UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AIR TRANSPORT ASSOCIATION of AMERICA, INC., Plaintiff, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiff-Intervenor-Applicant, vs. NATIONAL MEDIATION BOARD, Defendant.	)	Civil Action No. 1:10-00804-PLF

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

Pursuing an unprecedented and unmistakably partisan course of action, a two-member majority of the National Mediation Board ("NMB" or "Board") has adopted a new Rule (attached as Ex. B) regarding union elections that was intended to accomplish two goals: (a) to make it far easier for unions to win organizing elections; and (b) to make it all but impossible for employees to exercise their right to reject union representation once a union has gained representative status. The Rule would lower the threshold showing of support a union would need among affected employees to secure NMB "certification" as authorized bargaining representative. Rather than requiring the support of the "majority" of those employees, as the text of the Railway Labor Act ("RLA") requires, the union could achieve electoral success by obtaining support from a minority — perhaps even a small minority — of those in the affected employee group. Once the union is certified, the Rule would cement in place (and, in some circumstances, exacerbate) the all-but-insuperable obstacles facing employees who seek to shed union representation after a union has been certified.

The Board majority's predetermined course seems plain enough from the face of the Rule itself, but the way in which the Rule was prepared and the purported rationales offered by the majority make the arbitrary nature of those actions unmistakable:

- The Notice of Proposed Rule Making ("NPRM") (attached as Exhibit A) announcing the Rule came swiftly on the heels of a partisan shift on the Board, from Republican to Democratic majorities and in direct response to a request from the AFL-CIO.

- The new two-member Democratic majority of what Congress declared to be a bi-partisan Board purposefully excluded the Board's Chair — the only Republican member — from the process of preparing the proposed Rule and censored the dissent she prepared once she became aware of what the majority was doing.

- Although the Board had been routinely processing election applications and holding elections at other carriers while it prepared the Rule, it delayed action on applications for two very large elections at Delta Air Lines for many months. Three days *before* the NPRM was published, the International Association of Machinists withdrew its Delta-related election application and the Association of Flight Attendants did likewise on the same day the NPRM was published.

- Although the Board majority's preamble expressly rejected "labor stability" as irrelevant to the paramount goal the Rule sought to achieve — a more accurate measure of employee desires concerning representation — it embraced the interest in labor stability as a primary ground for *rejecting* the plea that the Board balance its election rules by streamlining the union decertification process. The primary purpose of the RLA was to ensure the uninterrupted flow of interstate commerce; "labor stability" cannot simultaneously be irrelevant in judging an attempt to lower the threshold for union electoral success and critical when the goal in freezing existing labor representation in place.

- The Board dismisses numerous challenges to the Rule from those commenting on the NPRM as lacking an evidentiary foundation, but the absence of a full record can only be explained by the majority's refusal to honor the commitment it had repeatedly made that it would only consider making such a fundamental change in election standards after developing a full record through sworn testimony and cross examination.

- The majority's principal rationale for the new "minority" rule is its insistence that it is improper for the Board to make assumptions about the desires of individuals who do not vote in representation elections (*i.e.* to consider them "no" votes), but the Rule they adopt will *necessarily* require the Board to make precisely these sorts of assumptions. No such assumptions are needed with the existing rule.

In sum, at every turn, the Board majority has made whatever decision, and offered whatever rationale, was needed in order to make union electoral success easier and decertification ever more elusive. It is difficult to imagine a process more pre-determined and illogical, or more fundamentally at odds with the reasoned and principled decision-making the Administrative Procedure Act requires. The Rule is invalid and its operation should be enjoined.

SUMMARY OF ARGUMENT

The Court should enjoin implementation of the Rule for these reasons:

1. <u>The Railway Labor Act Requires that a Union Obtain the Support of a Majority of a Craft or Class in Order to be Certified as a Representative</u>. The Railway Labor Act provides that "[t]he 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." 45 U.S.C. § 152, Fourth. For more than 75 years, the National Mediation Board and the courts have uniformly interpreted this statutory text to mean that to prevail in a representation election, a union seeking to represent a group of employees must obtain votes from the majority of those employees in a fair election.[1] The NMB's new Rule would sweep away this history in favor of a new standard that would allow a union to be certified if it receives the support of a majority of those casting votes in an election, even if that "majority" amounts to no more than a small minority of the eligible voters in that group (called a "craft or class" in RLA parlance) as a whole.

This new Rule cannot be reconciled with the explicit language of the RLA — the requirement that union representation will not be imposed on a "craft or class" unless a majority of the employees in that unit have affirmatively chosen that representation. The existing, longstanding standard is definitive: only when the majority of the affected employees affirmatively choose representation does a union get certified; there is no ambiguity or guesswork involved.

2. <u>The Board Majority Acted In Secret, Bypassing Congress' Bipartisan Design for Board Action</u>. The process leading to this Rule was, to say the least, extraordinary. The two-Member Democratic majority drafted the NPRM without involving — or even

[1] In the past, the Board has adopted other ballot forms for re-run elections in cases in which employers have engaged in election misconduct. The authority of the Board to adopt these remedial measures for employer misconduct is not at issue in this case.

providing notice to — the Chairman of the Board, Elizabeth Dougherty (the Board's sole Republican Member). Even though the Board had previously and unanimously held, twice, that a full evidentiary hearing would be a necessary precursor to any change to the existing standards, the Board majority held no such hearings before (or after) issuing its NPRM. When the fully-prepared NPRM was presented to Member Dougherty as a *fait accompli*, she insisted on the right to file a dissent. The Board majority gave her only hours to do so, and before the NPRM was published, the majority insisted that it would not publish that dissent in the Federal Register unless she deleted those portions of it that described the procedural shortcuts the majority had taken to publish the proposed Rule.

As a result of the clandestine efforts of the Board's majority, the Rule is not, in fact, a product of National Mediation Board action at all. Congress expressly required that the Board be composed of three Members of different political parties.[2] Congress thus expected that the Board would dispose of its business in a bi-partisan way and, at a minimum, that the majority-party Members would listen to the objections and viewpoints of the minority Member before taking formal Board action. As a result, for more than 75 years, Boards — whether majority-Democratic or majority-Republican — have operated almost uniformly by consensus and without dissent, fully informed of the competing values and interests their actions implicate.

By drafting the proposed Rule without even giving notice to minority Member Dougherty and then by muzzling her dissent, the Board majority repudiated this bi-partisan history, undermined 75 years of consensus building, and acted as free agents, not as the National Mediation Board.

[2] 45 U.S.C. § 154, First.

The preamble to the final Rule attempts to foreclose inquiry into "the Board majority's deliberative process" by characterizing those machinations as "an internal agency matter . . . outside the scope of the rulemaking proceedings." 75 Fed. Reg. at 26,065; *id.* at 26,066. The Board majority cites no law for the remarkable proposition that its pre-NPRM conduct lies beyond this Court's scrutiny, and indeed, no law supports that assertion.

3. <u>The Rule Cannot Be Justified by the Offered Rationale</u>. When an agency changes its rules or procedures, it must explain what has changed that might justify that change. Indeed, just two years ago, when the Board expressly rejected *precisely the rule it now embraces*, it committed that it would not reverse course on its 75-year old election standards without compelling evidence that it was unable to fulfill its statutory obligations through continued reliance on existing election standards. *Delta Air Lines, Inc.*, 35 N.M.B. 129, 131-32 (2008).

