. Today, this is a relatively easy task given the sophisticated communications devices available to carriers, and the inability of organizations to respond because their access to the electorate has been severed. Keller Decl. ¶ 6. These problems were unheard of in 1935 when the Board's ballot was adopted.

C. The Board's current form of ballot imposes on employees the burden of achieving a "super-majority" of voters from a diminished electorate to successfully achieve representation rights

Added to the intensity of anti-union campaigns is the indisputable fact that employees attempting to organize themselves are seriously handicapped. Their burden is not simply to sway the undecided; to change the minds of those who oppose organization. They must confront the indisputable fact that many eligible employees, for whatever reason, will not participate in the election. This is true of every election held.

Particularly in view of the complexity of the Board's ballot instructions, it is easier for employees not to vote than to make a conscious choice and do what is necessary to cast a valid ballot. Because of the Board's unique form of ballot, every employee who fails to cast a valid ballot is presumed to have voted against representation, even those who did not receive a ballot in the first place. *Trans World Airlines, Inc.*, 13 N.M.B. 210, 213, 217 (R-5610, May 13, 1986).

The evidence is compelling that every election conducted with the Board's standard ballot begins with a built-in percentage of constructive "No Union" votes. That non-voting bloc, consisting of those who do not participate for reasons other than

opposition to unionization, is often determinative of the election's outcome. Admittedly, it is difficult to quantify the handicap imposed by the Board's standard ballot. But the results in the Board's "Laker ballot" elections provide a baseline for a minimum nonvoter percentage. Using that "Yes or No" ballot, the elections produced a 12 percent nonparticipation rate. IBT Attachment A.

In at least half of the Laker-type cases surveyed, ballot-box elections were held. Because voter participation is higher in ballot-box elections than in those conducted by mail, it is likely that the non-voting bloc in the vast majority of Board elections is larger than 12 percent. National Labor Relations Board data for the past ten years support such a conclusion. They show an overall nonparticipation rate of 17.6 percent, and, in elections involving challenges to incumbents by another union, the nonparticipation rate is over 21 percent. IBT Attachment B.

But even taking the lower figure, it is possible to illustrate that severe handicap imposed on employee organization efforts by the Board's standard ballot. In an election involving 1000 eligible employees for example, only 880 will definitely decide to support or oppose organization; the remaining 120 will not participate because of apathy, indolence, non-receipt or loss of ballots, religious objections, and similar factors. The organization must win the valid votes of 501, or 56.9 percent, of the 880 employees who will actually make a decision in order to succeed. The carrier, however, has to convince only 380 or 43.1 percent, of the decisive group to defeat employee self-organization. Effectively, employees must put together a "super-majority" of voters to prevail in an NMB election.

Today, of course, carriers have the economic incentive to avoid organization and powerful weapons to influence their employees' representational choices. It is extremely doubtful that old-style interference is significantly more effective in avoiding representation than the new-style influence. This is precisely the point that needs to be understood. Employee organizational efforts cannot be handicapped by the Board's standard ballot and still succeed against the sophisticated anti-union campaigns now being waged by carriers.

The quantitative evidence in support of this proposition is overwhelming. Election results in unrepresented crafts or classes in the period immediately following deregulation show a marked decline in self-organization. 1987 IBT Exhs. 9, 13. Excluding the atypical TWA passenger service election in 1986 (Tr. 766-68), newly organized employees averaged 568 each year for the period FY 1981 through FY 1986, as compared with 932 each year during 1971-80, a drop of 39 percent. Id. For selected major air carriers and large rail carriers, the organizational success rate among unrepresented employees during the period March 1976 through 1986 dropped precipitously to 22.6 percent from 60 percent in the previous twenty-year period. Id.

Those trends have accelerated in recent years, with the last ten years producing a 48 percent decline in representation case filings even over the initial deregulation period and a continued 30 percent decline in the number of employees gaining representation each year, again, compared to the initial period following deregulation. IBT Attachments D and E. These data demonstrate categorically that the Board's rationale in *Pan American*, 1 N.M.B. 454, for continuing the standard form of ballot – that employee

selection rights were not seriously handicapped by conditioning representation on a majority vote of all eligible craft employees – no longer holds true.

D. The Board's Standard Ballot Tends to Destabilize Existing Collective Bargaining Relationships

As noted, there is no evidence in the modern post-deregulation era that the Board's standard ballot constitutes a stabilizing influence in either the rail or the airline industry. To the contrary, the latest data available suggest that the standard ballot tends to destabilize existing collective bargaining relationships by encouraging raids by rival organizations. IBT Attachment D.3, reflecting NMB elections reported within the 1990-2009 period, shows that the success rate in terms of achieving employee representation was 87.13 percent in multi-union elections, as compared to a success rate of 54.72 percent in single-union elections. Multi-union elections were larger, covering 28.19 percent of employees involved in all elections during the period examined. This was so even though multi-union elections constituted a much smaller percentage (20.14%) of total elections conducted.

Similar findings appear in IBT Attachment F, which compares NMB election data reported for the last ten fiscal years with those reported for the first decade after deregulation. Although 29 percent fewer employees acquired representation in the 2000-09 period, those changing representation increased by 19 percent. These data show that the NMB's standard ballot encourages multi-union elections, in which both the opportunity for success and the reward (in terms of craft or class size) are greater. We submit that continued use of an election ballot that encourages organizational efforts

among employees who are already organized necessarily has the effect of destabilizing existing collective bargaining relationships. [11]/

CONCLUSION

Structural changes in the industries regulated by the RLA have unleashed powerful economic incentives to resist employee organization. The Board's standard form of ballot no longer serves as an adequate tool to ascertain the true representation desires of employees in the deregulated era. The balance has shifted too strongly against employee self-organization to require employees any longer to struggle under the severe handicap imposed by the Board's standard ballot. To preserve a fair and equitable system for the selection of representatives, the ballot must be changed. Keller Decl. ¶¶13-14. Otherwise, the balance Congress sought to achieve by enacting the 1934 amendments to the Act will be lost. Cf., *IAM v. Street*, 367 U.S. 740, 759 (1961).

For the foregoing reasons, the Board should adopt its proposed rule.

Respectfully submitted,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

[11] Use of the form of ballot proposed by the NPRM will not result in greater instability in either the rail and airline industries. The NPRM notes that there will be no change in 29 C.F.R. § 1206.2, which requires a showing of interest of proved authorizations from a majority of craft employees before authorizing an election among represented employees covered by a contract.

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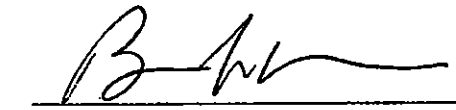
By: 

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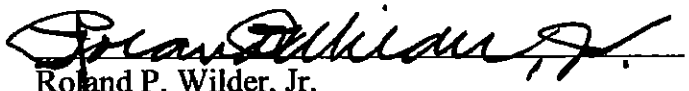
By: 

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