Mary Johnson, General Counsel
National Mediation Board
1301 K Street NW, Ste. 250E
Washington, DC 20005

RE: RIN 3140—AA01; Decertification of Representatives; Notice of Proposed Rulemaking

Dear Ms. Johnson:

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to submit these comments to the National Mediation Board ("Board"), pursuant to the Board's Notice of Proposed Rulemaking, 84 Fed. Reg. 612 (Jan. 31, 2019). This letter provides information on the Chamber's view regarding potential changes to the Board's decertification procedures.

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The Chamber represents numerous airline and railroad employers, all of which are employers under the Railway Labor Act ("the Act") and affected by the proposed decertification procedure.

The Board's Proposed Rule fixes a glaring hole in the Act's enforcement scheme. Courts have long recognized that employees have the right to decline representation under the Act. But because the Act lacks any codified decertification procedure, employees wishing to decline representation must resort to the cumbersome "strawman" process or remain in a relationship with a union that they do not want. The "strawman" decertification procedure is confusing, inefficient and an imperfect measure of the actual preferences of employees. The Proposed Rule provides a more direct, effective means for employees to exercise their freedom to choose or reject union representation. Under the Act, Congress delegated rulemaking on representation elections to the Board. The Board should exercise its authority to promulgate the Proposed Rule and create a more equitable election process that better promotes employee freedom of choice with respect to union representation.

Because decertification will remain a difficult process even under the proposed rules, the Chamber also encourages the Board to consider further rulemaking to reinstate its previous election rules related to how to count employees in a craft or class who refrain from voting. The Act contains particular language requiring a majority of employees in a craft or class to support representation in order to certify union representation. The Board's current rule allows for union certification with less support than the statute intended, essentially meaning that a union can be certified with only minority support. The Board should consider changing that rule to further its goals of encouraging employee free choice and finding for certification only when employees clearly express their desire for it.

1) The Railway Labor Act Seeks to Promote Employee Free Choice as to Union Representation, and the Proposed Rule Furthers that Aim.

The Act protects the rights of employees in the railroad and airline industries "to organize and bargain collectively through representatives of their own choosing."[1] The Act was specifically designed to prevent strikes and labor unrest in these vital American industries. To further that aim, Congress created the Board and charged it with duties to resolve representation disputes and encourage settlement of disputes regarding labor contract terms.[2] Otherwise, the Act provides very little guidance regarding the procedures necessary for employees to elect union representation or reject it.

It is undisputed that the right of employees to choose representation under the Act includes a corresponding right to reject representation.[3] The legislative history of the Act suggests Congress intended to provide "complete liberty" to employees to decide whether to organize and, if so, which union to join.[4] Indeed, courts have held it was "inconceivable" that the Act would saddle employees with union representation in perpetuity if one group of employees elected collective representation at one point in time.[5] But the Act contains no particular mechanism to allow for decertification.[6] Instead, the Act delegates to the Board authority to set election rules and to use "any…appropriate method" to determine the representatives employees select.[7] Although the Act does not prescribe particular procedures for decertification, it leaves the Board ample discretion to craft election rules that accurately measure employee preferences as to representation.

Until now, the Board has failed to exercise its discretion to craft a clear and unambiguous procedure for decertification under the Act. Instead, employees seeking to oust an unwanted union must utilize a procedure known as a "strawman election." The strawman procedure uses a certification election to achieve decertification indirectly. But the strawman election does not provide employees with a comparable, direct process to decertify a union as compared to the process for electing representation. The Proposed Rule accomplishes the statutory goal of allowing employee liberty in representation decisions and fills an unnecessary hole in the Board's current policies.

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[1] 45 U.S.C. § 152, Fourth.

[2] 45 U.S.C. §§ 152, Ninth; 155.

[3] *See Bhd. Of Railway and Steamship Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *Russell v. Nat'l Mediation Bd.*, 714 F.2d 1332, 1344 (5th Cir. 1983).

[4] *See Russell v. Nat'l Mediation Bd.*, 714 F.2d 1332, 1344 (5th Cir. 1983) (citing Senator Wagner comments from Railway Labor Act hearings and other legislative history regarding the intent to provide employees with "absolute liberty" or "absolute freedom" regarding union representation or lack thereof).