Rather than give a rational explanation of the reasons for adopting the Rule, the preamble to the Rule shows that the Board majority was committed to a pre-determined course, without any evidence that might support reasoned decision-making. According to the Board majority, the current election standards "assume[] that those who do not participate [in an election] are uniformly opposed to representation." 75 Fed. Reg. at 26,073. Claiming that it "will no longer substitute its presumption for an employee's intent," the majority will now certify a union based on the majority of those casting ballots. *Id.* at 26,078. This, the majority claims, will "accurately measure employee choice." *Id*. at 26,072.

This proffered rationale answers a question that the statute does not ask. The statute does not require the Board to divine the desires of those *who do not* vote; it requires the Board to determine whether "[t]he majority of any craft or class of employees [have] determine[d]" that they should be represented. 45 U.S.C. § 152, Fourth. Under the existing rule,

no assumptions, "presumptions" or ambiguities are permitted; if union representation receives the requisite number of votes — 50% plus one of those in the craft or class — "[t]he majority of [the] craft or class of employees [has] determine[d] who shall be [the] representative." *Id.* The subjective intent of those who do *not* vote is simply irrelevant.

On the other hand, under the Rule, the Board will *necessarily* be "substitut[ing] its presumption for an employee's intent." 75 Fed. Reg. at 26,078. If most of the votes cast in an election are in favor of union representation, but those votes amount to less than a majority of the craft or class, the Board will *assume* that the pattern in favor of representation revealed by the actual votes is replicated proportionately among the non-voting employees. If, as the Board asserts in the preamble, the purpose of the new Rule is to dispense with assumptions about the desires of those who do not participate, the Rule selected by the Board majority is not merely arbitrary and capricious, but is in fact antithetical to the proposed aim.

Moreover, the majority has used this occasion to complicate and frustrate further any effort employees might make to oust an incumbent union and return to non-union status — and the reasoning they adopt on this issue is totally inconsistent with the rationale proffered in support of the new Rule. The Administrative Procedure Act requires that when an agency engages in rulemaking, it must "consider [every] important aspect of the problem" before issuing a regulation. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Board majority did not do so. Rather, the majority would simultaneously lower the barriers for union organization and make it nearly impossible for employees to exercise their statutory right to change their mind and choose to no longer have union representation. Although the standards for union election and decertification are inextricably linked and have been presented in that fashion to the Board in the past, the Board has expressly refused to address

the latter issue — indeed, without admitting that it was doing so, has tinkered with the decertification procedures in ways that make it even *more* difficult for represented employees to reject representation.

FACTUAL BACKGROUND

The Rule seeks to reverse a standard the Board has steadfastly defended for 75 years, a standard the Supreme Court and the lower courts have repeatedly reaffirmed.[3] In its Second Annual Report, the Board explained that the "majority rule" standard for union elections was *required* by the statutory language of the RLA and by court decisions interpreting the statute:

> By judicial decision and opinion of competent counsel, the Board *is constrained* now to hold that *where a majority of the eligible voters participate in the election* and all are given opportunity so to vote, a majority of the legal votes cast will determine the right to certification by the Board of the representation chosen by the class or craft.

2 N.M.B. Ann. Rep. 11 (1936) (emphasis added).[4]

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[3] The 1934 Amendments to the Act gave the Board the authority to resolve representation disputes. The Board initially adopted an even stricter rule in some cases, requiring that in a multi-union election, a union could not prevail unless (a) a majority of the full craft or class voted for union representation by one of the unions; and (b) the prevailing union had received votes from a majority of employees actually casting votes. This interpretation was challenged almost immediately in *Virginian Ry. Co. v. System Fed'n No. 40*, 11 F. Supp. 621, 628 (E.D. Va. 1935), *aff'd on other grounds*, 84 F.2d 641 (4th Cir. 1936), *aff'd on other grounds*, 300 U.S. 515 (1937), where the district court held that the Board could lawfully certify a union receiving a plurality votes cast if, *but only if*, a majority of the voters in the unit had participated in the election. In the wake of that decision, the Board adopted the rule it has followed unswervingly until today. *See* 2 N.M.B. Ann. Rep. 11 (1936). Under that longstanding standard, a union prevails if (a) a majority of employees in the craft or class vote for union representation and (b) a plurality of the votes cast favor that union.

[4] Indeed, even in the preamble to the Rule, the Board majority admits that the "Board originally interpreted the language of Section 2, Fourth *as requiring* a majority of all those eligible to vote to choose a representative rather than a majority of the votes cast." 75 Fed. Reg. at 26,062 (emphasis added). This admission undermines the assertion made by the majority that the

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Over the years, the NMB has received multiple requests from labor to dispense with the majority rule standard in favor of a "minority rule" that would permit union certification even if less than a majority of eligible employees voted in favor of union representation. The Board has consistently refused. When the unions have taken their arguments to court, they have fared no better there:

- **1935**: In the first litigation involving the majority voting provision of Section 2, Fourth, the District Court for the Eastern District of Virginia expressly rejected the NMB's decision to certify a representative based on a simple majority of those participating, irrespective of whether a majority of the craft or class participate in the election. *See Virginian Ry. Co.*, 11 F. Supp. at 629. As a result of this decision the Board adopted the majority rule it currently applies. *See* 2 N.M.B. Ann. Rep. 11 (1936).

- **1948**: The Board expressly refused to alter its majority voting rule. *See Pan Am. Airways*, 1 N.M.B. 454, 455 (1948).

- **1950**: In its Sixteenth Annual Report, the Board reaffirmed the majority rule standard and observed that its duty under Section 2, Ninth "can more readily be fulfilled and stable relations maintained by a requirement that a majority of eligible employees cast valid ballots[.]" National Mediation Board, Sixteenth Annual Report 20 (1950).

- **1965**: In *Bhd. of Ry. & S.S. Clerks v. Ass'n for Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), the Supreme Court approved both the existing voting rules and the election ballot employed by the Board, holding them to be consistent with Section 2, Fourth, and, in particular, the RLA's command that "employees are to have the option of rejecting collective representation." 380 U.S. at 668-71.

- **1978**: The NMB expressly rejected a request to change its voting rules and unanimously acknowledged 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 of Executive Session of the NMB, at 78-15 (June 7, 1978) (emphasis added) (attached as Exhibit F); *see also* 43 Fed. Reg. 22,517 (May 23, 1978), 43 Fed. Reg. 25,529 (June 8, 1978).

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Board's original interpretation was merely an administrative convenience. *Id.*; *see also id.* at 26,074.

- **1987**: The Board, again, rejected a request by the International Brotherhood of Teamsters ("IBT"), to change the "majority" rule, stating that the IBT failed to demonstrate that the "proposed changes are either mandated by the [Railway Labor] Act or essential to the Board's administration of representation matters," *In re Chamber of Commerce*, 14 N.M.B. 347, 360-63 (1987). Moreover, the Board unanimously committed that any change of such magnitude would require a "full, evidentiary hearing with witnesses subject to cross-examination," *In re Chamber of Commerce*, 13 N.M.B. 90, 94 (1986).

The most recent example came just two years ago, as the Association of Flight Attendants ("AFA"), was attempting to organize the flight attendants at Delta Air Lines, Inc. ("Delta"). AFA asked the Board, again, to adopt a minority rule. The Board, again, unanimously rejected that request.[5] The Board explained that it had applied the existing rule with great success for many decades (through Republican and Democratic administrations alike), and that, in any event, elections under the more forgiving standard sought by AFA would be less conducive to "stable [labor] relations" — the primary purpose of the RLA. *Delta Air Lines, Inc.*, 35 N.M.B. 129, 131 (2008) (internal quotation marks and citation omitted).

