BEFORE THE NATIONAL MEDIATION BOARD

Representation Election Procedure — Docket No. C-6964

COMMENTS OF THE TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

On behalf of the Transportation Trades Department, AFL-CIO (TTD) and our 32 affiliated unions[1], we want to express our support for the National Mediation Board's (NMB or the Board) proposed revisions in 29 CFR Parts 1202 and 1206 to reflect contemplated changes in the Board's representation election procedure. 74 Fed. Reg. 56750, 56754 (Nov. 3, 2009).

Specifically, the Board proposes that in secret ballot representation elections conducted by the NMB, the choice of collective bargaining representation will be determined by the majority of valid ballots cast by the eligible employee voters. 74 Fed. Reg. at 56750, 56751-2, 56754. Instead of presuming that all employees who fail to cast a ballot oppose representation, the Board will now allow all eligible voters a fair and equal opportunity to cast a deliberate vote that *registers their own choice* for ("yes") or against ("no") collective bargaining representation. 74 Fed. Reg. at 56751-2. As the notice explains:

[1] TTD is the transportation umbrella organization of the AFL-CIO and our member unions represent thousands of workers covered under the RLA. Attached at 1 is a complete list of TTD's affiliated unions.

> The Board's primary duty in representation disputes is to determine the clear, un-coerced choice of the affected employees and the Board believes that this duty can be better fulfilled by modifying its election procedures to rely on the choice of the majority of valid ballots cast in the election. *This process will ensure that each employee vote, whether for or against representation, will be regarded with equal weight. The Board will no longer substitute its opinion for that of the employee and register the lack of a vote as a "no" vote.*

74 Fed. Reg. at 56752 (emphasis added). This proposed change would afford employees voting in NMB representation elections the same ballot choices that are available in secret ballot representation elections conducted by other labor agencies, such as the National Labor Relations Board ("NLRB"), and would align the NMB's standard with the familiar democratic majority-vote standard prevailing in federal, state and local political elections throughout the nation. 74 Fed. Reg. at 56751, 56752.

As the Board has noted, the Supreme Court and other federal courts have consistently emphasized that the Railway Labor Act ("RLA" or "Act") gives the NMB clear authority and broad discretion to decide the procedures it will follow and the form of ballot to use in resolving representation questions – including discretion to use the majority-vote standard and "yes"/ "no" ballot now proposed by the Board. The Board's original use of a different standard admittedly relied on no legal analysis or precedents and instead was justified as an administrative convenience. The Board's subsequent explanations for retaining that standard do not withstand scrutiny. In any event, whatever administrative and logistical considerations may have prompted the Board's choice seventy years ago no longer pertain. Under current circumstances, there is no legitimate justification for biasing NMB elections against those workers who desire union representation by counting all non-participants as "no" votes, and there is no arguable injury or

unfairness in providing all eligible employees a full, fair and equal opportunity to vote "yes," vote "no," or abstain entirely.

For all the reasons discussed below, and at the Board's public meeting, and those set forth in the NMB's formal notice of proposed rulemaking, the TTD supports this proposal and urges the Board's prompt adoption of final rules implementing the "yes"/ "no" form of secret ballot together with the majority-vote standard for deciding NMB representation elections.[2]

DISCUSSION

When conducting representation elections among a craft or class of railway or airline employees, the Board's current practice is generally to certify a bargaining representative only if a majority of eligible voters actually cast ballots for a labor organization. The ballot ordinarily used by the Board lists only the name(s) of the labor organization(s) seeking certification as collective bargaining representative; that ballot does not give voters a choice to register a "no union" vote. Instead, employees who oppose union representation are instructed not to cast a ballot, i.e. to do nothing. The result of this anomalous scheme is that all eligible employees who do not vote are conclusively presumed to oppose representation, regardless of the many and varied reasons why an employee may fail to vote in an election. In other words, every eligible employee begins as a "no" vote unless he or she affirmatively casts a ballot; anyone who does not vote is counted as a "no" vote; and no one has the opportunity to abstain from voting in the election.

The NMB proposes to change this practice by using a straightforward "yes"/ "no" ballot and determining the outcome of its elections based on the majority of valid votes cast, just as in

other union representation elections and political elections conducted throughout the United States. Under the Board's proposal, all eligible voters will have a chance to register their own deliberate choice for or against representation, and to have that actual choice counted. The Board will not presume the intent of employees who fail to vote, whether they are undecided, indifferent, forgetful or unable to participate for whatever reason. All votes will have equal weight, and the NMB election process will no longer embody a structural bias against representation.

As the Board explained in its notice of proposed rulemaking, the NMB's current policy was originally adopted as an administrative convenience, not because of any mandate by Congress in the RLA. 74 Fed. Reg. at 56751. Indeed, the Board itself acknowledged early on that it acted "*not on the basis of legal opinion and precedents*, but on what seemed to the Board best from an administration point of view." 1 NMB Ann. Rep. 19 (1942), quoted in 74 Fed. Reg. at 56751 (emphasis added). Nothing in the governing statute or its legislative history requires a secret ballot vote, or any other form of election at all, much less the anomalous process currently used by the Board. Even Chairman Dougherty's dissent from the proposed rulemaking recognizes that the current NMB ballot and election process is merely a long-standing Board "tradition." 74 Fed. Reg. at 56753.

