NMB Open Meeting of December 7, 2009

Submissions for Speakers before Lunch

Page	Name	Affliation
2	Robert Siegel	Air Transport Association of America
9	Edward Wytkind	Transportation Trades Department, AFL-CIO
14	Joanna Moorhead	National Railway Labor Conference
20	John Prater	Air Line Pilots Association International
26	Robert DeLucia	Airline Industrial Relations Conference
32	Robert Roach	Int'l Association of Machinists and Aerospace Workers
42	Jack Gallagher	Delta Air Lines
51	Carmen Parcelli	Transportation Trades Department, AFL-CIO
70	Randel Johnson	US Chamber of Commerce
75	Marianne Bicksler	Association of Flight Attendants - CWA
79	Sandy Gordon	Delta Air Lines
83	Joel Parker	Transportation Communication International Union / IAM
99	Candace Bruton	Self
103	John Conley	Transport Workers Union
106	Edward Bahmer	Self

Robert Siegel
Air Transport Association of America

December 7, 2009 Statement
Robert Siegel, of O'Melveny & Myers LLP
On Behalf of the Air Transport Association of America, Inc.

I am Bob Siegel, and I am appearing on behalf of the Air Transport Association, which is the principal trade and service organization of the major scheduled air carriers in the United States.*

In recognition of the unusually limited nature of this meeting, I will not present an extended discussion of the ATA's views. A more complete statement of those views will be contained in the formal written comments that we intend to submit on January 4, 2010. My remarks here will be limited to a discussion of the manifest inadequacies in the Board's process for issuing the November 3 Notice of Proposed Rulemaking (the "NPRM"); the wholly deficient process that the Board has put in place for its consideration of the NPRM; the Board's dramatic and unexplained departures from prior practice; and the absence of any adequate justification for abandoning the majority rule that the Board has used successfully for over seven decades and reaffirmed as recently as last year. These facts demonstrate that the Board majority has reached a predetermined position on the issues raised in Docket Number C-6964, and thus call into serious doubt the bona fides of this notice-and-comment process.

First, the Board majority's publication of the November 3 NPRM was the result of an extraordinarily inadequate and manifestly improper internal process. Indeed, the process was so remarkably deficient that it compelled the Board's own Chairman to send a letter to Senators detailing the deficiencies. *See* Appendix A (Letter from Chairman Dougherty to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009)). As Chairman Dougherty explained in her letter, there was a "complete absence of any principled process." Members Hoglander and Puchala aggressively excluded the Chairman from internal deliberations, refused to share drafts of the NPRM with her, gave the Chairman no information about the timing of the planned publication of their NPRM, and effectively operated as a two-person Board.

---

* The members of the association are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation.; Hawaiian Airlines; JetBlue Airways Corp.; Midwest Airlines; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. Associate members are: Air Canada; Air Jamaica; and Mexicana. Continental Airlines, Inc., UPS Airlines, Southwest Airlines Co., and American Airlines, Inc., do not participate in this statement.

Members Hoglander and Puchala not only excluded the Chairman from their internal deliberations, they sought to prevent the Chairman from publicly expressing her disagreement with their NPRM once she learned of it. Members Hoglander and Puchala initially gave the Chairman only 90 minutes to consider the NPRM prior to its publication (although this artificial deadline was ultimately extended to slightly more than a day). They also initially told the Chairman that she would not even be allowed to publish a dissent in the Federal Register, then later told her that she could do so but only if a dissent could be completed in 90 minutes. When the Chairman provided her draft dissent, Members Hoglander and Puchala censored it—ordering the Chairman to remove portions of her dissent as a prerequisite to publication. As the Chairman later observed in her letter to the Senators, Members Hoglander and Puchala were in an "obvious rush to put out a proposed rule," and their hastiness and efforts to silence official criticism of the NPRM "give[] the impression that the Board has prejudged the issue." Appendix A, at 2.

These extraordinary facts have severely damaged the Board's hard-earned and long-standing reputation as an impartial and honest broker—a neutrality that both Congress and the Supreme Court have recognized is critical to the Board's ability to effectively perform its mediation and other functions. These facts also demonstrate that Members Hoglander and Puchala have irreversibly prejudged the issues raised by their November 3 NPRM, and that this putative notice-and-comment process will be meaningless.

To put it bluntly: If Members Hoglander and Puchala were willing to exclude, stifle and even censor the dissenting views of their own colleague, there is little if any reason to believe that the ATA's views—or, for that matter, the views of any other person or organization concerned about the Board's neutrality—will be accorded any greater consideration or respect.

Second, the ATA is deeply troubled by the Board majority's unexplained and unjustifiable refusal to provide an adequate process for consideration of the November 3 NPRM. On September 10th of this year, after the TTD had requested that the Board abandon its 75 year-old majority rule, the ATA sent the Board a letter requesting that "if the Board were to consider exercising jurisdiction over the TTD's request, it should not do so without engaging in the briefing and hearing process employed by the Board when it considered this very same issue in *Chamber of Commerce*" in the late 1980s. Appendix B, at 2 (Letter from ATA to Chairman Dougherty and Members Hoglander and Puchala (Sept. 10, 2009)); *In re Chamber of Commerce of the United States*, 14 N.M.B. 347, 360 (1987). In the

Chamber of Commerce proceeding, the Board conducted a full evidentiary hearing which lasted nine days, designated a hearing officer, and allowed for appealable rulings on procedural matters prior to the hearing, as well as pre-hearing briefs and motions to dismiss and post-hearing briefs. After that careful and exhaustive examination, the Board reaffirmed its longstanding majority rule.

The ATA's request for *Chamber of Commerce* procedures was hardly excessive. Just last year, in a proceeding involving Delta Air Lines and the Association of Flight Attendants, the Board unanimously recognized that the *Chamber of Commerce* process is not just appropriate—it is ***necessary*** for a fair and meaningful review of any proposal to abandon the Board's 75 year-old majority rule. The Board stated, in unequivocal terms, that it "would not make such a fundamental change without utilizing a process similar to the one employed in *Chamber of Commerce*." *Delta Air Lines*, 35 N.M.B. 129, 132 (1998). In fact, the Board thought this point was so important that it repeated it in the very next paragraph of its decision: it "would not make such a sweeping change without first engaging in a ***complete and open*** administrative process to consider the matter." *Id.* (emphasis added).

Despite the Board's unequivocal past statements, the Board majority has refused to provide *Chamber of Commerce* procedures for reviewing the November 3 NPRM. Instead, the Board majority established a stripped-down process that comes nowhere close to being "complete" or "open." In stark contrast to the procedures the Board followed in the *Chamber of Commerce* proceedings, the November 3 NPRM itself provides for nothing more than a 60-day period for written comment. And neither the NPRM nor today's "meeting" provides for an evidentiary hearing of any kind—there is no testimony under oath, no cross-examination of witnesses, and none of the other procedural safeguards that impartial Board members would have wanted to put in place before considering such a fundamental change in the Board's long-standing practice.

Yet the Board majority has completely ignored the ATA's September 10 letter, and has not even acknowledged—let alone explained—its dramatic departure from prior Board procedures. The only plausible explanation for this change in procedures is that the Board majority is unwilling to hear evidence that would stand in the way of their predetermined decision to change the Board's majority rule ballot.

Indeed, the inadequate procedures mandated by the Board majority not only prevent full consideration of the NPRM, they also prevent interested parties from asking the questions that would further reveal the Board majority's bias and

predetermination of the issues. And there are a number of important questions the ATA would have asked witnesses testifying under oath in a *Chamber of Commerce* proceeding regarding their communications with Board Members about the issuance of the NPRM and related matters.

Third, the ATA is deeply troubled by the various other ways in which the Board majority has dramatically departed from prior Board practice. For instance, the Board majority has abandoned—without explanation—the Board's longstanding substantive standard for making material changes to its rules. The Board previously announced that it would materially change its rules only when a proposed change is shown to be "mandated by the [Railway Labor] Act or essential to the Board's administration of representation matters." *In re Chamber of Commerce of the United States*, 14 N.M.B. 347, 360 (1987). Following that standard would place an insurmountable obstacle in the path of the proposed rule change, because that standard cannot possibly be satisfied here. In its NPRM, the Board majority does not even acknowledge this substantive standard for changes to the NMB's rules, further conveying that the Board majority will do what is necessary to effectuate its predetermined position.

Moreover, the form of the November 3 NPRM is itself a sharp departure from the Board's earlier approach to this issue. The last time the Board considered changing its voting rules, it issued a neutral invitation for participation and comment. *See In re Petition of the Chamber of Commerce of the United States Requesting the Amendment of Board Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 12 N.M.B. 326 (1985). This time, the Board majority included with the NPRM a full legal argument attempting to justify the proposed rule and rebut the preliminary objections set forth in the ATA's letter of September 10, 2009. These actions reinforce the conclusion that the Board majority has already predetermined the issues raised in its NPRM.

Finally, the Board majority further departed from the Board's prior practice by insisting on "consider[ing] the TTD petition in a vacuum." 74 Fed. Reg. 56750-01, at 56754 (Nov. 3, 2009) (Chairman Dougherty, dissenting). When the Board last considered the same proposed voting rule change, it simultaneously considered a proposal to adopt a formal decertification procedure. *See In re Petition of the Int'l Brotherhood of Teamsters Requesting the Amendment of Board Rules Pursuant to 29 C.F.R. § 1206.8(b)*, 13 N.M.B. 1 (1985). This time, the Board majority has decided to consider the TTD's request for a voting change in isolation, without even acknowledging there is a pending request for consideration of a direct process for decertification. *See* 74 Fed. Reg. 56750-01, at 56754 (Nov. 3, 2009). As Chairman Dougherty has explained, given their interrelationship, these two

issues "must be considered together." *Id.* The Board majority's decision to unduly narrow the Board's consideration of issues appears designed to ensure that the TTD's requested voting rule change is adopted swiftly and to convey that only changes favorable to labor organizations will be considered by the Board.

Fourth, there is simply no basis for the proposed rule change. The Board has successfully employed the majority rule since President Franklin D. Roosevelt's first term in office, and it has undeniably become part of the fabric of the Railway Labor Act. The Board has reaffirmed the majority rule on at least four prior occasions, the rule has twice passed muster at the Supreme Court, and there has been no relevant change in circumstances that would warrant such a radical departure from longstanding practice. In light of these indisputable facts, it would be impossible for the Board to articulate any legally sufficient reasons for abandoning the majority rule.

Indeed, the Board recognized as much in 1978, during the Carter Administration, when it recognized that "[i]n 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." Minutes to National Mediation Board Meeting, at 78-15 (June 7, 1978).

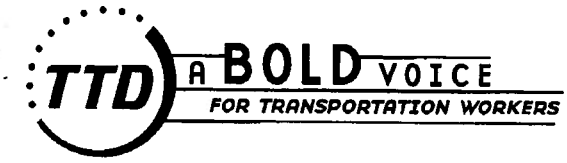
Both the TTD's request and the Board majority's November 3 NPRM argue that the proposed rule change is justified by a need to align Railway Labor Act representation elections with the rules governing elections for public office. This argument is both frivolous and misleading: Under current Board rules, a direct decertification option similar to the process under the National Labor Relations Act is not available and it is virtually impossible for employees in a large group to return to non-union status even if the majority strongly wishes to do so. As a practical matter, an RLA union that prevails in a representation election may never have to stand for re-election. Thus, the unions cannot honestly be compared to elected public officials, who have fixed terms of office and must run for reelection. Accordingly, if the Board were serious about the need to align representation elections with general democratic principles, it would now also be considering the need for a robust decertification procedure. The fact that Members Hoglander and Puchala have ignored that request makes clear that they are not interested in neutrally aligning the Board's rules with general democratic practices.

* * *

The Board majority's extraordinarily deficient and manifestly improper actions may well lead to the unjustifiable abandonment of the Board's 75 year-old majority rule. But that will not be a victory for the TTD or any particular union: If a union is elected even though it lacks true majority support, it will be incapable of representing the interests of employees it purports to count as members. Nor will it be a victory for organized labor generally: The Board's dramatic and unexplained abandonment of its prior procedural and substantive standards in order to push through an ill-advised rule change in a manifestly-politicized manner simply means that once the political winds change, and the Board's composition changes with them, organized labor will pay the price—not only will the majority rule likely be restored, but a straightforward decertification procedure and other rules unfavorable to labor organizations may be easily put in place. And it is certainly no victory for employees, who will face the real prospect of being tied to unions they do not support.

But it is clear who the losers will be: not just unions, carriers, and employees, but also the Board itself—which will have jettisoned its hard-earned reputation as an honest broker and disinterested referee, and thus will have jettisoned its ability to insure the labor relations stability that Congress intended it to provide.

Edward Wytkind
Transportation Trades Department, AFL-CIO



WRITTEN STATEMENT OF
EDWARD WYTKIND, PRESIDENT
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
NATIONAL MEDIATION BOARD
ON
THE REPRESENTATION ELECTION PROCEDURE; PROPOSED RULE;
DOCKET NO. C-6964
FOR
THE NATIONAL MEDIATION BOARD'S PUBLIC MEETING

December 7, 2009

On behalf of the Transportation Trades Department, AFL-CIO (TTD) I want to thank the National Mediation Board ("NMB or Board") for the opportunity to present our views on the proposed rule amending the procedures that govern representational elections. TTD consists of 32 affiliated unions representing workers in all modes of transportation, including those covered under the Railway Labor Act (RLA).[1] We commend the Board for the thoughtfulness of its proposal and believe the rule change is long overdue and should be adopted.

The current voting procedures are un-democratic, inherently unreliable and outdated in determining voter intent. The current rules also encourage employer-run voter suppression campaigns and deny aviation and rail workers the unfettered right to choose whether they want union representation. Moreover, despite the industry's hollow rhetoric questioning the NMB's right to change these rules, it is clear that the agency has the well-established authority to set its rules and policies.

Let me state at the outset that Carmen Parcelli, a principal at Guerrieri, Edmond, Clayman & Bartos, P.C. will specifically address on TTD's behalf the Board's legal authority to implement the proposed rulemaking. My comments today will generally focus on the policy issues, the reasons why current Board procedures are unfair and unnecessary, and why the NMB's proposal should be adopted.

---

[1] Attached is a complete list of TTD affiliated unions

The NMB's principal role in representation disputes is to determine the clear choice of affected employees seeking union representation. Unfortunately, the Board's election procedures fail to even meet this basic requirement. Currently, an absolute majority of all eligible employees in a craft or class are required to cast a ballot to merely certify an election and all non-voters are assigned automatic "no" votes. As a result, when workers are unable to meet this onerous threshold, the expressed will of the majority of those who vote is silenced by those who do not vote.