The Board also reiterated what it had said in 1987 — that the Board would not make such a momentous change to its longstanding election standards unless Congress amended the relevant text of the RLA to require such a change or there was compelling evidence that its current standards had ceased to work. Given the Board's consistent and successful practice under the existing standard stretching back to the New Deal, the Board held, the "'level of proof [that would be] required to convince the Board [that] the changes proposed are essential [would be] quite high [.]'" *Id.* at 131 (quoting *In re Chamber of Commerce of the United States*, 14 N.M.B. 347, 363 (1987)). Finally, the Board said that it "would not make such a fundamental

[5] Two of the three Board members who rejected AFA's request in the Delta case in 2008 remain on the Board today, Chairman Dougherty, who dissented from the new Rule, and Member Hoglander, who reversed his position.

change without utilizing a process" that included the full participation of all stakeholders, live testimony and the cross-examination of witnesses. *Id.* at 132.

In the Delta election that followed under the longstanding rules, AFA received support from less than 40 percent of the eligible voters and lost.[6]

Approximately one year after the Board had rejected AFA's request to change the existing election standards, AFA's former International President, Linda Puchala, was sworn in as a member of the National Mediation Board replacing an outgoing Republican Board member.[7] At the same time, AFA was again trying to organize Delta's flight attendants. On the heels of Member Puchala's swearing-in, the AFL-CIO's Transportation Trades Department[8] asked the Board to adopt the same rule AFA had unsuccessfully requested just 17 months earlier. This time, however, a two-Member majority of the Board (the newly-installed Member Puchala and the other Democratic Member, Harry Hoglander) issued an NPRM embracing precisely the standard the Board had just rejected. On the day the NPRM was published, AFA withdrew its request for an NMB-supervised election at Delta, saying that it wanted to wait for the Board to implement the new Rule. *Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 21 (Nov. 3, 2009).[9]

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[6] AFA had lost a similar election at Delta in 2001. *Delta Air Lines*, 30 N.M.B. 102, 104 (2002) (for election held in 2001 for Delta's flight attendants, "of 19,033 eligible voters, 5,520 cast valid votes for AFA").

[7] As explained *infra* at 20, the text of the RLA expressly provides that the three-member Board is to be bi-partisan.

[8] AFA is a member and its current President is an officer of the Transportation Trades Department.

[9] The International Association of Machinists and Aerospace Workers ("IAM") withdrew a similar application three days *before* the Board majority published its NPRM. *Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B 19 (Oct. 30, 2009). The majority now claims that "the timing of when employees or their representatives file applications or withdraw those

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ARGUMENT

I. THE NMB'S MINORITY RULE IS ARBITRARY AND CAPRICIOUS UNDER THE APA.[10]

Even if the relevant statutory language did not *expressly* cede to "[t]he majority of any craft or class of employees . . . the right to determine who shall be [their] representative," thus foreclosing the Rule's new election standards, the Board majority's abrupt decision to reject its long-standing interpretation of Section 2, Fourth, is arbitrary and capricious under the Administrative ProcedureAct for three separate reasons: (a) the agency failed to offer any substantial explanation for its departure from deeply ingrained and repeatedly reaffirmed precedent; (b) the administrative record compellingly demonstrates that the change was premised on impermissible political considerations, not reasoned decision-making; and (c) the Board reaffirmed its standards for decertification — indeed, made them even *more* onerous for employees seeking to oust an incumbent union — despite numerous requests that the Board rationalize its existing decertification procedures.

A. The NMB Failed to Provide an Adequate Explanation for Its Departure from Long-Standing Precedent.

1. The Rule Is Irreconcilable with the Majority's Expressed Rationale.

As explained above, the majority's principal justification for adopting the Rule is its self-avowed refusal to "assume[] that those [employees in a craft or class] who do not

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applications is not within the control of the Board." 75 Fed. Reg. at 26,065. That is no doubt true, but the timing of the IAM and AFA withdrawals for Delta elections is very strong circumstantial evidence that the unions had advance notice of the intentions of the Board majority. Of course, discovery might well confirm that fact.

[10] The brief filed by the Air Transport Association in support of preliminary injunctive relief fully describes the standards for such relief, the requirements of the RLA's statutory text and explains why the Board majority's new Rule cannot be reconciled with that language. *See* ATA Mem. at 8-18, 40-43. The Chamber incorporates those arguments by reference rather than repeating them here.

participate [in an election] are uniformly opposed to representation." 75 Fed. Reg. at 26,073. But if the majority's real purpose were to avoid assumptions, the Rule would be no solution. Contrary to the majority's explanation, under the current system, the Board makes no assumptions about the interests of those who do not vote. To fulfill its statutory obligation, the Board asks only one question: have the majority of the employees in the craft or class affirmatively declared their desire to be represented. If they have done so by casting votes for representation, the Board certifies the union that receives the most votes. If they have not, the *status quo* remains.

The new Rule, however, inescapably would require the Board to do precisely what the majority claims the Rule was intended to prevent: make assumptions about the desires of those who fail to participate in the electoral process. Suppose, for example, that an election is held in a craft or class of 1,000 employees. The election results in 250 votes for representation and 200 for "no-union." Because the union received a majority of the votes cast, the Board would certify it under the Rule and it would become the collective bargaining representative for the entire craft or class. But because the majority of employees in that craft or class did not indicate their desires regarding representation by voting, the Board cannot directly answer the statutory question, *i.e.* whether "[t]he majority of [the] craft or class of employees" want representation. Accordingly, under the Rule, for the Board to certify the union, it *necessarily* would have to *assume* that the non-voters have the same desires regarding representation, proportionately, as those who did vote.[11] Although the majority insists that it will "no longer

[11] The Board, of course, has continued to administer its existing standards in elections during the course of this rulemaking; it is unclear from the preamble whether the Board now believes that the results in those cases have been "unreliable." *See Compass Airlines*, 37 N.M.B. 63 (Nov. 19, 2009); *Delta Air Lines*, 37 N.M.B. 142 (Mar. 1, 2010). There is no evidence that the Board's (continued...)

substitute its presumption for an employee's intent" — that is *precisely* what the Rule requires (and the existing standards do not). The Rule therefore cannot be justified by the Board's avowed rationale.[12]

2. Analogies to "Political" Elections Have No Place In This Statutory Scheme

The majority's preamble also draws an analogy to political elections, where the majority of those voting determine the outcome. That analogy is flawed, however, because, in a political election, *someone* necessarily will win the election; there is no statutory right *not* to have a Congressman or mayor. But the RLA guarantees to employees the right to reject representation altogether. Moreover, candidates for political office have to stand for re-election and can easily be turned out of office if they fail to satisfy the needs of their constituents. The Board majority's reaffirmation of the current, effectively useless decertification process makes all but certain that, once elected (even if elected by a small minority of the craft or class), it becomes all but impossible for employees to exercise their statutory right to reverse the process and reject union representation.

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existing standards are deficient or that their reliability has changed since 2008. Indeed, the very suggestion implies that the standards applied by the Board over the last 75 years have been inadequate, despite the Board's adamant and repeated assurances to the contrary, an assertion the Board majority cannot bring itself to make expressly.

[12] As support for its avowed refusal to "presume" the intent of non-voters, the Board accepts uncritically the results of an academic study claiming that members of certain religious groups do not vote *in political* elections. 75 Fed. Reg. at 26,073. The Board "presumes" that the religious impediments to participation in political elections would be replicated in union elections — a presumption for which the Board cites no evidence at all. Moreover, the Board did not take — or apparently find relevant — evidence as to whether any meaningful number of Hassidic Jews, Mennonites, Jehovah's Witnesses or followers of the Nation of Islam are working as flight attendants, airline mechanics or commercial pilots. The majority's uncritical acceptance of this "evidence" reflects a patent double standard. When it served the majority's purposes, it rejected criticisms of the Rule precisely because there was "no concrete evidence [to] support [ ] the argument." *Id.* at 26,076. Of course, the Board ensured a truncated evidentiary record by refusing to abide by its commitment to *Chamber of Commerce* procedures.

