NATIONAL MEDIATION BOARD

PUBLIC HEARING

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(Continued)

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(Continued)

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P R O C E E D I N G S

MS. JOHNSON: Okay, everybody, we're going to get started. Good morning. I want to welcome you all here today. Thank you for being here. We're here today to hear public comment on the National Mediation Board's proposed rule change. This change is proposed to providing straightforward procedure for the decertification of representatives. Notice of the proposed change was published in the Federal Register at 84 FR 612 on January 31, 2019.

I'm Mary Johnson, General Counsel of the National Mediation Board, and I'll be conducting this hearing on behalf of the Board. Seated to my left are Chairman Kyle Fortson, Member Linda Puchala and Member Gerald Fauth.

I have some administrative announcements. The restrooms are out to the left and then you'll see some blue signs to the right. There are many trash receptacles, so there shouldn't be any trash left on any seat or any table. And in case of a fire or other emergency, go left out those doors and head back in that direction and there should be a backdoor exit.

Chairman Fortson, would you like to say something?

CHAIRMAN FORTSON: Sure. Absolutely. Good morning. I'm NMB Chairman, Kyle Fortson. I want to welcome you all here today and thank you for coming this morning. The Board looks forward to hearing all of your remarks. I would also like to thank the Pension Benefit Guaranty Corporation for providing us with this space to hold this hearing. Again, thank you all for being here.

MS. JOHNSON: We have nine speakers scheduled. Each speaker is slotted for 10 minutes. During this proceeding, neither the NMB board members or staff will respond to any questions. We expect the participants to conduct themselves appropriately and we'll not take lightly any disruptive behavior.

We ask that each speaker respect the court reporter's capabilities and identify yourself at the onset of the presentation. The speakers will be standing at this podium, and in order for your presentation to be recorded, you have to press the bottom of the microphone and wait for the green light

to come on. I think I just got cut off.

(Laughter)

MS. JOHNSON: Okay, so our first speaker is Dustin Hall -- Dustin Call.

MR. CALL: All right. Looks like it's on. I'm Dustin Call from Allegiant Air. Thank you, Chairman Fortson and Members of the Board. My name is Dustin Call, manager of Airport Affairs and Legal for Allegiant.

Allegiant focuses on linking travelers in small cities to world-class leisure destinations. We started in 1999 with one aircraft and one route, Fresno to Vegas, and now we have over 75 mainline aircraft and over 400 routes.

So we appreciate the opportunity to come and give our comments on the proposed rule change. We're very much in favor of the Board's proposal for a direct and straightforward decertification process. At Allegiant, we've seen some of the confusion that's come from the current straw man procedure, so we're in support of the proposed change.

Allegiant -- at Allegiant, we respect our

employees' rights to unionize. We have four unionized workgroups. Our pilots, our flight attendants, our mechanic group and our dispatchers are all represented and we have productive relationships with them.

We also respect our employees ability to be unrepresented if they so choose and we respect them if they pursue that process. And the right to be unrepresented is expressly guaranteed under the RLA and should be given equal treatment by the Board.

And unfortunately, in the past, we've seen at Allegiant that the equal treatment has not been there with the straw man procedure, that the straw man procedure presents some hurdles that are unnecessary and kind of a complicated and convoluted process.

The first is -- you've received some comments -- or you'll receive a statement from Ron Doig, who is our straw man for the dispatchers. And one hurdle that he faced was that he was -- he kind of describes it as a burden that he had to bear to be the straw man, that he faced some threats and some retaliation from pro-union groups. And so forcing an employee to carry that straw man mantle can be viewed as a hurdle to the

employees who wish to be unrepresented to their pursuit.

Another hurdle that Ronald explained was the confusion over the straw man having to go collect signatures on these authorization cards where they're selecting him to be the representative when in reality their wishes are to be unrepresented. And so that also can be a complex or a confusing process.

And finally, the election after the straw man procedure for straw man election can also be confusing. We've seen that at Allegiant as well, where some employees who wish to be unrepresented, they can be unsure or they might have to guess whether to vote for the straw man or vote for the no representative during that election process.

And so for some examples, in 2015, our flight attendants, they went through a decertification effort. The union -- the pro-union flight attendants defeated the decertification efforts, but it was a very close election. It was decided by only 16 votes. There were 289 votes for the union and 273 votes against the union. So a very close election.

But there was also one vote that kind of went unaccounted for, because one of the votes was for the straw man and this flight attendant was trying to vote to be unrepresented. But they voted for the straw man instead of for the no representative, and so that vote didn't get counted. And although it wouldn't have turned the election in that case, we have seen very close elections at Allegiant.

In 2015 as well our dispatchers, they also had a vote to decertify and that was decided by -- or a single vote would have turned that election. That vote came down to 7 for the union and 7 for decertification. And so if one of those dispatchers would have voted for a straw man on the election ballot instead of for the no representative, then the election would have been different.

And so that confusing process is something that Allegiant is in support of eliminating, those hurdles, so. Obviously, there's going to be opposition to simplifying this process, but we believe that this is just kind of bringing the Board's rules in line with what was done in 2010. At that time, the rules were

changed to mirror a little bit -- to mirror more closely the NLRA. And we fully support the NLRA's decertification rules, which are almost identical to what the Board is proposing. And those rules have been in place for decades and have -- and in our opinion there hasn't been the confusion that we've seen.

And as a side note, we also -- at Allegiant, we're also supportive of the 2 year bar for certification after a decertification effort. Ron Doig, who's statement you have, he also explained that he with the -- when the dispatchers deunionized in 2015, that there -- only having one year didn't really give a fair opportunity for the company and the dispatchers to have a productive relationship as they would have liked. And so in his opinion and in ours, a 2 year bar would have been preferable in giving a better chance of success.

In closing, I like to emphasize again that we are fully in support of the Board's proposal. We've seen it firsthand how confusing and convoluted the straw man process can be and that the unnecessary hurdles in place with the straw man procedure don't

need to be there and that they are -- they're not going to the heart of the RLA, which is to allow employees and give them the best opportunity they can to decide for themselves whether to be represented or not. So thank you for your time and I'm done.

MS. JOHNSON: Thank you. Our next speaker is Captain DePete from ALPA.

MR. DePETE: Thank you, thank you. If I speak -- can you hear me like that? I'll have the mic down here.

MS. JOHNSON: You need to have the mic on.

MR. DePETE: Uh?

MS. JOHNSON: The mic has to be on.

MR. DePETE: Oh, yeah. Yeah, I have it on.

MS. JOHNSON: Okay.

MR. DePETE: Okay. So thank you very much. On behalf of the Air Line Pilots Association International, I thank you for the opportunity to testify today before the National Mediation Board on the decertification of representatives proposed rule.

ALPA is the largest pilot union in the world, as well as the largest non-governmental safety

organization in the world. Our association represents over 61,000 pilots at 33 airlines in the United States and Canada. And I'd like to associate myself with the comments soon to be made by Larry Willis and the AFL-CIO Transportation Trades Department and use my opportunity today to address the Board to build upon those remarks by highlighting a few very serious concerns ALPA has with this proposed rulemaking.

Now, at the outset, let me be clear: ALPA strongly opposes this proposed rulemaking. The adoption of a direct decertification procedure coupled with a 2 year election bar only serves to make it harder for employees to maintain collective bargaining rights and freely choose representation.

Specifically, by making it easier for employees to decertify their representatives and remain without representation or collective bargaining rights for a substantial period of time, this proposal undermines rather than enhances both the stability of commerce and the rights of employees under the Railway Labor Act.

ALPA strongly urges the Board to reject the

proposed rule changes. They are wholly unnecessary, undermine the stability of labor relations and run contrary to RLA's mandate to promote industry stability through collective bargaining.

Until now, the NMB, unlike the National Labor Relations Board, has used an indirect decertification process called the straw man procedure. Under this procedure, employees simply designate a straw man to run against the union representative with the understanding that if elected, the straw man would disavow representation and thus decertify the union.

This procedure is very well known, understood and used. It has been for numerous years, for decades to decertify unions under the RLA. In fact, this well known method was used just last year by the Kalitta Air pilots to decertify their representatives and join ALPA with an unsolicited write-in vote I might add.

In addition to the straw man decertification procedure, the Board has long permitted a rival employee representative to petition to decertify an existing representative and serve as its replacement, as occurred when my pilot group at FedEx decided to

decertify ALPA in the '90s and become represented by the independent FedEx Pilots Association prior to their eventual return back to ALPA.