Against this background, we demonstrate below that the Board has clear statutory authority and discretion to adopt the proposed change in its election process; that the Board has

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[2] The TTD relies on, reiterates and incorporates herein, both expressly and by reference, the written statements submitted to the rulemaking record on December 7, 2009 by Edward Wytkind, TTD's President, and by attorney Carmen Parcelli on behalf of the TTD.

ample justification for its proposal; and that the notice and comment procedure followed by the Board satisfies any arguably applicable administrative rulemaking requirements.

I. THE NMB HAS THE LEGAL AUTHORITY AND DISCRETION TO ADOPT THE PROPOSED CHANGE IN ITS ELECTION PROCEDURES

A. The RLA grants the Board the authority and discretion to determine its representation election procedures and ballot format

1. There can be no serious question as to the Board's legal authority to make the proposed change in its election process. As the federal courts have consistently affirmed, the RLA gives the NMB broad authority with respect to determining employee representation, and that statutory authorization includes virtually unreviewable discretion over the processes for investigation and resolution of representation disputes.

Two provisions of the RLA bear on the NMB's authority in representation matters. First, RLA Section 2, Fourth provides in pertinent part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . .

45 U.S.C. § 152, Fourth. To facilitate employees' exercise of their collective bargaining rights, Section 2, Ninth of the Act empowers the NMB to investigate representation disputes among employees and to certify authorized employee representatives:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 152, Ninth.

Thus, the Act specifically authorizes the Board, in its sole discretion, to take a secret ballot vote or "utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives." 45 U.S.C. § 152, Ninth. The only statutory restriction on the Board's discretion in deciding representation disputes is that the Board must act so as to "insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." Id.

2. The language of the RLA itself dictates no particular procedure to determine the majority will, much less the election procedure currently followed by the Board. Accordingly, the Board has used a variety of methods over the years to resolve representation disputes, exercising its discretion as circumstances warranted. See Railway & Steamship Clerks v. Virginian Ry. Co.,

125 F.2d 853 (4th Cir. 1942) (upholding card check certification); Continental Airlines, Inc. v. NMB, 793 F. Supp. 330 (D.C. Cir. 1991) (upholding transfer of certification based on union merger vote); Laker Airways, 8 NMB 236 (1981) (certification based on majority of votes cast); Key Airlines, 16 NMB 296 (1989) (certification based on vote of majority of eligible voters against unionization); Ross Aviation, Inc., 22 NMB 89 (1994) (accretion of employees into existing certification).

In fact, the pre-RLA interpretation of the language later adopted by Congress in Section 2, Fourth confirms that the Board's current practice is not required by statute. The language of Section 2, Fourth comes from a rule, known as "principle 15," promulgated by the United States Railroad Board under the Transportation Act of 1920. Decision no. 119, Int'l Ass'n Machinists v. Atchison, Topeka & Santa Fe Ry., 2 Dec. U.S. Railroad Labor Board, 87, 96, par. 15. In a 1923 decision, the Railroad Board rejected a carrier's challenge that principle 15 required a representative to receive the vote of a majority of all eligible voters. Decision No. 1971, Bhd. of Ry. & S.S. Clerks v. Southern Pac. Lines, 4 Dec. U.S. Railroad Labor Board, 625. The Railroad Board construed its language in principle 15 to mean only that "a majority of the votes properly cast and counted in an election properly held should determine the will and choice of the craft." Id. at 629. The Railroad Board further held that its "purpose...was to give all the employees to be affected the privilege of expressing their choice. The Board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity." Id.

When the Board first adopted the current majority of eligible voters practice in 1934, it also recognized that the RLA did not require it to do so. As the Board stated, it adopted its election rule "not on the basis of legal opinion and precedents, but on what seemed to the Board

best from an administration point of view." 1 NMB Ann. Rep. 19 (1942). From the outset, however, the Board's practice was not monolithic. "Where . . .the parties to a dispute agreed among themselves that they would be bound by a majority of votes cast, the Board took the position that it would certify on this basis, on the ground that the Board's duties in these cases are to settle disputes among employees, and when agreement is reached the dispute as to that matter is settled." Id. In fact, "[f]or most of its history, the Board sought a mediated approach to election details and ordinarily went along with the arrangements mutually acceptable to the parties – even when contrary to Board precedent." The Railway Labor Act at Fifty, at 48 (1976).

3. Supreme Court precedent confirms that the RLA grants the NMB broad discretion to set the rules governing elections. In Virginian Railway Company v. System Federation No. 40, the Supreme Court rejected a carrier's challenge to an NMB certification issued to a union that failed to receive the vote of a majority of the employees in the craft or class, even though a majority participated in the election. 300 U.S. 515, 560 (1937). The Court held: "It is to be noted that the words of [RLA Section 2, Fourth] confer the right of determination upon a majority of those eligible to vote, *but is silent as to the manner in which that right shall be exercised.*" Id. (emphasis added). The Court also went on to analogize the NMB election process under Section 2, Fourth to the political election process:

> Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. . . . Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.'

Id.

Nearly three decades after the Virginian Railway case, the Supreme Court again examined the Board's authority to set election rules in Brotherhood of Railway & Steamship Clerks v.

Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965) ("ABNE"). And the Court again concluded that the Board possesses very broad discretion in election matters. The carrier in ABNE challenged the form of the NMB ballot, contending that the ballot must provide a space to vote "no union." In rejecting that challenge, the Court explained that the Act "instruct[s] *the Board alone* to establish the rules governing elections." Id. at 669 (emphasis added). In other words, "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." Id. at 662.