This method of discerning voter intent is inherently flawed and unreliable. By automatically assigning non-participating voters a "no" vote in opposition of a union, the current voting procedures are essentially declaring intent when none is expressed. There are a host of reasons why individuals do not vote: they may have no history of or interest in voting; forget to vote; may be unable, for a variety of reasons, to participate; or, as we've seen in 9 out of 10 union elections in recent history workers face an employer-run campaign to block unionization. Nonetheless, it is impossible for the NMB to determine the intent of such non-voters. Clearly, discerning a "no" vote in the absence of an affirmative vote is an inherently arbitrary method for surveying intent and has no place in our system of democracy.

The unreliable and arbitrary nature of the Board's election procedures place rail and aviation workers in a unique and unfair electoral category, completely detached from the democratic norms lying at the heart of any representational election. Throughout this country, from school boards to the United States Congress, a majority of those casting a ballot determines election outcomes. In contrast, the NMB's election procedures assign non-participating voters a role in determining electoral outcomes. The Board's proposed rule correctly identifies this voting standard as a type of "compulsory" voting that conflicts with our democratic system. This type of compulsory voting not only undermines the expressed will of a voting majority but also precludes employees from exercising their individual choice. To be truly democratic, workers must have the decision to vote for union representation, against union representation, or not to vote at all. If we subjected our political representatives to this standard, it is clear that many, if not most, federal, state and local officials would never hold public office by virtue of low voter turnout. In fact, in every mid-term election since 1930 the national turnout fell below 50 percent.

The NMB's election procedures are also an anomaly in the realm of American labor-management relations. Workers in all other areas of the economy, including those in both the private and public sectors, are afforded the right to definitively affirm or reject representation by a majority vote of those who participate. There is no legitimate reason, policy related or otherwise, for aviation and rail workers to be subject to an exceptional and undemocratic standard.

This compulsory voting standard has, in turn, fostered a unique culture of voter suppression as companies understand that impeding union organizing merely requires preventing employees from voting. During union elections, companies seek to decrease voter turnout and thereby defeat an organizing drive not by winning an actual vote on the merits, but rather through carefully managing a low turnout. In effect, the NMB's existing procedures reward this type of

underhanded employer conduct. If anything, effective federal labor relations policy should encourage employee participation in representational elections, not supply employers with the tools to block attempts at unionization.

In both 2002 and 2008, Delta Airlines ran intense suppression operations against flight attendant organizing campaigns, encouraging employees to destroy government-issued ballots – or as Delta named its 2008 campaign, "Give a Rip". Although over 98 percent of participating voters supported the union (the Association of Flight Attendants) in each effort, Delta's opposition campaign circumvented this majority by keeping turnout below 50 percent.

The election procedures further disadvantage employees who support unionization as companies seek to manipulate the Official Eligibility Lists. The NMB includes as eligible voters employees on lay off, military leave, extended medical leave of absence and other employees who may be hard-to-reach. As a result, the companies have an incentive to pad the eligibility lists with hard to reach workers or individuals no longer employed at the company, further increasing the certification threshold for union organizing and disabling a worker's right to choose a union.

Fortunately, the proposed rule will curtail these dubious practices and conform rail and aviation elections with the NMB's mandated goal of clearly determining voter intent. The new ballot will allow employees to vote "yes", "no" or abstain from voting and let a majority of those participating prevail. Such a standard provides each employee a precise choice when voting and ensures the equality of every vote. We believe it is time to let workers in these industries choose representation under the same system of democracy as others, and we are pleased that the proposed rule provides workers this opportunity.

The opponents of this reform continue to advance baseless claims in an effort to derail the Board's necessary and constructive rulemaking. However, their allegations all have one thing in common: to distract observers from the merits of the proposed rule and maintain the status quo. By dragging dubious and extraneous elements into the dialogue, they wish to avoid the uncomfortable reality that what they truly oppose is democracy.

Among the frequent arguments raised against the Board's proposal is the issue of timing. Critics claim the NMB should not change its procedures because potential organizing campaigns will benefit. This is a self-defeating proposition. If the Board was precluded from updating its representation rules based on this rationale, the agency would never be able to change its rules. There are always potential organizing drives or representations cases on the horizon. For the opponents of this rule there will never be an appropriate time to implement the proposal. In truth, their opposition has nothing to do with timing, but everything to do with derailing the proposal altogether.

Meanwhile, industry apologists continue to suggest that the NMB's anomalous threshold is a necessary, if not required, mechanism for preventing economic upheaval created by strikes. Although it is certainly true that the RLA is designed to limit disruptions to interstate commerce, the Board's election procedures have absolutely no bearing on this matter. Rather, the agency's

election procedures merely ascertain voter intent during representation disputes. In contrast, the issues and disagreements that lead to difficult labor-management disputes are dealt with by the Board's comprehensive bargaining and mediation process and status quo requirements. Opponents are thus relying on an old Washington tradition to advance their agenda: introduce completely unrelated red herring issues – in this case, "strikes" – to sow confusion over the true nature of the policy issues being debated. Let's be clear: the proposed rule in no way changes the NMB's mediation procedures and has no material effect on the Board's mechanisms used to drive the negotiating and mediation process toward consensual collective bargaining agreements and to avoid potentially disruptive disputes.

As we have clearly demonstrated, current NMB election procedures are a patently unfair means of determining voter intent. They deny workers the fundamental democratic rights found throughout American society in settling questions of representation. And by counting non-voting employees as "no" votes, they encourage employers to wage voter suppression campaigns that subvert the expressed will of the majority of those who cast a vote.

It is time to permit airline and rail workers to vote on the question of unionization under the same democratic standards used in all other elections – from union elections conducted under other labor laws to Congressional elections. The Board has proposed sensible reforms that will accomplish this goal.

Transportation labor enthusiastically endorses the NMB's proposed rule change and urges its adoption.

Joanna Moorhead
National Railway Labor Conference

Statement of Joanna L. Moorhead of Behalf of
The National Railway Labor Conference

NMB Docket No. C-6964

December 7, 2009
Washington, D.C.

My name is Joanna Moorhead. I am General Counsel of the National Railway Labor Conference ("NRLC"), which represents the nation's major freight railroads in multi-employer collective bargaining and in other matters of national significance with respect to labor relations in the rail industry. My comments are offered on behalf of the NRLC and its members, including BNSF Railway, CSX Transportation, Grand Trunk (Canadian National), Kansas City Southern, Norfolk Southern, Soo Line (Canadian Pacific), and Union Pacific as well as many Class II and Class III railroads. I appreciate the opportunity to address the National Mediation Board regarding the proposed changes to its election procedures.

The NRLC will file comments on the NMB's Notice of Proposed Rulemaking by January 4, 2010 and therefore I will not take the time now to delineate the specific concerns we will raise regarding the Board's proposed changes. What I will address today is our concern over the process used by the Board in deciding to make this proposal.

This year, the National Mediation Board ("NMB") is celebrating its 75th anniversary as an independent and non-partisan agency charged with vital responsibilities concerning labor-management relations in the railroad and airline industries, including the responsibility for determining the choice of representative by "[t]he majority of any craft or class of employees." 45 U.S.C. § 152 Fourth. During its long history, the Board has consistently promoted the interests of labor peace and stability, a fact for which we – both union and management – should be grateful. Unlike other unionized industries, which often suffer from representation disputes, inter-union raiding, strikes, and other labor unrest, the railroads have had virtually the same representation for decades, allowing the development of long-term, stable bargaining relationships.

These facts beg the question: why has the Board been so successful in maintaining stability? Why has the railroad industry experienced greater labor peace than most industries subject to the National Labor Relations Act, notwithstanding the fact that many carriers are more heavily unionized? The Board's Notice of Proposed Rulemaking suggests that stability in labor relations under the RLA is a product of the Board's unique mediation powers. NPRM at 56751. The railroads believe, however, that the answer is equally attributable to three special characteristics that have always defined the Board's overall approach to its role under the Railway Labor Act.

First, the Board has generally had a measured and deliberative style in carrying out its statutory responsibilities. It has been careful to assess all aspects of proposals for change, and examine all of the potential ramifications for labor and management. As the Board indicated in the case of *In re Chamber of Commerce*, a deliberative methodology is essential to assuring both sides that their concerns have been heard and weighed, meaning that they are more likely to accept the result as fair and balanced.

Second, the Board has always tried to act on the basis of consensus, especially with respect to hotly debated issues. Indeed, when it comes to proposals for sweeping change, the Board has virtually never acted without the agreement of all three Board members. This emphasis on consensus has long roots in the RLA; the statute itself was the product of cooperation between rail labor and rail management.

Third, the Board – unique among federal agencies – has remained largely immune from political pressures. It has been a truly independent agency, acting in the best long-term interests of both labor and management, but beholden to neither. The Board has, for the most part, carefully avoided actions that appear politically motivated or overtly biased in favor of one side or the other. In this fashion, the Board has achieved a hard-won reputation for true neutrality.

These characteristics not only define the Board, they help to set the tone for labor relations in the industries it serves. The mediation process has been successful in producing agreements precisely because the parties perceive the Board to be a truly neutral and honest broker. In other words, the Board's stabilizing influence is due largely to its non-partisan, reflective, and consistent character.

The railroad industry urges the Board to approach the proposed rulemaking that is now under consideration with the same sort of careful, deliberative, consensus-based, and non-partisan approach that has defined its history to this point. The rule under consideration would be the most dramatic change ever in the Board's election procedures. It would fundamentally alter the manner in which a "majority" of a craft or class is defined for purposes of representation. Moreover, this proposal comes less than two years after the Board rejected the same idea as lacking sufficient justification, less than one year after changes in the composition of the Board, and in the midst of hotly contested and very significant representation disputes in the airline industry. Especially given these circumstances, caution is warranted.

In particular, the Board should be wary of acting without having first engaged in the sort of "complete" administrative process that this Board has used in past cases involving proposed changes in fundamental rules. It is worth emphasizing what the Board has repeatedly said on this subject. In *Chamber of Commerce*, the Board held that when it comes to changes in the RLA's voting rules, "a full, evidentiary hearing with witnesses subject to cross-examination" is "the most appropriate method of gathering the information and evidence" needed to decide whether to even propose formal amendments to the existing rules, let alone adopt such changes. 13 NMB 90, 94 (1986). As applied, this procedure includes a meaningful opportunity for labor and management to present both testimony and written argument and to challenge the factual assertions raised by the other side. Less than two years ago, the Board reaffirmed the need for such an evidentiary hearing, noting that it cannot make fundamental changes without "first engaging in a complete and open administrative process to consider the matter." *Delta Air Lines, Inc.*, 35 NMB 129, 132 (2008).

A full evidentiary process would allow the Board an opportunity to consider all of the potential ramifications of the proposed change, including some possible consequences that have not been discussed by the rule's proponents. Let me suggest three examples. First, altering the voting rules to allow certification of a representative by a small but vocal minority of eligible voters could undermine the stability of labor relations in our industry by increasing the frequency of attempts to replace existing unions with rival organizations. Inter-union conflict can be very disruptive – it affects the stability of labor-management relations as well as employee morale and can interfere with operational cohesiveness. As a result, the railroads strongly wish to avoid any action that might exacerbate the potential for these disputes.

Second, how would the contemplated change affect the potential for decertification of existing representatives? The expressed rationale for promulgating new rules to determine whether a majority of employees desire representation should apply equally to whether there should be new rules to determine if employees no longer desire such representation. Advocates of the proposed change tend to focus on the claim that it would make it easier for employees to choose representation, but they ignore the fact that those same rules could be used to decertify a representative.

Third, the proposed change could very well increase the frequency of election campaigns and/or alter the manner in which unions and management exercise their respective rights to appeal to employees during such proceedings. The need to obtain a majority of votes cast, as opposed to a majority of eligible voters, could increase the pressure on employees. Examples of unwelcome pressure from both sides can be found in the history of election proceedings under the National Labor Relations Act. Hence, it is not at all clear that, if given a choice between the two procedures, railroad and airline employees would choose to abandon the system they have used for the last 75 years.

I do not mean to suggest that any of these potential consequences of the contemplated rule are established fact or are certain to arise. Rather, my real point is that development of a full evidentiary record is essential to a comprehensive and measured evaluation of all the possible ramifications of such a change. It is difficult to see how the Board can make a considered analysis without such a record, particularly within the timetable contemplated by the NPRM.

The railroad industry is doubtful that the proposed change will prove, on its merits, to be either warranted or advisable. But leaving aside the merits of any change in the election procedures, the railroad industry is concerned that a failure to adhere to the Board's historic procedures will foster a perception that the proposed change is politically motivated and driven by short-term interests. We have seen the consequences of such politicization of agency processes in other contexts; it inevitably results in instability and unpredictability, as rules shift back and forth depending on the party in power. The railroads have no wish to see that sort of disruptive dynamic take hold here.

In closing, I would like to emphasize again that the parties look to the NMB as an agency that strikes a balance between the needs of labor and management and offers stability and predictability. Precipitously changing the long-standing voting procedure would be a striking and unwarranted departure from the Board's

well-established practices concerning significant policy changes. I urge the Board to consider not just the content of the rule it selects, but how it goes about making that selection. In particular, the railroads recommend that the Board rescind the Notice of Proposed Rulemaking and in its place, choose a path that is designed to ensure a full, open, and considered decision-making process on this important matter.

This concludes my comments. Thank you again for the opportunity to participate in this proceeding.

John Prater
Air Line Pilots Association International

HEARING BEFORE NATIONAL MEDIATION BOARD
DOCKET NO. C-6964

Statement of John Prater, President,
Air Line Pilots Association, International
in Support of Proposed Changes
to the National Mediation Board's
Representational Balloting Procedures

Chairman Dougherty and Members Hoglander and Puchala:

I am John Prater, President of the Air Line Pilots Association, International, and on behalf of ALPA and the 53,000 pilots it represents, I thank the Board for the opportunity to speak firmly in support of the Board's proposal to change the representational ballot to restore basic fairness to the union representation election process. ALPA strongly speaks in support of the Board's efforts to remove the current significant bias against union representation in the balloting rules. ALPA also believes that the Board's proposal is a long overdue step to level the playing field in union elections by counting the wishes of the majority of voters participating rather than presuming, as the rule does today, that every worker who does not participate is voting against union representation. The current rule gives those who fail to participate -- for whatever reason -- what amounts to a veto power over those who do.

This fundamental bias in the current balloting system against union representation is unique to railroad and airline employees. No other group of private sector employees in the United States selects their representatives with similar anti-representational presumptions. Nor does the public, when it chooses its elected representatives and other leaders, vote under such a system. If it did, very few public elections would produce an

outright majority for candidates and few public elections would succeed in filling the offices for which the election is held.