The NPRM nonetheless claims that a direct decertification vote procedure needs to be adopted, and further, that if such a decertification vote is successful, the employees will be subject to a 2 year election bar, under which they are denied the right to seek alternative representation or collective bargaining rights.

The Board majority asserts that the adoption of these new procedures is required to protect employees' freedom to choose representation and to create a level playing field for those who choose not to be represented by a union.

I honestly think that this is a solution in search of a problem, because these arguments in my experience of 32 years are patently false. The adoption of these procedures will only serve to destabilize collective bargaining and existing collective bargaining relationships.

This is exactly contrary to the Board's

mandate under the RLA. The RLA was created as an agreed upon framework for labor relations between carriers and unions and ratified by Congress for the express purpose of maintaining stability and labor relations, to the adoption and maintenance of productive, collective bargaining relationships in order to protect the flow of interstate commerce.

ALPA believes that this statutory purpose of enhancing stability of collective bargaining is the first standard by which any rule change should be judged and these unnecessary proposed changes to the Board's rules clearly fail that basic threshold test.

In fact, the Board's proposal to facilitate decertification will have the opposite effect in our view and undermine the stability of collective bargaining and bargaining relationships in the air and rail industries that are so critical to our nation's economy.

ALPA has some experience, which makes this more than just a hypothetical concern. I'm sure you all remember in the 1980's the Frank Lorenzo management team led a lengthy campaign to decertify unions at

Continental and were successful in most crafts and classes, including pilots. Decertification did not lead to stability by any means or improve labor relations. Indeed, the opposite was true.

We know the fate of both Continental and its sister, Lorenzo-controlled carrier Eastern Airlines. Both continued to lose money and Eastern eventually went out of business despite Lorenzo having successfully facilitated the destruction of collective bargaining on each of those properties.

This lesson was not lost on employees, and during the 1990s, virtually all remaining crafts and classes reorganized at the surviving Continental operation.

Indeed, where there has been decertification in the airline industry, destabilization has inevitably followed. Facilitating decertification is facilitating destabilization and it puts good, well-paying middle-class jobs at risk.

The NMB proposal would go further than merely facilitating decertification. It would also decertifying employees out of any union representation

and the protections of a collective bargaining agreement for 2 full years, even if the employees merely want a change from their current representative.

This is a marked change from current practice and this proposed organizational bar contradicts the contention that this initiative is merely designed to restore balance to the union election process under the RLA. It is a serious, in our view, anti-representational overreach that further attempts to tilt the balance of collective bargaining away from workers at a time in this country's history when we can least afford it.

It is true that there is a current 2 year bar for newly certified unions, and there's good reason for it -- I lived through it. For applying that bar to that very -- it's a very different situation. The Board has wisely adopted the 2 year bar to give a fledgling representative time to consolidate employee support, and crucially, to attempt to make significant progress in negotiating an initial collective bargaining agreement without undue concern of raiding by other unions or efforts by management to encourage

employees to dislodge it.

Allowing at least this amount of time for a new union is particularly important, given that a newly organized representative is subject to the same, as an established one -- to the elaborate and lengthy RLA bargaining process administered by the NMB.

There can be no legitimate analogy for application of the same 2 year bar to circumstances of decertification and conversion to a non-union operation. A carrier which succeeds in breaking a union does not need to negotiate agreements, nor is it subject to mediation or mediator schedules in opposing rates of pay, rules and working conditions.

This new anti-organizing bar serves none of the interests served by the present 2 year bar protecting newly certified unions. Instead, it can serve to substantially restrict workers' ability to change union representation and leave employees with an existing collective bargaining agreement with neither the protections of representation nor their collective bargaining agreements protection for 2 long years.

At the same time, this proposal blocks

employees' representational and contractual rights. Management is simultaneously gifted 2 years of unfettered ability to impose whatever terms and conditions of employment they choose.

None of this promotes the RLA's key goal of stability through fostering collective bargaining and collective bargaining agreements. Instead, the proposal would serve to undermine existing bargaining relationships and agreements, thereby sowing instability, confusion and uncertainty among industry stakeholders.

In fact, the potential chaos sown by unraveling and undermining otherwise stable bargaining unions in order to place employees outside the protections traditionally affected by this Act increases the likelihood of strikes and other impediments to the continued flow of passenger travel and cargo movement.

And after hearing the last speaker -- we are the largest non-governmental safety organization and much of what we've achieved in this country today is due to the union's involvement in that area. All of

this is completely at odds with the RLA spirit and letter of promoting peaceful and uninterrupted commerce through stable collective bargaining relationships.

Lacking any justification consistent with the statutes purposes, we view the entirety of the proposal and particularly the proposed 2 year bar as clearly punitive and anti-labor in nature.

ALPA is also here to express its concern that those proposed rule changes, which we do not believe are justified, could lead the way even to more negative rule changes that we've heard being discussed that could interfere with the future organizing efforts by ALPA and other unions.

We're troubled that the Board may be beginning to go down a path that is clearly one-sided and heading in the wrong direction. We urge a reexamination of this proposal.

In summary, ALPA speaks against the proposed changes as unnecessary, destabilizing and totally inappropriate. We ask the Board to maintain the existing rules, which are well understood, time-tested and consistent with the RLA's statutory framework.

Thank you for allowing me to speak with you today. Thanks.

MS. JOHNSON: Thanks. Our next speaker is Russ Brown.

MR. BROWN: Is it on?

MS. JOHNSON: Is there a green light?

MR. BROWN: Yes. May 21, 2018 in Lewisville, a suburb of Dallas, Texas, the bomb squad was dispatched to the home of straw man Frank Woelke. At that time, Flexjet pilots were in the middle of a decertification with the Teamsters. Frank was singled out for no other reason than he was the straw man. More on that later.

Madam Chairwoman, Member Puchala and Member Fauth and General Counsel Johnson, thank you for having us here. And let me take a moment to commend the National Mediation Board for the service that you provide to the American people. A small agency that you are, the NMB has a big task, and all of the NMB people that I have dealt with at the agency have served honorably and remarkably efficient.

My name is Russ brown. I'm the President of

the Center for Independent Employees, a legal defense foundation that represents employees who are oppressed by their unions and want to decertify. We work in all jurisdictions: the government sector, the National Labor Relations Act and course the Railway Labor Act.

CIE has done several of these straw man campaigns and we are uniquely qualified to talk about the real mechanics of the process and how it works. Unlike other jurisdictions, we work with -- the employees of railroads and airlines have an extra hurdle they must go through just to rid themselves of an unwanted union. Meaning instead of working to gain support to decertify their union, they have to create a straw man and get fellow employees in their class or craft to sign an authorization card saying they want to be represented by a straw man.

That support must be by more than 50% of the class or craft across the entire domestic network. The 50% plus is a very tall hurdle.

If the employees gain enough support, they can apply to the NMB for an election, where the ballot will have four choices: the incumbent union; the straw man;

the write-in choice, which by the way I believe that should be eliminated as well; and finally, no representation.

Here's the catch. After no less the monumental effort it took to get more than 50% of their class or craft to sign an authorization card for a straw man, they now have to tell their supporters in order to decertify "don't vote for me, don't vote for the straw man, you have to choose the no representation choice."

I can tell you from our experience at CIE, no matter how much education you do, there will be people that will still vote for the straw man. This system is confusing and disenfranchises the class or craft. It also makes a target of the straw man.

The following is an excerpt from straw man Frank Woelke's comments, which were submitted last night. I'm going to begin this excerpt from the last sentence of the second paragraph and I'll end somewhere around the middle of the fourth paragraph. "The worst has yet to come. In the spring of 2018, I began receiving vulgar postcards at my home. These were

professionally printed cards and professionally printed envelopes. Every one of them referred to me specifically by name. One of my teenage daughters opened one of these we received and was brought to tears when her father was referred to as a bitch who sold himself.

The number of cards delivered each day steadily increased. Sometimes hundreds of postcards a day would arrive. My kids were no longer allowed to check the mail.

A private armed security firm was hired to watch my house. The security firm installed triple lock locks on all the doors and my children had to learn to double dabble doors every time they went in or out.

Our local police were contacted and informed of the situation. My wife was so concerned that she purchased a pistol. She trained to use it for home defense. We had never had a pistol in our home.

