UNITED STATES OF AMERICA
NATIONAL MEDIATION BOARD

IN RE: PROPOSED RULE ON REPRESENTATION ELECTION PROCEDURE	**NMB Docket No. C-6964**

COMMENTS OF PROFESSOR JAMIN RASKIN IN SUPPORT OF PROPOSED RULE

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As a professor and scholar of constitutional law, labor law, and law of the American political process, I respectfully submit these comments in support of the proposed rule that, in NMB representation disputes, a majority of those casting valid ballots shall determine the craft or class representative.

This change would reform the NMB's current practice of requiring the winner to obtain the votes of a majority of all eligible voters, including those who consciously abstain from voting, are sick or incapacitated, or are erroneously listed as eligible. This change is long overdue.

The NMB's current rules are indefensible. NMB policy on these points was last revisited twenty-two years ago in *Chamber of Commerce of the United States/IBT*, 14 NMB 347, 360-363 (1987). The *Chamber of Commerce* Board refused to change its rules, based only on institutional inertia rather than a clear statement of principle.

These rules remain indefensible now. The refusal to certify the winner of a majority of those voting is a relic of an agency practice that developed by accident, not from any principled statutory policy. It violates every modern standard of democratic elections at home and abroad. It effectively stuffs the ballot box against union representation. This rule gives employers a ready method of locking in a significant fraction of the unit as "No" votes through incorrect addresses. No union in any non-RLA industry -- and no other voters in any political, corporate or internal union election in America -- must overcome such arbitrary and lopsided barriers to majority rule.

ANALYSIS

I. The Majority Of Those Voting Should Decide NMB Elections.

A. History of the Supermajority Rule

1. The "majority of the unit" rule developed by accident, not by statutory policy.

As early as its First Annual Report in 1935, the NMB explained that its practice requiring a majority of all eligible voters was a matter of administrative convenience, not a legal requirement. Summarizing the days of the pre-RLA Railroad Labor Board, the NMB reported:

> ... the Board interpreted [Section 2, Fourth of the Act] as requiring a majority of all those eligible rather than a majority of the votes only. The interpretation was made, however, not on the basis of legal opinion and precedents, but on what seemed to the Board best from an administration point of view.

First Annual Report of the National Mediation Board (FY 1935) at 19, *quoted in Laker Airways*, 8 NMB 236, 254-255 (1981).

It appears that this rule developed by happenstance. The Supreme Court explained the accident in *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 560-561 (1937). In the first elections conducted by the NMB's predecessor Railroad Labor Board, the victorious unions happened to win so overwhelmingly that they captured a majority of all eligible voters. *See Virginian Ry. Co.*, 300 U.S. at 560-561, *citing Brotherhood of Railway & S. S. Clerks v. Southern Pacific Lines*, 4 Dec.U.S.Railroad Labor Board 625. These early supermajorities allowed the Railroad Labor Board to avert controversy, by describing the outcome as having been decided by a "majority of the entire craft." *Id.*

This understandable desire to avoid litigation with the railroads gave rise, however, to a default "rule" that a majority of the entire unit, not merely a majority of those voting, was necessary to win. *See id.*

2. *Virginian Railway* rejected the "majority of the unit" rule as contrary to the Act's purpose.

In 1937, however, the Supreme Court squarely rejected the argument that the RLA requires a majority of all eligible voters in *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 560-561 (1937).

In *Virginian Railway*, the NMB certified a union who won a majority of those voting, pursuant to the parties' stipulated election agreement. The Supreme Court rejected the railway's argument that the "majority of the craft" contemplated by Section 2, Fourth of the RLA, 45 U.S.C. §152, Fourth, required the winning party to win a majority of all eligible voters. 300 U.S. at 560-561.

The *Virginian Railway* Court held that the RLA permits the NMB to certify a winner of a majority of those voting. However, its opinion went even further to indicate that the more onerous "majority of all eligible voters" rule is itself contrary to the Act.

