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THE NATIONAL MEDIATION BOARD'S RULE PROPOSAL
FOR REPRESENTATION ELECTIONS: IF IT
AIN'T BROKE . . .

KYLE BURKE*

I. INTRODUCTION

FOR SEVENTY-FIVE YEARS, the National Mediation Board
(NMB or Board) has served as a neutral third party for rail-
road and airline carriers and their employees during labor dis-
putes.1 The 1934 amendments to the Railway Labor Act (RLA
or Act) created the Board and charged it with the duty to investi-
gate and certify an exclusive employee representative during
collective bargaining with employers over wages, rules, and
working conditions.2 The RLA granted the Board authority to
investigate representation disputes through the use of secret bal-
loting of employees, or by any other appropriate means neces-
sary in the Board’s exercise of its discretion.3 Since its
inception, the Board has conducted secret-ballot elections
among employees and has required that at least a majority of
employees must cast valid ballots in favor of union representa-
tion before certifying any union as the exclusive employee rep-
resentative.4 The Board has historically justified these
procedures on the grounds that unions could better negotiate
for employees when supported by at least a majority of eligible
voters.5

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1 See generally National Mediation Board: Representation Election Procedure,
74 Fed. Reg. 56,750, 56,751 (proposed Nov. 3, 2009) (to be codified at 29 C.F.R.
pt. 1202.4) [hereinafter NMB Proposal].

2 See generally Railway Labor Act, Pub. L. No. 73-442, 48 Stat. 1185 (1934) (re-

3 Id.

4 NMB Proposal, supra note 1.

5 Id. at 56,753.
On November 3, 2009, the Board published a proposal to change its union certification procedures so that participation by a majority of eligible voters would no longer be required.\(^6\) Under the new rule, the Board would certify a union receiving a simple majority of votes cast as the employees’ exclusive representative.\(^7\) The Board has justified this rule change on the basis of its authority to reasonably interpret the RLA and by its assertion that labor relations in the rail and airline industries have changed such that the current procedures are no longer applicable.\(^8\) This change will no doubt remove a hurdle for representative certification and make unionization much easier for railroad and airline employees. Not surprisingly, many industry employees favor the rule change, while their employers and the Board’s Chairman herself strongly oppose such a departure from long-established precedent.\(^9\)

The language of the RLA and a history of judicial deference to the Board’s decisions strongly suggest that the Board has the authority to change its election rules.\(^10\) But any rule change by an administrative agency necessitates an adequate justification by that agency for its departure from established practices.\(^11\) In fact, the Board itself has recognized that it should deviate from established procedures only when required by statute or when it is essential to the administration of the RLA.\(^12\) The current Board has not adequately justified its rule change proposal. Board decisions as recent as 2008 reiterated the importance of, and adherence to, the majority participation requirement.\(^13\) And the Board has not established that labor relations have changed so dramatically as to justify a rule change. Two newly-appointed members of the Board drafted the proposed rule after a request from major unions, hinting that partisan politics influenced the Board’s decision.\(^14\) Even if partisanship is not behind the proposal, its appearance threatens to undermine the legitimacy, authority, and neutrality of an important governmental body. This specter of partisanship only serves to stifle

\(^{6}\) Id. at 56,750.

\(^{7}\) Id.

\(^{8}\) Id. at 56,751–52.

\(^{9}\) See generally id.

\(^{10}\) See infra, Part III.E–F.

\(^{11}\) Atchison, Topeka, & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973).


the goals of the RLA—the peaceful settlement of labor disputes and the elimination of interstate commerce interruptions.\footnote{Railway Labor Act, Pub. L. No. 73-442, § 2, 48 Stat. 1185, 1186–87 (1934).}

Part II of this comment discusses the relevant historical background of the RLA, including the effects of World War I, post-war legislation, and the eventual enactment of the RLA in 1926 and subsequent creation of the Board in 1934. Part III follows with an in-depth analysis of the Board’s duties and functions under the RLA, including how the Board has interpreted the Act and carried out its duty to investigate representation disputes through the use of secret elections. Part III also examines the judicial deference granted to the Board throughout its history. Part IV looks at the Board’s power to change its rules and the procedures required to justify its rule changes. This comment also addresses the Board’s proffered reasons for the new rule and why those reasons fall short of justifying the change. Part V ultimately concludes that the proposed rule threatens the goals of the RLA because the appearance of partisanship destroys the Board’s legitimacy as a neutral fact-finder.

II. HISTORICAL BACKGROUND

A. Post-War Legislation and the Railway Labor Act of 1926

The RLA and the Board resulted in part from World War I.\footnote{William E. Thoms & Frank J. Dooley, Airline Labor Law: The Railway Labor Act and Aviation After Deregulation 2 (1990).} During that national emergency, the U.S. government took control over the railroads, an event which improved working conditions and wages for railroad employees.\footnote{Id. at 3.} Railroad labor became better organized through unionization that increased employees’ power through collective bargaining.\footnote{Ib.} After the War, debate raged over whether the railroads should be returned to private ownership or held by the federal government; instead, the Transportation Act of 1920\footnote{Pub. L. No. 66-152, § 407, 41 Stat. 456, 481 (1920).} established a middle ground between these positions.\footnote{Thoms & Dooley, supra note 16, at 3.} The government returned railroad ownership to private interests but the railroads were under increased governmental control.\footnote{Ib.} The Transportation Act encouraged railroad management and labor to meet and
settle their disputes among themselves. When private settlement failed, the parties referred the dispute to the newly created Railroad Boards of Labor Adjustment and Railroad Labor Board. Though the Act's framers thought referral to a governmental oversight board would provide final dispute resolution, such was not the case after the Supreme Court's decision in Pennsylvania Railroad Co. v. Railroad Labor Board. There, the Court determined that the Labor Board did not have the power to enforce its decisions:

The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.

The Transportation Act thus had no real teeth and failed to meet its goals of fostering dispute resolution among railroad labor and management and maintaining the smooth flow of commerce throughout the United States. Congress itself recognized the Transportation Act's shortcomings during the introduction of the bill that would become the Railway Labor Act. Because railway carriers constituted the primary means for transporting goods and people in interstate commerce, disruptions due to labor-management disputes could, and sometimes did, bring the national economy to a standstill.

In 1926 Congress attempted to secure more efficient and peaceful means for settling labor disputes while reducing strikes, lockouts, and other self-help remedies that were the norm. Congress recognized that labor-management disagreements involving contract fairness were a major source of labor strikes and the courts did not provide efficient or informed set-

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22 § 301, 41 Stat. at 469.
23 Id. §§ 301, 303, 307.
24 261 U.S. 72 (1923).
25 Id. at 84 (emphasis added).
26 THOMS & DOOLEY, supra note 16, at 3.
27 H.R. REP. NO. 69-328, at 2 (1926), reprinted in LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT, AS AMENDED (1926 THROUGH 1966), at 48 (1974) (quoting the Democratic platform of 1924: "The labor provisions of the act (transportation act, 1920) have proven unsatisfactory in settling differences between employer and employee. It must therefore be so rewritten so that the high purposes which the public welfare demands may be accomplished.").
28 O'Donnell v. Wien Air Alaska, Inc., 551 F.2d 1141, 1145 (9th Cir. 1977).
29 Id.
Railroad executives and railroad labor unions worked jointly to draft and present a bill that would create a mechanism for the speedy and peaceful settlement of disputes that might otherwise disrupt railroad service and interstate commerce. The bill passed easily in the House and Senate and became the Railway Labor Act on May 20, 1926. Section 2 outlined the major purposes of the Act:

1. to avoid interruptions of service and commerce based on disputes between carriers and employees;
2. to encourage dispute settlement by conferences between the representatives of carriers and employees;
3. to provide employees freedom to join labor organizations;
4. to provide both parties a means for independent self-organization;
5. to provide for the prompt settlement of disputes involving rates of pay, work rules, or working conditions; and
6. to provide for the prompt settlement of grievances arising from existing contracts.