4. In 1947, the United States Attorney General issued an opinion letter regarding the Board's authority in election matters. Specifically, the Attorney General addressed whether the NMB could certify employee representatives based upon the majority of votes cast, regardless of whether a majority of eligible employees participated in the election. The Attorney General concluded that the NMB "has the power to certify as a collective bargaining representative any organization which receives a majority of votes cast at an election despite the fact that less than a majority of those eligible to vote participated in the election." 40 U.S. Op. Atty. Gen. 541 (Sept. 9, 1947), available at 1947 WL 1780. In reaching this conclusion, the Attorney General first considered the language of Section 2, Fourth and the provision's legislative history, which specifically provides "that the choice of representatives of any craft or class shall be determined by a majority of the employees voting on the question." Sen. Rep. 1065, 73rd Cong., 2d sess., at 2.

Next, the Attorney General analyzed the Virginian Railway case and its language providing that those who do not participate are presumed to assent to the expressed will of the majority of those voting. Although acknowledging that a majority of eligible voters had

participated in the election at issue in the Supreme Court's Virginian Railway decision, the Attorney General went on to explain that a recent court decision interpreting the National Labor Relations Act ("NLRA") had relied on the Supreme Court's reasoning to uphold union certifications based upon the majority of votes cast, even where less than a majority participated in the vote. 40 U.S. Op. Atty. Gen. at 542-44, citing NLRB v. Standard Lime & Stone Co., 149 F.2d 435, 437-38 (4th Cir. 1945) ("The [NLRA] makes no provision for a quorum nor for the participation of any definite proportion of the employees in the election."). Given the similarity between the operative language under the RLA and NLRA, the Attorney General found that this and other NLRA precedents were applicable.[3]

Lastly, the Attorney General found that "when the Congress desires that an election shall be determined by a majority of those eligible to vote rather than by a majority of those voting, the Congress knows well how to phrase such a requirement." 40 U.S. Op. Atty. Gen. at 544. The opinion cites the example of NLRA Section 8(a)(3)(ii) requiring the vote of a majority of eligible employees in order to rescind a union's authority to enter into a union security agreement. Although finding that the NMB possessed the authority to certify an election based solely on the

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[3] NLRA Section 9(a) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." 29 U.S.C. § 159(a). Section 9(c) of the NLRA further provides that, if the National Labor Relations Board ("NLRB") finds that "a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. § 159(c)(2).

Numerous federal courts of appeal have held that the NLRA's language does not require that a majority of eligible employees participate in an NLRB election in order for a union to be certified. NLRB v. Deutsch Co., 265 F.2d 473 (9th Cir. 1959); NLRB v. Cent. Dispensary & Emergency Hosp., 145 F.2d 852 (D.C. Cir. 1944); Marlin-Rockwell Corp. v. NLRB, 116 F.2d 586 (2d Cir. 1941); New York Handkerchief Mfg. Co. v. NLRB, 114 F.2d 144 (7th Cir. 1940); NLRB v. Whittier Mills Co., 111 F.2d 474 (5th Cir. 1940).

majority of votes cast, the Attorney General also concluded that the Board had discretion not to exercise its authority in that manner. *Id.* at 544-45.

5. In sum, the RLA on its face gives the Board legal authority to make the proposed change to its election rules. The Supreme Court precedent interpreting Section 2, Fourth and analyzing the Board's authority to set election rules leaves no legitimate doubt on this point. The Attorney General's comprehensive opinion, confirming the Board's authority to make the specific rule change now contemplated, further supports this conclusion. Nonetheless, Chairman Dougherty's dissent from the Board's rulemaking notice states that "a serious question exists as to whether the NMB even has the statutory authority to make this reversal" (47 Fed. Reg. at 56753), echoing the position taken by the Air Transport Association of America ("ATA") in a prior letter to the Board. This suggestion is unfounded.

The claim that the Board lacks statutory authority to alter its current practice rests upon a single, terse notice in the *Federal Register*. That cryptic notice appears to indicate, without explanation, that the NMB Members determined at a meeting in 1978 that "the Board does not have the authority to administratively change the form of the ballot used in NMB representation elections." 43 Fed. Reg. 25529 (June 13, 1978). As a matter of administrative law, such a statement is not binding or conclusive as to the existence or scope of this Board's jurisdiction. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156-157 (2000) ("Certainly, an agency's initial interpretation of a statute that it is charged with administering is not 'carved' in stone."); Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993) ("The Secretary is not estopped from changing a view she believes is grounded upon a mistaken legal interpretation.").

More importantly, the NMB itself has not viewed the 1978 statement as binding upon it. Notably, the Board did not rely on its 1978 statement in its 1987 Chamber of Commerce decision, which declined to adopt the ballot change now proposed. Instead, the Board expressly concluded that the requested change lay within its broad discretion. Chamber of Commerce, 14 NMB 347, 362 (1987) ("The IBT cites several court decisions in support of its position that the Board has broad discretion in the manner in which it determines who should represent employees in a given craft or class . . .the Board does not disagree with the IBT on the question of its discretion . . . ."). Even after the 1978 statement, moreover, the NMB has repeatedly made changes *administratively* to the form of its ballot. Only three years later, for example, the Board adopted the Laker ballot for use as a remedial measure, and subsequently the Key ballot was introduced. Laker Airways, 8 NMB 236 (1981); Key Airlines, 16 NMB 296 (1989). The Board also administratively introduced telephone voting in 2002 and internet voting in 2007, with attendant changes to the ballot form. Telephone Electronic Voting, 29 NMB 482 (2002); Internet Voting, 34 NMB 200 (2007).