In addition to the current tilted ballot rules, management spends countless amounts of money and uses multiple means and technologies not even dreamt of in the 1930's to dissuade employees from voting. This conduct exaggerates the unfairness of the current balloting system. These tactics buttress the need to implement a system under which employees can clearly and easily express a position for or against union representation. This is especially so in light of the many forms of instantaneous communication and the ease of voting that will permit employers to communicate their point of view and for employees to express their sentiments.

The current NMB balloting system is not required by the statute and is the antithesis of democratic free choice. The Board's proposed rule change is a realistic but important update that ensures basic fairness and recognizes that conditions for voting have changed since the 1930's, when employees in remote locations could not quickly or easily get information, communicate their sentiments, or cast ballots. Today's modern world obviates these concerns and constraints and makes the proposed new rule appropriate.

Some argue unpersuasively for the continuation of a 70 year Board tradition without providing compelling reasons to support such a system. But our great country has a tradition of righting balloting injustices even when they persist over long periods of time. Civil Rights laws that provided minorities the right to vote were not passed for more than 100 years after the end of the Civil War. Women were not given the right to vote for more than 130 years after the founding of this country. The century-long

continuation of these unjust voting rules did not justify their retention. Nor should the existing NMB balloting system, that presumes to know how non-voters would vote, continue even though it has been used for more than 70 years. The Board has good reasons to make a change now and it has the authority to do so.

As the NMB noted in its NPRM, almost 45 years ago the Supreme Court ruled that the Board has very broad discretion to establish appropriate balloting procedures. The Court also noted that the Railway Labor Act does not require the Board to use a ballot at all to determine an employee's choice of union representation.

The NMB proposes a modest change that it has the discretion to determine is appropriate. In Canada, employees at the federal level are normally not required to vote in union elections if a majority submit authorization cards stating that they desire union representation. Although the Board has the power to adopt that kind of system, it is not proposing such a dramatic change from the current procedures. The Board is proposing simply to apply a widely accepted and fundamentally fair election process that recognizes that the majority rules. If the majority of participants in an election votes for a union, it wins. If a union is not supported by the majority of voters, it loses. These modest changes to the Board's balloting processes are justified and should be implemented as soon as possible.

Contrary to the view of parties who oppose this change, the proposed ballot modification would not undermine the RLA's goals of reducing strikes and preventing disruptions to commerce. The Board's proposal would not change any of the Board's mediation procedures nor would it impact the RLA's status quo rules. These are the

relevant procedures and rules that determine when strikes can begin, and they do not have anything to do with determining whether workers want to join a union.

The Board's representational function is purposely separate from its mediation function and its representational duties are simply to determine whether workers want to obtain union representation. The current ballot system impairs the accuracy of the Board's representational determinations when all non-voters are treated as voting no. The revised proposed ballot rules, on the other hand, will not impact the Board's mediation function at all.

The unstated premise of this corporate argument is there will be more strikes if we have more unions. They follow by arguing that there should be no change that makes it easier for a union to organize. Not only is that argument speculative, it also undermines the RLA's foundation. Labor and management together designed the RLA and jointly presented it to Congress. The statute purposely sought to avoid disruptions to commerce but also fostered the use of collective bargaining as a problem-solving device that would stabilize the transportation system. This foundation, and the statute's clear recognition that employees could choose their representative without coercion or interference by management, make clear that management's argument is unsound and contravenes the Act's purpose. The Board's proposed rule change more fully carries out all of the central purposes of the Act to foster peaceful, collectively-bargained solutions to labor disputes in the rail and airline industries.

ALPA stands united with the Transportation Trades Department of the AFL-CIO and our fellow unions in the rail and airline industries, who unanimously support this rule change. On behalf of ALPA and its members, I appreciate the opportunity to speak in

favor of the Board's proposal, which ALPA believes is long overdue and which we strongly endorse. Thank you.

Robert DeLucia
Airline Industrial Relations Conference

STATEMENT OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE TO THE NATIONAL MEDIATION BOARD

MEETING ON PROPOSED CHANGE TO THE REPRESENTATION BALLOT
December 7, 2009

My name is Robert DeLucia, and I serve as the Vice President and General Counsel of the Airline Industrial Relations Conference ("AIR Conference"). I am appearing today not only on behalf of AIR Conference, but also in support of the views expressed by the Air Transport Association. However, in addition to providing the perspective of AIR Conference, I would like to share my personal observations based on 27 years of experience with the National Mediation Board.

During my tenure at AIR Conference, I have had the unique privilege to personally know the 17 women and men who have served as Members of the National Board Member since 1982. The prudent, thoughtful, and measured manner in which Board Members have dealt with all controversial matters – both in the representation and mediation arenas – may have at times been frustrating to the parties, but it enabled the Board to establish a well-deserved reputation for even-handed administration of the Railway Labor Act (RLA). Such an approach is harmonious with the first general purpose of the RLA: avoidance of any interruption to commerce or to the operation of any air carrier engaged therein. And of course, the NMB's responsibilities cover not just carriers by air, but also rail carriers, including carriers providing rail commuter service.

The NMB has justifiably enjoyed a reputation for "non partisan" conduct that focused on the long term stability of the rail and airline industries, avoiding hasty, parochial changes to its practices to avoid even the appearance of partisanship. It did so in obvious recognition of the fact that doing so in one context would call into question its ability to act as an impartial public agency in other contexts, as well. Companies and unions that insisted on "immediate action" – be it a release from mediation or changes to representation rules - without first going through the proper steps, have never been rewarded by the agency. Studied actions and "consensus building" have been the hallmarks of the NMB, in a way harmonious with the method in which the RLA originally was enacted. Regrettably, the

manner in which two Board members have capitulated to labor organizations' public demands for the "minority union" proposal, threatens to undermine the character which an agency should have under a public law, particularly one formulated through the joint efforts of labor and management. Maintaining the parties' perception of the agency as an "honest broker" is essential to both the NMB and the industries that it governs.

The position of AIR Conference's members on the TTD's "minority union" proposal is both long-established and well-known to this Board. Minority unions are (a) barred under the Railway Labor Act, and (b) disruptive of stable labor relations. Further, the Majority Union representation requirement has been consistently and successfully applied for 75 years by the 35 women and men who have served as Members of the National Mediation Board.

Accordingly, I will not consume my time today with a recitation of AIR Conference's legal and policy analysis of the minority union ballot proposal. Those arguments will be fully set forth in our formal comments on the Notice of Proposed Rulemaking that will be filed by January 4, 2010. Instead, AIR Conference comments today will focus on the "broken process" that has led us to this NPRM.

If there has been one constant refrain of the NMB members during the past 75 years, it has been the agency's repeated admonitions to the parties that they must "go through the process" – slow as it may be at times – before the agency will act. This adherence to a methodical and thorough process, which is the surest method of avoiding interruptions to commerce and of promoting the orderly settlement of disputes, is most obvious in the mediation field, where the parties are never released into "self-help" until they have proceeded through the sequential stages of direct negotiations, mediation, and proffer of arbitration. As both management and unions have experienced, this process of moving from the filing of Section 6 openers to negotiations to mediation and onto a proffer and release often lasts years. The Board rarely "short circuits" the process by commencing mediation one month and then issuing a release, the next month.

However, in the current matter, the NMB has behaved in a fashion completely uncharacteristic of a public agency by surrendering to the unions' insistence for the equivalent of an "*instant release*" of the Minority

Union proposal. Their actions on the TTD's petition – before it was even published to the public – is completely contrary to the Board's past handling of similar administrative and representation rule matters. Further, it leads to the inescapable conclusion that two Board Members had predetermined the issue before hearing from the parties and gathering evidence. A quick recitation of the publicly disclosed events surrounding the progression of the TTD's Minority Union proposal reveals an abortive and hopelessly compromised administrative process:

a. July & August 2009. The IAM and AFA file for representation elections on Delta Air Lines. For both unions, at stake in the Delta representation elections is the continued flow of millions of dollars in dues income from former Northwest Airlines employees.

b. August 2009. In a radio interview, the President of the Association of Flight Attendants criticizes the current representation ballot form and emphasizes how important it is for AFA to have a new Board member in place before the next Delta flight attendant election occurs. She goes on to boast that her union was "able to get her [Member Puchala] nominated and confirmed and to do it in a really timely fashion."

c. September 2. The TTD sends a letter to the agency asking that the Representation Manual be altered to provide for a Minority Union ballot system. Curiously, the TTD does not issue a press release or otherwise seek to bring public attention to its demand.

d. September 30. The Chamber of Commerce files a petition requesting that if the NMB initiates proceedings on the Minority Union application, it should simultaneously consider the issuance of Union Decertification rules.

e. October 28. The third Board member is first informed of the existence of the proposed NPRM and given only one day to review and prepare her dissent.

f. October 29. The NPRM is sent to the Federal Register for publication.

g. October 30. The IAM suddenly withdraws its representation application for the Fleet Service group at Delta Air Lines.

h. November 3. The NPRM granting the TTD proposal is published in the Federal Register. The petition of the Chamber of Commerce for Decertification Rules is ignored. AFA withdraws its representation application for the Flight Attendants at Delta Air Lines.

This disturbing sequence of events, coupled with the unprecedented "rocket docket" treatment which the TTD petition has been accorded, stands in stark contrast to the deliberative, open-minded process to which all prior proposals to change Board rules and procedures have been subjected. A brief review of the thoughtful manner in which the Board handled earlier matters creates a vivid contrast to the one-sided handling of the TTD petition:

1. 1985-87. The Chamber of Commerce requested the issuance of union decertification rules, followed by the International Brotherhood of Teamsters' petition for "Excelsior" lists of employee home addresses, and the adoption of a "yes/no" ballot. Within days of receiving each petition, the Board circulated out the petitions for comment...without disclosing the Board Members' personal views of either petition. Subsequently, the NMB handled both applications simultaneously and ordered extensive evidentiary hearings, complete with transcripts and briefs. After almost two years of proceedings and thorough review by the Board Members, the NMB denied both applications.

2. 1992. The Board invites parties to suggest improvements to the Representation Manual.

3. 1993. The Board seeks comments on the issue of conducting elections at carriers that are merging under pending single transportation system proceedings.

4. 1994. United Steelworkers file a petition requesting that the Board provide Excelsior lists of home addresses in representation elections. The NMB, without indicating its position, publishes the petition and asks for public comments.

5. 1994-1996. Responding to the directive of the Commission on the Future of Worker-Management Relations (the "Dunlop Commission"), the NMB convenes a task force of air and rail labor-management practitioners to review possible changes to the Railway Labor Act and methods for improving the NMB's services. After over a year of proceedings, the Airline Industry Labor-Management Committee ("Dunlop I") issues its "consensus" recommendations in its April 1996 report.

6. 2003-04. On August 7, 2003, the NMB issued an Advanced Notice of Proposed Rulemaking seeking comments on its role in the administration of the National Railroad Adjustment Board grievance mechanisms. The ANPRM listed six questions which the parties were asked to address. After over a year of consideration, the Board published an NPRM on December 21, 2004 and schedules a public meeting to discuss the fee proposal. Ultimately, the Board never implemented the proposed fees.

Clearly, the frantic manner in which the NMB has expedited the Minority Union proposal is incompatible with its measured pace of handling prior, even identical, representation proposals. At this stage, the confidence of the parties in the Board's unbiased application of its established practices has been needlessly undermined. The agency's carefully cultivated, 75 year reputation for even-handed decision making has been seriously eroded.

Fortunately, the situation is not hopeless and can be remedied. First, the Board Members should withdraw the NPRM, and remove themselves from the politically charged and deeply flawed decision making process that has been generated. Second, the NMB should turn both the TTD and the Chamber of Commerce petitions over to a "Blue Ribbon" joint committee of experienced labor and management officials, ala the "Dunlop I" Committee of 1994-96. This committee – which should encompass a full spectrum of rail and air management, union and employee participants - could thoroughly review the entire representation process and make consensus recommendations for improvements.

AIR Conference would respectfully request that the NMB withdraw its proposed rule, and start the healing process by gathering both union and management representatives in a joint forum.

Robert Roach
Int'l Association of Machinists and Aerospace Workers

Comments of
Robert Roach, Jr.
General Vice President

International Association of Machinists & Aerospace Workers
9000 Machinists Place
Upper Marlboro, MD 20772

Before The National Mediation Board
Re: Docket Number C-6964
December 7, 2009

Thank you, Chairman Dougherty and members Hoglander and Puchala, for the opportunity to speak with you today on this very important matter. My name is Robert Roach, Jr., General Vice President of Transportation for the International Association of Machinists and Aerospace Workers. I represent more than 115,000 airline and railroad workers in the United States, making the Machinist Union the largest union with members working under the Railway Labor Act (RLA).

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." My comments today are based on the principles set forth in that document.

As the National Mediation Board's (NMB) largest stakeholder, we strongly support the proposed change to make union representation elections more in keeping with our nation's democratic principles.

The current election process has been in existence since the creation of the National Mediation Board in 1934. Opponents argue that if the process was broken it would have been fixed many years ago. But sometimes it takes government a very long time to correct mistakes.

The federal government did not guarantee women the right to vote until 1920, 131 years after the U.S. Constitution was ratified. Although some states conferred limited rights earlier, there were no nationwide constitutional protections until the 19th Amendment. There was fierce opposition to allowing women the right to vote, with ridiculous reasons ranging from "women really don't want to vote", to "it would lead to our nation's collapse". Today, society finds these bigoted excuses offensive. Denying women the right to vote was wrong. People who opposed women's suffrage were wrong. But it still took more than a century for the government to correct it.

African-Americans were denied the right to vote even longer. While the voting rights of former slaves were recognized by the federal government in 1870 through the 15th Amendment, it was nearly another 100 years before the government finally fixed the *process* of voting to ensure it was fair to people of all races. It was not until 1965's Voting Rights Act that the government finally outlawed discriminatory voting practices and afforded all citizens a fair voting process. There was violent opposition to granting African-Americans the same rights enjoyed by other citizens. Denying Americans their right to vote because of their race was wrong. Those who opposed eliminating racial prejudice in voting practices were wrong. But it still took 176 years, a Civil War and a massive nationwide civil rights movement for the government to correct it.

Under the current NMB election process, people who do not participate in an election are considered to have voted against union representation. It doesn't matter why they

didn't vote. They may have wanted a union but were unable to cast their ballot. But the government, without regard to a person's true desire, counts them as voting against union representation. They may have even decided not to participate in the election for religious or other personal reasons. However, the government does not allow them to abstain. It counts them as voting "no." The U.S. government is impermissibly imposing a viewpoint on a select group of its citizens.

There have been more than a hundred thousand jobs lost in the airline industry in recent years, and many of them are gone forever. Yet if these furloughed employees remain on a carrier's seniority list they are eligible to vote in NMB elections. Although they may have found other jobs in or out of the industry and may be disinterested in the election, if they choose not to vote or if they do not receive voting instructions because they were sent to an old address, the NMB counts them as voting "no".