Like the Transportation Act of 1920, the RLA encouraged labor and management parties first to attempt dispute settlement in private conferences between themselves. The RLA created two classes of disputes: "major" and "minor." Major disputes involved contested contract issues such as wages, working conditions, and work rules, while minor disputes involved grievances arising out of existing labor contracts. The RLA, by encouraging preliminary private conferences, still relied on carriers and employees to settle their major disputes through collective bargaining.

The procedural mechanisms of the RLA were triggered only when the employers and labor could not come to an agreement. The interested parties referred minor disputes not set-
tled in conference to Boards of Adjustment. These boards were created by written agreement between management and employees and were composed of an equal number of representatives from each party. Decisions by the adjustment boards were binding on the parties to the minor disputes. While the framers of the RLA may have aspired to create an effective mechanism for settling minor disputes through adjustment boards, this did not happen because the RLA did not require parties to agree on national adjustment boards, but allowed them to favor local labor unions. These local unions were often company owned and thus more favorable to company interests. Railroad carriers could negotiate with the local, company-owned and company-biased labor unions to settle disputes, effectively locking out the national trade unions. This strategy effectively vitiated the Act’s goals to promote employees’ freedom to associate and choose their labor representatives without influence from the railroad carrier. The RLA provided neither an effective enforcement scheme, nor penalties against carriers that sought to deny employees’ freedom of association mandated by the Act itself.

While the RLA of 1926 failed to foster minor dispute settlement, the Act did help resolve major disputes regarding wages, work rules, and working conditions. In addition to the Boards of Adjustment, the RLA also created the Board of Mediation to help administer the statute. When disputes arose involving proposed changes in wages, work rules, or working conditions, either labor or management could invoke the help of the Board of Mediation. The statute commanded the Board of Mediation to bring the parties to agreement through mediation, and when mediation failed, it had a further duty to encourage the parties to submit their dispute to voluntary arbitration. Beyond major disputes, it also had authority to hear disputes aris-

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40 § 3, First, 44 Stat. at 578–79.
41 Id.
42 Id.
43 NMB & Rehmus, supra note 31, at 5.
44 Id.
45 Id.
46 Id.
47 Id. at 6.
48 NMB & Rehmus, supra note 31, at 5.
50 Id. § 5, First.
51 Id.
ing from grievances not settled by an adjustment board and any other dispute not settled by the parties' private conferences.\(^{52}\)

The new Board of Mediation had marked success during its early years in settling disagreements over new labor contract terms, and railroad strikes were limited both in number and national impact.\(^{53}\) Though the Board of Mediation was no doubt important in dispute settlement, the onset of the Great Depression also created incentives for labor and management to quickly and peaceably settle their differences.\(^{54}\)

B. THE 1934 AMENDMENTS TO THE RLA


The 1926 Railway Labor Act proved ineffectual in resolving "minor" disputes and providing complete decisional autonomy for employees when unionizing.\(^{55}\) In early 1934, railroad carrier and labor union representatives worked together to submit a bill to Congress to address the shortcomings of the 1926 Act, and on June 21, Congress passed the 1934 Amendments to the RLA.\(^{56}\) Congress recognized that company-maintained railroad unions and the carriers' refusal to recognize the authority of employee-designated representatives stymied the objectives of the RLA.\(^{57}\) Section 2, Fourth, of the Act granted an affirmative right to employees to "organize and bargain collectively through representatives of their own choosing."\(^{58}\) The Act forbade carriers from interfering with employee organizations or coercing employees

\(^{52}\) Id.

\(^{53}\) NMB & Rehmus, supra note 31, at 5.

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id. at 6.

\(^{57}\) Report of H. Comm. on Interstate and Foreign Commerce, No. 1944, 73d Cong., 2d Sess., at 1–2 ("[The Act] forbids the use of the carriers' funds to maintain, aid, or control the labor organizations of the employees and specifically prohibits carrier managements from requiring employees . . . to join company unions."). Id. Regarding employee selection of their representatives, the House Report continued:

These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act.

Id.

to "join or remain members of any labor organization."\(^{59}\) This language effectively curtailed company-owned, -sponsored, or -dominated unions.\(^{60}\) Section 2, Fifth, of the Act recognized the importance of employee unionization by outlawing "yellow dog" contracts—agreements by prospective employees not to join a labor union if hired by the employer.\(^{61}\) The amendments also barred both labor and management from interfering in the designation of either party's bargaining representatives.\(^{62}\) But perhaps the most important addition to the Act came in section 2, Tenth. That section imposed criminal penalties against the carrier for its willful failure to comply with certain portions of the Act, notably:

1. interference with designation of bargaining representation;
2. interference with employees' right to organize;
3. coercing employees to join or remain members of certain labor unions; and
4. demanding or enforcing yellow dog contracts.\(^{63}\)

This section gave the RLA the teeth that its 1926 counterpart and the Transportation Act of 1920 lacked. When violations of the Act occurred, employee representatives could now invoke the U.S. Attorney General and the court system to compel employer compliance.\(^{64}\)

2. Creation of the National Mediation Board

The 1934 amendments to the RLA abolished the Board of Mediation and established a new executive agency, the National Mediation Board, to take its place.\(^{65}\) The Act reduced board membership from five members to three, to be appointed by the President, and only two could be of the same political party.\(^{66}\) As with the original Board of Mediation, both labor and management had the right to invoke the services of the NMB in settling certain disputes.\(^{67}\)

\(^{59}\) Id.
\(^{60}\) NMB & Rehmus, supra note 31, at 6.
\(^{61}\) § 2, Fifth, 48 Stat. at 1188.
\(^{62}\) Id. § 2, Third.
\(^{63}\) Id. § 2, Tenth.
\(^{64}\) Id.
\(^{65}\) Id. § 4, First.
\(^{66}\) Id.
\(^{67}\) Id. § 5, First.
Whereas the Board of Mediation dealt with grievance disputes not settled by the earlier Boards of Adjustment, the new NMB's duty focused on major disputes concerning changes in rates of pay, work rules, or working conditions, leaving minor disputes to the newly created National Railroad Adjustment Board. As with the 1926 Act, the 1934 amendments placed a duty upon the NMB to use its best efforts to bring carriers and employees to agreement through mediation of their disputes. When mediation failed, the NMB had the duty to encourage the parties to enter arbitration, with the added proviso that if the parties refused to arbitrate, neither party could change the status quo regarding wages, rules, work conditions, or established practices for thirty days. The amendments gave the NMB one new but significant responsibility: to settle disputes among the carrier's employees concerning their representation during bargaining under the RLA. The Act directed the NMB, at the request of either labor or management, to "investigate such dispute and to certify to both parties . . . 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." As part of investigating employee representation disputes, the Act granted the NMB authority to hold elections or use other means to determine the employees' choice for representation. The Act also gave the NMB power to determine who could participate in elections and the power to establish rules to govern the representation elections. Once the NMB certifies the employees' representatives to the carrier, that employer must treat those representatives as the exclusive bargaining unit for purposes of the RLA.

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68 Id.
69 Id.
70 Id.
71 Id. § 2, Ninth; NMB & Rehmus, supra note 31, at 7.
72 § 2, Ninth, 48 Stat. at 1188.
73 Id. ("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.").
74 Id.
75 Id.

The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary
C. Bringing the Airlines Under the RLA

The RLA had proven successful in resolving labor disputes and protecting commerce in the railroad industry, and Congress recognized that the RLA could (and should) be extended to cover the airline industry. Up until the mid- to late-1920s, America's people and its goods traveled primarily by rail, but the successes of air mail transport and the development of better navigational aids foreshadowed the growth of the commercial airline industry. Congress recognized the emerging importance of airlines to the efficient flow of interstate commerce and decided that the public needed protections against interruptions of that service. To that end, Congress amended the RLA in April 1936 to cover common carriers by air, U.S. mail carriers, and pilots employed by either.