Nor does the 1978 statement carry any persuasive weight on the issue of the Board's statutory authority. The public record of the meeting does not reveal any foundation or reasoning, legal or otherwise, underlying the Board's statement. 43 Fed. Reg. 25529. As such, the naked, conclusory pronouncement that the Board lacks authority merits little, if any, weight – especially when compared to the legal force that must be afforded to the language of the RLA itself and the Supreme Court's analysis of that language.

In questioning the Board's statutory authority, Chairman Dougherty also points to the 1935 decision of the district court in the Virginian Railway case. 11 F. Supp. 621 (E.D. Va.

1935). At the trial court level in Virginian Railway, the carrier challenged elections for six different crafts or classes, in which the AFL-affiliated System Federation (Federation) and a company union vied for representation. In one of those elections, a majority of eligible voters did not participate, but the Federation received the majority of votes cast and was certified on that basis. With regard to this election, the trial court found that the Board should not have certified a representative for a craft or class where less than a majority of eligible employees participated in the election. Id. at 627-28. No appeal was taken from that aspect of the court's ruling. Instead, an appeal was taken from the trial court's decision upholding an election in which a majority of eligible voters participated but the Federation only received the majority of the votes cast. In ruling on that appeal, however, the Supreme Court through its reasoning and broad language effectively rejected the trial court ruling setting aside the other election for lack of majority participation. In fact, the Fourth Circuit acknowledged the effect of the Supreme Court's ruling when it determined that a majority of eligible employees need not participate in order to have a valid election under the NLRA. See NLRB v. Standard Lime & Stone Co., 149 F.2d at 436-38. In short, the district court decision in Virginian Railway has no continuing vitality.

B. The Administrative Procedure Act does not curtail the Board's authority and discretion to change its ballot and its majority voting standard

1. As shown above, the RLA's plain language and the Supreme Court's consistent precedent dispel any concern about the Board's authority and discretion to determine its representation election processes. Nonetheless, Chairman Dougherty and other opponents argue that the Board's proposal cannot withstand scrutiny under the Administrative Procedure Act (APA). We demonstrate below that the Board's proposal meets any substantive and procedural

APA requirements that might arguably apply. As a threshold matter, however, TTD submits that under well settled Supreme Court precedent, the Board's decision to alter the form of its ballot is not, in fact, subject to judicial review under APA standards.

The Supreme Court held in ABNE that where, as here, the Board is acting within the scope of its statutory authority, its discretionary decision-making regarding the proper form of a ballot lies beyond court review. ABNE, 380 U.S. at 669 (the RLA "instruct[s] the Board alone to establish the rules governing elections. Thus, it is clear that its decision on the matter is not subject to judicial review where there is no showing that it has acted in excess of its statutory authority."); see id. at 671 ("the Board's choice of its proposed ballot is not subject to judicial review"). In so ruling, the ABNE Court applied to the Board's ballot choice the doctrine of judicial deference first set forth in Switchmen's. In Switchmen's, the Court held that Congress intended the NMB's determinations under Section 2, Ninth to be final and not subject to judicial review. Switchmen's Union of N. Am. v. NMB, 320 U.S. 297, 306 (1943). In fact, even prior to ABNE, the District of Columbia Circuit had ruled that the Board's adherence to its current election policy was unreviewable under Switchmen's. See Radio Officers' Union v. NMB, 181 F.2d 801 (D.C. Cir. 1950) (dismissing under Switchmen's a challenge to NMB's refusal to certify union based on majority of votes cast).

Thus, while the Board in this instance has voluntarily complied with APA notice-and-comment procedures, and has provided substantive justification satisfying APA criteria, federal law does not mandate all of these precautions in connection with the change in NMB representation election policy.

2. Opponents of the Board's proposal mount a related line of attack focusing on the very fact of change, *per se.* Specifically, they argue that the Board's proposal requires greater justification, and must pass stricter legal scrutiny, because it reverses longstanding NMB policy and practice. It is true that the Board's initial policy choice, made 75 years ago without legal analysis or factual foundation, has become enshrined as an NMB "tradition" with the passage of time. But such longevity and custom do not raise the bar for change or trigger a heightened standard of review.

Even assuming that the Board's current proposal would be subject to judicial review under the APA's "arbitrary or capricious" standard, the adoption of a "yes"/ "no" ballot and majority-vote standard clearly satisfies the APA's rulemaking requirements. In part II of our comments, we demonstrate that the Board's substantive justifications for the proposal clearly satisfy APA requirements, and that the Board has followed the APA's procedures for notice and comment. Before addressing those points, we show that the standard of judicial review under the APA remains the same whether the agency is changing an existing policy or promulgating an initial standard. Contrary to the suggestion in Chairman Dougherty's dissent, the NMB's departure from past policy or practice is not subject to stricter judicial scrutiny, even if the APA applies.

The Supreme Court directly addressed and clearly refuted that proposition in FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 173 L. Ed. 2d 738, 2009 U.S. LEXIS 3297 (April 28, 2009). Rejecting precedent from the Second Circuit and D.C. Circuit that demanded more substantial justification for changes in established rules or policy, the Court instructed that the APA does not provide a "heightened" standard of review where an agency reverses or modifies longstanding policy, and noted that the APA "makes no distinction" between judicial review of "initial agency

action and subsequent agency action undoing or revising that action." FCC v. Fox TV, 129 S. Ct. at 1810-11.[4] As the Court acknowledged, the agency must "display awareness that it *is* changing position" – instead of deviating "*sub silentio*" – and must "show that there are good reasons for the new policy." Id. at 1811 (emphasis in original). However, the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." Id. (emphasis in original).