[5] *Id*., citing *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Bhd. of Ry., Airline & S. S. Clerks*, 402 F.2d 196, 202 (D.C. Cir. 1968)

[6] *See Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Bhd. of Ry., Airline & S. S. Clerks*, 402 F.2d 196, 201 (D.C. Cir. 1968) (finding "[u]nlike the National Labor Relations Act, the Railway Labor Act has no decertification procedures").

[7] 45 U.S.C. § 152, Ninth.

Generally, the strawman process works as follows: if a group of employees desires to decertify a union, it must find an employee willing to serve as the strawman to act as a conduit to achieve decertification. The employees must explain to their coworkers that the strawman does not actually want to represent them, but that they need to petition to elect that employee so that an election can be held. The employees must gather authorization cards from more than 50 percent of the members of the craft or class in support of the strawman. If the employees can gather enough support, then they can petition the Board to hold an election. Once the election is called, the ballot will present four options: the existing union, the strawman, no union,[8] or a write-in. To win decertification, 50 percent or more of the eligible voters must vote for *either* the strawman or "no union." It is not enough for the strawman and the "no union" option to win a *combined* total of greater than 50 percent of the vote; the election is only complete if a single option achieves greater than 50 percent.

If no ballot option earns a majority of the votes, then the Board's run-off rules apply. Under the run-off rules, the Board will hold a second election between the two highest vote-getters from the first election.[9] So, for example, if the strawman receives 35 percent of the vote, the existing union receives 34 percent of the vote and the "no union" option receives 31 percent of the vote, then a run-off will be held between the strawman and the existing union, even though the combined total of votes against representation (for the strawman and no union) exceeded 50 percent of the vote. The winner of the election would then be determined by which option – the strawman or the existing union – received the majority of the votes during the runoff. If the strawman wins the run-off, he or she can then disclaim representation, leaving the craft or class without a representative and functionally achieving decertification.

2) The Strawman Rule is Confusing, Burdensome and Flawed.

The current strawman method for union decertification under the Act should be replaced with the straightforward decertification proposed in the NPRM. The strawman rule burdens employees with finding a strawman representative – a fiction under which the strawman has no real intent to represent the employees. This fiction creates confusion during the election process, is not required by the Act and is not the best way to measure whether employees prefer to reject union representation. The Board exists, in part, to create election rules that more effectively allow employees to resolve representation disputes and prevent labor unrest. The Proposed Rule accomplishes these goals.

First, the Proposed Rule is necessary because the strawman process is confusing. In order to achieve decertification, employees have to collect authorization cards in support of electing a representative they do not actually want and even though the vote is about declining further union representation. It is counterintuitive, to say the least, that employees seeking to rid

[8] The "no union" option was added during the Board's 2009 rulemaking. It did not exist when the strawman system first developed, and its addition makes the entire process even more murky.

[9] *See* FAA Modernization and Reform Act of 2012 § 1002, 42 U.S.C. § 152 (2012). Before the 2012 amendments, the run-off process could not include the "no union" option, even if it won a plurality of votes during the initial election. Based on the 2012 change, the run-off will be held between the two options receiving the most votes, including "no union" if it is one of the top two vote getters.

themselves of representation must first petition for a strawman to represent them. This is not how elections should operate. The problem is exacerbated because, even if the employees can gather enough authorization cards to support an election, their ballot options present more confusion. Should they vote for the strawman they petitioned for or "no union"? If either wins a majority vote, the employees seeking decertification will achieve their aim, but if they split the vote and neither option wins a majority, then they are subject to the run-off procedure. These additional hurdles are cumbersome, unnecessary and illogical.

The confusion created by the strawman rule is also hard to address because "crafts or classes" under the Act are broad and sometimes consist of thousands of members spread across multiple geographical, system-wide locations. These wide-ranging crafts or classes present challenges to effective communication, especially about something as unusual as the strawman process. If employees at one location wish to nominate a strawman, they must then communicate that goal with another location, explain the process, and encourage them to complete authorization cards that place their trust in a strawman they may not know. Thus, it is reasonable to assume that employees may not submit authorization cards for a strawman, even though they want to reject collective representation, simply because they do not understand the process and have not received enough information about how it works.