Our entire family was constantly on alert for strange cars or people in our neighborhood. My children, away at college, were taught to be extra

vigilant. I agonized every time I left to work to fly a trip.

All of this concern was not unfounded. On May 21, 2018, while I was on an extended trip to Sardinia, I received a call from a friend of the family who was living with us while she attended college. A box with no return address had been delivered to our house and she was frightened.

I told her to place the box outside. I immediately called our local police department long distance from Sardinia. They immediately dispatched officers to our home. Once they had seen the package, they considered it a bomb threat.

The police cordoned off the entire end of the block and the fire department dispatched both fire trucks and an empty rig. A bomb squad was called from a neighboring jurisdiction.

Our local school bus is on the same corner as our house and the buses had to be diverted. My neighbors were blocked from returning to their homes at the end of their work day." That's the end of the excerpt. And to say the least, conduct rule

(inaudible).

Consider Rob Wilson, a straw man with a travel management company also decertifying the Teamsters, where the Teamsters made libelous statement stating that while with Continental Airlines, he was labeled as a scab when he crossed the picket line in 1983.

What they left out was it was not a legal strike for self-help. And because it was not a legal self-help situation, he and the majority of the Continental pilots were all returned to the union as members in good standing. Yes, you can cross a picket line if it doesn't officially exist.

Steve Stecker, a flight attendant for Allegiant, was a straw man who was constantly being disparaged as doing his employer's bidding.

Ron Doig, an Allegiant dispatcher and straw man, was successful in a campaign to decertify the Teamsters. Yet when the election ended, the campaign never stopped, because there's inequity in the election bar. As a result, there was another election a year later, where Ron and his company and co-workers never had a chance to experience a direct relationship. As

for the election bar, when unions win, there can be no other election for a 2 year period.

To be clear, we support that timeframe for various reasons unique to the RLA. However, if no representation is chosen and the employees are successful in decertifying their union, the election bar is only one year. This is not fair and it causes instability and disruption in the workplace. We support the election bar change of 2 year threshold for successful decertifications.

In a year where values are emphasized on freedom of association on the heels of the Janus decision and new right to work states, the proposed rulemaking is appropriate and overdue. American employees deserve a straightforward process to act on their rights.

Trust me, as a practitioner, even with the straightforward process for employees to decertify, to decertify a union under the RLA will never be on a whim. The process under the proposed rule is such that when decertification rights are exercised, it will be for reasons that can and should only be answered at the

ballot box. Finalizing the rule change is the right thing to do and on the right side of history.

MS. JOHNSON: Thank you. Our next speaker is Carmen Parcelli.

MS. PARCELLI: It's still on? Yes. Good morning, Chairman Fortson, Board Members Fauth and Puchala, General Counsel Johnson. For the record, my name is Carmen Parcelli. I'm of counsel with the law firm Guerrieri, Bartos & Roma that's located here in Washington, D.C. And this morning, I'm here on behalf of the Transportation Trades Department of the AFL-CIO.

Now, TTD consists of 32 affiliated unions which represent employees in all modes of transportation, but also many organizations that include railroad and airline employees who are covered by the Railway Labor Act. I'm not going to list all of the organizations, but if you refer to the first page of my written testimony, you'll see all of them there.

So while the Board may be less familiar with TTD because it doesn't directly represent employees in matters before the Board, the unions that are constituents of TTD are very familiar to the Board and

several of them will also separately address the Board this morning.

So TTD welcomes the opportunity to address the National Mediation Board regarding its recent notice of proposed rulemaking related to decertification procedures. TTD opposes the proposed rulemaking. In our view, the NPRM is simply not consistent with the Railway Labor Act, particularly the proposed rule exceeds the scope of the Board's narrow jurisdiction under Section 2, Ninth of the Act, and it also unreasonably seeks to restrict employees exercise of the right to choose representation under the statute.

Now, TTD has requested that I address some of the legal issues that are raised by the notice of proposed rulemaking. Larry Willis, the President of TTD, will also give remarks this morning and he'll speak a little bit more from a policy perspective.

But basically, I intend to address the following five topics, briefly each one. First, I want to talk a bit about how the straw man process is rooted in the language of the Railway Labor Act itself, particularly Section 2, Ninth. But now it's also

reflected in the language of Section 2, Twelfth of the statute.

Second topic I want to address is why the Board has rejected past requests to add explicit decertification procedures through its rule making and the lack of any new justification for doing so now.

Next, I want to turn to the fact that the straw man process will continue to exist even if the Board adopts its new rule. Therefore, the stated goal of simplifying procedures under the Act will simply not be achieved.

Next, I want to take a look at how the NPRM's provision that an individual seeking decertification may file an application is in violation of the plain language of the RLA itself.

And lastly, take a look at the Board's proposal for a 2 year election bar following a decertification. This proposal simply lacks any rational basis. It unnecessarily restricts employees in their freedom of choice as guaranteed under the statute.

Now, turning to my first point. The Board's

NPRM makes it sound as if the straw man procedure were devised as some kind of malicious impediment that's intended to thwart employees from riding themselves of unwanted union representation. But really, if you look at the history of the topic, you can see that nothing is further from the truth.

In fact, through the straw man procedure what the Board has sought to do is actually to enable employees to exercise their full freedom to reject representation while doing so in a manner that's consistent with the language of the RLA. So the straw man procedure is simply what the language of the statute requires.

Now, as the Board notes in its NPRM, "unlike the National Labor Relations Act, the Wagner Act, the RLA contains no provision that sets forth a decertification process." Now, in 1947, Congress added language to the NRLA that specifically provides for a decertification process. But Congress has never chosen to amend the Railway Labor Act in a similar fashion despite making numerous other changes to the statute over the years.

So instead, Section 2, Ninth of the RLA only addresses disputes that "arise among a carrier's employees as to who are the representatives of such employees." And then also the statutory language limits the Board's power to certifying, and again I quote, "the name or names of the individuals or organizations that have been designated as authorized to represent employees." Okay? So this is just the language out of Section 2, Ninth.

And in the plainest language, the statute requires that an organization or an individual come forward as a would-be representative of the employees in order to trigger a representation dispute in order to trigger the Board's jurisdiction.

So as the Supreme Court has explained, the Board's only ultimate finding of fact is the certificate. That's Switchmen's, a very famous RLA case. And it's because of the language of the statute, especially in contrast with the decertification language which Congress added to the NRLA, that the Board has used the straw man process, and thereby they're permitting an application from a would be

representative even where it's known that the representatives ultimate intent is to disavow representation if elected.

Now, Congress most recently amended the Railway Labor Act in 2012 and those amendments shed further light on the straw man procedure. So first one thing to understand and keep in mind is that Congress legislated in 2012 against the backdrop of the Board's yes/no ballot rulemaking. So during that rulemaking process, employer groups urged the Board, as they had done previously, to adopt explicit decertification process.

So the Board back in 2010 declined to do so and they made findings that the straw man process is consistent with the Railway Labor Act and provides a fully adequate opportunity for employees to alter their representation status.

So Congress was aware of all of this that occurred in the Board's rulemaking process. And yet again, in 2012, they decided not to add a decertification provision to the Railway Labor Act. Instead what Congress did was it tasked the Comptroller

General to make a review within 180 days of "the processes applied by the Mediation Board to certify or decertify representation of employees by a labor organization."

And again, it tasked the Comptroller General to make recommendations to the Board and appropriate congressional committees regarding actions that may be taken by Congress or the Board to ensure that processes are fair, reasonable for all parties. Okay? So this they write into the statute in 2012.

Now, ultimately, no recommendations were made with respect to decertification and Congress took no further action on the matter.

Now, again also in the 2012 amendments, Congress added to the statute Section 2, Twelfth. Now, the language in this section also confirms the Board's long established reading of Section 2, Ninth as requiring an application to invoke it services that is filed by a would be representative. Okay?

So in setting forth a statutory showing of interest requirement, Section 2, Twelfth states -- and I will read in a little bit of length here -- "The

Mediation Board upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees," okay. And that's key language. And then it goes on to state "shall not direct an election or use any other method to determine who shall be the representative of such craft or class unless the Mediation Board determines the application is supported by a showing of interest from not less than 50% of the employees in the craft or class." So the 50% showing of interest now is also in the statute.

So Congress clearly understood in enacting this language in Section 2, Twelfth that applications filed with the NMB under Section 2, Ninth are those "requesting that an organization or individual be certified as a representative of any craft or class of employees." That is what the application is and must be under the statute.