The *Virginian Railway* Court looked to the standards of public election laws: "Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as a requiring only the consent of the specified majority of those participating in the election." 300 U.S. at 560, *citing Carroll County v. Smith*, 111 U.S. 556 (1884) and *Douglass v. Pike County*, 101 U.S. 677 (1879). The

Virginian Railway Court relied on the basic premise of democratic elections that voter abstention indeed means abstention –and should not be counted as support or opposition. "Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.'" *Id*., *citing County of Cass v. Johnston*, 95 U.S. 360, 369 [1877] and *Carroll County v. Smith*. The Court concluded: "We see no reason for supposing that section 2, Fourth (45 U.S.C.A. § 152, subd. 4) was intended to adopt a different rule." *Id.*

The *Virginian Railway* Court held that any other rule would frustrate the purposes of the Railway Labor Act: "If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives." 300 U.S. at 560 (emphasis added.) The *Virginian Railway* Court also warned that such a rule would invite employers to take steps to cause employees to abstain: "There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer." 300 U.S. at 560 (emphasis added.) As I discuss below, the NMB's continued adherence to the "majority of those eligible" flies in the face of the Supreme Court's construction of the RLA in *Virginian Railway*.

3. The NMB persisted after 1937 in following the very rule condemned in *Virginian Railway*.

Nevertheless, the NMB continued in most cases after 1937 to apply the very rule that the *Virginian Railway* Court condemned as "thwart[ing] the purpose of the Act."

In 1947, the Board sought the opinion of the Attorney General as to whether it had the power to certify a union where less than a majority of eligibles voted. The Attorney General replied:

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

Op.Atty.Gen. (September 9, 1947). This opinion was grounded on the NMB's bureaucratic immunity from judicial review, not on the correctness of its rule.

The only reason the NMB could disregard the Supreme Court on this point was that courts lack jurisdiction to order the NMB to comply with *Virginian Railway*. *See, e.g., Radio Officers Union v. NMB*, 181 F.2d 801, 802 (D.C.Cir.1950) (rejecting union challenge to supermajority rule on jurisdictional grounds). This is the only reason the NMB's "majority of the unit" rule has survived– not because of the wisdom or logic of this "longstanding policy," but because no court may order the NMB to comply with the Supreme Court's construction of the Act in *Virginian Railway*.

In later years, the Supreme Court has reluctantly concurred that courts may not order the NMB to adopt a fair procedure. Yet the Court has continued to observe that the "majority of the unit" rule is even more biased against unions than a ballot that allows a

"no union" vote: "The practicalities of voting - the fact that many who favor some representation will not vote - are in favor of the employee who wants 'no union.' Indeed, the method proposed by the Board might well be more effective than providing a 'no union' box, . . ." *Brotherhood of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650, 669 n.5 (1965).

This was a frank confession that the NMB's election procedure is stacked against unions. The NMB should not be in the position of defending its standards for majority rule based on how much a given rule disadvantages unions, as it apparently did in *Brotherhood of Ry. & S.S. Clerks*.

4. The NMB acknowledges its power to certify based on a majority of the voters: *Laker Airlines*.

The NMB has at times attempted to fend off union criticisms of its rule, including an unexplained minute entry "determining" that "the Board does not have the authority to administratively change the form of the ballot used in NMB representation investigations." 43 Fed. Reg. 25529 (June 7, 1978).

As a matter of law, this 1978 "determination" was clearly wrong. The NMB has no power to overrule the Supreme Court in *Virginian Railway*, which not only affirmed the NMB's discretion to change the ballot, but appeared to mandate it.

In any event, the NMB has since held that it <u>does</u> have authority to adopt a "majority of the voters" ballot, without Congressional approval. *Laker Airways*, 8 NMB 236, 254-255 (1981); *see also US Airways*, 16 NMB 194, 200 (1989); *Rio Airways*, 11

NMB 105, 106 (1983). Meantime, the courts hold that the adoption of a yes/no ballot is entirely within the NMB's discretion. *Continental Airlines, Inc. v. National Mediation Bd.*, 793 F.Supp. 330, 334 n.5 (D.D.C.1991) ("Even in election cases, the NMB has discretion to treat a nonvoter as either (1) acquiescing in the will of the majority or (2) voting for no representation."*)*; *Zantop Int'l Airlines, Inc. v. NMB*, 554 F.Supp. 504, 506 (E.D.Mich.1982) *aff'd* 732 F.2d 517, 522 (6th Cir.1984).

No one suggests that the NMB needs Congressional approval to adopt a *Laker* ballot in any given case. Yet this exception discredits any claim that the NMB is bound by statute to require a majority of all eligible voters. Contrary to the Board's unexplained dictum in 1978, 43 Fed. Reg. 25529, the NMB now acknowledges that it does have the power under the Act to certify the winner of the majority of votes cast.