Second, the strawman rule unfairly burdens employees, unlike the union certification process. The NPRM accurately captures the difficulties of the strawman rule and the extra steps employees must take to proceed in a strawman election.[10] Indeed, the weakness of the strawman procedure is not only that it provides for "indirect" rather than direct decertification, but also that employees must find a person willing to put his or her name up to serve as the strawman representative. Volunteering to serve as the strawman requires one employee to bear the burden of the decertification movement for the collective and subject herself to scorn from pro-union employees and potential retaliation from union representatives. Moreover, if the employees in support of decertification lose the election, the strawman will return to the represented workforce branded with a scarlet letter because of her willingness to serve as the strawman.[11] These potential consequences are simply unfair and unnecessary, and the Proposed Rule eliminates the problems caused by singling out a strawman.

It is clear the Act does not require the Board to retain the strawman rule or to perpetuate this confusing fiction. Congress specifically delegated to the Board the ability to craft effective election rules. Nothing in the Act or court decisions interpreting it prevents the Board from enacting a straightforward decertification procedure. To the contrary, a reasonable interpretation of the Act is that Congress wanted to ensure employee liberty as to union representation in the

[10] *See* NPRM at 612.

[11] The current election procedure also burdens employers because of the restrictions placed on participation or involvement of employers in the process. Employers cannot provide employees with information about election procedures or voting options without risking violation of the Act. The Board should consider allowing some limited, neutral employer involvement in the process to provide more information to employees, prevent retaliation by pro- or anti-union representatives and promote open communication between employees and employers in the industry. Employers can participate in the election process with influencing or interfering with employees' right to choose under the Act, and they may be able to help employees better understand the process and their options.

railroad and airline industries to prevent labor strife. The best way to achieve that goal is to create a non-fictional decertification election process that accurately captures employee preferences. Indeed, if the goal of the Act is to encourage employee liberty and labor peace rather than forced collective representation, there is no question that the Proposed Rule better accomplishes that aim.

3) The Proposed Rule will not Cause Increased Labor Uncertainty.

The Act instructs the Board to use its authority to adopt policies and practices that encourage labor peace and reduce the likelihood for work stoppages or disruptions in the railroad and airline industries.[12] The Proposed Rule creates a more efficient means to determine whether employees prefer representation or prefer to deal with their employer directly. This improved process will prevent disputes about employees' true intent and encourage resolution of representation disputes through the election process rather than other illegal or undemocratic action. The Proposed Rule will reduce the likelihood of labor stoppages, avoid lingering resentment that may exist after a strawman election or attempt to gather support for one, and create more confidence in a straightforward decertification election process. Further, the Proposed Rule includes a two-year election bar associated with certification or decertification elections, so it will not cause a significant increase in the frequency of decertification efforts. It also maintains the requirement that at least 50 percent of the craft or class employees petition for decertification before such an election is held. Although the Proposed Rule creates a less confusing, more efficient way to vote in a decertification election when a valid petition is filed, the rule will not create constant challenges to union representation because of the two-year bar and the 50 percent petition requirement.

The Act's goal to promote labor peace and industry stability does not mean it needs to promote continued unionization. Labor peace is best attained when employees have the representation or independence they desire. The current system perpetuates a bias in favor of unionization that suffocates employee choice and is thus more likely to cause labor tension than prevent it.

4) The Proposed Rule Represents an Appropriate Exercise of the Board's Rulemaking Function and Complies with the Administrative Procedure Act.

Finally, the Proposed Rule is lawful and within the Board's authority under the Act. In the NPRM, the Board articulated a number of good reasons to introduce the rule and considered the relevant factors based on its delegated authority. The rule is not arbitrary or capricious and addresses a legitimate weakness in the Act's current administrative scheme. Thus, if adopted, the Proposed Rule should withstand judicial scrutiny.

[12] 45 U.S.C. 151a.