Now, the NPRM that was issued by the Board proclaims that there is "no statutory basis for the additional requirement of a straw man." That's at page 613. This is simply incorrect. It's very telling that

the NPRM does not discuss the language in sections 2, Ninth and 2, Twelfth. Doesn't discuss them, much less explain how the proposed rule can be reconciled with that language. Obviously, the Board cannot disregard plain statutory language in its rulemaking.

Now, the second point I would like to make -- it's really closely related to the first point, but a little different emphasis. So employer groups have asked the Board previously to adopt an explicit decertification procedure and the Board has consistently declined to do so. And in the past, the Board has explained that its current procedures are both consistent with the statute and also emphasized that employees have an ample opportunity to alter their representation under existing rules.

So in the NPRM, the Board does not claim that any changed circumstances have led the agency to reevaluate what its held in the past, that its longstanding process is entirely adequate.

In fact, what the NPRM does is simply label the current procedures as "unnecessarily complex and convoluted" and then also as "an unjustifiable hurdle

for employees." But the Board has not provided in the NPRM even a single piece of evidence that supports these characterizations, much less evidence that shows that the procedures that they previously deemed were adequate are now for some reason no longer sufficient.

Instead, the Board seems contend to proceed without any real empirical showing whatsoever that employees are thwarted in their desires by the current process. And we suspect that no evidence is presented because it simply doesn't exist.

And in fact, our own analysis of the NMB's representation cases -- and we took it back really over the last 20 years and we're going to submit that analysis with our written comments on Monday -- what it shows when you look at the cases is that employees freely and frequently alter their representation status under the Board's current rules. So there's simply no need to change those rules. There's ample precedent that employees avail themselves of the current process.

My third point relates to the supposed aim of the NPRM to simplify the Board's procedures. Now, I've heard some of my RLA colleagues on the management side

say that the Board's new rule will get rid of the straw man procedure. But that's simply incorrect.

The straw man procedure, as I said earlier, comes out of the language of the RLA itself and it's going to continue to exist as an option for employees even if the Board's proposed rule is ultimately adopted.

And why is this? Well, if you look at Section 1, Sixth of the Railway Labor Act, that section defines a representative under the statute. And a representative can be "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its employees or their employees to act for them." Okay?

So the statutory definition says any person or persons. So an individual is plainly entitled under the language of the Act to act as a representative under the Railway Labor Act.

So therefore, the NMB will still be obligated to continue to accept representation applications that are made by individuals even if the new rule is adopted. And maybe such an individual would continue

to act as a representative at least for some period of time or he or she may act as a straw man and disavow representation. But in any event the point is, the Board is not simplifying its procedures overall, you're just adding an additional process.

Now, my next point concerns the proposed language to be included in the new rule under Section 1203.2. So as amended by the NPRM, the rule would allow an application for an investigation to be filed by "an individual seeking decertification." Okay? That's the language that's in the new proposed rule.

The rule doesn't give any further definition of the term "individual seeking decertification." So as it's written, any person could file an application seeking decertification with the Board. So this would be regardless of whether the individual has any kind of preexisting connection with the work group that's covered by the decertification request. Okay?

So just the way it's phrased, the way it's written now, really anyone no matter what connection or lack of connection they might have with the work group could file as an individual seeking decertification.

So as such, the language of the proposed rule simply is not consistent with Section 2, Ninth of the RLA. Under Section 2, Ninth only a party is permitted to file a representation application with the Board.

Under a case decided by the District of Columbia Circuit back in 1994, Railway Labor Executives' Association versus the NMB, the court addressed at length this issue of who is a party under the statute, under Section 2, Ninth. And interestingly, that case grew out of a rulemaking process that was conducted by the NMB back in 1987.

So at that time, the Board had proposed new merger procedures and the Board recognized that corporate mergers and consolidations can lead to changes in the composition of an existing craft or class, and you could even have a result where you had multiple certifications covering a single craft or class.

And so the Board proposed to allow carriers to petition to investigate representation matters following a merger, or alternatively, that the Board just initiate an investigation of its own, sua sponte.

And the DC Circuit found that such a procedure would violate the plain language of Section 2, Ninth. And the court explained to the agency that the Board "has no freewheeling authority to act as it sees fit with respect to anything denoted as a representation dispute." Okay? Instead, the Board's jurisdiction is narrowly circumscribed by Section 2, Ninth.

And then the court went on to find that the term "party" in Section 2, Ninth is limited to employees or their representatives.

They also noted that, and again I quote, "for more than 50 years following its creation the Board variably conducted representation elections only at the behest of employees or their representatives." So the rules adopted in '87 were a stark departure from what the Board had done consistently for 50 years, much as the rule today is.

The term party plainly does not include carriers or the Board itself, and therefore, the merger procedures exceeded the Board's authority under Section 2, Ninth and the court deemed that they were void.

So similarly, in the current NPRM, the Board

is proposing to allow any individual seeking decertification to invoke its jurisdiction, seemingly without regard to whether the individual is a party under Section 2, Ninth. So this aspect of the proposed rule plainly violates the statute. And if the Board were to proceed, it should expressly provide that only employees or their representatives can submit an application under Section 1203.2.

Now finally, I want to turn to the Board's proposal to apply its current 2 year certification bar to cases in which a decertification occurs under its new rules if adopted.

This aspect of the proposed rulemaking simply lacks any rational basis. It's just an unwarranted restriction on employees' right to organize and bargain collectively as guaranteed under Section 2, Fourth of the Railway Labor Act.

Now, the Board has long applied a 2 year bar on representation applications following the issuance of a certification covering the same craft or class. And the rationale for the 2 year bar is simply to give a newly certified representative 2 years in which to

negotiate a new collective bargaining agreement, and so it would be 2 years where you're free from the distraction and uncertainty of a challenge to the new representative certification.

Now, the Board's selection of a 2 year period for this purpose is really informed by its own experience in its mediation capacity. So the Board through that has recognized that collective bargaining under the Railway Labor Act is often a lengthy process. Particularly, it can be the case with a first contract, where the parties don't start out with any preexisting terms of agreement. And then the 2 year bar also aids the Board in its mediation function, because it ensures this period of stability in which it can assist the parties in reaching a first contract.

So under these circumstances, there's a solid rationale for imposing a bar that limits employees in the exercise of their rights. But no similar rationale exists with respect to decertification. Obviously, no contract negotiations follow once an employee representative is removed and there is simply no need to provide a kind of breathing room for negotiations --

there are none. Instead, employees simply return to a state of at-will employment and the employer then is free to impose terms and conditions.

So, you know, the Board is unable to apply its current rationale for the 2 year certification bar and so it has asserted instead that successful decertification, like certification, is challenging and a significant undertaking by employees with a substantial impact on the workplace for both employees and their employer.

So in the Board's view the changes in the employer-employee relationship that occur when the employees become represented, change representative or become unrepresentative require similar treatment.

MS. JOHNSON: Carmen, you're running out of time.

MS. PARCELLI: Thank you. I'm almost done. So the Board offers this view, but without benefit of any factual support. Indeed, the Board itself has no experience working with groups of employees following decertification since that would not trigger its mediation function.

So it's unclear how the Board can form any opinion regarding the challenges for employees or employers after decertification.

So in conclusion, the NPRM suffers from substantial legal defects. Even under the deferential standard that federal courts generally apply in reviewing agency rulemaking, we do not believe that the proposed rule would survive judicial scrutiny. And for this reason, we urge the Board not to adopt the NPRM in a final rulemaking. Thank you.

MS. JOHNSON: Our next speaker is Glenn Taubman.

MR. TAUBMAN: Good morning. I am Glenn Taubman on behalf of the National Right to Work Legal Defense Foundation. The Foundation is a nonprofit charitable organization providing free legal assistance to individual employees only.

The Foundation staff attorneys represent individual employees in litigation challenging the abuses of compulsory unionism arrangements and advise employees about their rights concerning the imposition of union monopoly bargaining in their workplaces.

Since its founding in 1968, the Foundation has provided free legal assistance in virtually all of the United States Supreme Court cases involving employees right to refrain from joining or supporting a labor organization as a condition of employment, cases such as Communications Workers versus Beck, Chicago Teachers Union versus Hudson, Harris v. Quinn, most recently Janus v. AFSCME, and cases under the Railway Labor Act, including Airline Pilots versus Miller and Ellis versus Railway Clerks.