To be sure, the NMB to date has reserved a "majority of the voters" rule as a special remedy for egregious employer violations of the Act. However, this limitation is completely irrational. It declares that employers are entitled to count non-voting employees as deliberate "no" votes, unless the employer has been so lawless that this special employer privilege must be taken away. That is not the rule regarding non-voters of any democratic society I am aware of. Majority rule cannot be reserved as an occasional punishment for an employer's egregious offenses. If it is ever permissible to measure a union's majority standing by the normal procedures of parliamentary vote, then this must be the rule whether or not the employer has already violated the law. If normal majority rules do not offend abstaining employees' rights in a *Laker* election,

then they do not offend their rights in any other election.

To the contrary, the automatic alignment of non-voting workers with the "no" votes offends the rights of all workers to a fair election. *See Virginian Railway*, 300 U.S. at 560 ("If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives.")

Seventy-two years later, workers subject to the RLA are still waiting for the NMB to comply with the *Virginian Railway* Court's view of the Act.

B. The NMB's Rule Violates All Modern Standards of Majority Rule.

1. The NMB's rule is contrary to civil election law.

The NMB's arbitrary "majority of all voters" rule violates every principle of American democracy, which is based on the will of citizens who actually vote. This is how we elect Presidents, Senators, Representatives, governors, and state and local legislators. I am not aware of any federal or state office in which the *status quo* regime prevails absent a majority vote of all eligible voters.

If such a rule applied in presidential contests, the *status quo* would never change. No President of the United States since voter records were first kept in 1824 has ever been elected with a majority of all eligible voters. *See Historical Statistics of the United States, Colonial Times to 1970* (U.S. Bureau of the Census); *Statistical Abstract of the United States*. For example, Barack Obama won 69,456,897 votes, or 52.9% of those

voting in the 2008 Presidential election. The 2008 election had the highest turnout for any presidential election since the voting age was lowered to 18, with 62.3% of all eligible voters actually voting. Had the NMB run the election, however, there would have been no change in the *status quo*, since 212,720,027 people were eligible to vote, and Obama won only 32.7% of the total eligible electorate. *See* www.elections.gmu.edu.

American courts uniformly reject arguments that a statutory requirement of "majority of the electorate" refers to all eligible voters, and not simply those voting in a given election. "It is a fundamental principle of our system of representative government that the will of the majority expressed according to law must prevail. But the majority of those who actively participate in the affairs of state and not of the entire body of voters, controls. Elections must be settled as a practical matter by those manifesting interest enough to vote. Failure on the part of some of the electorate to take the trouble to express their views by depositing their ballots cannot stop the machinery of government. Apathy is not the equivalent of open opposition. It is the nature of our institutions that the majority of those who vote must accomplish the avowed purpose of all elections, which is the choice among candidates or the approval of policies." *Kuhrt v. Sully County Bd. of Ed.*, 85 S.D. 11, 176 N.W.2d 479, 481-482 (1970) (emphasis added) (*quoting Cashman v. City Clerk of Salem*, 213 Mass. 153, 100 N.E. 58, 59 (1912)). *See also Lake County Sheriff's Merit Bd. v. Buncich*, 869 N.E.2d 482, 486 (Ind.App. 2007) *citing Black's Law Dictionary*'s definition of "majority vote": "Vote by more than half of voters for candidate or other matter on ballot. When there are only two candidates, he who receives

the greater number of the votes cast is said to have a majority . . .”’ *Black's Law Dictionary* 955 (6th ed.1990); *State ex rel. Cashmore v. Anderson*, 160 Mont. 175, 500 P.2d 921, 928-929 (1972) (“ When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government . . . to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent . . .”); *Munce v. O'Hara*, 340 Pa. 209, 16 A.2d 532, 533 (1940) (“No method having as yet been devised whereby to compel a complete vote by all the voters, the practical working of the elective system necessarily requires that those who abstain from voting be considered as acquiescing in the result declared by a majority of those who exercise the suffrage.”); *Laconia Water Company v. City of Laconia*, 99 N.H. 409, 112 A.2d 58 (1955); *Dominic v. Davis*, 262 P.2d 143 (Okl.1953).

This is the same principle applied by the *Virginian Railway* Court: “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.” 300 U.S. at 560, *citing Carroll County v. Smith*, 111 U.S. 556 (1884) and *Douglass v. Pike County*, 101 U.S. 677 (1879).