III. CURRENT LAW

A. The Role of the NMB in Representation Disputes

The RLA Amendments of 1934 charged the NMB with the duty to investigate representative disputes among a carrier's employees. A representation dispute typically occurs in two types of situations: (1) the employees are not currently represented by any labor union, and aspiring unions request a vote to determine if employees wish to unionize, or (2) the employees are currently represented by a union, but another union wishes to replace or challenge the validity of the incumbent. In both steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First. Virginian Ry. Co. v. Sys. Fed'n, 300 U.S. 515, 548 (1937).

76 Thoms & Dooley, supra note 31, at 9.
77 Id. at 6-7.
78 Id. at 9.
80 Pub. L. No. 73-442, § 2, Ninth, 48 Stat. 1185, 1188 (1934) (recodified at 45 U.S.C. § 152, Ninth (2006)) ("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 Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute . . . .").
situations, the carrier, employees, or labor union can request the help of the NMB to determine what union, if any, will represent the employees.\[82\]

The NMB has promulgated a variety of rules to govern representation disputes, and before the NMB gets involved, a minimum number of employees must request or authorize the investigation.\[83\] Where the employees are not currently represented by any labor organization, at least thirty-five percent of the employees in the craft must authorize the Board’s investigation;\[84\] if the employees are currently represented, at least a majority of those employees must authorize the investigation.\[85\] A “craft” or “class” is a set or subset of employees pooled together with common interests such that it would be logical and fair for the same union to represent them.\[86\] For example, in the airline industry, one craft might include pilots and flight engineers, while another craft might include flight attendants, and yet another might include mechanics. Once a craft or class accumulates the required number of employee authorizations, the NMB must investigate the dispute.\[87\]

The NMB typically begins the investigation by requesting employee information from the carrier, who is required to provide such information to the NMB for purposes of its investigative function under the RLA.\[88\] The Board analyzes the employee information to determine which employees should be included in the class or craft and which employees should be allowed to vote if an election is held.\[89\] Where disputes arise concerning the makeup of the craft, the Board makes the final determination of the appropriate craft and its membership.\[90\] After the Board has determined the appropriate class for the election and the eligible voters, the Board sends notification of a scheduled election with voting times to the eligible voters.\[91\]

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\[82\] § 2, Ninth, 48 Stat. at 1188.
\[84\] Id. § 1206.2(b).
\[85\] Id. § 1206.2(a).
\[86\] NMB Manual, supra note 81, § 9.1.
\[87\] § 2, Ninth, 48 Stat. at 1188.
\[88\] Id.; 29 C.F.R. § 1202.6.
\[89\] 29 C.F.R. § 1202.5.
\[90\] Id. § 1202.8.
\[91\] NMB Manual, supra note 81, § 13.201
B. COUNTING THE VOTES—MAJORITY RULE

The Board currently conducts elections through telephone, internet, and mailed-ballot voting. The Board lists the union candidates on the ballot in a specific order, with the incumbent listed first, then challengers, then intervenors. Ballots also provide a space for write-in candidates. The Board only counts valid ballots toward representation "where the voter's intent to vote for representation is clear." While the ballot provides space for representation candidates, there is no choice to vote "no," "no union," or "no representation." In fact, should a voter write-in a "no" or "no union" type vote, the ballot is considered void and not included toward a vote for representation.

Soon after the election, the Board tallies the votes to determine the employees' choice, if any, for union representation. The RLA commands 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." Since its inception in 1934, the Board has interpreted this language to mean that at least a majority of eligible voters in the craft must cast valid ballots in favor of representation. If a majority of voters do cast valid ballots, they will have voted, as a whole, for representation, and eligible employees who do not vote become "no" votes, or votes against representation.

Though a majority of voters may have cast valid ballots in favor of representation, the Board will not certify a union as a representative unless that union also received a majority of the

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92 Id. §§ 13.0–14.0.
93 Id. §§ 13.204, 14.201. Local or national labor organizations, corporations, or any person or groups of persons may represent a craft of employees for purposes of the RLA. 45 U.S.C. § 151, Sixth (2006). The RLA does not require that the employee representatives be employed by the carrier in question. Id. § 152, Third.
95 Id.
96 Id. §§ 13.204, 14.201.
97 Id. §§ 13.304-2, 14.305-3 (Void ballot/votes also consist of: (1) votes for a carrier or carrier official; (2) votes that select more than one candidate, or otherwise fail to indicate a voter's intent; (3) blank ballots; (4) votes for "self" or "self representation"; and (5) ballots that identify the individual voter.).
99 NMB Proposal, supra note 1, at 56,751. "If there is a majority of votes for representation generally, the organization or individual receiving a majority of votes cast for representation will be certified as the representative . . . ." NMB Manual, supra note 81, §§ 13.304-1, 14.305-2.
100 See generally NMB Proposal, supra note 1.
votes actually cast.\textsuperscript{101} And, if a majority of eligible voters cast votes for at least some representation, it is possible for a union to win the election, even where a majority of the class did not vote for that particular union.\textsuperscript{102}

The NMB has followed the majority participation rule for over seventy-five years. \textit{In re Representation of Employees of the Pan American Airways, Inc. – Radio Operators and Teletype Operators}\textsuperscript{103} illustrates the application of the rule during the Board's formative years. There, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees represented Pan Am's teletype operators, while the radio operators remained unorganized.\textsuperscript{104} The Radio Officers' Union, C.T.U., A.F.L. wished to represent both the teletype and radio operators, and invoked the services of the NMB under section 2, Ninth, of the RLA.\textsuperscript{105} The Board determined a dispute existed and that 183 employees were eligible to vote in its representation election.\textsuperscript{106} Employees cast sixty-nine votes in favor of the Radio Officers' Union, some twenty-three votes short of the ninety-two required for a showing of majority interest in representation.\textsuperscript{107} Since a majority of eligible employees had not cast valid ballots, the Board refused to certify the Radio Officers' Union as a representative, even though it had won a clear majority of votes cast.\textsuperscript{108}

In its decision, the Board noted that its policy had been seriously challenged by several parties, and the Board even invoked the advice of the Attorney General before rendering its judgment.\textsuperscript{109} Ultimately, the Board stuck to its precedent and argued that the majority participation policy helped further the goals of the RLA.\textsuperscript{110} The Board noted the carriers' and employees' duty to settle disputes and avoid interruption of commerce:

\textsuperscript{101} NMB \textit{Manual}, supra note 81, \textsection{} 14.305-2.
\textsuperscript{102} \textit{Id.} \textsection{} 13.304-1 ("[T]he organization or individual receiving a majority of votes cast for representation will be certified as the representative even if that individual or organization did not receive votes from a majority of the craft or class.").
\textsuperscript{103} \textit{1 N.M.B.} 454 (1948).
\textsuperscript{104} \textit{Id.} at 454.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.} (The Brotherhood declined to participate in the representation determination and was not listed on the ballots. Seventeen ballots were void.).
\textsuperscript{108} \textit{Id.} at 455.
\textsuperscript{109} \textit{Id.} at 454–55.
\textsuperscript{110} \textit{Id.}
"The Board is of the opinion that this duty can more readily be fulfilled and stable relations maintained by carriers' and employees' representatives by a requirement that a majority of eligible employees cast valid ballots in elections conducted under the Act before certifications of employee representatives are issued." The Board has steadfastly applied its rule in standard employee representation disputes.

It is important to note that valid votes and ballots cast for different unions may be pooled in order to reach the majority participation threshold. During a representation dispute among certain employees of Aspen Airways, the Board determined that 142 employees were eligible to vote in the certification election. A write-in candidate received fifty-four votes, well short of the seventy-two for a majority, but employees cast thirty-nine votes for two other labor organizations. As part of its standard procedure, the Board pooled the votes of all three union candidates (ninety-three total votes) to reach the majority threshold requirement and then certified the write-in candidate as the employees' representative. Aspen Airways also illustrates the importance of a write-in option on the NMB's ballots and the impact a write-in candidate can have on employee representation.