The Board majority also claims in the NPRM that the existing voting rule is "at odds with the modern participatory workplace philosophy that has evolved in the air and rail industries and the basic principles of democratic elections." 74 Fed. Reg. at 56752. The majority's preamble does not explain the meaning of the opaque phrase "modern participatory workplace philosophy." Nor does it claim (nor could it) that this "participatory philosophy" emerged only since its last reaffirmation of the majority rule in 2008. Even if it were comprehensible and true, this observation would not justify the Board's radical departure from a position it has reaffirmed repeatedly in recent years — most recently only two years ago.

3. No Change in Circumstances Exist that Might Validate the Board Majority's Reversal of Board Precedent.

Under the Administrative Procedure Act, when an agency changes its rules or procedures, it must provide a cogent explanation of the circumstances requiring the change.[13] The agency's decision to cast off its prior construction must be the product of reasoned decision-making; otherwise, the rule must be invalidated as arbitrary and capricious.[14]

The Board majority has failed to do so. The preamble observes that circumstances have changed *since the 1920s and the 1930*s, when the current rule was first adopted. 75 Fed. Reg. at 26,074; 74 Fed. Reg. at 56752. The relevant yardstick for the APA purposes, however, is 2008, not 1934. Just two years ago, the Board carefully considered

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[13] *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-91 (9th Cir. 2007) (agency departure from a two-decade-old precedent is arbitrary and capricious without reasoned explanation); *see also INS v. Yang*, 519 U.S. 26, 32 (1996).

[14] *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009); *id.*, at 1822 (Kennedy, J., concurring in part and concurring in the judgment) ("an agency's decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so"); *PG&E Gas Transmission, Nw. Corp. v. FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003) (agency's "failure to come to terms with its own precedent [and explain the need for change] reflects the absence of a reasoned decision-making process").

whether any change in circumstances might justify such a fundamental change and it *reaffirmed* the existing standards (as it had in 1948, 1978 and 1987) and, more directly, rejected the *very standard it now seeks to adopt* because that standard would not fulfill the agency's statutory mission as well. *Delta Air Lines, Inc.*, 35 N.M.B. at 131-32. The Board majority offered no explanation for this about-face, as the APA requires.[15]

The Board majority invokes the Supreme Court's decision in *Fox Television* to excuse its failure to supply a reasoned explanation for the reversal of its decades-old policy. *See* 75 Fed. Reg. at 26,072-26,074. The majority misunderstands the case. The *Fox Television* Court did not hold that an agency never needs to "provide a greater justification when it's changing course than it does when it acts in the first instance." 75 Fed. Reg. at 26,072. While "the agency need not *always* provide a more detailed justification than what would suffice for a new policy created on a blank slate[, s]ometimes it *must* — when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." 129 U.S. at 1811 (emphasis added); *see also id.* at 1822-23 (Kennedy, J., concurring in part and concurring in the judgment) ("whether a change in policy requires an agency to provide a more-reasoned

[15] It seems that for the Board majority, its ability to "determine the clear, uncoerced choice of the affected employees" is measured by assessing union organizing success. But even using that patently partisan yardstick, the Board's longstanding election rules have been a runaway success. The Board's own reports demonstrate that the union "win rate" in NMB-sponsored elections is significantly *greater* than the analogous number under the voting rules used by the National Labor Relations Board. From 1935 to the present, unions have won more than two thirds of NMB-supervised elections. By contrast, since 1948, unions have won barely more than half of the elections overseen by the NLRB. Indeed, the union success rate in NMB elections in 2009 was approximately 73 percent — among the highest rates ever registered by the Board. *See* Comments of Delta Air Lines, Inc. to NPRM at Ex. F (attached as Ex. G). This evidence convincingly refutes the Board majority's assertion that its current rule "allow[s] those lacking the interest or will to vote to supersede the wishes of those who do take the time and trouble to cast ballots." 74 Fed. Reg. at 56752.

explanation than when the original policy was first announced is not susceptible . . . to an answer that applies in all cases").[16] Indeed, it makes no sense to argue that the views of the current Board members are entitled to "deference" when the unanimous views of their predecessors over more than 75 years may be ignored as if that history did not exist.

Fox Television's requirement of a "more-reasoned explanation" applies here. As the Board tacitly admits, its new policy rests upon findings (such as they are) that "contradict those which underlay its prior policy" — namely, its prior findings that unions enjoying majority support promote stable labor relations and that the majority rule accurately reflects the employees' choice to endorse or reject union representation. *See supra* at 8-9. Nor can there be any doubt that the Board's 75-year-old policy "has engendered serious reliance interests" on the part of both employees and carriers.[17] *Fox Television Stations*, 129 S. Ct. at 1811.

B. The Process by Which the NMB's Minority Voting Rule Was Adopted Undermines Any Claim that It Was the Product of Reasoned Decision-making.

Although the Board majority offered no principled rationale for abandoning 75 years of precedent, the administrative record suggests an unsavory explanation. That political rationale, however, cannot validate the Rule.

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[16] Justice Kennedy's concurring opinion is controlling in this case, since he concurred in the judgment on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[17] For example, at Delta Air Lines, the flight attendants have experienced two union representation elections in recent years, both conducted under the NMB's longstanding rules, *i.e.*, in order to vote "no union," the employee did have not to vote at all. Both Delta and AFA, of course, expended substantial efforts to educate the voters about the mechanics of the voting process. *See Delta Air Lines*, 35 N.M.B. 260 (Sept. 30, 2008) (no election interference found by Delta in flight attendants election); *Delta Air Lines*, 30 N.M.B. 102 (Dec. 12, 2002) (same). There can be no doubt that a new election under new rules will result in at least some employees being confused about how to vote "no union."

1. The Board Majority's Actions Bespeak a Pre-determined Conclusion and a Political Motivation.

Just months after the Board unanimously committed itself to the existing rule — and promised that it would not make any changes to that rule absent truly compelling circumstances — the Board's political composition changed. In the immediate wake of that political changeover, the Board's new Democratic majority met in private to draft the new Rule, excluding the Board's Republican Chairman. These two Democratic Members, however, did not call a meeting of the Board to discuss or debate the language of the proposed rule; the Board took no formal or public vote on whether to proceed with the proposed rule; and, once the Board Chairman was finally presented with the NPRM as a *fait accompli*, the majority effectively censored her hastily-prepared dissent to excise her criticisms of this clandestine process. *See* Ex. E (Dougherty Letter at 1-2).

Events external to the Board also shed light on these events. Before the majority's actions, AFA and IAM were vigorously campaigning to organize portions of Delta' workforce.[18] Contemporaneous with the Board majority's publication of the NPRM, the AFA and the IAM each withdrew their pending applications for NMB-run elections. *See Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 19 (Oct. 30, 2009) (withdrawal of IAM application regarding Fleet Service employees); *Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37

[18] Although the Board had promptly processed requests by AFA for elections at *other* airlines (including a Delta subsidiary, Compass Airlines), *see USA 3000 Airlines*, 37 N.M.B. 1 (Oct. 7, 2009); *Compass Airlines*, 37 N.M.B. 63 (Nov. 19, 2009), AFA and IAM delayed their initial applications for elections at Delta for many months, until Member Puchala was sworn in. 37 N.M.B. 19 (IAM filed with the NMB on Aug. 13, 2009); 37 N.M.B. 21 (AFA filed with the NMB on Jul. 27, 2009). Both applications were subsequently withdrawn — IAM's just days *before* the NPRM issued and AFA's on the day the NPRM was published. *See* 37 N.M.B. 19 (IAM investigation terminated by NMB on Oct. 30, 2009); 37 N.M.B. 21 (AFA investigation terminated by NMB on Nov. 3, 2009).