Of most importance to this rulemaking proceeding, Foundation staff attorneys represented the employees who attempted to decertify in Russell versus National Mediation Board, the groundbreaking case that recognized the right of employees to decertify under the Railway Labor Act and that is cited in the notice of proposed rulemaking in this proceeding as one of the main reasons to simplify the decertification process.

The Foundation fully supports the proposed rules and the Foundation is uniquely qualified to comment on the proposed rules. I wish to make three points this morning. The Foundation supports the

proposed rules because the RLA mandates employee free choice, not perpetual forced unionization.

RLA Section 2, Fourth provides that a majority of any class or craft of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter. Applying this statute, the federal courts are unanimous in holding that the RLA gives employees the right, but not the obligation to choose a representative and the corresponding right to have no representative at all.

The famous ABNE case states "the legislative history supports the view that employees are to have the option of rejecting collective representation." The Fifth Circuit in Russell said "employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well."

The bottom line is that the RLA's undisputed and primary policy is employee free choice and the selection or non-selection of the representative. In fact, you can't get to collective bargaining and so-called labor stability unless and until employees first exercise that feature as a right.

My second point is that the proposed rules are desperately needed and long overdue. Currently, and for too many decades, the Board has employed a "confusing and obfuscatory process" for employees seeking to unseat an unpopular incumbent union, and that's a quote from Former Member Dougherty of the NMB.

Under the current rules, employees cannot simply request a decertification election. They must designate the straw man to run ostensibly as employees new representative, with the straw man expected, although not legally bound, to disclaim that representative status if he or she gets elected.

The employee straw man, moreover, must conduct this campaign using his or her own time and financial resources, while the incumbent labor union can use its "often considerable economic, political and informational resources" to try to defeat the decertification effort and cling to power. And that was a quote from the Lehnert versus Ferris Faculty Association.

Given this convoluted process in the large nationwide bargaining units common in the air and rail

industries, the Foundation does not believe that the Board's current procedures have ever resulted in decertification of a representative of a craft or class of more than a few hundred employees.

And it's here that I want to tell you a bit about my day to day practice of law in representing employees. I've been a staff attorney with the National Right to Work for 37 years. I take calls every day from employees seeking information about their right to disassociate from a union, whether by resignation from union membership or revoking a dues check-off authorization or declaring dues subject their status under Ellis v Brock, or by decertifying the incumbent union.

I can tell you that most RLA covered employees I speak with are left confused and disheartened when I explain the straw man rule. The decertification process under the National Labor Relations Act is complicated and there's all sorts of technical rules regarding election blocks and bars. A decertification under the National Labor Relations Act is a piece of cake compared to the straw man rules under the RLA.

Most employees I talk to under the RLA give up and are never heard from again when these obstacles are explained to them. This is a true fact, but it is unfair and bad public policy for this Board to allow such an asymmetrical regime of easy to get in, difficult to get out.

This is especially true given the geographic spread of employees in so many of the RLA's large nationwide bargaining units. It's not wrong to say that a union that gains power under the RLA will almost never have to give it back and this is not fair if the RLA actually favors employee free choice and not permanent incumbency.

Labor unions in America do not have to stand for periodic decertification and it is been estimated that 94% of unionized workers in America have never voted for the union representing their workplace. Perpetually encrusting a labor union on to a workplace with no showing of current employee support does not lead to workplace stability.

In fact, past NMBs have invoked the rationale of labor stability to support the straw man rule,

claiming that the rule imposes headwinds against decertification precisely to discourage unions from raiding an already represented workplace. But that should be more properly called labor union stability, not labor stability.

The NMBs past reliance on stability for unions to impede decertifications was wrong and highlights the way in which the agency lost its way in the past. In fact, continued representation by an unpopular minority union is itself a grave threat to stable operations of interstate commerce that the RLA is supposed to foster.

The Supreme Court said in the famous garment workers case there could be no clear abridgment of the labor law than for a union and employer to enter into a collective bargaining relationship when a majority of employees do not support union representation.

Russell was decided 36 years ago. Almost two generations of workers have come and gone in that time yet employees under the RLA are still saddled with unions voted in many decades ago with no easy means to express their representational preference.

Even with the proposed rules being adopted,

these employees wishing to end or change the union representation will still face enormous hurdles. The time has come to change the rules to place certification and decertification elections on an equal footing and get rid of a policy that everyone agrees is confusing and obfuscatory.

My final point is: the Board has statutory authority to enact the proposed rules. Any argument that the NMB has no statutory power to change and must retain the current unbalanced and discriminatory regime is false. The courts have long recognized and the Board agrees that employees have the right to reject representation. Implicit in the right to reject representation is the Board's power to issue a certification order when employees so choose.

It is true that the RLA spells out no specific procedures for either representation or decertification and for that matter does not mention the idea of a straw man.

However, in Russell, the U.S. Court of Appeals for the Fifth Circuit rejected the Board's argument that it could not process a plaintiff's application for

an election to terminate elective representation because no procedure for decertification is contained in the Act. Russell and many other court cases implicitly recognize that the NMB has authority to specify procedures for decertification.

And finally, the case that was referenced previously, Railway Labor Executives versus NMB, a D.C. Circuit en banc decision from 1994, does not stand for the proposition that the Board cannot adopt the proposed rules, as many will surely argue. The issues in that case were completely different and that was a divided D.C. Circuit en banc opinion, a closely divided D.C. Circuit en banc opinion. And the issue in this proceeding is much different than the issue in that case.

So in conclusion, the proposed rules are long overdue. Employee free choice is the RLA's most significant policy and the proposed rules are needed to ensure that all employees have an equal and fair choice regarding union representation.

The Board has statutory authority to adopt the proposed rules and should do so as soon as possible.

Thank you.

MS. JOHNSON: Thank you. Our next speaker is Sara Nelson.

MS. NELSON: Good morning. Chairman Fortson, Board members Puchala and Fauth, thank you for the opportunity to testify here today.

My name is Sara Nelson. I'm the President of the Association of Flight Attendants, representing 50,000 flight attendants at 20 different airlines. I am also a 23 year United Airlines' flight attendant from the rank and file. And with me here today is also an American Airlines flight attendant, Ivy Milles (ph), who is a representative from the Association of Professional Flight Attendance.

So I -- we did submit our written testimony from AFA that offers AFA's position that this rule change is really counter to the mission and an historical mandate to the Board. And the Board doesn't really have the authority to make this change either.

But I can't help but note where we are today, at the Pension Benefit Guaranty Corporation, where the United Airlines pension plans sit. And when 100,000

workers -- or retirees have their pension plans on the line, we didn't hear a word from the Right to Work Legal Defense Fund, we didn't hear any concern for the employees who were using that certainty in their retirement.

And we take at issue those who are pressing an ideological anti-union animus here. We find it frankly pretty outrageous and offensive that this proposed rule is being championed by an outsider's agenda "trade labor-management relations is adversarial in the airline and railroad industries." And that's simply false. This law, the Railway Labor Act, was built on historical labor-management cooperation and in a bipartisan fashion.

And it's been through collaboration that we've built the safest transportation system in the world. We have championed, as unions, the public good and the safety and health in air travel. And most recently, we were unanimous in standing together to stop the government shutdown. And now unanimous in our work to promote legislation that will stop a shutdown from ever happening again or ever affecting the government

functions that are so necessary for us to continue as the safest transportation system in the world.

Unions have done a lot of good. Our union in coordination with other flight attendant unions ended smoking on planes. We are addressing sexual harassment in the workplace and we have fought to end discrimination, to provide opportunities for both men and women.

Our pilots are among the best trained in the world, as we've come to learn the importance of that in recent days. And that has been by the promotion of the pilot unions in demanding those standards. We are working in collaboration to fight for a level playing field in open skies agreements and other trade deals to ensure that the American workers and American companies can compete with everyone around the world.

Nonunion groups also benefit from our unions as many of the work rules that are formed at those nonunion carriers really mirror what's in the union contracts, because unions negotiate what works at the airlines and for the workers that we represent.

And our unions have also provided an

incredible training ground for some of the most effective mediators at this agency.

Now, as AFA President, I literally meet with and talk with thousands of workers in the airline industry, both workers represented by unions and those who are not. For those union workers I meet and hear from is the same refrain, "I appreciate having a contract that guarantees me good wages and benefits and I want my union to be even more aggressive in representing our members. From nonunion workers, I hear a burning desire for union representation, for due process at work, for a contract that forces management to keep its promises and provide the middle-class lifestyle that's disappearing from America.