The current voting procedures of the Board do not even allow voters who do not want a union to express that opinion. If somebody marks "no" on their ballot to indicate they oppose unionization, their ballot is voided and their vote not formally counted. We should not have a process that discourages voters from expressing their true intent while at the same time assigning a viewpoint to voters who do not cast a ballot. That is not a democratic system. Every voice should be heard and counted. Every employee should be allowed to choose for him or her self whether to vote yes, no or to abstain. And our government should respect that choice.

In a free and democratic society people have the right to form and express their own opinions, including the right not to express any opinion. The *process* of voting under the RLA needs to be changed to ensure the voice of everyone who wishes to convey their viewpoint is heard and fairly counted. As has happened every time the government tried to change the voting process to make it fair, there are people loudly objecting. Yet, opposing the fair voting rights of air and rail workers is wrong. The people and organizations who wish to allow the government to continue imposing a viewpoint on non-participatory voters are wrong. This unfairness has gone on for 75 years, but now is the time for the government to correct it.

The carriers and their representatives are opposed to air and rail voters' rights for the same reason people were opposed to voting rights for women and African Americans – they are afraid to upset the status quo and lose the advantages they enjoy at the expense of others. Airlines have enjoyed an advantage in union organizing campaigns for decades. The new rule will not suddenly give unions an edge in elections, as some claim. It will only take the advantage away from the carriers – leveling the playing field to ensure that every voice is heard. It will simply allow workers who participate in an election to vote for a union or vote against a union for the first time.

Ironically, many of the same people who are opposing this proposal were elected to a place on their company's Board of Directors utilizing the same process the NMB is

advocating - those who choose to abstain from voting are not counted. Air and rail employees deserve the same fair process as their corporate leadership.

The IAM was founded as a rail union in 1888 – long before the passage of the RLA. The rail industry was largely unionized when the RLA was crafted. The Act was designed around the concept of cooperation between labor and management. The NMB representation process was not developed to decide *whether* a union would represent workers at a carrier, but which union would represent them. At a time when wildcat rail strikes endangered interstate commerce, railroads sought the stability that unions and collective bargaining agreements provided. Even before the Act railroads routinely voluntarily recognized unions. Things have changed.

Airlines are now covered by the Act, and the airline industry is strongly opposed to unionization. The common purpose that existed between labor and management in 1926 is no longer present. Carriers today mount massive anti-union campaigns and voter suppression drives. Yet the Act was designed in such a way that the carrier was not intended to be a party to the representation dispute; carriers were to remain neutral. Today, with the carriers no longer a neutral party in the election process, the current system is rigged against representation and needs to be corrected. I have some examples to demonstrate the unfairness of the current system.

In a 2001 representation election for 110 Pan Am mechanic and related employees (R-6891), 100% of the employees who voted chose unionization. But since only 54 workers cast votes, 5 less than the mandated NMB minimum, the 54 employees who voiced their opinion were denied unionization.

Fleet service employees at American Trans Air faced a similar result in July, 2000 (R-6757). With 224 employees eligible to vote, 106 (or 47%) cast a ballot. In spite of every employee who participated wanting IAM representation, their wishes were ignored because seven (7) of their coworkers chose not to take part in the election.

Earlier this year the outdated NMB rules ignored another group of employees' desire to unionize because only 50% of the employees participated, instead of the required 50%+1. Half of the 34 eligible helicopter mechanics at The Center for Emergency Medicine (R-7208) voted to join the Machinists Union. The other half, for whatever reason, did not participate in the election. Because only 17 employees voted, not 18, the NMB dismissed their case. A process where a group of employees' desire to join a union can be hijacked because a single person refrained from voting is unfair.

Carriers are claiming the NMB's proposed rule would lead to industry instability by increasing the likelihood of a strike without majority membership support. This position is both irrelevant and illogical. Under the RLA, strikes can only occur after an exhaustive NMB-controlled process. Because the NMB controls when the parties may seek self-

help, strikes are no more likely to occur because the Union won representation without an absolute majority of support. In fact, the opposite is true. Individual unions set their own requirements and procedures for authorizing a strike. In recognition of the need for strong membership support before a strike is called, the Machinist Union constitution requires approval from 2/3rds of the voting membership before a strike can be authorized. Other organizations have similarly stringent requirements, showing the responsible way unions seek input and guidance from their membership before undertaking a strike. If a Union does not have sufficient support for a strike, they will not undertake one. As the NMB has no authority over the method unions utilize before calling a strike, the entire issue should be disregarded.

The question is not whether the current and proposed voting processes favor unions or carriers; unions and carriers do not vote in representation elections. The only question for the NMB to consider is which process is the most fair to the working people involved and impacted by the election.

The NMB should reject a process in which the government imposes a viewpoint on its citizens. It should support a process where each person has the opportunity to choose for themselves if they want to vote "yes" or vote "no", and those who abstain from voting for whatever reason do not influence the outcome of the election.

If our government had not modified its election rules, 2/3rds of today's National Mediation Board and the current President of the United States would not be eligible to vote in public elections. I would not be eligible to vote. A government of the people, by the people and for the people must change to ensure that its people are not disenfranchised. It is time for the NMB to change its election rules.

We, the transportation workers of America, in order to have a fair opportunity to form a union, establish justice, provide for our common defense and to secure the blessings of liberty for ourselves and our children, request the National Mediation Board provide us with a fair election process.

Jack Gallagher
Delta Air Lines

BEFORE THE
NATIONAL MEDIATION BOARD

Docket No. C-6964

STATEMENT OF DELTA AIR LINES, INC.

AT OPEN MEETING ON

NOTICE OF PROPOSED RULEMAKING

ISSUED BY THE

NATIONAL MEDIATION BOARD

AT 74 FED. REG. 56750 (NOVEMBER 3, 2009)

Submission Date: November 20, 2009

Open Meeting Date: December 7, 2009

John J. Gallagher
Paul Hastings Janofsky & Walker, LLP
875 15th Street, N.W.
Washington, D.C. 20005
202-551-1712

Counsel for Delta Air Lines, Inc.

I. DELTA'S EMPLOYEES ARE UNIQUELY IMPACTED BY THE PROPOSED RULE CHANGE

Delta Air Lines and Delta employees are in a unique position with respect to this rulemaking proceeding. Delta employees to date are the only employees who have been directly affected by the Board's sudden decision — seemingly out of nowhere — to change the voting rules. This has resulted in a significant delay in affording employees their right to exercise their choice regarding union representation. It also has prevented Delta from aligning the pay, benefits and work rules of large numbers of pre-merger Delta and Northwest employees. The result is that some groups of Delta employees are fully able to participate in the benefits of the Delta-Northwest merger while others are prevented from doing so.

It has now been more than a year since the Delta-Northwest merger took place. In view of the timing of the Board's rule change proposal and the coordinated withdrawal of the AFA's and IAM's applications to resolve representation issues for the post-merger workforces, as a practical matter an election now could not be completed for many more months at the earliest. Efforts to align pay, benefits, work rules and seniority so that the affected employees can access the full benefits of the merger now could not even begin for many more months, all as a result of the delays.

As Delta advised the Board and the unions more than a year ago, we expect to receive a single operating certificate from the FAA by the end of 2009. Our integration will proceed, and we will do what we can to allow all of our employees to access the benefits of the merger, but they are being harmed by the failure to resolve representation.

AFA and IAM have campaigned actively for more than a year, but apparently became convinced that they could not win the support of a majority of Delta under the election rules which have governed everyone else for the last 75 years, and under which the AFA recently won two elections, including an election at Compass, a Delta subsidiary.[1] As a result, the AFA and the IAM withdrew the representation applications which they had filed during the summer, and became the prime movers in support of this effort to change the Board's longstanding election rules.[2] AFA has not been bashful about its intentions. Indeed, it publicly proclaimed that the change of administration was the reason it expected to succeed in changing the rules so soon after the Board unanimously rejected its prior request.[3]

Delta and Delta employees have been singled out for discriminatory treatment. Representation 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. Indeed, some of the representation issues resulting from Delta's acquisition of Northwest Airlines were resolved early in 2009 by elections under the existing Board rules, while other Delta employees are now apparently to be subjected to different rules for no reason

---

[1] *USA 3000 Airlines*, 37 NMB 1 (2009); and *Compass Airlines*, 37 NMB ___ (11/18/2009). In both of these cases, AFA's application was filed subsequent to AFA's application to represent Delta's flight attendants.

[2] *Northwest Airlines, Inc./ Delta Air Lines, Inc.*, 37 NMB 19 (10/30/2009) (IAM application re Fleet Service employees; dismissal-withdrawn during investigation; filed 8/13/09); *Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 NMB 21 (11/3/2009) (AFA application; dismissal-withdrawn during investigation; filed 7/27/2009).

[3] In an August 2009 radio interview, AFA's President criticized the current representation ballot form and emphasized how important it was for AFA to have a new Board member in place before the next Delta flight attendant election.

other than the wishes of the AFA and the IAM and a change in the membership of the NMB.[4] In this context, there can be no doubt that Delta was the subject of Chairman Dougherty's observation that there is a "growing perception that the majority is attempting to push through a controversial election rule change to influence the outcome of several very large and important representation cases currently pending at the Board." Letter from Chairman Dougherty to Senators, at p.2 (Nov. 2, 2009).

The unions seem quite certain of the outcome of this proceeding. AFA's letter withdrawing its application at Delta made clear that they plan to re-file after the new rules become effective. Yet, the Railway Labor Act is about the protection of *employee* rights, not the interests of unions. The Board has abandoned any semblance of neutrality on representation issues — surrendering the integrity which both the Supreme Court and the NMB have long recognized as essential to the Board's effective discharge of its responsibilities under the RLA. Such conduct by the Board has also trampled on the interests of Delta and *all* Delta employees in the prompt and fair resolution of representation issues resulting from its acquisition of Northwest Airlines. The treatment of the Chairman by the other member of the Board is unprecedented and inappropriate. The gamesmanship surrounding the withdrawal of representation applications by the AFA and IAM is transparent.

Delta has longstanding collective bargaining relationships with our pilots, represented by ALPA and with our Dispatchers, represented by the Professional Airline Flight Controllers Association ("PAFCA"). ALPA and PAFCA have each negotiated combined collective

[4] *Delta Air Lines, Inc.*, 36 NMB 88 (2009) (dismissing NAMA application re Meteorologists following election); *Delta Air Lines, Inc.*, 36 NMB 90 (2009) (certifying PAFCA as representative of Dispatchers).

bargaining agreements and integrated seniority lists with Delta — with none of the acrimony seen in other recent airline mergers. ALPA's agreement was negotiated prior to the acquisition; PAFCA's was negotiated shortly after the acquisition. Thus, we can proudly and truthfully declare that Delta handles its union relationships with respect. But ALPA and PAFCA have earned respect by their professional conduct and by clear majority support among their workgroups.

Delta is pro-employee and pro-freedom of choice for our employees on representation matters. Delta has a unique pro-employee culture, developed and nurtured over many years. It was this culture which led Delta's employees to band together in the 1980s to buy a large jet airplane for the Company, and to stand together in the 1990s and in this decade to save the Company from financial peril. It is this culture which has resulted in Delta's never experiencing a strike.

II. THIS NPRM IS DESIGNED TO ADDRESS A PROBLEM WHICH DOES NOT EXIST.

A. The Bizarre Origins Of This NPRM

Correspondence from the Chairman of the Board to certain members of the U.S. Senate, indicates that the Chairman had no role in the formulation of the proposed rule change: there was no formal meeting of the Board to discuss the actual language of the proposed change, no vote to proceed with the proposed change, no discussion of the language used as the rationale for the proposal. Rather, the Chairman was presented with the proposal and a demand that she immediately accede to its prompt publication as an NPRM. Only when she objected vigorously was she allowed time (24 hours) to review the document and prepare a dissent. Even then, however, her dissent was edited by someone within the Board prior to publication. Thus, it is

apparent that the two majority-party members of the Board intentionally excluded the third Board member from participation in any deliberative process — or any process at all — in connection with this NPRM. To state these facts is to make readily apparent the reasons there are serious concerns about the Board's good faith in initiating this proceeding. All indications are that the majority members have made up their minds to proceed with the proposed change no matter what comments may be submitted and no matter what the third Board member may think or say.

B. A Solution In Search Of A Problem

The NPRM proposes to change a practice which the Board has used from the earliest days of the Railway Labor Act and which the Board has repeatedly and unanimously affirmed over the past seventy five years — including as recently as last year.[5] It is reasonable, therefore, to ask "why" this change has been proposed; *i.e.*, what exactly is the problem this proposed change is intended to solve. The Board has held that it would materially change its rules only when a proposed change is shown to be "mandated by the [Railway Labor] Act or essential to the Board's administration of representation matters." *In re Chamber of Commerce of the United States*, 14 NMB 347, 360 (1987). Surprisingly, however, the Notice is remarkably vague as to the existence of any problem in the administration of the Act. Indeed, the only apparent statement of purpose or intent is the statement in the "Summary" that the proposed change is "part of [the Board's] ongoing efforts to further the statutory goals of the Railway Labor Act" and that the NMB "believes that this change to its election procedures will provide a more reliable measure/indicator of employee sentiment in representation disputes and provide

[5] *Delta Air Lines, Inc.*, 35 NMB 129 (2008).

employees with clear choices in representations matters." There is no suggestion that there have been problems or inadequacies in the administration of elections under the Act, or that some sort of changed circumstances have compromised the integrity of the ballot process. Indeed, the Board has successfully modernized the ballot process by adopting telephone and Internet voting procedures in recent years by seeking a consensus before the Board acted. *See Internet Voting Comment Period*, 34 NMB 200 (2007).

Implicit in the Summary of the NPRM is the proposition that the election procedures used and endorsed by every prior Board in the history of the Act have been unreliable and failed to provide clear choices. Nowhere, however, does the NPRM purport to explain or support such an astounding proposition. Indeed, Board reports reflect that the success rate of unions in NMB-sponsored elections under the RLA has been *substantially higher* than the union success rate under the form of ballot used by the National Labor Relations Board.[6] It cannot be the case, then, that the current form of ballot discourages unionization. The union success rate confirms that employees are not unaware of their choices. It is readily apparent, then, that the proposed change does not address any real "problem" at all, and most certainly does not satisfy the standard which the Board has previously decreed as applicable to such changes as are currently proposed.

This open meeting is not the proper time or place for a detailed explanation of our substantial legal objections to the proposed change, and to the process by which that change has been brought forth. We will address those issues in our written comments in response to the

[6] Review of NMB decisions reveals that the union success rate in NMB conducted elections under the RLA has been approximately 67.5% from 1935 to date. In only four years out of 74 has the union success rate in NMB elections fallen below 50%.