N.M.B. 21 (Nov. 3, 2009) (withdrawal of AFA application).[19] One need not speculate about cause and effect; current AFA President Patricia Friend publically announced that the move was intended to position AFA to take advantage of the Board majority's action. Ex. H (AFA Press Release); *see also* ATA Mem. at 39.

By complying so promptly with the AFL-CIO's request to change the agencies' 75-year old rules for administering union elections,[20] the Board majority undermined the Board's hard-earned reputation for impartiality that the Supreme Court and the Board itself have long recognized as essential.[21] As Chairman Dougherty acknowledged, the Board majority's

> obvious rush to put out a proposed rule gives the impression that the Board has prejudged this issue, and it will contribute to the 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.

Ex. E (Dougherty Letter at 2).

These events suggest behavior that is antithetical to the Board's mission and to reasoned decision-making. During the congressional hearings that ultimately lead to the creation of the Board, representatives of both management and labor emphasized that the Board (and its predecessor) had to be "regarded by both parties [*i.e.*, by both labor and management] as an impartial body" that could "bring [the parties] together." *Railway Labor Act: Hearings on S.*

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[19] Because the majority's process was so opaque, limited discovery is urgently needed to fully develop a record with respect to the majority's methods and motives.

[20] *See* attached Ex. I.

[21] *See, e.g.*, *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 580-81 (1971) (describing Congressional concern that the Board be perceived by both labor and management as neutral and impartial as vital to the Board's ability to settle disputes); *In the Matter of Arbitration Pursuant to Subsection 508(d) of the Rail Passenger Service Act*, 9 N.M.B. 497, 499 (1982) (referring to the Board's "neutral capacity and policy").

2306 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess. 13 (1926) ("S. 2306 Hearings")[22] (testimony of A.P. Thom).[23] To serve its statutory function, the Board must "be made from [persons] as far disinterested, as broad in viewpoint and as impartial in their attitude as possible." *Id.* at 36 (testimony of Donald R. Richberg).[24] "Neither [labor nor management wanted] any partisans on this board of mediation. Neither side wants any biased men." *Railway Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 77 (1926) ("H.R. 7180 Hearings")[25] (testimony of Donald R. Richberg). Without both the perception and reality of neutrality, the Board's "power is gone." S. 2306 Hearings at 30 (testimony of A.P. Thom).

Thus, even if discovery were to show that this extraordinary course of events — the organizing campaigns at Delta, the delay in processing those elections, the shift in party majority at the Board, the request from AFL-CIO, the total about-face on 75 years of precedent, the secret Board meetings and decisions, the attempt to muzzle the lone Republican Board Member by censoring her dissent — amounted to no more than an unconnected series of nearly inconceivable coincidences, the *appearance* of bias leaves a stain from which the Board may never recover and undermines the validity of the Rule.

2. **The Board Majority's Actions Were *Ultra Vires***

Even if *the Board* had the authority to make the changes reflected in the Rule, and even if those changes were explained in a rational way, the Board majority's action in this case

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[22] Reprinted in 2 *The Railway Labor Act of 1926, A Legislative History* (M. H. Campbell and E. C. Brewers eds., 1988).

[23] Col. A. P. Thom was the General Counsel of the Association of Railway Executives.

[24] Donald R. Richberg was Counsel for the Organized Railway Employees.

[25] Reprinted in 2 *The Railway Labor Act of 1926, A Legislative History* (M. H. Campbell and E. C. Brewers eds., 1988).

would be invalid because it was not, in fact, the result of action *by the Board*; instead, it was merely an unlawful, *ultra vires* action of two Members of the Board acting outside the Board's own procedures. The Board's two-Member majority excluded the third Board Member (and the only Member from a different political party) "from the process of crafting the NPRM and [gave the minority member] bizarre and arbitrary deadlines for drafting a dissent [.]" 75 Fed. Reg. at 26,083 (Chairman Dougherty, dissenting); *also see supra* at 3-4. The Board as a collective three-member agency did not meet to discuss the language of the NPRM and held no vote to proceed with the Rule.

The Board majority now takes a sort of no-harm-no-foul approach to its secretive actions, explaining that "the Chairman's dissenting views were published in the Federal Register with the NPRM [.]" 75 Fed. Reg. at 26,065. *Portions* of her dissent were, indeed, included when the NPRM was published, but the majority insisted on *excising* from the Chair's remarks any criticism of the majority's unprecedented, partisan approach. 75 Fed. Reg. 26,084 (Chairman Dougherty, dissenting). Rather than address this "censorship," *id.*, the majority pretends that this never happened. According to the majority, everything that happened before the NPRM was published is only "an internal agency matter . . . outside the scope of the rulemaking proceedings." 75 Fed. Reg. at 26,065; *id.* at 26,066.

The majority cannot dismiss its purposeful evasion of Congress's design so glibly. By statute, the Board is "composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party." 45 U.S.C. § 154, First. Thus, Congress expected the Board to function as a bi-partisan collective, with all three Members participating in the Board's decision-making process. Secret actions taken by a Board majority, like their actions here, make a mockery of that congressional

design. If the actions of two like-minded Members — taken while purposefully excluding the Board's minority member — can be viewed as action of "the Board," the third Board Member would be entirely irrelevant to the Board's work and Congress's bipartisan design.[26]

C. The Rule Is Arbitrary and Capricious Because the Board Adopted An Inconsistent Rationale In Refusing to Authorize a Parallel Process for Decertification of a Union.

The arbitrary and capricious nature of the Board's partisan actions is also exposed by the irreconcilable conflict between the rationale on which it bases the Rule and the rationale offered for *refusing* to modify meaningfully its current — and almost never successfully used — mechanism for decertifying a union. The effect of the Board's decision on this point is so patently result-oriented as to demonstrate that the entire rulemaking process was nothing more than a sham to reach a pre-determined outcome — to make it easier for unions to organize and harder to oust them.

Although the Board majority insists that the new final Rule is motivated by only one concern — to "more accurately measure employee choice in representation elections," 75 Fed. Reg. 26,072, the decertification procedure seems finely honed to frustrate "employee choice." As Chairman Dougherty observed, "[i]f the Board is going to elevate the cause of measuring employee intent above all else in order to overturn its longstanding election rules,

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[26] It is true, of course, that "[*v*]*acancies* in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board." 45 U.S.C. § 154, First (emphasis added). This requirement "provides for the continued existence of power" if a Member dies, resigns or is incapacitated. *See Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1340-41 (D.C. Cir. 1983). But when there is a full, functioning three-Member Board, a private agreement of the Board majority to prevent the full and unfettered participation of the third Member cannot be countenanced. For the same reason, Section 4, First's quorum provision, *see* 45 U.S.C. § 154, First, is irrelevant. While the quorum provision allows the Board to transact business when "at least two members [are] present at Board meetings," *Railroad Yardmasters*, 721 F.2d at 1341, it does not permit a two-Member majority purposefully to exclude the third Member altogether.

those same interests — as well as basic fairness — dictate that the Board must give employees a clear means of choosing not to be represented." 75 Fed. Reg. at 26,086 (Chairman Dougherty, dissenting). Rather than vindicating the statutory right to reject representation by clarifying the Board's most bewildering process, the Rule merely adds new layers of confusion and frustration.