C. VARIATIONS ON THE MAJORITY RULE

When special circumstances warrant, the NMB modifies its employee representation election procedures. Where no labor

111 Id. at 455; see also Chamber of Commerce of the United States, 14 N.M.B. 347, 362 (1987) ("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.").


114 Id. at 275.

115 Id.

116 Id.
organization captures a majority of votes cast or a tie occurs, the Board may hold a runoff election.\textsuperscript{117} Part 1206.1 dictates that the Board must hold a runoff election when requested by a candidate who is entitled to appear on the runoff ballot.\textsuperscript{118} In these elections, the ballot contains only the names of the two labor organization that received the highest number of votes in the general election, and the ballot provides no space for write-in candidates.\textsuperscript{119} The Board certifies the candidate that received the simple majority of votes cast in the runoff election, regardless of whether a majority of total eligible voters cast valid ballots in that election.\textsuperscript{120} At least a majority of eligible voters must have cast valid ballots in the first election that produced a tie or failed to produce a majority winner.\textsuperscript{121}

The Board also modifies its elections procedures during instances of carrier interference.\textsuperscript{122} The RLA mandates that employees choose their representatives without interference or influence from their employers.\textsuperscript{123} In \textit{Laker}, the Teamsters solicited the services of the NMB to determine the exclusive representative of Laker Airways employees, and the Board held an election by secret mailed ballots.\textsuperscript{124} However, during the election, the Teamsters alleged that Laker Airways had illegally coerced employees not to vote and had otherwise interfered with the representation election.\textsuperscript{125} Upon investigation, the Board found that Laker Airways had encouraged employees not to vote, instructed them to turn their ballots into Laker rather than the Board, tracked employees who had received ballots, asked for names of employees requesting duplicate ballots, and granted a significant pay increase just before the election to discourage unionization.\textsuperscript{126}

\textsuperscript{117} 29 C.F.R. § 1206.1 (2010).
\textsuperscript{118} Id. § 1206.1(a).
\textsuperscript{119} Id. § 1206.1(b).
\textsuperscript{120} NMB Manual, supra note 81, § 16.0.
\textsuperscript{121} Id.; see USAir, Inc. – Fleet Serv. Emps., 21 N.M.B. 385 (1994).
\textsuperscript{122} E.g., Int’l Bhd. of Teamsters (Laker), 8 N.M.B. 236 (1981).
\textsuperscript{123} 45 U.S.C. § 152, Fourth (2010) ("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 its employees . . . 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 . . . .").
\textsuperscript{124} Laker, 8 N.M.B. at 236.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 240-43.
Laker’s activities appalled the Board, who declared that new methods had to be employed during the representation elections. The Board mandated a ballot-box type election and clarified that “the desires of the majority of those actually casting valid ballots will determine the outcome of the elections, whether or not a majority of those eligible participate in the elections.” The Board noted though that its decision to modify the election scheme was solely in response to Laker’s violations of the RLA and was not meant to change the precedent of requiring majority participation in normal representative elections.

The Board approved another election procedure in Key Airline, where the Board found that the carrier had a history of coercing employees and discouraging unionization through meetings, firings, and disparate pay raises. The Board also acknowledged that the Laker-type ballot would not be effective because Key’s repeated conduct had damaged the employees’ sense of freedom to elect union representation. Therefore, the Board ordered a new election in which the Teamsters would be certified unless a majority of eligible voters returned valid ballots opposing Teamster representation. A “Key” election, then, is an extreme measure where the normal election procedure is essentially reversed, and it allows union certification without obtaining majority support.

D. Decertification

Once the NMB certifies a union as the employee representative to the carrier, that certification remains in effect until the Board issues another certification or dismissal regarding that

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127 Id. at 244 (“The Board views Laker’s admitted conduct as among the most egregious violations of employee rights in memory. Rarely has a carrier waged such a deliberate campaign designed to override employee free exercise of the rights guaranteed by the Act. Extraordinary remedies are required to overcome Laker’s violations and to restore conditions which will permit a free election.”).

128 Id. at 256–57. In such “Laker” elections, the ballot simply inquires whether the employee wishes to be represented by the candidate union and provides “yes” and “no” check boxes. The ballot provides no space for write-in votes. Application of the Int’l Bhd. of Teamsters – Airline Div. (Key Airlines), 16 N.M.B. 296, 297 n.1 (1989).

129 Laker, 8 N.M.B. at 257.

130 Key Airlines, 16 N.M.B. at 307–12.

131 Id. at 311–12.

132 Id. at 312.
craft or class. Neither the RLA nor the Board’s procedure explicitly provides a mechanism for decertifying a union previously elected by employees. However, a union can lose its status as a class representative through “de facto” decertification. In Alitalia, a prospective union challenged the incumbent union’s right to represent the office clerical employees of Alitalia Airlines. The Board held an election in which less than a majority of eligible employees voted for representation by either union. Consequently, the Board held that the incumbent union had lost its certification and its right to represent the employees. The Board based its decision on its history of requiring majority participation, while citing to a D.C. Circuit opinion that recognized employees’ right to reject collective representation. Unsatisfied with de facto decertification, some unions have asked the Board to promulgate an explicit decertification procedure. The Board declined to issue such a procedure, finding “no persuasive evidence or argument that decertification procedures are mandated by the Railway Labor Act.” The Board noted that “formal decertification rules” were not essential to the Board’s functions in representation disputes, as employees had alternative avenues to terminate representation.

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133 NMB Manual, supra note 81, § 15.1.
136 Id. at 331.
137 Id.
138 Id. at 332.
139 Id. at 331–32 (citing Int’l Bhd. of Teamsters v. Bhd. of Ry., Airline & S.S. Clerks, 402 F.2d 196 (D.C. Cir. 1968)). In Steamship Clerks, the court reasoned that “it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation.” Steamship Clerks, 402 F.2d at 202. The court continued:

The Board has in the past refused to certify a representative, when an election among unorganized employees failed to elicit the votes of 50% of the employees, without any hue and cry that employees must be represented so that the negotiations contemplated by the Act may go on. The Board may not only decline to certify a representative, but may go further and certify that there is no representative.

Id. at 202–03.
141 Id. at 358.
142 Id.
E. Judicial Interpretation Regarding Majority Participation

Given the Board’s long history, it is not surprising that many carriers, unions, and employees have filed suit against the NMB in its handling of representation disputes. Just a few years after the 1934 creation of the Board, the U.S. Supreme Court granted certiorari to settle a dispute over the RLA and the validity of the Board’s election procedure. In Virginian Railways, the Board held an election to determine the appropriate representative for the railway’s employees and subsequently certified the Federation as the duly elected representative. The carrier refused to recognize the Federation as the employees’ representative, propped up a local company union, and coerced employees not to affiliate with any organization other than the company union. The Federation brought suit and secured an injunction to compel the railway to recognize Federation as the elected representative and to enjoin the company from coercing and influencing employees from freely exercising their right to organize. On appeal to the Supreme Court, the railway attacked the enforceability and constitutionality of the RLA and the validity of the Board’s certification procedures. After affirming the constitutionality and enforceability of the RLA, the Court examined how the Board conducted its representative elections. In particular, the railway attacked the certification of the blacksmith craft, asserting that because a majority of eligible voters had not voted for the Federation, the Board’s certification was invalid. The Court disagreed, noting that at least a majority of eligible voters had participated in the election and the Federation had received the majority of the votes actually

145 Id. at 539.
146 Id. at 539–40.
147 Id. at 540–41.
148 Id. at 542–62.
149 Id. at 559.
150 Id. at 559–60.
The Court first examined the language of section 2, Fourth, of the RLA and held:

It is to be noted that the words of the section 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. 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.