NPRM. But to better put our concerns into perspective, I would like to close by quoting from Member Hoglander's statement last year when the Board proposed a much more minor rule change:

> In my view, when the Majority Members of the NMB seek to implement revisions in midstream of the merger process, doubt and mistrust regarding the process is a regrettable consequence. Historically the NMB merger policy has remained unchanged since 1987, the only exception being a minor administrative clarification in 2002, thus prompting the question — why now.

In view of the concerns expressed by Member Hoglander and others, that proposal was withdrawn. The Majority Members of the Board should act honorably and do the same with the current proposal.

Carmen Parcelli
Transportation Trades Department, AFL-CIO

HEARING BEFORE THE NATIONAL MEDIATION BOARD

DOCKET NO. C-6964, RIN 3140-ZA00

STATEMENT OF CARMEN R. PARCELLI

ON BEHALF OF THE TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

My name is Carmen Parcelli and I am a principal of the law firm Guerrieri, Edmond, Clayman & Bartos, P.C. I appear on behalf of the Transportation Trades Department of the AFL-CIO ("TTD"), which consists of 32 affiliated unions representing employees in all modes of transportation, including railroad and airline employees. TTD welcomes the opportunity to address the National Mediation Board regarding its notice of proposed revisions to its election procedures. TTD firmly supports the Board's proposed rule change both for the reasons outlined in the Board's notice and for the additional reasons offered at today's hearing by proponents of the rule change.

TTD has requested that I address some of the legal issues raised by the Board's proposed rulemaking. Specifically, I will address the NMB's statutory authority to make the proposed change to its election rules. I will show that the Board's authority in this realm is plenary and its discretion very broad. I will also address from a legal perspective the reasons why the proposed change to the NMB's rules is most appropriate in light of current circumstances. Others will speak to the policy reasons supporting the proposed change, and specifically how the policy reasons previously articulated in support of the

current rule, such as labor stability and the avoidance of strikes, are not valid, particularly in the present day.

I. The Board Possesses Full Statutory Authority To Change Its Election Procedures As Proposed In Its Notice.

Under the NMB's current election practice the Board generally will certify a bargaining representative only if a majority of employees eligible to vote cast ballots for a labor organization. The current ballot lists the name(s) of the labor organization(s) seeking to become the representative. There is no space on the current ballot to vote "no union." Instead, employees who do not wish to be represented are instructed not to cast a ballot. As a result, the current practice presumes that any employee who does not vote rejects representation, regardless of the actual reason why the employee does not vote. Or stated another way, every employee starts as a no vote, until he or she affirmatively casts a ballot. Now, the NMB proposes to change its rule and instead determine elections based upon the majority of valid votes cast, just as in political elections and elections conducted by the National Labor Relations Board ("NLRB"), the Federal Labor Relations Authority, and state labor relations boards. The proposed ballot would provide a space to vote "yes" for a union or "no" for no union representation.

The authority of the Board as a legal matter to make the proposed rule change is absolutely clear. Two sections of the RLA bear on the determination of employee representation. Section 2, Fourth provides in pertinent part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. 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 chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . .

45 U.S.C. § 152, Fourth.

Section 2, Ninth of the Act empowers the NMB to investigate representation disputes among employees and to certify authorized employee representatives.

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, 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 after the receipt of the invocation of its services, 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 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. In such an investigation, the Mediation Board shall be 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. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 152, Ninth.

Thus, the Act specifically contemplates that the Board may use either a secret ballot election or "utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives." 45 U.S.C. § 152, Ninth. In fact, the only statutory restriction on the exercise of the Board's discretion in deciding representation disputes is to "insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." *Id.*

The language of the RLA itself does not mandate any particular procedure to determine the majority will, much less the election procedure currently followed by the Board. Accordingly, the Board has resolved representation disputes through a variety of methods over the years as circumstances warranted. *See Railway & Steamship Clerks v. Virginian Ry. Co.*, 125 F.2d 853 (4th Cir. 1942) (upholding card check certification); *Continental Airlines, Inc. v. NMB*, 793 F. Supp. 330 (D.C. Cir. 1991) (upholding transfer of certification based on union merger vote); *Laker Airways*, 8 NMB 236 (1981) (certification based on majority of votes cast); *Key Airlines*, 16 NMB 296 (1989) (certification based on vote of majority of eligible voters against unionization); *Ross Aviation, Inc.*, 22 NMB 89 (1994) (accretion of employees into existing certification).

In fact, when the Board first adopted the current majority of eligible voters practice in 1934, it recognized that the RLA did not require it to do so. Instead, the NMB adopted its election rule "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 (1942). From the outset, however, the Board's practice was not monolithic. "Where . . . the parties to a dispute agreed among themselves that they would be bound by a majority

of 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, and when agreement is reached the dispute as to that matter is settled." *Id.* In fact, "[f]or most of its history, the Board sought a mediated approach to election details and ordinarily went along with the arrangements mutually acceptable to the parties -- even when contrary to Board precedent." *The Railway Labor Act at Fifty*, at 48 (1976).

Supreme Court precedents confirm that the RLA grants the NMB broad discretion to set the rules governing elections. In *Virginian Railway Company v. System Federation No. 40*, the Supreme Court rejected a carrier's challenge to an NMB certification issued to a union that failed to receive the vote of a majority of the craft or class, even though a majority participated in the election. 300 U.S. 515, 560 (1937). The Court held: "It is to be noted that the words of [Section 2, Fourth] confer the right of determination upon a majority of those eligible to vote, *but is silent as to the manner in which that right shall be exercised.*" *Id.* (emphasis added). The Court also went on to analogize the NMB election process under Section 2, Fourth to the political election process.

> Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring 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.

Nearly three decades after the *Virginian Railway* case, the Supreme Court again examined the Board's authority to set election rules in *Brotherhood of Railway &*

Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965) ("*ABNE*"). And again, the Supreme Court concluded that the Board possesses very broad discretion in election matters. The case involved a challenge to the form of the NMB ballot, in which the carrier contended that the ballot must provide a space to vote "no union." In rejecting this challenge, the Court explained that the Act "instruct[s] *the Board alone* to establish the rules governing elections." *Id.* at 669 (emphasis added). In other words, "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." *Id.* at 662.

In 1947, the United States Attorney General issued an opinion letter regarding the Board's authority in election matters. Specifically, the Attorney General addressed whether the NMB could certify employee representatives based upon the majority of votes cast, regardless of whether a majority of eligible employees participated in the election. The Attorney General concluded that the NMB "has the power to certify as a collective bargaining representative any organization which receives a majority of votes cast at an election despite the fact that less than a majority of those eligible to vote participated in the election." 40 U.S. Op. Atty. Gen. 541 (Sept. 9, 1947), *available at* 1947 WL 1780. In reaching this conclusion, the Attorney General first considered the language of Section 2, Fourth and the provision's legislative history, which specifically provides "that the choice of representatives of any craft or class shall be determined by a majority of the employees voting on the question." Sen. Rep. 1065, 73rd Cong., 2d sess., at 2.

Next, the Attorney General analyzed the *Virginian Railway* case and its language providing that those who do not participate are presumed to assent to the expressed will of the majority of those voting. Although acknowledging that a majority of eligible voters had participated in the election at issue in the Supreme Court's *Virginian Railway* decision, the Attorney General went on to explain that a recent court decision interpreting the National Labor Relations Act ("NLRA") had relied on the Supreme Court's reasoning to uphold union certifications based upon the majority of votes cast, even where less than a majority participated in the vote. 40 U.S. Op. Atty. Gen. at 542-44, *citing NLRB v. Standard Lime & Stone Co.*, 149 F.2d 435, 437-38 (4th Cir. 1945) ("The [NLRA] makes no provision for a quorum nor for the participation of any definite proportion of the employees in the election."). Given the similarity between the operative language under the RLA and NLRA, the Attorney General found that this and other NLRA precedents were applicable.[1]

---

[1] NLRA Section 9(a) provides: "Representatives 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 in respect to rates of pay, wages, hours of employment or other conditions of employment." 29 U.S.C. § 159(a). Section 9(c) of the NLRA further provides that, if the National Labor Relations Board ("NLRB") finds that "a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. § 159(c)(2).

Numerous federal courts of appeal have held that the NLRA's language does not require that a majority of eligible employees participate in an NLRB election in order for a certification to issue. *NLRB v. Deutsch Co.*, 265 F.2d 473 (9th Cir. 1959); *NLRB v. Cent. Dispensary & Emergency Hosp.*, 145 F.2d 852 (D.C. Cir. 1944); *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586 (2d Cir. 1941); *New York Handkerchief Mfg. Co. v. NLRB*, 114 F.2d 144 (7th Cir. 1940); *NLRB v. Whittier Mills Co.*, 111 F.2d 474 (5th Cir. 1940).

Lastly, the Attorney General found 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." 40 U.S. Op. Atty. Gen. at 544. The opinion cites the example of NLRA Section 8(a)(3)(ii) requiring the vote of a majority of eligible employees in order to rescind a union's authority to enter into a union security agreement. Although finding that the NMB possessed the authority to certify an election based solely on the majority of votes cast, the Attorney General also concluded that the Board had discretion not to exercise its authority. *Id.* at 544-45.

Based on the above, the language of the RLA plainly gives the Board authority to make the proposed change to its election rules, particularly in light of the Supreme Court precedents interpreting Section 2, Fourth and analyzing the Board's authority to set election rules. The Attorney General's comprehensive opinion on the specific rule change now contemplated further supports this conclusion. Chairman Dougherty, however, states in her dissent from the Board's rulemaking notice that "a serious question exists as to whether the NMB even has the statutory authority to make this reversal" (Notice, at 9), echoing the position taken by the Air Transport Association of America ("ATA") in a prior letter to the Board. TTD flatly disagrees that any serious question has been raised.

The claim that the Board may lack authority to alter the current practice rests upon a terse notice in the Federal Register appearing to indicate that the NMB Members at a meeting in 1978 determined that "the Board does not have the authority to

administratively change the form of the ballot used in NMB representation elections." 43 Fed. Reg. 25529 (June 13, 1978). As a matter of administrative law, such a statement is not binding or conclusive as to the matter of this Board's jurisdiction. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156-157 (2000) ("Certainly, an agency's initial interpretation of a statute that it is charged with administering is not 'carved' in stone."); *Good Samaritan Hospital v. Shalala,* 508 U.S. 402, 417 (1993) ("The Secretary is not estopped from changing a view she believes is grounded upon a mistaken legal interpretation.").

More importantly, the NMB itself has not viewed the 1978 statement as binding upon it. In the 1987 *Chamber of Commerce* decision when the Board declined to make the ballot change now proposed, it made no reference to the 1978 statement, and instead concluded that the requested change lay within its broad discretion. *Chamber of Commerce*, 14 NMB 347, 362 (1987) ("The IBT cites several court decisions in support of its position that the Board has broad discretion in the manner in which it determines who should represent employees in a given craft or class . . . the Board does not disagree with the IBT on the question of its discretion . . ."). In addition, even after the 1978 statement, the NMB has repeatedly made changes administratively to the form of its ballot. For example, only three years later, the Board adopted the *Laker* ballot for use as a remedial measure, and subsequently the *Key* ballot was introduced. *Laker Airways*, 8 NMB 236 (1981); *Key Airlines*, 16 NMB 296 (1989). The Board also administratively introduced telephone voting in 2002 and internet voting in 2007 with attendant changes

to the ballot form. *Telephone Electronic Voting*, 29 NMB 482 (2002); *Internet Voting*, 34 NMB 200 (2007).

Nor does the 1978 statement carry any persuasive weight on the issue of the Board's statutory authority. The public record of the meeting does not reveal the reasoning, legal or otherwise, upon which the Board relied to make its determination. 43 Fed. Reg. 25529. As such, the naked pronouncement that the Board lacks authority carries little, if any, weight -- especially as compared to the weight that must be afforded to the language of the RLA itself and the Supreme Court's analysis of that language.

In questioning the Board's statutory authority, Chairman Dougherty also points to the 1935 decision of the district court in the *Virginian Railway* case. 11 F. Supp. 621 (E.D. Va. 1935). At the trial court level in the *Virginian Railway*, the carrier challenged elections for six different crafts or classes, in which the AFL-affiliated System Federation and a company union vied for representation.[2] In one of those elections, a majority of eligible voters did not participate, but the Federation received the majority of votes cast and was certified on that basis. With regard to this election, the trial court found that the Board should not have certified a representative for a craft or class where less than a majority of eligible employees participated in the election. *Id.* at 627-28. No appeal was taken from that aspect of the court's ruling. Instead, an appeal was taken from the trial court's decision upholding an election in which a majority of eligible voters participated

---

[2] In four of the elections, a majority of eligible voters participated and the Federation received the vote of a majority of the eligibles. In one election, a majority of eligible voters participated, but the Federation only received the majority of the votes cast.

but the Federation only received the majority of the votes cast. In ruling on that appeal, however, the Supreme Court through its reasoning and broad language effectively rejected the trial court ruling setting aside the other election for lack of majority participation. In fact, the Fourth Circuit acknowledged the effect of the Supreme Court's ruling when it determined that a majority of eligible employees need not participate in order to have a valid election under the NLRA. *See NLRB v. Standard Lime & Stone Co.*, 149 F.2d at 436-38. In short, the district court decision in *Virginian Railway* has no continuing vitality.

In her dissent, Chairman Dougherty also expresses concern that the Board has failed to articulate a rationale for changing the current rule sufficient to satisfy the strictures of the Administrative Procedures Act ("APA"). As a threshold matter, under the Supreme Court's decision in *ABNE*, the Board's decision to alter the form of its ballot is not subject to judicial review under APA standards. As the Supreme Court held in that case, provided that the Board is acting within the scope of its statutory authority, its decision-making regarding the proper form of ballot lies beyond court review. *ABNE*, 380 U.S. at 669 (the RLA "instruct[s] the Board alone to establish the rules governing elections. Thus, it is clear that its decision on the matter is not subject to judicial review where there is no showing that it has acted in excess of its statutory authority."); *see id.* at 671 ("the Board's choice of its proposed ballot is not subject to judicial review").

Thus, in the *ABNE* case, the Supreme Court applied to the Board's ballot choice the doctrine first set forth in *Switchmen's*. In *Switchmen's*, the Court held that Congress intended the NMB's determinations under Section 2, Ninth to be final and not subject to

judicial review. *Switchmen's Union of N. Am. v. NMB*, 320 U.S. 297, 306 (1943). In fact, even prior to *ABNE*, the District of Columbia Circuit ruled that the Board's current election rule was unreviewable under *Switchmen's*. *Radio Officers' Union v. NMB*, 181 F.2d 801 (D.C. Cir. 1950) (dismissing under *Switchmen's* challenge to NMB's refusal to certify union based on majority of votes cast).