1. The Majority's Proffered Rationale Cannot Be Reconciled With Its Position on Decertification.

As the Supreme Court has expressly confirmed, the right to union representation under the RLA carries with it the equally important statutory "option of rejecting collective representation" altogether. *ABNE*, 380 U.S. at 669 n.5. The statute is balanced in this regard, and efforts to promote one right at the expense of the other are irreconcilable with the Act. Under the RLA,

> 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 . . . . [T]he 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.

Russell v. NMB, 714 F.2d 1332, 1343 (5th Cir. 1983).

Unlike the NLRA, however, the text of the RLA does not prescribe a decertification mechanism. Accordingly, it has been up to the Board to ensure that employees who seek to exercise their statutory right to *reject* representation have a meaningful, accessible mechanism for accomplishing that goal. The Board has failed utterly in that statutory obligation, and compounds that failing in the Rule by imposing *additional* unwarranted burdens on the exercise of that right.

Employees covered by the RLA cannot simply ask for a decertification election. Instead, as discussed in *Russell*, an awkward and virtually unusable "straw man" process has

evolved. The organizational and communications hurdles facing employees embarking on this path are monumental, especially in large, company-wide crafts or classes with employees in multiple locations (as RLA units tend to be). At the inception of the process, the employees seeking to decertify must obtain "authorization" cards from unit employees constituting 50%-plus-one of the group asking the NMB to conduct an election. This showing is far more than the 35% showing of interest that a *union* must produce when it seeks to organize the craft or class in the first instance.

The authorization cards signed by employees expressly request a *representation* election. Thus, those seeking decertification must designate a "straw man" to run to be the employees' "representative." That straw man runs to be the employees' representative, but does so explaining to every employee from whom he seeks a card that he wants to be elected as the craft or class's collective bargaining representative only to renounce that status after the election if he is successful — that is, that he wants to take the group non-union. If a majority of the employees in the unit vote in the election, and if the straw man gets a majority of the votes cast, the Board will certify that individual as the craft or class's bargaining representative. The straw man can then surrender his NMB certification to the Board and take the craft or class "non-union." Because the employer cannot play any supporting role in that effort or foster the decertification process in any way, the straw man must do all of this on his own time and on his own dime.

Not surprisingly, this confusing and arduous process has rarely resulted in decertification. Indeed, there is no evidence that it has *ever* resulted in decertification of a representative of a large craft or class (*i.e.*, 1,000 or more eligible voters). *See, e.g.*, *SwissAir*, 16 N.M.B. 150 (1989) & 16 N.M.B. 192 (1989) (applicant triggered decertification of mechanics

craft at the small domestic operations of larger, foreign carrier, ousting the IAM — only 12 eligible voters); *Jet America Airlines*, 13 N.M.B. 57 (1985) & 13 N.M.B. 96 (1986) (decertification triggered at small carrier, ousting IAM as representative of mechanics — 29 eligible voters); *Jet America Airlines*, 12 N.M.B. 254 (1985) & 12 N.M.B. 301 (1985) (same — 37 eligible voters).[27]

In the preamble to the Rule, the Board majority expressly refuses to change the current rule requiring a 50%-plus-one showing of interest by employees to secure a decertification election, and retains this unusable "straw man" process. Thus, while the Rule will permit a union to obtain certification even if it receives support from less than a majority of the employees in the craft or class, employees who wish to embark on the theoretical decertification process will be held to the "majority" rule.

This patently inconsistent and one-sided approach to the question of employee choice cannot be reconciled with the APA. Agency rules are arbitrary and capricious whenever the promulgating agency has "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs Ass'n*, 463 U.S. at 43. The Board majority's approach to "accurately measure[ing] employee choice in representation elections" is profoundly unbalanced; it addresses only one aspect of the RLA's statutory guarantee of employee free choice. Decertification is a mirror image of certification; changes to the standards applicable to one

[27] It is ironic that the Board majority justified the NPRM in part by reference to the standards for political elections, where the top vote-getter is elected even if voter participation is below 50%. The salient differences between NMB-run elections and elections for city council or Congress are that in the latter circumstance, (a) the open office will necessarily be filled by one of the candidates, and (b) the election is for a defined term, *i.e.*, an opportunity arises every few years to reject existing representation. By refusing to consider the issue of decertification, the Board majority perpetuates a situation in which, as a practical matter, no incumbent is *ever* term limited.

necessarily implicate the availability of the other. The NMB was obliged to "consider [every] important aspect of the problem"; when it failed to do so, it acted arbitrarily. 463 U.S. at 43. The Rule lowers the barriers to union entry and, as explained below, actually *raises* the barriers to union ouster.

2. **The Rule Announces New Barriers to Decertification.**

Although the Board disclaims any interest in addressing (or, indeed, any *need* to address) the decertification problem, in fact the preamble to the Rule announces that the Board intends to apply that Rule in a way that erects *additional* barriers to employees who attempt to exercise their statutory right to decertify a union. Previously, the ballot in a decertification election typically contained two choices: the incumbent union and the straw man. The majority now declares, for the first time,[28] that based on the Rule, there apparently will be four options on the "decertification" ballot — the incumbent, the straw man, a write-in option, and "no union." *See* 75 Fed. Reg. at 26,079.

This can have profound consequences for decertification elections and materially frustrate the goals of covered employees. Suppose, for example, employees in a craft or class of

[28] The majority's attempt to smuggle this profound change to decertification procedures into this Rule while asserting that the Rule does not address decertification at all provides an independent basis to invalidate the Rule. A final Rule can contain only regulatory changes that are a "fair outgrowth" of the NPRM that announced the change. A "final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. . . . . By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to 'divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (internal citations and quotation marks omitted). Here, interested parties urged the Board to address decertification and the majority refused. Given that the majority *still* steadfastly insists that it is not addressing decertification, *see* 75 Fed. Reg. at 26,078, interested parties had no reason to know that the majority would so substantially change its existing decertification procedures.

employees with the desire to decertify present the Board with signed cards showing that more than 50% of the employees in the group seek an election. When the ballots go out, under the Rule they apparently will have four options: (a) incumbent union; (b) straw man; (c) write-in; and (d) "no union." Two of the choices — "straw man" and "no union" — appear to employees to be no-union choices — the straw man has presumably explained to all of the employees during the campaign that he intends to renounce his status if elected — but as the Board explains the Rule, that is not the case. If no one gets 50% of the vote in this four way election, the Board will count all of the votes for the straw man *as votes for representation*, and force a run-off between the straw man and the incumbent union, giving the union a second bite at the apple without a "no union" choice on the ballot. *See* 75 Fed. Reg. at 26,087-88 (Chairman Dougherty, dissenting); *see also id.* at 26,082 & n.33.

The majority's application of the Rule in the decertification context is thus both irrational and incompatible with the animating principal that supposedly underlies the Rule: to effectuate the representation desires of employees more effectively. The Board would consign those who want to decertify a union to the bewildering "straw man" process — forcing employees to *elect* a representative to shed representation — and when they do, the Board intends to count these who register *pro-decertification* votes *as votes for representation*. It is difficult to imagine a process more finely tailored to *depriving* employees of their right to reject representation. Where votes *against* representation are treated as votes *for* representation, no rational explanation is possible, and the Board offers none.