I have never once been told by an airline worker nor in the elections that we have been involved in that they want a more direct decertification process. For anyone to believe that that is true is engaging in wishful thinking based on a desire to see unions disappear and to not see the very good that unions do in this country.

And despite terrorist attacks, bankruptcies

and economic downturns, the airline industry continues to provide good jobs and benefits and a middle-class life to millions of workers and their families precisely because the unions were there protecting their members interests throughout the worst of times.

In an age of soaring inequality, where millions of young millennial workers are forced to take low paying jobs with no health insurance, paid vacations or pensions, the unionized airline industry acts as a wall against this ongoing economic attack on working Americans.

This proposed rule will embolden an employer to inject itself into the decertification process. That the Board's rule purports to protect employees from carrier election interference is cold comfort to unions like AFA, who have watched as employers repeatedly interfered during the election period while the Board refuses to investigate until after the election is over and the damage done is too great to undo, a Board practice which has applied until recently where the employer claims have called for an election interference investigation.

The fear of employer interference is not mere speculation or fear mongering. Airline management have privately told me on many occasions that despite record profits in recent years, Wall Street is relentless in its pressure on CEOs to take on their unions, to just get rid of them.

Even those companies with decades long collective bargaining relationships are under intense pressure to reduce costs and increase shareholder value by cutting wages and benefits. They want more in stock buybacks and less to the employees. And that's not a recipe for ensuring labor stability in rail and air industries. And as we're seeing across the country, when workers are stretched to the limit, they will strike back.

A 2 year bar following decertification since no negotiations will occur at a union carrier -- I'm sorry, a 2 year bar undermines the Railway Labor Act's fundamental guarantee of providing employees with the right to select their own bargaining representative by erecting a new barrier to representation for the additional 2 years.

This is simply not going to create the collaborative environment that maintains labor peace, the environment that continues to promote interstate commerce.

And I like to know who's not here today? There's no airline or railroad management with any significant contribution to interstate commerce who is here today in support of this rule change. That is because they know the value of having this collaborative relationship and they also know that it's necessary that the unions are there to put a check on their boards and on Wall Street that continue the pressure to try to force them to impose unrealistic wages, benefits and work rules on the employees of the airlines -- unrealistic, and dare we say, unsafe conditions of these airlines.

So for these reasons, we encourage the Board to dismiss this proposed rule change and we will be happy to work with you on any additional questions you may have.

MS. JOHNSON: Thank you. And I just want to say to the remaining speakers we need to be out of this

room by noon, so please bear that in mind. Our next speaker is Larry Willis.

MR. WILLIS: Good morning. Good morning. Do I turn this on or it's good?

MS. JOHNSON: Is the green light on?

MR. WILLIS: No. Sorry.

MS. JOHNSON: Okay.

MR. WILLIS: Good morning. My name is Larry Willis. I'm the President of the Transportation Trades Department at the AFL-CIO. I appreciate the opportunity to testify this morning.

As earlier mentioned, Carmen gave a good overview of the legal arguments of why we believe that this rule should be rejected. I want to touch on a couple of arguments that she made, but focus on some broader policy issues.

We are a coalition of 32 unions that represent workers in almost all areas of transportation. Our TTD includes several unions that represent workers under the Railway Labor Act and thus have a vested interest in this rulemaking, including a number of unions that have already testified today or will testify, ALPA, the

Machinists and AFA.

In short, I'm here to express our strong opposition to this proposed rule and urge the Board to reconsider moving forward with this measure. The proposed rule is unnecessary, it limits the rights of working people to seek union representation, and undermine stability and labor-management relations.

In fact, after carefully reviewing the Board's proposal, our executive committee, which met earlier this month, unanimously adopted a policy statement opposing this rule.

We're not alone in this position. We understand that Transportation Committee Chairman Peter DeFazio, Rail Subcommittee Chair Dan Lipinski and Aviation Subcommittee Chair Rick Larsen sent a letter to this Board expressing their opposition to the rulemaking and specifically noted that it would unnecessarily limit the rights of workers to choose union representation after a decertification vote. Senator Patty Murray, the Ranking Democrat on the Health Committee, sent a similar letter and urged the Board to reverse course.

Quite frankly, it's easy to see why. The proposed rule needlessly undermines the rights of aviation, rail workers and does so at a time when working people are turning to collective action at a level not seen in years. Stagnating wages, the skyrocketing cost of healthcare, advances in technology and a lack of jobs that pay livable wage have all contributed to an economy that is tilted against working families.

Given this reality, it makes no sense to adopt policies that would limit the rights of working people to form and join unions. Yet that is precisely what two members of this Board have proposed.

More often than not, the job in the aviation or rail industry is a job someone can raise a family on, buy a house on, send their kids to college on and save for retirement. This is not an accident. It is because of high union density and strong collective bargaining agreements in these sectors.

We know that those with a union contract earn on average $200 or more a week, have safer work environments and are more likely to have employer paid

healthcare than their nonunion counterparts.

A rule that makes it easier to remove union representation from people who already enjoy the protections of a collective bargaining agreement is ill timed and tone-deaf to the needs of workers in these sectors. More to the point, the proposed rule is simply not necessary. There are already procedures in place that allow workers to remove unions completely or to change the representative.

Despite claims to the contrary, these procedures are not overly complex and they are not part of some nefarious plot by the labor movement to force working people to stay within an incumbent union. We know this because there is a record and it's been discussed already of workers in both the aviation and rail sectors using those mechanisms for their intended purpose.

To the degree that unions are not removed from rail and aviation properties at a rate sufficient to satisfy the right to work community, look, let me offer an alternative perspective. Working people, they actually want a union voice. In fact, the majority of

working people not only understand the benefits of collective bargaining, but see a strong union contract as the most efficient tool they have to make life better for themselves and their families.

Look, these concepts may be difficult for some to understand, but I would suggest a desire for fair pay, fair treatment, safety of work and the freedom to care for one's family is what drives the union support that we see from frontline rail and aviation employees.

The fact that the proposed rule would mandate a 2 year bar for union elections after decertification vote and deny workers in that unit any union benefits for a 2 year period goes against the clear wishes and needs of working people in America today and the very purposes behind the Railway Labor Act.

The Board in its federation notice attempts to justify this ban by noting that once a union is certified there is a 2 year moratorium on union elections. This comparison and the asserted need for similar treatment however has no merit and ignores the policy goals of a 2 year bar for a new union, which simply do not exist after a decertification vote.

We must ask ourselves: Is limiting the ability of workers to secure strong union representation for 2 full years really about fairness or is it about denying workers the freedom to join together to secure wages, benefit and work rules that they deserve?

It's also troubling that this rule has the potential to undermine stability in labor-management relations. The increased threat of union decertifications can make contract negotiations, especially during economic downturns, more difficult, more contentious. And barring people from even voting for a union for 2 years could postpone the resolution of labor-management disagreements and allow issues that could be addressed through collective bargaining to needlessly fester.

Finally, we would be remiss if we ignored all the ways that unions benefit employers and the industries in which they operate. It's true that some in the industry are going to push back on unions at every opportunity they get. But I am struck on how often labor and management in the aviation and rail sectors can agree on the federal policy issues that we

focus on at TTD.

Just by way of example, recently transportation unions and the freight rail industry, we testified together before the Senate on the need for Congress to invest in our nation's infrastructure and to support specific measures for the freight rail industry.

During the longest government shutdown in our nation's history, as airlines and other aviation companies saw their commercial interests threatened, it was working people backed by their unions who gave a strong voice and clear focus to what was happening in our national aviation system. At a time when some dared not to discuss potential safety hazards brought on by tens of thousands of government employees furloughed or working without pay, workers and their unions rose to the occasion.

One has to wonder how much longer the shutdown would have continued had it not been for the rallies, new stories and, yes, the agitation brought to you by the labor movement.

We don't agree with industry on every issue of

course and collective bargaining can be difficult, where you have to divide up wages and benefits and the economic pie, but it would be a mistake to ignore all the ways that strong unions and stable labor-management relations not only help frontline workers, but also employers in the aviation and rail sectors.

Yet here we sit debating a proposal designed to remove us, the labor movement, from the equation. The Board should reject this proposal and instead focus its time and energy on policies that will support the rights of working families and improve labor-management relations in these sectors. Thank you.

MS. JOHNSON: Thank you. Our next speaker is Mike Wolly.