The NMB's proposal satisfies each of these three requirements. As discussed above, the Board's use of a "yes"/ "no" ballot and a majority-vote standard is unquestionably permissible under the RLA. As we show below, there are numerous good reasons for using this procedure in NMB elections; and the Board's publicly announced, "conscious change of course" – including explanation of its reasoning, and use of a notice-and-comment process – adequately indicates the agency's belief that its proposal reflects a better approach. Accordingly, while commentators may disagree over the substance and wisdom of the Board's policy judgments, the Board's legal authority to adopt the proposed election procedures is not in doubt.

II. THE BOARD'S PROPOSAL HAS AMPLE JUSTIFICATION AND COMPORTS WITH NOTICE AND COMMENT RULEMAKING PROCEDURES

Given the RLA's broad, explicit delegation of authority to the NMB, the Supreme Court has repeatedly confirmed the Board's virtually unreviewable discretion where, as here, it acts

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[4] Likewise, the Supreme Court in Fox TV expressly rejected the proposition that "rulemaking by

within the scope of its statutory authority over representation matters. But even without the benefit of special deference afforded to NMB decision making under the RLA, the Board's proposal clearly passes muster under the ordinary APA standard of judicial review.

A. The Board has strong and persuasive justification for its proposal

In its notice of proposed rulemaking, the Board presents compelling reasons for using a "yes"/ "no" ballot and allowing a majority of valid votes to determine the outcome of representation elections. These reasons amply justify the Board's proposal. Among other considerations, the Board's proposed reforms give all eligible voters a fair and equal opportunity to register their choice for or against union representation, and they give all votes equal weight. Instead of conclusively presuming that every non-voter is a "no" vote – a form of compulsory voting at odds with democratic principles – the Board's proposal provides a more reliable, straightforward means of ascertaining employees' deliberate choices in an election, and it gives legal effect only to those actual choices. 74 Fed. Reg. at 56751-2. These measures, which bring the Board's practice in line with the prevailing standard for democratic elections in U.S. labor relations and political arenas, cannot possibly be deemed harmful or unfair to any party in an NMB election.

By contrast, there is no compelling justification for retaining the current policy of "veto by silence," a policy that thwarts the clearly expressed will of the majority of workers who actually vote. This is particularly so in light of significant changes in technology and industry since the policy's inception. 74 Fed. Reg. at 56752. Even if the Board could identify a factual basis for its

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independent agencies is subject to heightened scrutiny," noting that the APA makes "no distinction between independent and other agencies." 129 S. Ct. at 1818.

original determination as to administrative convenience – a determination admittedly lacking any legal or evidentiary foundation – the factual context and logistical considerations surrounding RLA elections in the 1930's no longer pertain. The Board's subsequently stated reasons for retaining the original policy are just as weak, and simply cannot foreclose well-justified electoral reforms now proposed by the Board. 74 Fed. Reg. at 56751-2. The following discussion further highlights some of the many strong reasons for adopting the Board's proposed changes.

1. The current election procedure does not reliably fulfill the NMB's statutory authority to determine the clear choice of employees seeking collective bargaining representation. By automatically assigning all non-participating eligible voters a "no" vote to be counted against representation, the current NMB policy arbitrarily registers undifferentiated, inherently ambiguous silence as a deliberate choice, when no such choice has been expressed and no such intent is discernible. The Board's proposal provides a fairer and more reliable method to discern and give effect to an employee's choice.

As the Board recognized in its notice, just because an employee does not vote does not mean that the employee opposes union representation. There are many possible reasons for failing to vote, including simple oversight; indifference to the outcome; a conscious choice to abstain; indecision or procrastination; lack of familiarity with elections and voting; sudden, unforeseen circumstances making it impossible to participate in the election; or, all too often, intimidation and fear in the face of an aggressive employer campaign. Using a "yes"/ "no" ballot, and allowing the majority of valid votes to decide the election, provides employees a full and fair opportunity to register their intended choice, and to have those deliberate choices determine the election outcome. By contrast, assigning a "no" vote to all non-participants is completely

arbitrary, and produces a form of "compulsory voting" and silent veto incompatible with democratic principles. 74 Fed. Reg. at 56751-2. This kind of voting system not only undermines the expressed will of the voting majority but denies individual employees a full and equal chance to register their own, deliberate choice for or against representation.

2. Treating all eligible employees as "no" votes at the outset, and by default, builds into the NMB election system a structural bias against those workers who desire union representation. The Supreme Court itself has acknowledged the anti-union bias embodied in current Board practice. As the ABNE decision explained: "The practicalities of voting – the fact that many who favor some representation will not vote – are in favor of the employee who wants 'no union.'" ABNE, 380 U.S. at 669 n.5; see id. at 670 (current NMB ballot practice "more favorable" to employees who do not want union representation). Similarly, in the Virginian Railway case, the Supreme Court observed that under a majority of the eligible voters rule, a representation election could be invalidated by employees who are indifferent on the issue of representation – or, even worse, who have been coerced by management not to vote in favor of unionization. 300 U.S. at 560.

In short, the Board's current election practice poses an inherent obstacle for employees seeking to obtain union representation. The Board's proposal simply removes the anti-representational weighting by treating all eligible voters as neutral, by default, unless and until they register a "yes" or "no" choice, and by giving both of those deliberate choices equal effect in the election. This approach, offering a level playing field, is unquestionably consistent with the policy objectives of the RLA.