The Court pointed out how difficult certification would be for a union if the RLA required not only that a majority of eligible voters participate, but also that the union receive a majority of eligible votes. Furthermore, an "indifferent minority" could spoil an election and frustrate the purposes of the RLA. The district court opinion showed that the Board originally scheduled an election that required the union to receive a majority of total eligible votes but changed the procedure after receiving complaints that the railway influenced employees not to vote.

The district court also provided a useful analysis of section 2, Fourth, of the RLA, noting that its majority vote requirement was met where at least a majority of those eligible to vote participated. Once that minimum was met, the Board could rightfully certify any union that received a majority of votes cast. The court analogized the majority rule to a corporate stockholder meeting requiring participation by a majority or quorum of stockholders. As a corollary to this rule, the court stated that where a majority of eligible voters had not participated in the election, an election had not truly occurred, and thus, no certification could be issued.

The D.C. Circuit Court of Appeals addressed the propriety of the Board's election procedure in Aeronautical Radio, Inc. v. Na-
tional Mediation Board. The Board certified the Teamsters as the representative of a craft of Aeronautical employees, and Aeronautical filed suit seeking to have the certification invalidated. During the election, a majority of employees voted for at least some representation, and the Teamsters received a majority of the votes actually cast, though not a majority of eligible votes. The employer attacked the Board, claiming that it had failed to perform its duty to investigate representation disputes under the RLA. Aeronautical argued that since the Teamsters had not received a majority of eligible votes, one could not rationally conclude that they "were the choice of the majority." The court stressed that a majority of eligible voters had cast ballots in favor of representation, and by certifying the Teamsters, the Board had "reached a permissible conclusion." Furthermore, there was "no showing that the Board [had] failed to perform its duty to investigate or that it [had] acted in excess of its statutory authority." The court of appeals then affirmed the dismissal of Aeronautical's claims, holding that the court lacked the jurisdiction to question the Board's election procedures where the Board had met its statutory obligations. Courts have universally affirmed the Board's majority participation rule in representation dispute elections.

F. JUDICIAL DEFERENCE TO NMB PROCEDURES

Not only have courts specifically approved the Board's method of representative certification, they have generally

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161 380 F.2d 624 (D.C. Cir. 1967).
162 Id. at 625–626.
163 Id. at 626.
164 Id.
165 Id.
166 Id. at 627.
167 Id.
168 Id.
169 E.g., Zantop Airlines Int'l, Inc. v. Nat'l Mediation Bd., 732 F.2d 517, 522 (6th Cir. 1984) ("The method of determining a majority was within the broad discretion granted to the Board."); Nashville, C. & St. L. Ry. v. Ry. Emps.' Dep't, AFL-CIO, 93 F.2d 340, 343 (6th Cir. 1937), cert. denied, 303 U.S. 297 (1938) ("[W]hen society endeavors to express its collective will to ascertain it by a majority of votes cast . . . a majority of those entitled to participate is the quorum that validates its choice."); Ass'n of Clerical Empls. of Atchison, Topeka & Sante Fe Ry. Sys. v. Bhd. of Ry. & S.S. Clerks, 85 F.2d 152, 156 (7th Cir. 1936) ("[W]here a majority of those qualified to vote had in fact voted, a proposed representative receiving a majority of the quorum which thus voted was the duly elected representative under the statute.").
showed the Board incredible deference in its procedures and decisions.\footnote{E.g., Horizon Air Indus., Inc. v. Nat'l Mediation Bd., 232 F.3d 1126, 1134 (9th Cir. 2000), \textit{cert. denied}, 539 U.S. 915 (2001); Am. W. Airlines, Inc. v. Nat'l Mediation Bd., 119 F.2d 772, 775–76 (9th Cir. 1997), \textit{cert. denied}, 523 U.S. 1021 (1998); \textit{Nashville, C. & St. L. Ry.}, 93 F.2d at 343.} Nine years after the Board's creation, the Supreme Court issued a decision holding that the Board's decisions were subject to very limited judicial review.\footnote{320 U.S. 297 (1943).} In \textit{Switchmen's Union of North America v. National Mediation Board}, the petitioner brought suit to have the Board's certification of a rival union cancelled.\footnote{\textit{Id.} at 299.} The complaining union asserted that the Board had incorrectly designated which employees should be included in the craft holding the election.\footnote{\textit{Id.} at 299–300.} The district and appellate courts upheld the Board's decision, and the Supreme Court affirmed on jurisdictional grounds, holding that the judiciary did not have jurisdiction to hear such complaints about the Board's decisions.\footnote{\textit{Id.} at 303 ("Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain.")}. The Court pointed to the provisions of the RLA that created the Board, as well as the absence of language permitting judicial review.\footnote{\textit{Id.} at 306.} While section 3 and section 9 of the RLA provided judicial review of some issues, section 2 offered no such remedy, and the Court assumed that Congress made the distinction consciously.\footnote{\textit{Id.} at 305.} Furthermore, Congress vested enormous power in the NMB as fact finder in representation disputes so that "the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."\footnote{380 U.S. 650 (1965).} 

The Supreme Court reiterated the deference afforded to the NMB by the judiciary in \textit{Brotherhood of Railway & Steamship Clerks v. Ass'n for the Benefit of Non-Contract Employees}.\footnote{850 U.S. 650 (1965).} During a representation dispute for clerical and office employees of United Airlines, the airline and the Association sued to enjoin the Board from using a ballot that did not contain a selection for
The parties also attacked the Board's designation of the appropriate craft that would participate in the election. After the district court enjoined the Board from using a ballot that did not have a "no union" option, a divided court of appeals affirmed, and the Supreme Court granted certiorari to resolve the dispute. Turning first to the dispute over craft designation, the Court cited and followed the precedent from Switchmen's Union and held that the Board's designation of the appropriate class was not to be disturbed by the courts. The Court noted that the Board's decision would be reviewable had it neglected its duty under the RLA to investigate representation disputes, but the Board met its duty by using a craft long established in its prior proceedings. The Court then turned to the issue of the ballot form and the lack of a "no union" selection box, and held that the district had erred by enjoining the Board's current ballot. The Court noted the plain language of section 2, Ninth, of the RLA, which granted a high level of discretion to the Board in executing representative elections:

[N]ot only does the statute fail to spell out the form of any ballot that might be used but it does not even require selection by ballot. It leaves the details to the broad discretion of the Board...[T]he details of selecting representatives were to be left for the final determination of the Board.

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179 Id. at 653.
180 Id.
181 Id. at 654.
182 Id. at 668.
183 Id. at 665–66 ("Time and again [the Board] has acknowledged that it has the task of determining the appropriateness of a craft or class, and nothing in this case suggests that it abdicated that responsibility here... This procedure clearly complied with the statutory command that the Board 'investigate' the dispute.").
184 Id. at 667–68. Before the case reached the Supreme Court, the Board decided to amend the instructions on the ballots to read: "INSTRUCTIONS FOR VOTING. No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified." Id. at 657. The Court noted these changes but did not base its opinion on the new ballot, since these instructions did not change election procedures. The ballot merely "stated on its face what has been the practice of the Board in these elections since its inception." Id.
185 Pub. L. No. 73-442, § 2, Ninth, 48 Stat. 1185, 1188 (1934) ("[T]he Media
tion Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method... and establish the rules to govern the election.") (emphasis added)).
The Court noted that ballot selection was a "necessary incident" to the Board's investigation, and judicial inquiry into the Board's decision was inappropriate in the absence of a statutory violation.\textsuperscript{187}

In the Board's seventy-five year history, courts have repeatedly deferred to its decisions in representation investigations.\textsuperscript{188} Courts have exercised jurisdiction over the NMB's decisions in two limited situations—where the Board has acted outside the scope of its statutory authority or where a party has alleged unconstitutional action by the Board.\textsuperscript{189} In \textit{Russell v. National Mediation Board},\textsuperscript{190} the court of appeals determined that the Board failed to carry out its duty to investigate a representation dispute among employees of Atchison, Topeka, and Santa Fe Railroad.\textsuperscript{191} In the hopes of ousting an incumbent union, Russell—the employees' chosen representative—submitted the required number of authorization cards and requested that the Board investigate the representational dispute.\textsuperscript{192} But the Board declined to investigate the dispute on the grounds that Russell had no intent to actually represent the employees if he were elected.\textsuperscript{193} The Fifth Circuit held that by dismissing Russell's application, the Board had denied the employees' right to select their representative under the RLA and thus, had failed to carry out their statutory duty.\textsuperscript{194} The D.C. Circuit Court of Appeals set aside a rerun election held by the Board after the court determined that the Board acted unconstitutionally.\textsuperscript{195} The Board

\textsuperscript{187} \textit{Id.} at 669.