Thus, although the Board insists that it *has not* addressed decertification with the Rule, the foregoing demonstrates vividly that the Rule *does* in fact materially alter the decertification landscape by making it even *more* confusing, *more* cumbersome and *more*

ineffective. Moreover, the fact that the Board majority was unable to announce its Rule without having a direct and adverse impact on the right to reject collective representation simply reinforces the fact that the election and decertification standards are two sides of the same coin and should have been addressed — expressly and reasonably — in the same Rule.

II. THE NMB'S MINORITY VOTING RULE IS INVALID BECAUSE THE AGENCY FAILED TO FOLLOW ITS OWN STANDARDS AND PROCEDURES.

As noted above, the NMB has repeatedly assured both labor and management that it would never revise the existing standards for union elections unless there was a compelling need to do so and it had gathered a complete administrative record supporting such a change in a fair and transparent process through the use of live witnesses and cross-examination. *See Delta Air Lines, Inc.*, 35 N.M.B. at 132; *Chamber of Commerce*, 14 N.M.B. at 360-62. The Board majority did not comply with these substantive and procedural standards. As a result, the Rule is invalid.

A. An Agency Is Bound by Its Own Procedural and Substantive Standards.

"It is a familiar rule of administrative law that an agency must abide" by its own regulations and internal procedures. *Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990) (citing *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957)). The doctrine that "a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated … is not limited to rules attaining the status of formal regulations." *Massachusetts Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985). Rather, this doctrine — articulated by the Supreme Court in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) — "requires federal agencies to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions." *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003); *see also Guam Industrial*

Services, Inc. v. Rumsfeld, 441 F. Supp. 2d 21, 26 (D.D.C. 2006). Federal courts "have [thus] long required agencies to abide by internal, procedural regulations … even when those regulations provide more protection than the Constitution or relevant … laws" otherwise require. *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1098 (D.C. Cir.1985).[29] As the D.C. Circuit has explained, "agencies may not violate their own rules and regulations to the prejudice of others." *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) (citing *Steenholdt*, 314 F.3d at 639.[30]

Courts have applied the "*Accardi* doctrine" to invalidate agency actions when they were inconsistent with interagency agreements and internal guideline manuals, *Massachusetts Fair Share*, 758 F.2d at 712; provisions in agency personnel manuals, *Mazaleski v. Treusdell*, 562 F.2d 701, 717-18 n.38 (D.C. Cir. 1977); rules set forth in agency weekly bulletins, *Smith v. Resor*, 406 F.2d 141, 143-44 & n.2 (2d Cir. 1969); instructions to special agents reported in agency news releases, *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969); and even expectations established by an agency's "usual [but unwritten] practice," *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224-25 (D.C. Cir. 1959). In fact, an agency is required to follow *unstated* "rules [that are] *implicit* in an agency's course of

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[29] *See also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("it is incumbent upon agencies to follow their own procedures") (citing *Vitarelli*, 359 U.S. at 539-40; *Service v. Dulles*, 354 U.S. at 388); *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32, 60 (D.D.C. 1998) (citing *Ruiz*, 415 U.S. at 235; *Massachusetts Fair Share*, 758 F.2d at 711) ("even internal, unpublished rules can be binding … on the agency").

[30] *See also IMS, P.C. v. Alvarez*, 129 F.3d 618, 621 (D.C. Cir. 1997) ("it is a 'well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action'") (quoting *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994)) (additional citations omitted); *VanderMolen v. Stetson*, 571 F.2d 617, 624 (D.C. Cir. 1977) ("It is, of course, a fundamental tenet of our legal system that the Government must follow its own regulations. Actions by an agency of the executive branch in violation of its own regulations are illegal and void.") (citations omitted).

conduct where that conduct gives rise to a 'common law' administrative rule." *Wilkinson*, 27 F. Supp. 2d at 61 (citing *Doe v. Hampton*, 566 F.2d 265, 281-82 (D.C. Cir. 1977)) (emphasis added).

In determining whether to hold an agency to self-imposed requirements or procedures that have not been formally promulgated through the notice-and-comment process, courts follow "a general rule [that] an agency pronouncement is transformed into a binding norm *if so intended by the agency*, and agency intent, in turn, is 'ascertained by an examination of the statement's language, the context, and any available extrinsic evidence.'" *Padula v. Webster*, 822 F.2d 97, 100 (D. C. Cir. 1987) (emphasis added) (quoting *Hampton*, 566 F.2d at 281-82).[31]

Finally, an agency is required to abide by its procedural rules even when the agency might either have modified or revoked them altogether. Even when "it is theoretically possible for the [agency] to amend or revoke the regulation defining [its] authority," so long as the rule "remains in force the [agency] is bound by it" and a court "is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974); *see also Service v. Dulles*, 354 U.S. at 388 ("the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, . . . and having done so he could not *so long as the Regulations remained unchanged*, proceed without regard to them.") (emphasis added).[32]

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[31] *See also Wilkinson*, 27 F. Supp. 2d at 60 ("an agency will be bound [by] those rules *to which it intended to be bound*") (citations omitted) (emphasis added).

[32] Thus, the majority's insistence that the "Board is free to amend its rules at anytime, even in the absence of a rulemaking petition" is a non sequitur. The fact that it *might* have amended its commitment to the *Chamber of Commerce* procedures is irrelevant; it did not do so before publishing the NPRM.

Given the Board's repeated and unqualified commitment to be bound to specific substantive and procedural standards before adopting something as sweeping as the Rule at issue here, there can be no doubt that the Board intended to be bound by them. Nor can there be any doubt that it has failed to deliver on those promises.

B. The NMB Has Articulated Binding Procedural ans Substantive Standards to Govern Its Determination on Whether to Change the Union Election Rules.

In 1987, the Teamsters asked the Board to change its standards for union elections; after "a full, evidentiary hearing with witnesses subject to cross-examination," the Board denied the request. *See Chamber of Commerce,* 14 N.M.B. at 348. In doing so, the unanimous Board reiterated its historical standard for making such a change: the proponent would have to show "that the rule changes requested are either mandated by statute or essential to the well-ordered management of the Board's representation functions." *Id.* at 364. Because the Teamsters had failed to meet this standard, which the Board called "quite high," the request was denied.[33]

In 2008, the Board again considered — and again rejected — an identical request to change the majority participation requirement in union elections. *See Delta Air Lines, Inc.*, 35 N.M.B. 129 (2008). Retracing the ground covered in *Chamber of Commerce,* the Board committed that it:

> *would not make such a fundamental change without utilizing a process similar to the one employed in Chamber of Commerce,* above. . . . A change in the balloting procedures in this matter would necessitate a permanent deviation from over 70 years of

[33] The hearings and accompanying rounds of briefing in the *Chamber of Commerce* proceeding lasted for over a year, and included opportunity for cross-examination and for rebuttal witnesses and evidence. *Chamber of Commerce,* 14 N.M.B. at 348-49. In making its decision, the Board expressly considered and relied upon "the transcripts of the hearing, the evidence submitted and all briefs filed [.]" *Id.* at 349.

> Board practice. The Board . . . *would not make such a sweeping change without first engaging in a complete and open administrative process to consider the matter*.
>
> AFA offers no substantive evidence or other compelling circumstances that the changes it seeks are essential. Rather, the Union relies largely on policy considerations previously submitted to and rejected by the Board. For this reason, as well as the reasons stated above, AFA's request for changing the balloting procedures is denied.