2. The NMB’s rule is contrary to basic principles of organizational self-governance.

In 1987, this Board offered a paternalistic rationale for requiring unions to achieve a supermajority before winning certification. It reasoned that a union that wins only a majority of those voting may not be as effective in strikes and negotiations as one that has a supermajority. *Chamber of Commerce/IBT*, 14 NMB 347, 362 (1987). The Reagan Board therefore justified its refusal to certify unions who win a majority of those voting as a salutary measure to prevent the formation of weak unions.

This argument, espoused by employer groups like the Chamber of Commerce, is completely disingenuous. Employers do not demand union supermajorities in elections in order to breed a hardy strain of more effective unions; they demand this requirement to prevent unions from forming in the first place. Whether and how employees strengthen their ability to negotiate and strike is a matter for <u>them</u> to decide, not for the NMB. It is not for the NMB to assume a paternalistic role in "helping" unions, by preventing their formation where the NMB judges the union's majority to be insufficiently large. Congress has never authorized its labor agencies to manipulate the rules of union recognition to influence the internal policies of unions or affect their bargaining strength. *See, e.g.*, *NLRB v. Financial Institution Employees*, 475 U.S. 192, 204 & n.11 (1986) ("Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible.' It believed that only essential standards should be imposed by legislation." (citation omitted)).

This is a basic fact of democratic self-governance. For this reason, *Robert's Rules of Order* (10th ed. 2000) at p. 390 condemns "majority of the electorate" rules as a

hindrance to fair and effective parliamentary procedure. "Voting requirements based on the number of members present . . . while possible, are generally undesirable. Since an abstention in such cases has the same effect as a negative vote, these bases deny members the right to maintain a neutral position by abstaining. For the same reason, members present who fail to vote through indifference rather than through deliberate neutrality may affect the result negatively."

Unlike a regular democratic procedure, in which adversaries begin with a level playing field and compete to attract the most votes, a union in an NMB election begins as the landslide loser, and must fight to achieve more votes, not merely than those who oppose the union, but than all other workers who would simply choose not to vote.

No RLA employer that now requires its employees to achieve such a supermajority would tolerate that requirement in its own internal corporate governance. State corporation law enforces shareholder elections based on a majority of those actually voting. *See*, *e.g.*, 8 Del.C.§ 216(2) ("In all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders.")

3. The NMB's rule forces conscientious objectors to be counted involuntarily and unfairly as anti-union voters.

This rule is especially pernicious, because a significant number of workers are bound by religious principle to refrain from voting in <u>any</u> election.

For example, the Jehovah's Witnesses, the Hassidic, Mennonite, and Nation of

Islam faiths abstain from all voting, because they insist on strict neutrality in all secular controversies. *See* Zook, N. N. "Exercising the Right Not to Vote: Religious Groups Abstaining from Voting," Midwest Political Science Association (May 25, 2009). Such religious dissenters already have an individual right to refrain from full union membership, *see Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 769 (1961). However, the NMB's rule goes further, and attributes their abstention in a representation election as a partisan statement about their fellow workers' effort to organize.

This approach violates the First Amendment rights of these workers, by involuntarily treating their conscientious abstention as secular participation — a "no" vote that cancels another employee's "yes" vote. The courts have been quick to condemn any rule that imposes involuntary participation in pro-union causes, *see, e.g., Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977). The law may not impose the same rule in reverse, to associate the abstaining worker with an anti-union partisan position. *See also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *citing W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624, 645 (1943).) If a Jehovah's Witness' secular neutrality justifies a special exemption from union dues payment, *see Abood*, then the same neutrality must not be disregarded when tallying the opposing numbers of pro-and anti-union voters.

4. The NMB should bring its rules in line with NLRA law.

Ironically, *Virginian Railway* has been faithfully followed under the NLRA. Although *Virginian Railway* interpreted the RLA, the NLRB and the reviewing courts adopted its reasoning as the controlling law to require "majority of the voters" in NLRA elections. *See J. Ray McDermott & Co., Inc. v. NLRB*, 571 F.2d 850, 856 n.5 (5th Cir.1978) ("So long as the absence of a majority of union members at an election cannot be attributed to unfair action by any party, it must be presumed that those who could have voted, but did not, assented to the will of the majority of those voting"); *NLRB v. Deutsch Co.*, 265 F.2d 473, 480 (9th Cir.1959). The reviewing courts treated employer objections to a "majority of the voters" rule as "absurd":

> [I]t would be as absurd to hold that collective bargaining is defeated because a majority of employees fail to participate in an election of representatives as it would be to hold that the people of a municipality are without officers to represent them because a majority of the qualified voters do not participate in an election held to choose such officers. . . . If the employees do not wish to be represented in collective bargaining they can so declare in the election; but where, as here, only a comparatively small number so express themselves the result should not be the same as if a majority had so voted. We pointed out in the *Virginian Railway* case the disadvantages and dangers which would follow from failure to apply the political rule in such elections.