\textsuperscript{188} See, e.g., Horizon Air Indus., Inc. v. Nat'l Mediation Bd., 232 F.3d 1126, 1134 (9th Cir. 2000), \textit{cert. denied}, 533 U.S. 915 (2001) (holding that the Board had not acted outside its statutory duty by ordering new election after finding carrier interference); Am. W. Airlines, Inc. v. Nat'l Mediation Bd., 119 F.3d 772, 775–76 (9th Cir. 1997), \textit{cert. denied}, 523 U.S. 1021 (1998) (deferring to the Board's decision to allow discharged employees to vote in a representative election, noting that "judicial review of NMB decisions is to be extraordinarily limited"); Nashville, C. & St. L. Ry. v. Ry. Emps. Dep't of AFL-CIO, 93 F.2d 340, 343 (6th Cir. 1937), \textit{cert. denied}, 303 U.S. 649 (1938) (deferring to the Board's majority rule and its decision to allow furloughed employees to vote).

\textsuperscript{189} Horizon Air, 232 F.3d at 1132.

\textsuperscript{190} 714 F.2d 1332 (5th Cir. 1983).

\textsuperscript{191} Id. at 1347.

\textsuperscript{192} Id. at 1335.

\textsuperscript{193} Id. at 1336.

\textsuperscript{194} Id. at 1347 ("The Board failed here to find the fact in dispute: who is the true representative of the employees? It is, therefore, a 'perversion of truth' for the Board to insist that it conducted the investigation and discharged its duty under the Act.").

found carrier interference during the first election and subsequently prohibited carrier campaigns that would promote pre-existing employee committees over the outside unions during the period before the new election. The court held that the Board’s actions went too far and violated the carrier’s free speech rights. Thus, the Board’s decisions are not completely immune to judicial review.

IV. ANALYSIS

A. THE PROPOSED RULE CHANGE

The NMB has proposed to amend 29 C.F.R. § 1202.4—the rule describing secret ballots used in representative disputes—so that the Board would certify a representative based on the majority of valid ballots cast in the election. The proposed rule adds the language: “Except in unusual or extraordinary circumstances, in a secret ballot the Board shall determine the choice of representative based on the majority of valid ballots cast.” This change would eliminate the first hurdle customarily required in representative dispute elections—the requirement that a majority of eligible voters cast valid ballots in favor of representation. There is no doubt that this procedural change would make it easier for a labor organization to achieve certification. The Board thus dispenses with seventy-five years of procedural precedent. The proposal has sparked a flood of comments supporting and opposing the change. Whether

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196 Id. at 992.
197 Id. at 994.
198 NMB Proposal, supra note 1, at 56,754. Section 1202.4 currently states:
SECRET BALLOT. In conducting such investigation, the Board is 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.

29 C.F.R. § 1202.4 (2010).

199 NMB Proposal, supra note 1, at 56,754.

200 As of January 15, 2010, the Board had received comments, emails, and letters from U.S. Senators and Representatives, labor groups such as the International Brotherhood of Teamsters, carriers such as Delta and Southwest Airlines, other employees potentially affected, and members of the public in general. Over 2,000 emails and more than 20,000 individual, handwritten, and form letters have been sent to the Board regarding the rule change. Proposed NMB Representation Rulemaking, NMB, http://www.nmb.gov/representation/proposed-rep-rulemaking.html (last visited June 15, 2010).
one is for or against such a procedural change, the starting point for analyzing the proposal is simple: does the National Mediation Board have the power to make such a significant rule change? To answer that question, one must look to the RLA.

B. The National Mediation Board's Power to Change Its Rules

The 1934 Amendments to the RLA created the NMB as an "independent agency in the executive branch of the Government." An administrative agency's power to make rules or carry out policy is directly tied to the underlying statute, and the agency cannot promulgate rules outside its enabling law. Where Congress has created an agency specifically to carry out the policy of a statute, that agency cannot fulfill its duty without some inherent power to make rules and interpret its enabling statute. Courts make two basic inquiries when analyzing an administrative agency's actions: whether Congress has directly addressed the issue in question and, if Congress has not addressed the issue, whether the agency construed the statute in a permissible manner.

Turning to the question of whether Congress addressed the specific issue requires a look at the language of the 1934 Amendments to the RLA. In section 2, Ninth, of the Act, Congress granted the Board power to investigate representation disputes by taking a secret ballot but did not specify the form of ballot required, how votes would be tallied, or any other voting particulars. It seems clear that Congress did not specifically address the question of voting procedures. In fact, Congress's language suggests that it entrusted the Board with broad discretion when investigating employee representation disputes.

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202 La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act... unless and until Congress confers power upon it.").
203 Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").
206 Id. ("[T]he Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method... and establish the rules to govern the election.") (emphasis added).
Since Congress did not specifically address voting procedures, the remaining question is whether the NMB has fairly construed the statute in executing its duties. As the discussion in Part III demonstrated, courts have universally recognized both the Board’s broad discretion in carrying out its investigative duties and the limited scope of judicial review. And, given the broad language of “establish the rules to govern the election,” a change in those rules is a reasonable interpretation of the Board’s authority under the RLA.

Beyond the RLA, the Administrative Procedure Act demands that the Board publish notice of its rules and any amendments or changes in the Federal Register. Though administrative agencies are not required to follow their own precedent, it is presumed that the agency’s policies “will be carried out best if the settled rule is adhered to.” As a corollary to that presumption, an agency has a duty “to explain its departure from prior norms.” The agency can justify its position by asserting that (1) circumstances have changed, (2) the rule is not applicable to specific facts, or (3) the rule should be read more narrowly in a particular case. But as Part III illustrates, the judiciary has historically accorded extreme deference to the NMB in its procedural decisions.

C. HAS THE NMB ADEQUATELY EXPLAINED OR JUSTIFIED THE PROPOSED RULE CHANGE?

Statutory and case law strongly suggest that the NMB has the power to change its rules and procedure, but has the Board acted within the scope of the RLA and adequately justified the need for the new rule? The Board began its proposal by assert-

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207 See supra Part III.E-F.
208 Russell v Nat’l Mediation Bd., 714 F.2d 1332, 1337 n.3 (5th Cir. 1983) (“[T]he Board has clear authority to change its own procedures, so long as such changes comply with the requirements of the Act.”); see also Nashville, C. & St. L. Ry. v. Ry. Employees Dep’t of AFL, 93 F.2d 340, 342 (6th Cir. 1937), cert. denied, 303 U.S. 649 (1938) (“[T]he intent of the Congress was to clothe the Board with large discretionary powers in the conduct of elections for the appointment of representatives . . . .”); Bhd. of Ry. & S.S. Clerks v. Ass’n for the Benefit of Non-Contract Employees, 380 U.S. 650, 661-62 (1965) (“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.”).
211 Id.
212 Id.
ing its power to “reasonably interpret” section 2, Fourth, of the RLA. The Board noted that administrative concerns prompted its original interpretation of that section, and that the Board had authority to re-interpret the statute so that a simple majority of those actually casting votes would be sufficient for certification.