But even if APA review were available in this matter, there are more than sufficient reasons for the proposed rule change to satisfy those requirements. As the Supreme Court explained in its most recent decision on APA review, the statute requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). The Court also explained that this standard is the same whether an agency is adopting a policy for the first time or changing an existing policy. *Id.* "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." *Id.* at 1811 (emphasis in original).

The reasons already set forth in the Board's detailed notice of proposed rulemaking amply satisfy the APA standard as defined by the Supreme Court. We submit that there are also additional reasons in support of the Board's proposed change, as outlined below and presented through other testimony submitted to the Board. Therefore, the Board can readily meet the APA standard in this matter.

II. Current Circumstances Dictate That The Board Should Remove The Barrier To Representation Presented By Its Current Rule.

Obviously, we inhabit a very different world from the one that existed when the Board first adopted its current election rule in 1934. Even since the Board last formally considered a rule change 22 years ago in 1987, we have witnessed profound changes in culture and technology. These recent changes have undermined the rationales previously offered for retaining the current practice and any other conceivable rationale for affording weight to the failure of employees to participate in a Board-sponsored election.

1. The Board Can No Longer Be Confident That Employee Organizing Efforts Have Not Been Handicapped By Its Practice.

Under the Board's current practice, every eligible voter is presumed to reject union representation unless he or she affirmatively votes in favor of a labor organization. "Thus, the failure or refusal of an eligible voter to participate in an NMB-conducted election is the functional equivalent of a 'no union' vote." *The Railway Labor Act at Fifty*, at 48. In other words, all those not voting are presumed to be against representation, even if their failure to vote stems from another reason, such as indifference, indecision, mistake, forgetfulness, or even employer coercion. As the Board expressed in its notice, the current presumption constitutes a "type of compulsory voting, not practiced in our democratic system." Notice, at 7.

The Board's current presumption skews the process against union representation, as the Supreme Court itself has acknowledged. In the *ABNE* case, the Court explained: "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.'" *ABNE*, 380 U.S. at 669 n.5; *see id.* at 670 (current NMB ballot practice "more favorable" to employees who do not want union representation). Similarly, in the *Virginian Railway* case, the Supreme Court observed that under a majority of the eligibles rule, a representation election could be invalidated by employees who are indifferent on the issue of representation or worse have been coerced by management not to vote in favor of unionization. 300 U.S. at 560.

Thus, as acknowledged by no less an authority than the Supreme Court, the Board's current practice creates a barrier for employees seeking to obtain union representation by presuming that non-participating employees reject union representation. The fact is that there are numerous reasons why an employee might fail to participate in a union election, as the Board recognized in its notice of proposed rulemaking. Some employees may be indifferent or ambivalent on the issue of unionization, such that the failure to vote is simply a reflection of their apathy or indecision. In fact, there has been a well-documented decline in voter turnout in political elections over the last several decades, which is generally attributed to rising voter apathy. *See generally* Thomas E. Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (Vintage Books 2002). Still others who intend to vote may miss the deadline for voting through inadvertence or neglect. In addition, airline and railroad employees represent a highly mobile workforce with whom carriers increasingly communicate solely by electronic means, not mail. Although the Board subtracts undeliverable voting materials from the total number of eligible voters, in reality not all mail sent to bad addresses is returned through the postal service. Finally, in some elections, the carrier may have improperly

influenced employees to destroy Board-provided voting materials or engaged in other forms of voter suppression.

Under the NMB's current practice, however, an employee who fails to vote for any of these reasons is presumed to reject union representation. This practice stands in stark contrast to the general presumption under election law that a non-participant consents to the will of the majority of those participating in the vote. In sum, the effect of the Board's current presumption that non-participants affirmatively refuse representation places a thumb on the side of the scale against union representation. We submit that the current climate demands that the Board remove its thumb.

In 1948 and again in 1987, the NMB declined to alter its election practice in large part because the rail and airline industries were highly unionized. *See Pan American Airways*, 1 NMB 454 (1948); *Chamber of Commerce*, 14 NMB 347, 362 (1987). The Board reasoned that its current practice of presuming that non-participants reject representation had not actually presented an impediment to unionization, and on this basis declined to make any change. Specifically, in 1948, the Board found that only one-fourth of one percent of employees who voted for representation had been deprived of such representation for lack of majority participation. *Pan American Airways*, 1 NMB at 455. Therefore, the Board could conclude that the impact of its election rule was *de minimus*, at most.

Without doubt the current situation is now far different. Unions no longer prevail in an overwhelming number of elections as they did when the Board first adopted its current practice. Thus, the Board cannot say as it did in the past when confronted with

this issue that employees are able to successfully organize despite the Board's presumption in favor of non-representation.

In fact, we have identified 42 elections held from 1995 through 2008, where the union fell short of the majority of eligible voters threshold by 15% or less of the votes needed. For example, in a 2006 election at Air Logistics for mechanics and related employees, there were 331 eligible voters and the Office and Professional Employees International Union received 164 votes with one vote cast for other. 33 NMB 189 (2006). Thus, the election fell one vote short of majority participation by all eligible voters and was declared invalid. Similarly, an election involving 474 train dispatchers at Union Pacific Railroad was declared void because participation fell four votes shy of the majority of eligibles with the Brotherhood of Locomotive Engineers receiving 232 votes and 2 void ballots. 24 NMB 399 (1997). In the 42 elections where the union fell short by 15% or less, approximately 14,000 employees voted for union representation, but were denied. We submit that in relatively close elections such as these, the Board cannot be confident that its practice of counting non-voters as "no" votes has not impacted the result.

2. Recent Technological Changes Militate In Favor Of A Change In Practice.

Although never specifically articulated by the Board, one possible rationale for the current practice may have been the concern that the Board's voting process might not be sufficiently representative to warrant basing the result on the majority of votes cast. This could occur if employees in certain geographic locales dominated the process or if some

employees could attain an informational advantage regarding the conduct of the election. In fact, the Attorney General in his 1947 opinion letter indicated that such concerns might justify the Board in declining to exercise its authority to decide elections on the basis of the majority of votes cast. 40 U.S. Op. Atty. Gen. at 544.

Such concerns about geographic barriers to participation, to the extent that they ever existed, have now largely been put to rest by the technological revolution of the last decade. Now, there are myriad avenues for virtually instantaneous communication with employees, wherever they may be located, through Internet web sites (including Facebook, blogs, message boards, chat-rooms, and YouTube), cell phones, and text messaging, among others. These forms of communication are widely available and rapidly increasing. According to recent statistics released by the U.S. Census Bureau, as of 2007, 64% of all individuals 18 and older used the Internet, up from only 22% just ten years prior in 1997. U.S. Census Bureau News, "Internet Use Triples in Decade, Census Bureau Reports," (June 3, 2009), *available at* http://www.census.gov/Press-Release/www/releases. Among individuals who are employed 74% used the Internet as of 2007. *Id.* Airline and railroad workers in particular represent a highly computer literate group, due to the fact that many facets of their work are computerized. Thus, election-related information can be disseminated without regard to barriers of distance and the haphazard working schedules common to the railroad and airline industries.[3]

---

[3] Although the new technology has leveled old barriers in terms of geographic locations and schedules, by no means do we suggest that the ability of employers and unions to communicate with employees has been equalized by the new technology. If anything, the new technology has increased this imbalance, as employers are able to

The Board has also taken full advantage of recent technological advances in order to make the voting process as accessible as possible to all eligible employees. In 2002, the Board introduced its Telephone Electronic Voting ("TEV") system, which allows an employee to vote using any phone. More recently, the NMB added Internet Voting in 2007. Thus, employees now have an additional option for participating in an election. Internet Voting also gives enhanced access to national guard/reserve employees and other employees temporarily stationed overseas. With the current voting technology used by the Board, there can be little concern about barriers to exercise of the franchise which might undermine the presumption that those who decline to participate consent to the will of the majority who vote.

Conclusion

The language of the RLA itself and applicable precedents make clear beyond serious doubt that the Board has statutory authority to change its election rules as proposed. Not only does the Board possess full authority, but ample and compelling reasons exist for the Board to modify its rule in light of current circumstances. Accordingly, TTD urges the Board to make final the proposed rule change.

---

make extensive use of company email and intranets to communicate with employees in a manner not equally available to a union seeking to organize.

Randel Johnson
US Chamber of Commerce

LABOR, IMMIGRATION &
EMPLOYEE BENEFITS DIVISION
U.S. CHAMBER OF COMMERCE

Statement of Randel K. Johnson
Senior Vice President, Labor, Immigration, and Employee Benefits
Before the National Mediation Board
Regarding Proposed Changes to Representation Election Procedures
December 7, 2009

Thank you Chairman Dougherty and Members of the Board. My name is Randy Johnson and I am Senior Vice President of Labor, Immigration, and Employee Benefits at the U.S. Chamber of Commerce (Chamber). The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber's membership includes many employers subject to the Railway Labor Act ("RLA" or "the Act") including those in the railroad industry, airline industry, and in other industries that are deemed derivative carriers under the RLA. Our membership also includes trade associations that broadly represent carriers in both the railroad and airline industries.

The Chamber opposes the Board's proposal to change its rules for representation proceeding. However, rather than offer comprehensive comments in response to the Board's proposal, our comments today focus on two particular issues, one substantive and one a matter of process.

Our substantive comments today are focused on the failure of the Board to include in its proposal any changes to the method by which unions are decertified under the RLA. Specifically, if the Board is to change its procedures to rely on a majority of votes cast, then the Board should also amend its procedures to allow employees to vote to decertify a representative in the same manner. Decertification should be a mirror image of certification and should be conducted using the same criteria and voting procedures used by the Board in response to an application to certify a union representative beginning with an application supported by a showing of interest from 35% of the affected craft or class rather than the majority showing of interest required today. This would then be followed by an election using the same ballot used to elect a representative, re-phrased to permit a vote to decertify rather than to elect a representative. Such a change is needed to ensure that the representation duties of the Board are carried out in a manner that is consistent with the Act and that is fair and just.

The Act contemplates that the right of the majority to determine their representative will be exercised in the same way to the decertification process as is applied to the certification process. In its proposal, the Board has stated that its "primary duty in representation disputes is to determine the clear, un-coerced choice of the affected employees."[1] This duty applies equally when employees no longer wish to be represented and the Board's current proposal creates a double standard in RLA representation disputes, overtly favoring unions at the expense of employee freedom of choice.

We recognize that the Board has previously considered and rejected our proposed change, but in each instance that rejection was under the assumption that the Board's longstanding majority rule voting procedures would remain unchanged, i.e. that majority support for union representation would be required in order to certify a representative. If the proposal is adopted, however, there is no longer a determination that a majority of employees has ever supported representation, let alone that a majority continue to support representation by the union certified. In those circumstances, it is all the more important that the employees have an equal right to exercise their choice not to have union representation—just as the employees subject to the National Labor Relations Act ("NLRA") are able to do. If, as the Board argues, the expressed will of a majority of voters is sufficient to select a union, the same standard must apply to de-selection. To require any other standard would be to impair and inhibit employee freedom of choice in representation matters. The Supreme Court has confirmed that such freedom of choice is required by the RLA.[2] As the Court stated in *Russell* v. *National Mediation Board*,:[3]

> employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well. The language of the Act...clearly stands for this proposition. ....the implicit message throughout the Act is that the "complete independence" of the employees necessarily includes the right to reject collective representation. Indeed, the concept of "complete independence" is inconsistent with forced representation, most especially when that forced representation is at odds with employees' will and desires.[4]

In *Teamsters* v. *BRAC*,[5] the Court expressly agreed with *the Board's* position that under the RLA "it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face, that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit."[6] As the Fifth Circuit further stated in *Russell,* the Board's duty under Section 2, Ninth of the RLA is to find the fact in dispute

---

[1] 74 Fed. Reg. 56,742.

[2] BRAC v. Association for Benefit of Non-Contract Employees, 380 U.S. 650 at 669 n.5 (1965) ("legislative history of the RLA] supports the view that the employees are to have the option of rejecting collective representation.").

[3] 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984).

[4] 714 F.2d at 1343.

[5] 402 F.2d 196 (D.C. Cir.), *cert denied*, 393 U.S. 848 (1968),

[6] 402 F.2d at 202-03.

and the "Board failed here to find the fact in dispute: who is the true representative of the employees?"[7]

Nevertheless, the Board has a long history of disfavoring employee rights when it comes to decertification of a union.[8] If the Board truly believes the existing certification rules are out-of-date and confusing, they are a model of clarity when compared to current decertification procedures that effectively require the replacement of one union with a "straw man" that is ultimately abandoned.[9] It is incumbent upon the Board to equally respect the freedom to association with the freedom not to associate.

The second matter I wish to address today is procedural. This is not the first time the Chamber has made a request such as this. On September 5, 1985, the Chamber made a similar request. Records indicated that the Board received this request on September 9 and on September 12, the Board announced a hearing on the matter. On September 30, 1985, the International Brotherhood of Teamsters filed a petition similar to that proposed by the AFL-CIO's Transportation Trade Department (TTD) earlier this year. The next day, the Board filed a notice consolidating the matters. Evidentiary hearings and other formal proceedings were held and, as the Board knows, ultimately no changes were made as a result of the petitions.[10]

Whatever one thinks of the results of the Board's deliberations in the 1980s, one thing was clear—both the Chamber and the petitioning labor unions had their proposals before the Board and stakeholders had an opportunity to evaluate them and participate in the Board's processes.

Contrast this with the processes in use by the current Board. After learning of the TTD's request for the Board to adopt the change it has proposed today, the Chamber sent a letter in opposition to the request and making the same points I am making today—that if the Board goes down this road it is incumbent upon it to adopt mirror-image decertification rules. To date we have received no response and no acknowledgement of our request. Nevertheless, here we are debating the TTD's proposal, as embraced by the

---

[7] 714 F.2d at 1347.

[8] For example, by requiring putative representatives to comply with the organizational and reporting requirements of the Labor-Management Reporting and Disclosure Act within 90 days of filing an application, requiring a one year period before a representative could renounce representation, and refusing to conduct an election if the applicant did not intend to "represent" employees. THE RAILWAY LABOR ACT (Douglas L. Leslie ed., 1995) 136.

[9] As described in one treatise:

> The NMB has no standard procedure governing cases in which employees desire to terminate their union's representative status. Decertification has typically been achieved through a "straw man" petition by one or more employees who only nominally seek to become the new representative. The straw man must present a majority showing of interest. The ensuing election could result in decertification in two ways. If a majority of employees do not vote for any representative, the incumbent union would be decertifiedand the employees would become unrepresented. Alternatively, the straw man could petition for an election, win the election, and then disclaim representative status.