35 N.M.B. at 131-32 (emphasis added).

In these two cases, then, the Board unanimously made and applied two critical promises, one substantive and one procedural. First, it committed that it would not make *the very change at issue here* unless that change became "mandated by [some change in the] statute or [became] essential to the well-ordered management of the Board's representation functions." *Chamber of Commerce*, 14 N.M.B. at 362-64. Procedurally, the Board promised that it would never even *entertain* the possibility of such a change without conducting "a full evidentiary hearing with witnesses subject to cross-examination," *id.* at 348, which it viewed as necessary in order to ensure "a complete and open administrative process to consider the matter." *Delta Air Lines, Inc.*, 35 N.M.B. at 132.

The majority does not meaningfully address its prior commitment in the preamble. Selectively quoting from *Delta Air Lines*, the majority claims that it promised only "a complete and open administrative process." 75 Fed. Reg. at 26,064. Dismissing the Star Chamber proceedings that lead to the NPRM as "an internal agency matter … outside the scope of the rulemaking proceeding," 75 Fed. Reg. at 26,065; *id.* at 26,066, the majority insists that by following the APA *after* it drafted the Rule and was committed to this course, it provided an "open administrative process," *id.* at 26,064. But the majority does not even acknowledge, much less address, the Board's previous commitment 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, Inc.*, 35 N.M.B. at 131-32 (emphasis added). The majority neither engaged in such a process nor acknowledged its commitment to do so in the preamble.

C. The Board Majority Failed To Comply With Its Own Procedural and Substantive Standards.

1. The Board Ignored Its Commitment to Conduct a "Process Similar to the One Employed in *Chamber of Commerce*."

The suspect route the Rule has taken bears no resemblance to the "complete and open administrative process" to which the Board was previously committed. In the place of "a full evidentiary hearing with witnesses subject to cross-examination," the Board majority acted alone, in secret, without input even from the Board's own Chairman, much less from the labor and management communities. Unquestionably, the path selected by the Board majority was easier and less contentious, but the commitments of prior Boards cannot be so easily set aside. The process followed by the Board majority is the antithesis of what the Board had previously promised.

2. The Board Denied That It Needed Evidence that the Change Was "Essential to the Well-Ordered Management of the Board's Representation Functions."

There has been no relevant change to the text of the RLA since 2008, or even since 1934, when the Board first adopted the existing election rules. Thus, if the Rule is to be justified under the Board's self-imposed substantive standards, it can only be because there is "compelling" evidence that the change is "essential to the well-ordered management of the board's representation functions." *Chamber of Commerce,* 14 N.M.B. at 369.

As noted above, the Board majority attempted to justify the Rule based on the assertion that this change would enable the Board to "better fulfill[]" its "duty … to determine the clear, uncoerced choice of the affected employees." 74 Fed. Reg. at 56,752; *see also* 75 Fed.

Reg. at 26,063. The Board's experience over the past 75 years belies this contention, as does the Board's own recognition that it had "satisfactorily resolved all representation disputes in the railroad industry and all such disputes involving flight employees in the airline industry." *The Railway Labor Act at Fifty: Collective Bargaining in the Railroad and Airline Industries* 245 (National Mediation Board & Charles M. Rehmus, eds. 1977).

In sum, the final rule published by the Board patently fails to adhere to the Board's own firmly established standards and criteria. The Board does not even pretend — because it cannot — that this change is "mandated" by the Railway Labor Act, *see Chamber of Commerce*, 14 N.M.B. at 360, 364, or is based on any direction from Congress, *see* Ex. F (Minutes of Session of the National Mediation Board (June 7, 1978)). The Board points to no new judicial interpretation of Section 2, Fourth of the RLA that "would necessitate a permanent deviation from over 70 years of Board practice." *Delta Air Lines, Inc.*, 35 N.M.B. at 132.[34] And the preamble identified no changes in circumstances since the Board — in a showing of bi-partisan unity — rejected this very change. Given the magnitude of this impending change, this Court should insist that the Board's settled procedures "be scrupulously observed." *Graham v. Richmond*, 272 F.2d 517, 522 (D.C. Cir. 1959) (internal quotation marks and citation omitted).

[34] The Board majority's failure to abide by its own substantive and procedural standards cannot be purged by its subsequent decision to pursue rulemaking through the notice-and-comment process. *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224-25 (D.C. Cir. 1959). In *Sangamon Valley Television*, the D.C. Circuit reviewed "a rule-making decision of the Federal Communications Commission [that] had been initiated by Notice of Proposed Rulemaking." 269 F.2d at 222-23. The FCC rule-making notice requested comments from the public on the proposed allocation of a television channel and established a specific cut-off date for any reply comments in response to the original submissions. *Id.* at 223. The agency then permitted off-the-record *ex parte* comments made after the prescribed cut-off period had expired. *Id.* at 224. Because the action "violate[d] the agency's rules," the D.C. Circuit vacated the rule and required the agency to reopen its proceedings. *Id.* at 224-25

III. THE CHAMBER'S MEMBERS WOULD SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

The Chamber's members will suffer irreparable injury as a result of the Board's actions. Those members include employers covered by the RLA, including those in the railroad and airline industries, and unless this Court acts, those members will be subject to the Board majority's new election standards. The Chamber's membership also includes trade associations that represent carriers in both the railroad and airline industries. Moreover, nearly every Chamber member depends on the uninterrupted flow of interstate commerce. Board action that simultaneously permits a minority — potentially even a small minority — of employees to impose unionization on a much larger craft or class, without an effective mechanism to effectuate the right to reject collective representation, materially increases the risk of labor strife and the interruptions to commerce that can follow.

Finally, all Chamber members are injured whenever an agency of the United States promulgates regulations directly impacting business in such a clandestine, apparently partisan way. The Board previously committed that it would not entertain a change to its election standards without first conducting a full and fair evidentiary hearing in which the Chamber and its members could be heard; the Board majority's action here cannot be squared with that promise.

IV. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF GRANTING A PRELIMINARY INJUNCTION.

As already demonstrated, the RLA grants the employees in the airline and railway industries a right to determine, by an affirmative majority vote, whether to opt for union representation. A preliminary injunction would protect this right, by continuing the Board's current practice of certifying a union as a collective bargaining representative only when the majority of employees affirmatively vote in favor of representation. By contrast, the Board's

Rule would permit certification of unions with a mere minority support, thereby eviscerating the majority's right to select or reject representation. The public interest will be served by enjoing union elections until this Court has an opportunity to determine the legality of the instant Rule.

Given the Board's decades-long adherence to the majority rule, no injury to the Board or the public will ensue from continuing the present practice for the modest period of 60 days sought by the ATA. Nor is there any evidence that the existing process prevents airline and railroad employees from freely and effectively exercising their right to unionize; in fact, the union success rate at labor elections in these industries has been substantially higher than in labor elections in other industries governed by the National Labor Relations Act. *See supra* at 15 n.15. Moreover, the Board itself does not appear to view the application of existing election procedures as injurious to the public — the Board has continued to accept and process applications during the pendency of the NPRM. *See* ATA Mem. at 4-5 n.2; text *supra* at 17 n.18.

When the Board previously rejected the election procedure it endorses today, it observed that "certification based upon majority participation promotes harmonious labor relations" because "[a] union without majority support cannot be as effective in negotiations as a union selected by a process which assures that a majority of employees desire representation." *Chamber of Commerce*, 14 N.M.B. at 362. The public interest will be well served by a modest injunction that ensures a continuing stability of these labor relations, which is vital for effective functioning of the entire airline and railway system.

CONCLUSION

For the foregoing reasons, ATA's motion for a preliminary injunction pending expedited discovery and an expedited trial on the merits should be granted.

May 24, 2010 Respectfully submitted,

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