The Board cited the Virginian Railways decision and asserted that section 2, Fourth, “confer[s] 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.” Thus, the Board claimed that it had the power to determine what “majority” means and how to measure that majority in an election. But the Court in Virginian Railways used the above language in a case where a majority of eligible voters actually did participate in the election. The Court thus defined the discretion of the Board against the backdrop of a vote legitimized by a majority of workers.

Would the Supreme Court have felt the same if a majority of eligible voters had not participated in the initial election? And is it correct for the current Board to extrapolate the Court’s reasoning to a situation where a majority of eligible voters have not participated? A review of the trial court’s opinion in Virginian Railways helps elucidate the answer to those questions. The trial court noted that in all but one of the voting crafts—the carmen and coach cleaners—a majority of eligible voters had cast valid ballots in favor of representation. For that craft, the court held the certification invalid because no quorum had participated, and thus, no election by that craft had truly occurred. The Supreme Court did not address this issue because the unions did not appeal the district court’s decision to invalidate the certification of the carmen and coach cleaners. The parties themselves seem to have realized that no representative could be legitimate when a majority of eligible voters had not partici-

213 NMB Proposal, supra note 1, at 56,751.
214 Pub. L. No. 73-442, § 2, Fourth, 48 Stat. 1185, 1187 (1934) (“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 purposes of this Act.”).
215 NMB Proposal, supra note 1, at 56,751 (citing the Board’s 1942 Annual Report, 1 NMB Ann. Rep. 19 (1942)).
216 Id. (citing Virginian Ry. Co. v. Sys. Fed’n No. 40, 300 U.S. 515, 560 (1937)).
217 Virginian Railways, 300 U.S. at 590.
218 See id.
219 Id. at 628.
220 Id. at 626.
221 Virginian Railways, 300 U.S. at 559.
participated in the election. The current Board’s proposed rule would create that very situation by allowing a minority of eligible voters to determine representation. Chairman Dougherty noted this incongruity in her dissent to the Board’s proposed rule change: “[T]he only court ever to rule specifically on the question of whether the Board has the authority to certify a representative where less than a majority of the eligible voters participates in an election found that it did not.”

The current Board also supported its proposal with the 1947 opinion of Attorney General Clark, which relied in part on the legislative history of the RLA. The Attorney General believed that the Board had the power to certify a representative in an election where less than a majority of eligible voters cast ballots, though the Board in its discretion need not exercise that power. The Attorney General noted a Senate Report on the bill, which became the 1934 Amendments to the RLA, that said “the choice of representatives of any craft shall be determined by a majority of the employees voting on the question.” Such language might support the current Board’s proposed rule, but the Board and the Attorney General failed to recognize two important points.

First, this statement by Senator Dill was made in the context of explaining how the new amendments would correct the problems of carrier interference against employees when choosing their representation. This statement was not made to delineate specific voting procedures, but simply to bolster the idea that the employees, not the carrier, would get to choose their representatives.

Second, Senator Dill’s statement is not an accurate reproduction of the language actually used in the final bill, which states that “the majority of any craft or class of employees shall have the right to determine who shall be representative . . . .” The Board forgets that Attorney General Clark’s opinion was drafted at the request of the sitting NMB in 1947. Though the Attorney General opined that the Board had the authority to certify

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222 NMB Proposal, supra note 1, at 56,753 n.2 (Dougherty, Chairman, dissenting).
223 Id. at 56,751 (citing 40 Op. Att’y Gen. 541 (1947)).
225 Id. at 542 (quoting S. Rep. No. 73-1065, at 2 (1934)).
elections where less than a majority had participated, the Board stuck to its precedent and ignored the Attorney General's opinion.229 The Board noted that under the RLA, carriers and their employees had a duty to maintain labor agreements and settle disputes efficiently so as not to disrupt interstate commerce, and the Board ruled that this duty could "more readily be fulfilled and stable relations maintained by carriers' and employees' representatives by a requirement that a majority of eligible employees cast valid ballots in elections conducted under the Act before certifications of employee representatives are issued."230 Thus, in the Board's opinion, stable labor relations required majority participation. This recognition undercuts the current Board's statement that its majority participation requirement was made for purely administrative reasons.231

The Board and Attorney General Clark argued that the RLA should be given a construction similar to section 9(a) of the National Labor Relations Act (NLRA).232 The Attorney General noted that the language of section 9(a) is similar to the language of section 2, Fourth, of the RLA, and that the National Labor Relations Board (NLRB) had interpreted section 9(a) as allowing representative certification based on a simple majority of votes cast.233 However, section 9(a) was enacted after section 2, Fourth, of the RLA, and the language of the NLRA is no less ambiguous than that of the RLA.234 Given this language ambiguity, it is difficult to see how the NLRA necessarily demands that a representative should be chosen by a majority of ballots cast. Rather, the NLRB has interpreted that language to allow certification based on a simple majority of votes cast.235 The NMB and NLRB are distinct, independent agencies, and if the NLRB wishes to interpret its enabling statute in that manner, the NMB is under no duty to follow suit. In fact, to suggest that the NMB should follow the NLRB's procedure is to undermine the deci-

229 Id.
230 Id.
231 See NMB Proposal, supra note 1, at 56,751.
234 National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 453 (1935) ("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 . . . ").
sional autonomy of the NMB in determining election procedures.

In her dissent to the NMB’s proposed rule change, Chairman Dougherty notes another important distinction between the RLA and the NLRA: decertification.\footnote{236} Under its authority from the NLRA, the National Labor Relations Board has established formal procedures that allow employees to decertify their current union representation.\footnote{237} As discussed in Part III above, the NMB has no such formal decertification procedure. While it is possible for a union to lose its certification, as occurred in Al\-\italia,\footnote{238} this is a difficult process. Employees do not have the simple option of petitioning for a decertification election.

The lack of a formal decertification procedure becomes critical when considered in conjunction with NMB Rule 1206.4, which limits the frequency of applications for investigation into representative disputes.\footnote{239} Under that rule, employees or carriers must wait two years after a representative has been certified to apply for investigation of a representation dispute.\footnote{240} In other words, employees are stuck with their union for two years. Under the proposed rule, unions do not have the majority participation hurdle to clear, and certification will likely come more easily. For those who do not want any form of union representation, two years is a long time to be held to the desires of an unwanted union.

In its rule change proposal, the Board noted that previous boards justified the majority requirement based on maintaining stable labor relations under the RLA.\footnote{241} The current Board asserts that this reasoning is inaccurate and that stable labor relations are the result of the NMB’s mediation function rather than its role in certifying employee representatives.\footnote{242} The Board claims that its power to determine mediation duration compels the parties to compromise their positions and come to agreement, thus obviating the need for strikes.\footnote{243} The Board’s reasoning is quite specious when one considers the nature of

\footnotesize{236 NMB Proposal, supra note 1, at 56,753 (Dougherty, Chairman, dissenting).  
237 Procedures Guide, NLRB, http://www.nlrb.gov/publications/Procedures_Guide.htm (requiring that 30% of employees have petitioned to have a decertification election) (last visited Aug. 30, 2010).  
240 Id. § 1206.4(a).  
241 NMB Proposal, supra note 1, at 56,751.  
242 Id.  
243 Id. at 56,751–52.
mediation itself. If successful mediation is responsible for labor peace, then certification of representatives is the foundation upon which that mediation success is built. One cannot isolate mediation from representation certification because successful mediation cannot occur unless those bargaining have the authority and confidence given by those they purport to represent. That authority and confidence is granted by employees, and under the Board's seventy-five year procedure, elected unions can be confident that their authority is legitimate. Employees have greater confidence and faith in their elected representatives when they know a majority of employees support representation. The Board's proposed rule threatens to undermine this confidence. If a union purports to represent employees, a majority of whom did not favor representation, how can that union be a successful negotiator during mediation, arbitration, or private dispute settlement?