Thirty years ago, the Board refused a petition by the Chamber of Commerce to craft a formal decertification procedure.[13] The Board held the Chamber to a "heavy burden of persuasion" to show that its proposed decertification rule was either required by the Act or "essential for administrative purposes." In rejecting the Chamber's petition for rulemaking, the Board justified its decision on several grounds that no longer apply. The Board noted that it rarely engaged in rulemaking, which countenanced against changing its rule unless absolutely necessary. Since then, the Board has engaged in rulemaking more frequently. The Board's previous sparing use of rulemaking does not invalidate the propriety of this Proposed Rule.

Further, the Board has recently engaged in rulemaking with much more dubious reasoning. The Board's 2009 decision to change its election rules to disregard abstentions by members of a craft of class rather than count them as votes against representation relied on a tortured interpretation of the Act and created bad policy. The Act includes language that states a union may be certified only if a majority of the members in a craft or class vote for representation. 45 U.S.C. § 152, Fourth. The Board's rule change fundamentally altered that calculus and reduced the showing of support required to certify a union below the levels Congress intended. As a result, unions may be certified to represent a craft or class when a majority of those employees do not actually vote for collective representation. The Chamber encourages the Board to revisit its decision and consider whether it best reflects the legislative intent of the statute and represents the best policy for conducting elections. The Chamber believes the Board should change the rule back to its original form because the original rule more accurately captured the actual desires of employees with regards to representation.

Despite refusing to grant the Chamber's previous petition for rulemaking, the Board recognized the legislative history suggesting that employees should have a meaningful ability to reject union representation. The Board has now independently recognized that its election procedures are insufficient and the Proposed Rule is, in fact, essential for proper administration of the Act. The Board's rulemaking authority under the Act is broad and it can enact rules as long as they do not contradict a statutory requirement of the Act, and as long as they can satisfy arbitrary and capricious review under the APA.[14] Here, both requirements are clearly met, and the Board is entitled to engage in rulemaking.

First, the Act is silent as to decertification procedures. Because courts have found that the Act clearly did not contemplate infinite representation once a group of employee elected a union, the Board's attempt to codify a decertification rule represents a proper exercise of administrative gap-filling. The Board is within its statutory authority to craft a rule to resolve the inherent ambiguity within the statute, so long as it is a reasonable interpretation of the statute.

The Board succinctly articulates its justification for the Proposed Rule – it is necessary to fulfill the statutory mission of the Act and eliminate hurdles for employees who no longer wish

[13] In the Matter of the Petitions of the Chamber of Commerce of the United States & the Int'l Brotherhhood of Teamsters Requesting the Amendment of Bd. Rules Pursuant to 29 C.F.R. S1206.8(b), 14 NMB 347, 359 (July 24, 1987)

[14] *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 484 (D.C. Cir. 2011) (analyzing the Board's rulemaking authority based on the APA and *Chevron* deference principles).

to be represented.[15] The Board believes, logically, that the Proposed Rule will better accomplish the statutory goal of "freedom of association among employees."[16] These persuasive arguments for adopting a formal decertification procedure are acceptable reasons to change the rule under the APA. The Proposed Rule also puts decertification on par with certification, so it is a reasonable interpretation of a statute that focuses on accurately gauging employee preferences.

Further, the fact that the Board previously refused to enact decertification rules does not create a heightened burden for the Board's current rulemaking. The Supreme Court has specifically held that the APA allows an agency to change a prior policy or interpretation of a statute without being subject to "more searching review."[17] Thus, the fact that the Board refused to adopt a decertification rule in response to the Chamber's proposal in the 1980s does not prevent the Board from adopting the Proposed Rule now. The Board is free to change its views as long as it acknowledges its change and provides a "reasoned explanation" for it, and it is clear the Proposed Rule meets that standard.[18]

5) The Board Should Adopt the Proposed Rule.

For the foregoing reasons, the Chamber urges the Board to adopt a formal, straight forward and efficient decertification procedure consistent with its NPRM. The Board has an opportunity to take action that is long overdue for the benefit of employees and employers in the airline and railroad industries. The Proposed Rule meets the statutory goals of the Railway Labor Act, provides a fair process for employees, unions and employers, and brings order to a disorganized process.

Respectfully submitted,

Glenn Spencer

[15] NPRM at 612.
[16] *Id*.
[17] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).
[18] *Id*.