3. The current election system induces and rewards employer interference campaigns designed to suppress voter turnout. Delta's successful "Give a Rip" campaign (updated, more recently, to include a "Don't Click" electronic component) provides a well-known example. As employees and commentators have detailed for the record, the Carrier systematically and consistently instructed its employees to destroy the government-issued ballot instructions necessary to vote, an unseemly practice that should give pause to any federal policy-makers.

In his presentation to the NMB's public forum, Delta's own counsel attempted to justify the Carrier's "Give a Rip" election-boycott campaign as a necessary consequence of the Board's current election process. This candid acknowledgment only confirms the legitimacy of the Board's reform proposal: there is no compelling reason to retain an anomalous practice that inherently undermines respect for the federal government's election processes and promotes bad public policy. The NMB's current election process disfavors employee participation and instead permits inaction, indifference, opposition and ambiguity to combine as an undifferentiated "silent veto" that may determine an election outcome. By contrast, under the Board's proposal for a "yes"/ "no" ballot and majority-vote standard, carriers could simply urge employees to vote "no," instead of denigrating and discouraging participation in the electoral process itself. Government policy can and should encourage voter participation, not perpetuate a system that encourages destruction of ballots.

4. As the Board's notice recognizes, the current NMB voting system is truly an outlier, out of step with our basic notions of democracy and majority rule in the political as well as labor relations spheres. 74 Fed. Reg. at 56752. Democratic decision making at all levels of our society, from election of a PTA president to election of Senators and Representatives, is

premised on allowing a majority of those voting to decide a question. In our system, those who do not participate are presumed to assent to the majority will of those who do cast ballots. If the Board's current standards applied in our political system, the populace would routinely be denied representation, and few if any current political leaders would hold office. Notably, national voter turnout has failed to reach 50 percent in every mid-term election since 1930. There is no good reason to continue subjecting rail and airline employees to a compulsory voting and silent veto scheme so dramatically detached from democratic norms.

5. The Board's previously stated reasons for retaining the old, anomalous procedures lack merit. Even if they once made sense, which we seriously question, those reasons no longer apply, particularly in light of changing circumstances. By way of illustration, consider the Board's claim that its election practice poses no obstacle to representation, an argument reiterated by Chairman Dougherty in her dissent. 74 Fed. Reg. at 56753.

We begin by emphasizing, once again, that the Board's current process embodies the presumption that non-participants reject representation, a presumption that skews the entire NMB election process against those workers seeking union representation. See ABNE, 380 U.S. at 669 n.5, 670. Despite this troubling anti-representational bias, the NMB previously declined to alter its practice in large part because the rail and airline industries were highly unionized. See Pan American Airways, 1 NMB 454 (1948); Chamber of Commerce, 14 NMB 347, 362 (1987). The Board viewed union density as proof that the institutional anti-representational bias in its election system had not actually presented an impediment to unionization, and on this basis declined to make any change. Significantly, in 1948 the Board had found that only one-fourth of one percent of employees who voted for representation had been deprived of such representation for lack of

majority participation. Pan American Airways, 1 NMB at 455. The Board could therefore conclude that the impact of its election rule was *de minimis*, at most.

The present situation is far different. Unions no longer prevail in an overwhelming number of elections as they did when the Board first adopted its current practice. Thus, despite Chairman Dougherty's observation that union density in the rail and airline industry remains higher than in other sectors (74 Fed. Reg. at 56753), the Board cannot say now, as it did in the past when confronted with this issue, that its institutional "no union" presumption has no adverse effect on employees' ability to organize and obtain bargaining representation.

In fact, we have identified 42 elections held from 1995 through 2008, where the union fell short of the majority of eligible voters threshold by 15% or less of the votes needed. For example, in a 2006 election at Air Logistics for mechanics and related employees, there were 331 eligible voters and the Office and Professional Employees International Union received 164 votes with one vote cast for other. 33 NMB 189 (2006). Thus, the election fell one vote short of majority participation by all eligible voters and was declared invalid. Similarly, an election involving 474 train dispatchers at Union Pacific Railroad was declared void because participation fell four votes shy of the majority of eligibles with the Brotherhood of Locomotive Engineers receiving 232 votes and 2 void ballots. 24 NMB 399 (1997). In the 42 elections where the union fell short by 15% or less, approximately 14,000 employees voted for union representation, but were denied. We submit that in relatively close elections such as these, the Board cannot be confident that its practice of counting non-voters as "no" votes has not impacted the result.

6. Equally unpersuasive is the alternative rationale advanced in the Chamber of Commerce proceeding, and reiterated in the Dougherty dissent, that the Board's current election

procedures are essential to reduce strikes and preserve stability in the rail and airline industry. 74 Fed. Reg. at 56753. That claim rests on the Board's conclusory assertion, unsupported by any evidence, that a union elected by a majority of valid votes "cannot be as effective in negotiations as a union selected by a process which assures that a majority of employees desire representation." Id. We emphasize here, however, that the Board's current election policy does not serve to prevent strikes, and the goal of strike-avoidance cannot justify perpetuating that election policy.