The Board further attempted to justify its rule change by asserting that "labor relations in the air and rail industries have progressed since the early days of the RLA but many of the Board's election procedures have not."244 The Board noted, as was discussed in Part II above, that company unions were widespread in the early days of the RLA. Yet, the current election procedures and the majority participation rule were effective in breaking those company unions and encouraging interference-free employee elections. If the current rule was effective, then the Board fails to explain how better labor relations have made the rule less effective now. The Board asserted that "[a]ir and rail labor and management now go to great lengths to encourage employee participation in workplace matters."245 If this is the case, and employees are participating in greater numbers, then the majority participation rule serves no hindrance to those employee groups that truly wish to be represented.

As part of the proposed rule, the Board noted that in future elections, employees will have the opportunity to vote "no," or against union representation.246 The Board stated that as part of the progression of employer and labor relations, employee participation is strongly encouraged today, and giving employees an affirmative choice against representation furthers that

244 Id. at 56,752.
245 Id.
246 Id.
However, the current procedure has been in place for seventy-five years, and if labor and management have taken greater measures to encourage participation, then is it not reasonable to conclude that many (if not most) employees are aware of the effect of their non-participation in an election? While the Board was right in explaining that employees do not vote for many reasons—indifference, conscious choice, etc.—the Board placed too much emphasis on employee indifference. If employee participation has increased, then perhaps the "indifferent" non-voters are truly cognizant of their decision not to vote and really intend to "vote" against unionization through their non-participation.

The Board and labor unions condemn the current procedure as undemocratic because those who do not vote have a role in determining the outcome of representation elections. But union representation elections are unlike an election for a congressman, president, or the like, whose positions are set up by constitutions and are necessary for a functioning government. Unions are not essential to employment in the same way. Furthermore, in elections outside of labor, voters typically have comfort that elected officials sit for a specific term and often are constrained by term limits. Labor organizations and unions are not faced with these dangers. Once a union is certified, its position is indeterminate; it remains the employees' representative until the Board certifies a different union. Given the absence of formal decertification procedures, employees face the prospect of long-term dissatisfaction and uphill battles to dethrone a sitting union.

As recently as 2008, the Board itself denied a request to change election procedures. The Association of Flight Attendants alleged a representation dispute and the Board authorized an election. The Association requested that the Board change its ballot to a simple "Yes/No" ballot, and that the Board certify the union if it received a simple majority of votes cast. This is exactly the procedure the Board now proposes to use. But the 2008 Board rejected these requests, holding that "no

247 Id.
248 See id.
249 Id.
250 NMB Manual § 15.1.
252 Id.
253 Id.
caselaw ... supports an unannounced and extreme departure from decades of NMB balloting rules and procedures.\footnote{Id. at 130–31.} The Board continued: “The level of proof required to convince the Board the changes proposed are essential, then, is quite high, and has not been met.”\footnote{Id. at 131 (quoting Chamber of Commerce of the U.S. and the International Bhd. of Teamsters, 14 N.M.B. 347, 363). The Board in \textit{Chamber} opined: “Since the Board has a long-standing policy of amending its rules only when required by statute or essential to the administration of the Act, it follows that those seeking rule changes bear a heavy burden of persuasion.” \textit{Chamber}, 14 N.M.B. at 356.} Ironically, the current Board now proffers the failed arguments that the Association made to the 2008 Board in its rule change request—employee participation, the “undemocratic” nature of the election procedure, and results based on non-action.\footnote{See generally NMB Proposal, \textit{supra} note 1.} The Board has not shown that labor relations in the airline and rail industries have changed so much in the year-and-a-half since \textit{Delta} that a rule change is necessary.

So what has changed since \textit{Delta}? Only the makeup of the Board itself. Board members Harry Hoglander and Linda Puchala—drafters of the proposal—were appointed by the new administration under President Obama.\footnote{Id. at 356.} Both Mr. Hoglander and Ms. Puchala are former presidents of labor organizations.\footnote{Obama Union Rules, \textit{supra} note 14.} Having experience in labor relations is no doubt important and helpful for members of the Board, but being tied so closely to the parties that will likely benefit most from a rule change raises the specter of bias or special treatment. In fact, Chairman Dougherty expressed this concern: “[I]t ‘gives the impression that the Board has prejudged this issue,’ and is trying to ‘influence the outcome of several very large and important representation cases currently pending.’”\footnote{Id. \textit{(quoting Chairman Dougherty’s letter to Congress).}} Chairman Dougherty’s remarks also illustrate the questionable timing of the NMB’s rule change proposal. The Board proposed the rule change after a request from the Transportation Trades Division of the AFL-CIO.\footnote{NMB Proposal, \textit{supra} note 1, at 56,752 (Dougherty, Chairman, dissenting).} Not coincidentally, the union’s request came in the wake of the Delta and Northwest Airlines merger, where the un-
ions have struggled in the new elections because of Delta’s lower unionization rates.\textsuperscript{261}

Even if the Board’s proposal is not a direct attempt to stack the deck in favor of unionization, the mere intimation of such could critically damage the Board’s legitimacy, reputation, and authority. Both carriers and employees enlist the help of the Board in labor disputes, and both come to the Board with the expectation that it is a neutral, unbiased, and fair decision-maker. The Board’s power to certify representatives and mediate disputes is critical to maintaining peaceful labor relations. With the proposed rule, carriers will likely not see the Board as a neutral party but rather as a union ally. Under the RLA, carriers have a duty to come to the table and negotiate in good faith, but carriers are not obliged to enter any agreements with employees or their unions.\textsuperscript{262} If employers believe a major player in the game is biased, they have one less reason to come to agreement with their employees. This is not the environment that the RLA demands. That Act’s purpose is simple: to encourage peaceful settlement of labor disputes in the railroad and air industries so that interstate commerce flows smoothly.\textsuperscript{263} The proposed rule takes a step backwards from that purpose.

\textbf{V. CONCLUSION}

The Railway Labor Act of 1926 and its later amendments aspired to reduce conflict between labor and management in the railroad and airline industries. To that end, the Act established the National Mediation Board which stands as a neutral government agency that helps carriers and employees through its mediation and arbitration services. One of the Board’s most critical duties is the investigation and certification of the employees’ union representatives. For seventy-five years, the Board has conducted its investigation through secret ballot elections among a carrier’s employees, and before certifying a union as a representative, the Board has required that at least a majority of eligible employees cast valid ballots in favor of representation. The Board believed this policy was not only legitimate but necessary because unions could more effectively negotiate labor disputes when they enjoyed the support of a majority of employees. The Board has faithfully followed this policy, deviating only

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\item \textsuperscript{261} Obama Union Rules, supra note 14.
\item \textsuperscript{262} See generally Pub. L. No. 73-442, \textsection{} 2, 48 Stat. 1185 (1934).
\item \textsuperscript{263} Id.
\end{enumerate}
\end{footnotesize}
when circumstances—such as carrier interference—necessitated a change in the balloting process. Historically, the judiciary has afforded the NMB wide deference in carrying out its duties under the RLA, and successful challenges to the Board’s discretion have been few.

The current Board now proposes to adopt a rule changing its certification procedures so that a majority of eligible voters need not participate. Rather, the Board will certify any union receiving a majority of valid ballots cast. This change stands to reduce one of the hurdles to union certification. Statutory and case law suggest that the Board has the authority to make such a rule change, but the Board has not adequately justified the need for the new rule. The Board has not established that employer and labor relations have changed so dramatically as to necessitate a rule change. The Board has failed to realize the importance of representative certification to maintaining stable labor relations. The Board has failed to show that the current election procedures are “undemocratic.” The specter of partisan politics looms over the Board’s proposal and threatens to undermine the Board’s authority and image as a neutral mediator of disputes among carriers and employees. With the Board’s authority thus compromised, its effectiveness will suffer, and the goals of the RLA—encouraging labor peace and reducing interruptions in interstate commerce—will be lost.