NLRB v. Standard Lime & Stone Co., 149 F.2d 435, 438-439 (4th Cir.1945). *See also Deutsch Co.*, 265 F.2d at 479-480.

There is nothing unique about the railway and airline industries that changes this federal policy. To the contrary, the NLRA rule was based on the Supreme Court's construction of the RLA itself in *Virginian Railway*. "On the first and principal question,

that presented by lack of majority participation in either of the elections, we think that the conclusive answer is found in the decision of the Supreme Court in *Virginian R. Co. v. System Federation No. 40*, 300 U.S. 515. . . And we see no reason to think that a different rule was intended by the National Labor Relations Act." *Standard Lime*, 149 F.2d at 436-437. *See also Hawaiian Airlines v. Norris*, 512 U.S. 246, 263 n.9 (1994) (where the policies of the RLA and the NLRA are the same, the statutes should be interpreted consistently.)

The NMB should eliminate this anomaly, where all other labor agencies follow the Supreme Court's construction of "majority" in the RLA, except the very agency that administers the RLA itself.

5. The NMB's rule makes every mistaken address a fictitious "no" vote, and gives unscrupulous employers an incentive to falsify employee lists.

Another unhealthy aspect of the "majority of the unit" rule is that it rewards employers who, by accident or design, generate employee lists with false names and addresses. The current rule denying unions access to the list further prevents any effort to check the names for accuracy.

In a normal election, the existence of fictitious voters on the rolls is relatively harmless. A fictitious voter will not appear to vote, and so will not affect the election result. But in an election governed by a "majority of all eligible voters" rule, every fictitious name on the list, and every voter who fails to receive a ballot due to an incorrect address, becomes a "no" vote. This is a potent threat and a moral hazard.

Employer provision of spurious voter lists has been a problem in past NMB elections. *See, e.g., Mesa Airlines*, 26 NMB 373, 381-382 (1999). The Board acknowledges that incorrect names and addresses often appear on election lists. "In large elections, it is not unusual for the Board to receive large numbers of duplicate requests, and materials returned as undeliverable." *Continental Airlines*, 35 NMB 42, 47 (2008); *see also America West Airlines*, 30 NMB 72 (2002) (incorrect information for approximately 4.5 percent of the electorate.)

However, the Board has complacently relied on procedures to remove voters from the list for whom ballots are returned "undeliverable." *See id.* This overlooks that the Postal Service is not able to identify all undeliverable mail – such mail simply ends up lost at the point of delivery. *See* GAO's discussion of "discarded lobby mail" at http://www.gao.gov/htext/d08348r.html. Neither Board personnel, nor the Postal Service, nor the human resources departments that generate employee lists are infallible. Studies of commercial mail identify many factors that prevent a complete correction of false addresses: 1) Up to 40% of all moves are not reported to the Postal Service, 2) an address may be valid, but the addressee no longer resides there due to death or divorce, 3) postal procedures only certify a valid delivery point but do not certify the addressee, or 4) missing apartment numbers. http://www.uaaclearinghouse.com/uaaoverview.aspx; Reuters, July 14, 2009.

The inclusion of false names, or the failure to deliver a ballot, is relatively harmless when the election is simply "majority of those voting." But in most current

NMB elections, every false name and address results in an undeserved "no" vote – a one-sided default rule that stuffs the ballot box against union majorities.

NMB policy on this point is strangely schizophrenic. Employer handling of ballots is a *per se* basis for overturning the results of an election, because it raises the possibility of ballot tampering. *HERE/Lufthansa*, 27 NMB 18, 44-46 (1999). Yet the NMB's current practice allows employers to "handle" and indeed create the very election lists on which a majority will be determined. Where every misdirected ballot counts as a "no" vote (save those that the Postal Service can identify and return as "undeliverable"), employers have a perverse incentive to supply incorrect names and addresses. Even where employers do not deliberately falsify the list, the inevitable mistakes by employers and the Postal Service result in automatic "no" votes. That is not a democratic system for deciding majority rule.

CONCLUSION

The NMB should reform its election procedures to certify the party that wins a majority of the votes cast as the winner of a representation election

January 4, 2010 Respectfully submitted,

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