It is correct that the RLA was designed in part to limit disruptions to interstate commerce. But that goal is accomplished by the Act's extensive mediation requirements and status quo obligations, not by the NMB's election procedures. The Board's responsibility in representation disputes is to ascertain and certify the employees' free and un-coerced choice of a collective bargaining representative – a goal that is often frustrated by the Board's practice of counting all non-participants as "no" votes. The Board's proposed change in its election process would not alter in any way NMB conducted mediation or the RLA's status quo requirements.

Moreover, the notion that unions elected by a majority of those voting are weaker than unions elected by an absolute majority of the craft or class, and that this "weakness" will lead to strikes, seems nonsensical. In fact, just the opposite would appear to be true. As a practical matter, unions do not strike unless a majority of the workers supports such a high-stakes tactic, especially given the possibility that a carrier might try to replace strikers. A stronger union (i.e., one with greater employee support) is better able to mobilize support for economic warfare, and more likely to reject compromise at the bargaining table, which in turn could increase the likelihood of a strike. A "weaker" union, by contrast, would justifiably fear strike failure due to

lack of widespread support among the workforce. The logical consequence of mere plurality support, therefore, would be greater interest in settling a contract at the table, and greater willingness to compromise toward that end. In any event, the NMB's comprehensive authority and virtually unfettered control over the collective bargaining and mediation process remain unaffected by the Board's election proposal. Raising the specter of strikes and economic disruption is a patent distraction from the merits of the proposal.

7. Another possible reason for the Board's current practice may have been a logistical concern that employees in a widespread railway or airline system might have inadequate or unequal opportunity to vote, thus making it unfair or unwise to decide elections based on the majority of votes actually cast. This concern might arise, for example, if employees in certain geographic locales had an undue advantage enabling them to dominate the voting the process unfairly, or were unable for some reason from participating in the election. The Attorney General in his 1947 opinion letter indicated that such concerns about the representative character of the vote might justify the Board in declining to exercise its authority to decide elections on the basis of the majority of votes cast. 40 U.S. Op. Atty. Gen. at 544-45.

Obviously, we inhabit a very different world from the one that existed when the Board first adopted its current election rule in 1934. Even in the 22 years since the Board formally considered a rule change, in the 1987 Chamber of Commerce proceeding, we have witnessed profound changes in culture and technology. These advances maximize even widely scattered and highly mobile employees' ability to register their free and deliberate choice in an election. There are myriad avenues for virtually instantaneous communication with employees, wherever they may be located, through Internet web sites and social networking (including Facebook,

blogs, message boards, chat-rooms, and YouTube), cell phones, text messaging and Twitter, among other means. These forms of communication are widely available and rapidly increasing. According to recent statistics released by the U.S. Census Bureau, as of 2007, 64% of all individuals 18 and older used the Internet, up from only 22% just ten years prior in 1997. U.S. Census Bureau News, "Internet Use Triples in Decade, Census Bureau Reports," (June 3, 2009), available at http://www.census.gov/ Press- Release/www/releases. Among individuals who are employed, 74% used the Internet as of 2007. Id. Rail and airline workers, in particular, represent a highly "wired," computer-literate group, given that so many facets of their work are computerized and networked. Thus, election-related information can be disseminated without regard to time, distance, physical location and dispersal, geographic barriers, or the varied working schedules common to the rail and airline industries.[5]

The Board has also taken full advantage of recent technological advances in order to make the voting process as accessible as possible to all eligible employees. In 2002, the Board introduced its Telephone Electronic Voting ("TEV") system, which allows an employee to vote using any phone. More recently, the NMB added Internet Voting in 2007. Thus, employees now have an additional option for participating in an election. Internet Voting also gives enhanced access to national guard/reserve employees and other employees temporarily stationed overseas. With the current voting technology used by the Board, there can be little concern about barriers to

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[5] Although the new technology has leveled old barriers in terms of geographic locations and schedules, by no means do we suggest that the ability of employers and unions to communicate with employees has been equalized by the new technology. If anything, the new technology has increased this imbalance, as employers are able to make extensive use of company email and intranets to communicate with employees in a manner not equally available to a union seeking to organize.

exercise of the franchise by any employee who wishes to register his or her own choice in an NMB election.

In sum, these circumstances now make it most appropriate and rational to employ a "yes"/ "no" ballot, to afford all eligible employees an equal opportunity to register their own choice or abstain from voting, to give legal effect only to clearly expressed intent in the form of a valid vote, and to allow the majority of valid votes to determine the election outcome. Under such conditions, it is entirely fair and reasonable that those eligible voters who fail to participate should be bound by the will of the majority who vote, as the Board now proposes.

8. Some opponents of the proposed rule claim that the Board cannot institute this change because it does not meet the standard cited by the Board in Chamber of Commerce – namely that a change is either mandated by the RLA or essential to the Board's administration of representation matters. Although it is not clear that the Board's authority is limited in that manner, we submit that the Board's proposal does indeed meet this threshold. While the "yes"/ "no" ballot may not be directly mandated by the RLA, the proposal is essential to the Board's administration of representation matters. Furthermore, the statute does require the Board to investigate and settle representation disputes. And as the notice correctly explains, "The Board's primary duty in representation disputes is to determine the clear, un-coerced choice of the affected employee ..." 74 Fed. Reg. at 56751.

As we have demonstrated throughout these comments, the current procedures no longer serve to determine the clear, un-coerced choice of employees in representation elections. Assigning "no" votes to all non-voters is arbitrary, unfair to those who actually vote and rewards employer interference campaigns designed to suppress turnout in union elections. Conversely,

the Board's proposal is a modest and measured approach that will simply allow a majority of those voting to decide the outcome. It is clear that this procedure, especially compared to the current rule, is needed to fulfill the Board's mandate to determine the true intent of employees in representation matters.