THE RAILWAY LABOR ACT (Douglas L. Leslie ed., 1995) 136 (*citing In re* Chamber of Commerce, 14 NMB 347).

[10] *See* 14 NMB 347 (1987).

Board without any knowledge of whether the Board has even received the Chamber's request or when it will move to invite the views of interested stakeholders and properly consider the matter.

If the Board truly believes it is necessary to amend its representation rules, it is critically important that it do so in a fair and impartial manner.

Thank you for the opportunity to present these views. Please do not hesitate to contact us if the Chamber can be of further assistance in this matter.

Marianne Bicksler
Association of Flight Attendants – CWA

Thank you Chairman Dougherty and members Hoglander and Puchala for holding this public hearing today.

My name is Marianne Bicksler and I am here today to testify on how the current National Mediation Board voting rules unnecessarily create a hostile working environment during airline elections and why they are contrary to the values of our American democracy.

I would also like to share my experience as a in-flight supervisor during the first AFA Delta organizing campaign, where a vote was requested in August 2001 and the final votes were tallied in early 2002. Even though a majority of flight attendants over time had signed authorization cards, our ultimate percentage "voting" for representation came in at less than 30%. How did this happen?

Having become a supervisor for Delta Air Lines in 1996, hoping to make a positive difference for our flight attendant group, I was amazed at the alarming turn of events as the organizing drive gathered steam and Delta hired the American Consulting Company, which is a firm specializing in so called "union avoidance". Each flight attendant base had a representative on staff from this company. Those staff members employed tactics which were designed to teach us, as supervisors, to intimidate flight attendants.

As a supervisor at that time, my job became to employ first-hand the tactics these consultants taught us. The strategies and tactics they utilized were designed around, and because of, the current NMB voting procedures. The tactics they deployed were all based on voter suppression.

Every morning the consultants conducted a briefing to update us on the latest "hot" topic issues that flight attendants were discussing, especially issues that may make flight attendants vote for representation. We were taught techniques to confront flight attendants and confuse, twist and turn the issue around without any real relevance to the truth.

Specifically, other tactics we used were:

- When AFA activists asked to set up a table in the lounge to have conversations with fellow flight attendants, we had to block the AFA table by inviting other "vendors" to set up tables ahead of time and instituted a rule that only one "vendor" could be in the lounge at any given time. Delta flight attendant AFA activists were considered vendors. This frequently made it impossible to have any union table in the lounge area.
- We were given anti-union fliers to ensure they were stocked and present in the lounges.
- We collected any union information in the lounge area and threw it away.
- We conducted intimidating one-on-one meetings behind closed doors with flight attendants to tell them not to join the union.

- We attended union meetings and reported back about topics and issues discussed.
- The consultants targeted supervisors who were not aggressive enough in their anti-union tactics and counseled them that if flight attendants elected a union, their job security was at risk.
- We were promised a substantial "bonus" if we met certain objectives, including the "union avoidance" objective.
- We stood near the AFA activists when they were speaking to other flight attendants to intimidate them.
- Some flight attendants feared they would be put on a "black list" if they were seen talking to a union representative.
- We were told to be constantly visible in the crew lounges, again an intimidation tactic.

Once the election was called, things really started heating up. Among the worst tactics deployed, and what is most relevant to today's hearing, was when flight attendants were told by the company to rip up their ballots and throw them away. Can you think of anything more contrary to our democracy?

- An aggressive "Give it a Rip" campaign was started by Delta to ensure that the flight attendants ripped their ballots up so that they would not vote.
- Huge 6 foot posters were put in the crew lounges with the message: "Give it a Rip." By-the-way, this same strategy was used in the second election when we voted electronically. The posters were modified to read: "Give It A Rip, Don't Click, Don't Dial" to reflect how not to vote via telephone or internet.
- Anti-union information was everywhere.

- As if the in person intimidation wasn't enough, Delta had a separate, insidious track in the list of eligible voters.

Specifically:

- Delta management made sure that the flight attendants never got a copy of the system-wide seniority list. They could view it, but could never actually obtain a copy. Due to the fact that 21,000 flight attendants were spread out nationwide and in some cases other countries, it was virtually impossible to contact flight attendants to communicate the benefits of a union. The only message that many of the flight attendants heard was the anti-union communication.
- Delta kept as many flight attendants as they could on the seniority list to manipulate the current voting system. In simple terms: the more "flight attendants" on the list, the greater amount of No votes. After all, under the current rules everyone begins as a No vote.
- Many flight attendants on leaves of absence had no idea they were eligible to vote, so they didn't. They threw their ballots away. They all counted as "no" votes, even if they were supportive of representation.

- Supervisors were put on "active" status and counted as No votes

So, it was a multi-track strategy: suppress the vote of active flight attendants, pad the list to create more No votes, and hide the list so flight attendants couldn't actually have access with one another to share why it was important to form a union.

Having seen this side of supervision, I returned to the line and became an AFA activist, understanding that was the only honest way to make a difference for our flight attendants. We had taken huge pay and benefit cuts that we were told, during the last union vote, was not going to happen. The union avoidance techniques had worked and the pay and benefits cuts were imposed.

My testimony today has given you a perspective on why the current voting method distorts the union election process and why the proposed changes are so necessary.

The current voting method encourages employers to tell employees not to vote, don't participate, tear up your ballot, throw your ballot away, don't get informed and just don't vote. Our American government is founded on democracy and voter participation. Just because a rule exists, doesn't make it right. Today, as a woman, I can vote, which wasn't always a fundamental right. Please consider the contradictory message and environment these current voting rules have in the workplace.

A ballot is our voice. The current NMB voting rules for union elections erodes that voice. I ask you to restore the voices of workers and implement the changes you have proposed. Thank you.

Sandy Gordon
Delta Air Lines

Remarks by Sandy Gordon, vice president – Delta In-Flight Service Field Operations
as prepared for NMB open meeting – Dec. 7, 2009
NMB Docket number C-6964

- Good [morning/afternoon]. Thank you for the opportunity to speak at this forum as I truly believe a change of this magnitude requires dialogue from all interested parties.
- My name is Sandy Gordon. I am Delta's vice president of In-Flight Service Field Operations and I have responsibility for the programs and policies that allow our 20,000-plus flight attendants to provide a safe and memorable travel experience to hundreds of thousands of customers who fly with Delta every day.
- During my 19 years at Delta I have led the safety, scheduling and training departments within In-Flight Service.
- And, most importantly, I began my career as, and continue to be a Delta flight attendant.
- I am not a lawyer, so I will happily defer the legal arguments to the many legal experts in the room.
- I am here today to talk about flight attendants – the human faces and voices who ultimately are being impacted by the NMB's actions.
- For the past 14 months, more than 70,000 Delta employees have been working very hard to integrate the Delta and Northwest operations.
- Our employees understand that the critics – and maybe even history itself – were betting against us.
- But, in true Delta fashion, employees are making this integration smooth and successful.
- Since last October:
    - More than 20,000 Delta flight attendants are wearing the same uniform
    - Delta flight attendants are serving customers the same celebrity chef-inspired entrees, the same wines from our master sommelier, and offering customers the same in-flight amenities.
    - To date, more than 17,000 flight attendants have been trained on Delta's culture, service and new aircraft types.
    - In January, they will work from the same onboard manual.
    - And, soon they will be qualified to fly every aircraft in the post-merger Delta operation.
- Harmonizing our products and services quickly has provided a consistent travel experience for our customers and a consistent work experience for flight attendants.
- We still have work to do, but our progress is rapid and our commitment unwavering.

- One area where we still have not provided consistency is the package of pay, benefits, work rules and seniority that our flight attendants are asking for – and deserve.
- We cannot provide this consistency until representation is resolved.
- And we cannot quickly resolve representation with this continued gamesmanship.
- Delta pilots, dispatchers, meteorologists, aircraft maintenance technicians, and technical writers and planners are all benefiting from a single set of pay, benefits and work rules – and a single seniority list.
- Dispatchers and meteorologists were able to quickly make their own choice about representation under the existing voting rules.
- And, just weeks ago, flight attendants at Delta subsidiary Compass Airlines voted for AFA representation using the existing voting rules.
- In fact, the Compass election was run in its entirety in less time than it took for the NMB to issue a simple ruling confirming single carrier status for Delta flight attendants.
- For those of you who are saying to yourself – "the NMB never issued a single carrier ruling for the flight attendants" – you're right.
- Flight attendants waited 14 weeks for a ruling that never came – even though Delta and the AFA agreed we were a single carrier and the NMB ruled as much back in January.
- In the case of Compass Airlines it would be difficult to argue that the existing voting rules prevented employees from voting in favor of representation – the AFA won the support of a clear majority of eligible voters.
- There have been no objections by unions or the NMB to the existing voting rules in these recent elections involving other Delta workgroups, Comair, USA 3000, Compass Airlines or in other cases that the existing Board members have overseen.
- So I must ask: When and what was the epiphany that has allowed Delta flight attendants, airport customer service, cargo, reservations, logistics and clerical workers to be singled out?
- In the absence of logic, there are only politics.
- Politics is not a good enough reason to change the rules or to single out Delta and Delta people for discrimination.
- Gamesmanship and politics are fostering anxiety and holding our employees hostage.
- We rely on the NMB and the Railway Labor Act to help promote stability in our industry so we can do everything we can to foster stability in our employees' work environment.
- By continuing to allow this delay, the gamesmanship and politics, the NMB is acting in a manner that is opposite from its intended purpose.
- Instead of promoting stability, their actions are divisive.
- At the end of the day – whether flight attendants vote for or against representation – they want and deserve to fly together, to be able to bid on trips across our vast global network and

to fly these trips making the same pay rates, under the same work rules and using a single seniority list.

- Before I close, I promised hundreds of flight attendants that I would speak to what they say is one of the greatest injustices in this proposal – the lack of a decertification process similar to the election process being discussed today.
- Union supporters ask "what's wrong with a yes/no ballot – that's how other union elections are held; that's how our government officials are elected."
- On its face, aligning the ballots used in elections guided by the Railway Labor Act with those used in elections guided by the National Labor Relations Act seems fair enough.
- But the National Labor Relations Act allows employees to become non-union in the same manner that they vote in a union.
- That is not what is being proposed here.
- The unions want to make it easy for their organizations to be voted in and virtually impossible for employees to be able to change their minds.
- There is nothing democratic about a process that appears to promote free choice on the front end and stifle it on the back end.
- I truly believe our flight attendant team is most effective and successful when the will of the majority is heard through a process that treats them consistently with other employees in our industry, and the best interest of all 20,500 flight attendants is considered.
- Thank you for your time, and for your willingness to listen to the many Delta employees who are very passionate on both sides of this issue.

Joel Parker
Transportation Communication International Union / IAM

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

STATEMENT OF JOEL M. PARKER

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

TCU represents employees employed in the clerical craft and class. The United Transportation Union (UTU) representing employees in the conductor craft and class; the Transport Workers Union (TWU) representing employees in the carmen craft and class; the International Brotherhood of Electrical Workers (IBEW) representing electricians and communications employees; the American Train Dispatchers Association (ATDA) which represents train dispatchers; the National Firemen and Oilers District of Local 32-BJ, SEIU (NCFO) which represents shop laborers and stationary engineers; and the Sheet Metal Workers International (SMWIA) are joining in this statement. These unions and TCU are among the traditional rail labor organizations, representing employees in the rail industry for approximately 100 years.

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

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

The Board's current practice results in those failing to vote being counted as a vote against representation. As recognized by the Supreme Court in 1937 in the Virginian Railway case, 300 U.S. 515, 560, this rule is contrary to the general election procedures which require only the approval of the majority of those voting. As the Court noted therein, normally "Those who do not participate are presumed to assent to the express will of the majority of those voting." Ibid.

As discussed by the majority opinion of this Board, there may be a number of reasons an employee does not vote, so the failure to vote should not be presumed to constitute a "no" vote. Non-voting

may reflect a conscious choice not to participate, or it may reflect forgetfulness, indecision, or apathy and acceptance of whatever the majority of those voting chose. The current NMB rule is contrary to the election procedures of the National Labor Relations Board, the Federal Labor Relations Authority, and various state labor relations boards and commissions. All certify representatives based on a majority of those voting, effectively relying on the Virginian Railway presumption that an employee not voting is acquiescing in the will of the majority.

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

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

The Current Rule Does Not Contribute to Labor Stability

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

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

unions on whose behalf I'm speaking, have some type of procedure in place to have a strike vote to assure majority, and often more than majority support for a strike.

Further, the Board's premise is counterintuitive since a union enjoying less support would be less likely to strike than a union enjoying more support. The Board's view is based on the concern over a hypothetical, irresponsible labor organization not enjoying full majority support, engaging in a strike not supported by the employees it represents. The theory ignores the Board's significant control through its mediation process over a union's ability to strike. Further, this theory ignores the fact that the Board has, in certain circumstances, certified a union based on a majority of those voting, with no noticeable increase in strikes. *See, e.g.*, Laker Airways, 8 NMB 236 (1981).

In determining whether to strike, the stakes for the union, and the members it represents, which were always high, have since 1989 become even higher with the issuance of the Supreme Court's decision in IFFA v. TWA, 489 U.S. 426, permitting carriers to hire permanent replacements for its striking employees. Not coincidentally, a review of the NMB's Strike Reports for Railroads and Airlines shows a significant decrease in recent years in the number of strikes, their duration, and the size of the involved

carrier.[1] These Reports show that since 1995 there have not been any rail strikes, and during that same period the strikes among major airlines were limited to one carrier.

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

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

---

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

factors in any given negotiations that influence the effectiveness of the union, but in my judgment the method of the union's certification is not one of them. The various unions on whose behalf I'm speaking join TCU in this view.

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

The Board's Procedure Handicaps Unionization

In addition to labor stability, the Board has given as the second basis for its rule the fact that it had not "seriously handicapped" unions' ability to win elections. 1 NMB at 455 (1948). In that opinion, the Board noted that between 1934 and 1948 only one-fourth of one percent of employees voting for union representation were denied such representation because of a lack of

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

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

TWU's experience during the last decade at Continental Airlines, where three elections (2005, 2006 and 2008) were held in response to TWU petitions by the NMB for the class or craft of Fleet Service, serves as an example of the way in which the current

rule frustrates the desire of thousands of employees for union representation. In 2005, 3,122 employees of 6879 eligible voted for union representation; in 2006 it was 3,524 of 7.641; and in 2008, 3,473 of 7,660. In each case, nearly 100% of the non-voters have to be thought of as consciously anti-union in order to argue that there was not a real majority of Fleet Service employees that desired union representation; it more than strains credulity to imagine such unanimity of the silent group. Thus, the desire of thousands of employees, who are plainly the majority of eligible employees who hold active opinions on the issue, has been frustrated.