MR. WOLLY: Good morning. I am Michael Wolly, a principal in the firm of Zwerdling, Paul, Kahn & Wolly in Washington, D.C. I appear before you today on behalf of the Rail Conference & the Airline Division of the International Brotherhood of Teamsters.

The Teamsters' Rail Conference is comprised of the Brotherhood of Locomotive Engineers and Trainmen and the Brotherhood of Maintenance and Way Employees.

The BLET represents over 36,000 locomotive engineers, conductors and trainmen working in what is commonly known as the operating crafts for the nation's class I, II and III rail carriers. The BMWED represents approximately 35,000 employees in the maintenance of way, craft or class at most of those same carriers.

On the airline side, the Teamsters Airline Division represents about 80,000 workers in every major craft or class, including pilots, flight attendants, mechanics and related stock clerks, maintenance controllers, aircraft appearance, passenger service employees on carriers across the airline industry.

I come before you today to express the opposition of the Teamsters and their affiliates to the agency's proposal. Usually, when a federal agency proposes to amend its rules, it does so because of an intervening change in the statute it administers, a court decision requiring that it do so, a significant change in circumstances in the industry it regulates, or to address a condition that has been exacerbated by an existing rule or that is here to (inaudible) or not.

None of these circumstances have precipitated

the change that the Board has proposed to implement. Rather we find ourselves faced with a proposal to fix a system that is not broken. In the proverbial sense, the Board has found a hammer and now is looking for a help.

Prior to 2010, an employee or employees dissatisfied with their representative could petition the Board by filing an application for an election to replace the incumbent union with another union, or to become the representative and then either negotiate new terms and conditions with the employer or carrier, or disavow the representation, leaving his or her fellow employees without representation.

To gain that authority, the employee had to garner votes from a majority of the craft or class, the entire craft or class. To do that, the employee would explain to the other employees exactly what he or she intended to accomplish if chosen and how that could be done.

That employee was said to be acting in the role of a straw man, a person put up in name only to accomplish something that could otherwise not be

accomplished by the Board's rules. The person was in essence a front. That's because the ballot the Board used in such elections only contained the name of the incumbent representative and the applicant. There was no box to check that said "no representative."

Because to prevail in an election during those times, at least half the craft or class plus one had to vote. The straw man would advocate that his or her followers not vote. And the union would then lose because it couldn't demonstrate the necessary support.

That changed in 2010. The Board amended its rules so that no one -- so that -- excuse me, the Board amended its rules so that one only had to gain votes from a majority of those who voted, not the entire craft or class to prevail, and the Board added a no representative box to the ballot. That meant that employees desiring to vote out their existing representatives had to cast ballots to accomplish that outcome.

Since then, the ballots have contained the names of the incumbent representative, the straw man and no representative. There's also a line for write-

ins and a provision for a run-off if no option gets a majority when more than one union and no representative is on the ballot.

So now in every board election, whomever is the applicant, employees faced with the choice of becoming or remaining represented by a union have a clearly identified opportunity to vote no representative.

There is no evidence or data set out in the Board's notice exhibiting that this process is intimidating, confusing or otherwise isn't working. In fact, the evidence is quite to the contrary as exhibited by the numerous representation proceedings in which it has been tested.

The Board's notice, however, would have the public believe otherwise. It implies that airline and railroad workers are somehow locked into existing representation even if they no longer desire to retain that representation. Moreover, that such employees, in the Board's words, are unjustifiably impeded in the efforts to remove a representative by what the Board's notice calls an unnecessarily complex and convoluted

process.

But the facts simply don't back that up. To the extent that there ever was a problem with respect to the ability of employees to decertify a representative, that putative problem was solved when the Board put the option "no representative" on all ballots in all representation disputes.

By labeling the existing procedures unnecessarily complex and convoluted, the Board infers that those procedures are the cause underlying the low number of decertification attempts. We suggest that the procedures have nothing to do with that.

It's far more likely that the reason the Board sees few attempts to supplant existing representatives is that unions do a good job representing their members in these highly unionized industries and that the vast majority of employees they represent are satisfied with the representation they receive. That's why decertification campaigns are few and far between, not some NMB rule.

Those who are dissatisfied have had no problem understanding how to secure a vote to remove a union.

For one thing, all they need to do is look at the Board's website. It explicitly clears up any confusion an employee who wants to get rid of his or her union might have. The Board includes frequently asked questions about representation, one of which is "How can employees decertify their current representative without getting another one?" And the Board says: "A majority of valid votes must be cast for no representation."

The same page describes how the winner of an election is determined. The question: "How is the winner of an election determined? The answer: "If an organization or individual receives a majority of the valid votes cast, it will be certified as the representative. But if the majority of votes cast are for no representation, no representative will be certified."

The Board's proposed change also ignores the fact that in every representation campaign, whether for or against representation, there are employees at the forefront who support the purpose of the authorization cards being circulated. They are the advocates for or

against representation. When representation is sought, the organization for which they advocate files the application. When removing a representative is the objective, one of the employees files the application.

That's what the straw man does. Without the straw man, there will be no one for the Board to communicate with. And because he or she is the proponent for the application, it's fully appropriate that he or she be identified on the ballot.

The Board's reports of decertification elections reveal no reason to suspect that the current scheme has interfered with the employees' free expression of choice vis-a-vis representation. Those who want decertification know what to do, and if they don't, the Board's website and the straw man tell them.

Furthermore, under the existing process, an employee wishing to decertify an incumbent union no longer has to vote for a straw man in order to become represented. All he or she has to do is check the no representative box. It's that simple. And as I said before, employees on numerous occasions have done just that and succeeded in becoming unrepresented.

The proposition that having a new formal decertification procedure will remove an impediment for employees who desire to become unrepresented because no one will be required to lead the effort by being the person to initiate the process and whose name would be on the ballot is a shallow one at best.

Again, experience under the existing rules shows that there is no impediment. But beyond that, the new rule would not and could not eliminate the requirement for an employee or employees to collect and submit the required authorization cards because that requirement is found in the statute itself. Under Section 2, Ninth, the Board is authorized to determine representation of a carrier's employees only upon request by an employee or a group of employees. It says that in a representation dispute, the Board may act "upon request of either party to the dispute to investigate" and to "certify" to both the parties and to the carrier who would if anyone has been designated to authorize -- who has been designated and authorized to represent the employees involved.

And we know, as other speakers have

pointed out, from the DC Circuit's decision and the RLEA v. NMB case that means the Board can't get involved on its own or at the request of a carrier or anyone else for that matter. Only an employee or a group of employees or a union can initiate the process. If that's an impediment, the proposition with which we do not agree, it takes legislation, not NMB rulemaking to remove it.

This is buttressed by Section 2, Twelfth. It describes the procedure the Board must follow "upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees." The Board's regulations and the representation manual follow suit.

Unless some employee or employees come forward and initiate the card collection drive, sign the application and appear as representatives, no one could be held responsible for the decertification effort. There would be no accountable party to receive notices from the Board and respond to matters raised during the representation proceeding.

To reiterate, the Teamsters' rail and airline members submit there's no need for the Board to adopt its proposed decertification rule. It's a proposal seeking to fix a system that needs no repair.

Even if the Board does adopt the proposed new procedure, imposing a 2 year bar on subsequent representation applications is unwarranted. The reasoning behind that aspect of the Board's proposal was flawed.

Under Section 1206.4 of the Board's regulations "when an applicant for representation loses an election, the Board won't accept another representation application for a year." The Board now proposes to impose a 2 year bar if the incumbent loses its representative status in an election it didn't seek.

So if a union submits sufficient cards to get an election but loses, it or another union only has to wait a year to try again. However, if a union is on the ballot in a decertification election and loses, it or another union under the proposed rule won't be allowed to try again for 2 years. Why? Because the

Board thinks there's some parallel between decertification and certification that demands that employees forego representation for 2 years in both situations.

It's true that the Board won't accept a representation application till 2 years pass after a union is certified, but there is a well-founded justification for that. The reason for the longer bar after a certification is that the bargaining process under the Act, which the Supreme Court has described as purposely long and drawn out, must be fulfilled.

A newly certified representative is expected to negotiate a collective bargaining agreement. To do that, it needs sufficient time to establish a bargaining committee; prepare proposals; engage in negotiations; if necessary, participate in mediation before it status become subject to challenge.

