HEARING BEFORE THE NATIONAL MEDIATION BOARD

DOCKET NO. C-6964, RIN 3140-ZA00

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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]

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[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]

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[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.

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