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

The Effect of Defining the Craft as Encompassing a System

Chairman Dougherty has stated that requiring a union to have the support of a majority of those eligible to vote is important under the RLA because the certified representative must represent

employees in a craft over an entire transportation system, covering a wide geographic area and including a large numbers of employees. The Board had not previously cited its requirement of system-wide representation as one of the bases for its election rule.

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

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

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

To be sure, I agree that a long standing rule should not be changed without reason. But there are significant reasons for change. The two reasons originally cited by the Board for the adoption of this rule are no longer valid. First, as discussed above, the rule is no longer needed for stable labor relations by discouraging strikes, which have significantly decreased in recent

years. Today, unions assure that any strike will be supported by at least a majority of employees by holding strike votes. Second, while the rule did not hinder unionization during the 1934-1948 period, it clearly does so today. The Board's original reasons for this rule which have been reiterated over the years without analysis no longer are supported by current experience. An election procedure that favors management and denies the employees their right to representation can no longer be justified by the theories and assumptions articulated by the Board in 1948. They have not withstood the test of time.

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

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

an election to determine whether they wish to continue representation. See Chamber of Commerce, supra, and Alitalia Airlines, 10 NMB 331 (1983).

While the NLRB permits an election petition challenging an incumbent with only a 30% showing of interest, such a petition may only be filed during limited periods under the NLRB's contract bar rule. But under the Railway Labor Act contracts do not expire. A reduction of the required showing of interest would endanger the very labor stability which Chairman Dougherty has cited as the principal justification for the current rule.

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

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

Docket No. C-6964

OUTLINE OF JOEL PARKER TESTIMONY

I. Introduction

- Biographical Information
- Background on TCU

II. NMB Practice Inconsistent All Labor Relations Agencies

- Current practices inconsistent with Virgin Railway, 300 U.S. 515
- Current practices inconsistent NLRB, FRLA, and State PERB's
- Current rule favors management

III. Current Rule Does Not Contribute to Labor Stability

- Rationale of Board is that current rule contributes to labor stability
- Union support not fixed and will vary over time
- Strike issue won't even come up until several years after certification
- Today all unions have strike vote to assure at least majority support
- Assuming union certified with only majority support is weaker, it is counterintuitive that weaker union is more likely to strike than stronger union
- Board through its mediation process controls ability to strike
- Labor ballot has not resulted in strikes
- IFFA v. TWA, 489 U.S. 426 (1989), striker replacement discourage strikes
- NMB statistics show strikes have markedly decreased

IV. Current Rule Not Assure Certified Union More Likely To Be Effective

- Experience under RLA and outside RLA indicate that, while many factors impact effectiveness, method of certification not one
- Perverse to interpret statute whose purpose is to protect employee right to engage in bargaining so as to create an election system that favors management

V. Current Rule Handicaps Unionization

- Early rationale rely on fact that under current rule between 1934 and 1948 unions won overwhelming number of elections
- This is no longer true
- Board's earlier view was labor stability not attained by denying employees opportunity to be represented by a union

VI. Higher Concentration Unionized Than Under NLRA Not Support Rule

- Most of rail industry organized before passage of 1934 Amendments
- Railroad industry for most part not organized under NMB procedures
- Recent study shows unions lose higher percentage of elections run by NMB than NLRB

VII. Effect of System-Wide Representation

- Newer rules telephonic and internet voting make it unlikely that a committed minority will hijack election process

VIII. Longevity

- Longevity alone not support rule
- Changes since rule adopted
  - strikes have decreased

- strike votes held by all unions
- unions no longer win overwhelming number of elections

IX. NLRB Rules Should Not Be Adopted Wholesale

- Reason for change is changed experience since originally adopted
- Rule does not discourage strikes, and it does hinder unionization

X. Other Issues

- Need not address all to address one
- RLA, unlike NLRA, lacks statutory decertification procedure
- Current showing of interest rules justified by lack of contract bar
- NMB well advised not to consider these other issues

XI. Conclusions

- Earlier Justifications for rule no longer valid
- Board policy should no longer favor management

Candace Bruton
Self

Good Morning. My name is Candace Bruton and I have been a Delta flight attendant for over 38 years, a fact of which I am extremely proud. Throughout my career I have had a world of experiences...my flying has ranged from domestic, to charters, to international, flying in both leader and non-leader positions. Like many of my colleagues, my career has included two mergers and one acquisition, resulting in the combination of distinct and varied cultures. I have also been an active employee advocate, serving as a member of various employee forums and groups and most recently as a member of the pre-merger Delta Flight Attendant Seniority Integration team. Over the years, whether I was advocating for employee issues or customer focused issues, I have found Delta to be respectful, supportive, and always open to dialog and debate. And while I may not have agreed with every decision, I have always found Delta to be fair in their decisions and, more importantly, fair in their decision making process.

In my career Delta flight attendants have had two opportunities to unionize: the concerted effort in 2002 by both AFA and TWU and more recently May of 2008 by AFA alone. In both elections the Delta flight attendants, by a wide margin, clearly answered no. Yet those who don't agree with the decision continue to attribute the last two election results to apathy, padded seniority lists, uneducated flight attendants and any number of other excuses being tossed around, to which I and all Delta f/as take great offense and find incredibly disrespectful. We are not uneducated or unaware. We knew exactly what we were doing.

A critical part of our integration is hearing from the combined group as a whole on the question of representation. Both Delta and Northwest flight attendants are ready to make their choice – we've been ready as we watch our co-workers in other departments within the company resolve this issue and work together. They are now working under the same pay rates, they have a single seniority list and they're able to bid on jobs throughout the company. All the while, we flight attendants are being held back by continued delays. These delays that we have had to endure have been frustrating to all and are keeping tension alive.

We want to know what our place on the seniority list is going to be – and we could have had that figured out by now. That valuable information lets us know if we can move to another base or fly certain trips – all things that impact my paycheck, my work environment and life outside of work.

But instead, there continues to be delay.

In the beginning, the AFA said it wasn't time because they needed to further educate Delta flight attendants - though we had just had the previous 2 years of education when they tried to organize us in 2007 and 2008. Next, the AFA determined they should delay a vote until a more favorable board was put into place. And finally, after submitting a request for single carrier status to the NMB, AFA has withdrawn the request in hopes to take advantage of a change in the voting process.

These delays have done *nothing* to promote the efforts to move forward as one flight attendant group, have done *nothing* to promote the combining of two proud cultures, have done *nothing* to settle the anxiety surrounding the future of the new Delta flight attendant population.

While you can probably tell that I am not a proponent of having a union here at Delta, I am even less interested in a union representing me that only has support from a minority of my co-workers. A union that holds only minority support cannot possibly function to its potential...it will cause instability within the combined group and most certainly, without the support of the majority, the group will experience an imbalance of power in contract negotiations.

The AFA has said as much in a mobilization training document that is circulating around on the Internet. In this document, the AFA says "A Union's power at any point in time is nothing more than the total energy and support of its members who can be mobilized." Without the majority supporting them, what kind of power could they have? Chaos is a trademark of the AFA's strategy. How effective would it be when only a small percentage agree to it...Or even the right to strike - with only minority support the threat of strike is immensely weakened.

The combined pre-merger Delta and pre-merger Northwest flight attendant group is the largest flight attendant group in the world. The potential for success with minority support is limited at best. And as such, the impact on the success of other unions assured. The current voting process, on the other hand, ensures that you are doing the will of the majority of the population. By changing this process, you lose the guarantee and security that the majority believe they are doing the right thing...and the results are left open to debate and criticism.

My thought process is not new. This issue has been being debated for over 70 years. Yet even with all the previous discussions, all the intellect of some very thoughtful and skilled individuals on both sides of the argument, and all the various intentions and interpretations of the voting process, the majority vote was put into place and upheld by the NMB several times over.

I would also echo my colleague Ed's comments about decertification. The proposed voting process, while allowing a minority to determine the outcome, does not include a balance to the equation....a decertification process.

There are many flight attendants at Delta who have worked at unionized carriers. Some of those flight attendants came to Delta to experience a new working environment. They say that the driving factor in their decision to give up seniority at another airline and to work for Delta is the fact that we are non-union. And while we're not perfect, they've liked what they've seen. If this Board is going to change the rules, it is only fair and democratic to give us the choice to get rid of the union if and when we choose to do so. And, to do this with a process that consists of a simple yes/no ballot with a majority of ballots cast determining whether the union stays or goes.

Ultimately, it is time to move on. We have been in the process of merging for over a year. Delta flight attendants need to begin the work of creating the best airline in the industry together.

It is good for the company and good for flight attendants ourselves. We need to know what our futures will hold, what aircraft we will be able to fly, what destinations we will be able to experience, where we will be based. We need to fly together, learn about each other, and join our two histories so we can produce a great future.

We are ready. Please stop the delays and the politics, and let us make our choice.

Thank you for your time.

John Conley
Transport Workers Union

Transport Workers Union Comments on NPRM to Change Rules Governing Union Representation Elections

First, the TWU would like to thank the National Mediation Board for the opportunity to comment here today.

Imagine a dictatorship in which the dictator wanted to create a mock democracy. He would probably create an election system much like the system we use for union representation elections today. In such a system, no challenger would have a true chance to defeat the dictator, because all citizens who did not cast a vote would be counted as votes to retain the dictator. The dictator would simply discourage voting, and the "reelection" of the dictator would be assured. Of course, real democracies would be outraged that such a system existed. And the TWU is outraged that such spurious methods continue to determine the outcomes of union representation elections and are still in practice as part of the law, in our otherwise democratic nation.

The TWU supports the National Mediation Board's recommendation that the Railway Labor Act be amended to "provide that, in representation disputes, a majority of valid ballots cast will determine the craft or class representative". The current methodology, which requires 50% +1 of eligible members of a class or craft to vote "yes" in order for a union drive to be successful, implicitly benefits the company in the same way that it benefits the dictator. It is a system that automatically categorizes non-voters as no votes, and motivates the company to discourage voting rather than to encourage it.

There are no other election mechanisms in America that operate this way, mechanisms that discourage participation. When we hold elections for public office we not only encourage, we demand participation. The American dream is based on majority rule, but this is the majority of those who choose to participate. Votes for union officers, votes in congress, votes for PTA president and votes for the American Idol are all based on a majority of the votes cast, not a majority of the universe of possible votes. Elections for union representation should be no different, as they provide a dichotomous choice as well. Like the

dictator, employers are currently vested in ensuring low participation rates in representation elections because a non vote is counted as a no. Employers should be subject to a system in which they encourage, not discourage their employees to make a choice.

Would the current system pass muster if evaluated from a scientific perspective? Imagine a survey researcher that counted all unanswered questions on his survey as "no" answers. Or perhaps he instead lump all "no opinion" responses in with the "disagree" responses. This researcher would quickly be ostracized and debunked as a fraud for not following the scientific method. The US Census Bureau would never assume that people in a particular household fell into particular categories unless they actually were counted and queried. It has been empirically shown, time and time again, that people who don't answer, answer "no opinion" or don't vote really mean to convey that they are not interested in the outcome. They are OK with it either way.

The current system is un-American, unscientific, intuitively unfair and simply wrong. The TWU supports the NMB's NPRM and changing the way union representation elections are held.

Edward Bahmer
Self

Good day and thank you for the opportunity to speak with you and make my statement.

My name is Edward Bahmer and I will celebrate the completion of my 22nd year as a flight attendant in March. I am a pre-merger Northwest flight attendant and am currently a member in good standing with AFA. My career as a flight attendant began in February of 1987 with a small airline in Orlando, Florida. Over the years I have worked for several different carriers and during that time have been represented by a multitude of unions, including AFA, the International Brotherhood of Teamsters, the Professional Flight Attendants Association, an in house union at Northwest, and back to AFA.

During my 20 years of tenure with Northwest Airlines I have been a part of the changes within the Northwest flight attendant group when the group wished to change representation and switch to another union whom we (as a group) felt could offer us a better product in regards to servicing the members and representation. This is the first time in my career at Northwest that I have had the opportunity to not have a union represent me.

Since the merger with Delta, I have been part of the integration. I have been able to participate and enjoy the benefit of the Satellite base in Atlanta and make many new friends. I have experienced first-hand that Delta offers a unique culture and has a deep history and pride that is rarely seen in Corporate America today. I am very encouraged about the future that all employees will be able to enjoy with Delta regardless of the representation election before us. I have seen how Delta has taken the time and made the investment to bring the Pre-Merger Northwest Airlines flight attendants into the fold as soon as possible so we can truly create "One Great Airline" together and move forward on the same page at record speed. Having many friends working for different airlines in the business, it is my belief that this merger will go down in the aviation history books as a very well planned and executed merger. With that said, I have no interest in becoming like other airline mergers, in which employees are waiting five years or longer to integrate. All employees of Delta deserve this issue to be resolved in a timely manner as well.

As we all are aware, one of the major hurdles that we face as Delta Employees is the deep and personal choice of union representation. A choice that, for some, runs deep into the core of their being and goes against the grain of everything they have known to date. As I sit/stand before you, I realize full well what is at stake for all parties involved and I respect personal choices. I am also here to ask that if this "new" way of voting turns into a "minority rule" yes/no vote that we also have the same and fair opportunity for decertification.

One basic right and benefit we all enjoy as Americans is the right to choose. We all know as consumers that if we don't like the company we are doing business with we can either change to another company or cancel our service completely. Again, that choice is left up to the consumer. It is my opinion and I know many colleagues who share my view that we should have that right as union members as well. If at some point a union represented group no longer feels that they are being offered a high enough level of service they should be able to cancel that representation completely – just as easily or as difficult as it was obtained.

Since the merger, many have moved, changed and enhanced their personal lifestyles and are looking forward to flying new aircraft types to new destinations after we are trained in March. I am deeply concerned as to what I and others perceive as delay tactics. I am confused as to why the USA3000 and Compass AFA votes continued – under the current rules, no less – and our vote was withdrawn? I am concerned as to why the Delta Vote is being singled out to be ground zero for a new way of voting. Moving forward if the Delta Employees choose representation and then at a later date decide en mass that representation is no longer what they want in the work place, that there is no "equal" decertification process.

Whatever the outcome of these hearings and whatever the outcome of the voting rules, I and others ask that you keep it fair and balanced on all sides of the issue. That the parameters of how to gain representation should be the same as to how to get rid of representation.

Again, many employees have made life changes that could create hardships if this vote delay continues. It is to my understanding that unions were put in place to hold the companies of the employees they represent accountable. I think it is fair to say, unions should be held accountable to the people they represent and move forward in a timely manner with as little impact as possible to its members lives.

It is time to move on, it is time to vote and it is also time to be fair from all directions and to ensure that the majority is listened to and, most importantly, respected. Please allow us to make the choices that need to be made for our futures and let the voices finally be heard.

Thank you for your time.