Were the bar shorter, the representative could find itself criticized in short order because of its failure to arrive at an agreement within a year. Management intransigence could hamstring the organization.

The reason that employees choose unions is to deal with management intransigence. This intransigence would put the union status in jeopardy and distracted from its bargaining obligations by having to defend itself under premature representation proceeding.

The 2 year insulation period recognizes that possibility and serves the statutory goal of labor-management stability so each side can exert every reasonable effort to make an agreement and settle the dispute without interruption to interstate commerce. And that of course is the goal of the Act.

A successful decertification effort, on the other hand, simply ends representation. If there's no representative, there's no collective bargaining agreement. It's automatic. The agreement is gone with the Board's announcement of the results. The employees become at-will and return to working under rules unilaterally imposed by the carrier. It's as if there had never been a representative.

No one has to exert any effort to make an agreement, because without a representative, there isn't one and won't be one.

There is simply no parallel between that situation and when a representative is elected. There's simply no convincing justification for a 2 year bar when employees are unrepresented.

I'm finishing up. Thank you. Just as one year is sufficient when a union fails to achieve representative status in an election, it's also sufficient when a union loses that status in a subsequent action. This is not to say that the employees are required to select a new or even an old representative a year later, but they certainly should have the opportunity to do so if that's what the majority wants.

The employees get nothing from an extended bar. The only party who benefits from doubling the length of the application bar after a decertification is the carrier. It gets to operate unchallenged for an additional year.

For these reasons, if the Board does adopt a new decertification procedure, it should not adopt a longer bar on accepting subsequent applications. Thank you.

MS. JOHNSON: Thank you. And our final speaker is Jeff Bartos.

MR. BARTOS: I'm just checking if that's on.

MS. JOHNSON: Is the green light on?

MR. BARTOS: That's going to be on? I can't tell.

MS. JOHNSON: I think you press the bottom here and then look at the -- is there a green light?

MR. BARTOS: Now it's on. Yes. I was looking at the wrong place. Sorry. Good morning, Chairman Fortson, Board Member Puchala, Board Member Fauth, General Counsel Johnson. My name is Jeffrey Bartos from the firm Guerrieri, Bartos & Roma and I'm here with a statement on behalf of International Association of Machinists and Aerospace Workers.

With me from the IAM is James Carlson, Assistant Airline Coordinator; Carla Siegel, Deputy General Counsel; and Emily Pantoja, Assistant Director, Industry Relations of TCU.

The IAM has a vital interest in the enforcement of the Railway Labor Act and the proper administration of the NMB's role within the statutory

framework. In fact, the IAM has been representing rail employees since before the Act was adopted and today represents approximately 150,000 workers in the airline and railroad sectors and is the United States largest transportation industry union.

The IAM unequivocally opposes the Board's proposed rule. As a fundamental matter, the Board lacks statutory authority to issue this rule. Congress has expressly forbidden the action, now proposed in Section 2, Twelfth. And were the Board to proceed with this proposal, this regulation would surely be struck down as the Board's merger procedures were found to have been a gross violation of the Act. And we urge the Board not to take such an unlawful action.

Even if the Board had authority and jurisdiction to adopt this rule, there's plainly no basis for doing so and many reasons not to do so. There is no need, because employees have always had and continue to have the ability to change representation or end representation. In fact, just last month the Board issued a termination at Endeavor Air under the Board's current procedure.

Adoption of the rule would also have many pernicious consequences for employees, for carriers and the public. It would incentivize and empower employers and outside forces to support anti-union decertification efforts and it would unfairly prohibit employees from expressing their right to seek union representation.

And I think an institutional concern for this Board would be that, in particular, the adoption of a 2 year bar on seeking representation would undermine the Board's traditional historical role as a neutral stabilizing force in the transportation sector.

And I will give some condensed version of my written comments. Many of these points have been touched on. I want to just highlight a few things.

Fundamentally, is this rule within the Board's jurisdiction? No. Federal courts have repeatedly admonished that the Board has limited statutory authority confined to matters expressly authorized by the Act. And I will just refer to the RLEA versus NMB language as a -- which others have done.

In the Russell case in 1983, the Fifth Circuit

observed correctly that the Board has stated time and time again that the direct decertification vote process under the NLRA is not allowed by the Railway Labor Act.

Russell went on to mandate the straw man process as a process consistent with the Act. And there's some discussion in the Russell case that maybe there's some question whether the Act allowed for direct decertification. And the Board's position was, "no, it does not."

If there ever was such a question, Congress expressly answered that question in the negative in 2012 after the Board declined to create direct decertification, after the DC Circuit held that no such procedures were required. Congress amended the Act, and in doing so, adopted language that specifically precludes the rule here.

2, Twelfth of the Act provides not only the 50% threshold mandate, but also provides that before the Board may use any procedure to determine who shall be the representative, there must be an application requesting that an organization or individual be certified as the representative. The Board may not use

a different process, the Board may not go under 50%, and the Board may not recognize an application that does not seek a certification.

The proposed rule is flatly contrary to the statute, and I think as expressed by the TDD comments, it's contrary to the statutory purpose as reflected by the guidance directive given to the GAO.

And we submit that in light of the clear controlling statutory language and the indications of congressional intent, moving forward with the proposed rule will be a grave mistake.

And of equal importance, as a practical matter, adopting the rule would undermine the purposes of the Act. And even if the Board had jurisdiction, adopting the rule would be counter to the statutory purposes of protecting the right of employees to organize and prohibiting carriers from interfering with the organization of their employees.

And I want to touch on two of the truly most negative aspects of the proposed rule. First, the rule, even if lawful, would open additional avenues for rail and air carriers and by outside groups supported

by employers in this and other industries to seek to influence and interfere with employees choice of representatives.

The Board is aware that even under the current procedures, carriers have been caught in the act of illegally supporting and directing efforts to oust there to be elected representatives.

I'm personally familiar with that situation several years ago at Great Lakes Aviation. I think there's other examples cited in some of the other comments. And whether intentional or not, I heard this morning a troubling phrase from -- in some of the testimony referring -- a carrier referring to "our straw man."

That's a concern that labor organizations and employees have of employers utilizing the existing straw man procedure as well as the Board's proposed procedures to unlawfully interfere with the representative of the employees.

And we submit that the proposed rule and the expansion of the process for decertification will incentivize and empower employers to push the envelope

further to multiply the opportunities for illegal conduct and make it more difficult to enforce the legal prohibition.

Under the current roles, an individual who seeks to invoke the Board's jurisdiction has a responsibility to go amongst his or her coworkers and affirmatively seek to act as their representative. That's what Mr. Russell did in the Russell case.

The current proposed rule would allow any organization or any individual seeking decertification to invoke the Board's jurisdiction through the filing of cards seeking no representative. This rule would eliminate even the minimum threshold of accountability and responsibility or indeed any connection with the actual workforce, which the current procedures require.

We have seen in recent years and decades that the removal of individual and institutional transparency, accountability and responsibility from the public sphere creates a danger of improper influence, interference that's difficult to even uncover or prevent. We submit that the proposal would import that problem into the Railway Labor Act and into

the labor relations process that has been a stable and functioning process for the past 8 decades.

A second negative consequence that is of great concern to the IAM is the utterly unjustifiable prohibition on employee self organization following direct decertification. The proposal to double the length of time after an effective decertification that employees must wait is absolutely contrary to the statute and in fact contrary to the Board's stated purpose of expanding and protecting employees' freedom to choose a representative.

There is absolutely no statutory or practical purpose in a 2 year bar. And in fact that is flatly contrary to the purposes of the Act and would at best be an arbitrary and capricious step for this Board to take.

The IAM appreciates the opportunity to present its views to the Board. We thank the Board for listening to the concerns of organizations which collectively represent hundreds and hundreds of thousands of employees who have elected them to speak to you.

We submit the proposed action is unlawful, it's unneeded, it would undermine the purposes of the Act. And we hope the Board will reconsider this ill-advised approach. Thank you.

MS. JOHNSON: Thank you. This concludes the hearing.

CERTIFICATE OF NOTARY PUBLIC

I, KEVON CONGO, the officer before whom the foregoing proceedings were taken, do hereby certify that any witness(es) in the foregoing proceedings, prior to testifying, were duly sworn; that the proceedings were recorded by me and thereafter reduced to typewriting by a qualified transcriptionist; that said digital audio recording of said proceedings are a true and accurate record to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of

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Notary Public in and for the

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ANOSH KURANE