B. Efforts to attack the proposal for not including a decertification rule, for the adequacy of the notice and comment opportunity and for the timing of proposal must be rejected

Opponents' remaining arguments, attacking the scope of the proposal and the adequacy of the notice and comment process, are unfounded. As we explain below, neither law nor logic compels the Board to undertake more than the changes it proposes at this time. Further, the Board's notice and comment process for adopting this change clearly satisfies controlling legal requirements for administrative rulemaking.

1. Opponents attack the Board's proposal because it does not create a decertification procedure and fails to address other potential administrative changes in the investigation and resolution of representation disputes. But the NMB is not required by law to establish a special decertification procedure. Unlike certain other labor relations statutes, the RLA itself does not require or provide for the NMB to conduct decertification proceedings. Moreover, the Board's existing representation procedures do provide represented employees the opportunity to obtain an election to determine whether or not they wish to retain that representative. The Board's proposed change in its discretionary election process, to use a "yes"/ "no" ballot and decide election outcome based on the majority of valid ballots cast, would cover all such representation elections. It is neither unlawful nor arbitrary for the Board to propose and adopt only the limited, specific changes set forth in the notice of proposed rulemaking. See Capital Network Sys., Inc. v.

FCC, 3 F.3d 1526, 1531 (D.C. Cir. 1993) (agencies possess broad discretion to determine appropriate scope of rule making): Cellnet Comm., Inc. v. FCC, 965 F.2d 1106, 1111 (D.C. Cir. 1992).

Contrary to the suggestion of the dissent (74 Fed. Reg. at 56754) and the arguments of some opponents of the proposal, the Board's proposal to adopt a "yes"/ "no" ballot and a majority-of-valid-votes standard does not compel reconsideration of existing showing-of-interest standards for initiating a representation investigation and election. Those criteria entail a lower threshold for invoking NMB processes to seek initial representation among unrepresented workers, than to displace a lawfully elected or recognized bargaining representative. If anything, the statutory policy of encouraging collective bargaining, and opponents' emphasis on the need to maintain "stability" in collective bargaining representation under the RLA, argue persuasively for retaining the existing administrative criteria.

In fact, the National Railway Labor Conference, in its statement submitted for the Board's December 7, 2009 public meeting on this proposal, noted its concern with administrative action that would "... increase the frequency of attempts to replace existing unions with rival organizations." The statement goes on to argue that "Inter-union conflicts can be very disruptive – it affects the stability of labor-management relations as well as employee morale and can interfere with operational cohesiveness. As a result, the railroads strongly wish to avoid any action that might exacerbate the potential for these disputes." While these observations were apparently intended as grounds for opposition to the Board's election proposal, in fact they articulate a perfect rationale for not modifying the Board's existing showing of interest criteria and decertification procedures in this rulemaking.

Finally, we should note that many RLA covered unions desire improvements in the NMB representation process, including access to a roster of eligible voters analogous to the Excelsior list used in NLRB elections. But we would not argue, and do not do so here, that federal law mandates that the NMB propose or address such measures in its current rulemaking proceeding.

2. Opponents also complain that the Board's rulemaking process is legally inadequate because the Board failed to use adversary litigation procedures like those followed in the Chamber of Commerce proceeding. The Air Transport Association has even gone as far to claim that the Board is using a "stripped-down process that comes nowhere close to being 'complete and open.'" This characterization and others made by opponents of the rule erroneously suggest that the NMB is simply imposing a change without any opportunity for public review or input. In truth, the Board has gone out of its way to consider changing this rule in an open and transparent manner that more than complies with any statutory obligation.

As we have previously demonstrated, the Board has unusually broad authority and discretion in representation matters, and Supreme Court precedent persuades us that this authority is not limited by the Administrative Procedure Act. Consistent with that authority, the Board has used a variety of means over the years to adopt and modify its processes for investigating and resolving representation matters, as discussed above.

In this instance, the Board voluntarily complied with the APA's notice and comment procedure for informal rulemaking. In particular, the Board published a clearly adequate "notice of proposed rulemaking" in the *Federal Register* (5 U.S.C. § 553(b)); and the Board provided "interested persons an opportunity to participate in the rule making through submission of written data, views or arguments" (5 U.S.C. § 553(c)) during a 60-day period following publication of the

notice. 74 Fed. Reg. at 56750.[6] Assuming *arguendo* that the APA applies to the Board's proposal, nothing in the APA compels the NMB to follow more formal or stringent procedures. Specifically, the APA does not mandate use of formal adjudicatory proceedings unless the rules proposed "are required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c). Here, the RLA plainly does not compel such formal proceedings. Furthermore, the APA does not require any form of public hearing in connection with informal rulemaking. United Air Lines v. CB, 766 F.2d 1107, 1116 (7th Cir. 1985). Rather, agencies have full discretion whether or not to provide an "opportunity for oral presentation" in addition to written submissions, as the Board has chosen to do in this matter. 5 U.S.C. § 553 (c).

3. Finally, opponents complain about the timing of the proposal, arguing that the Board cannot propose and adopt a "yes"/ "no" ballot and majority-vote standard while significant representation petitions are looming or major organizing campaigns are under way, such as at Delta Air Lines. This factor cannot preclude the Board's rulemaking. Given that employees and unions have unfettered freedom to mount organizing efforts at any time, requiring the Board to refrain from regulation in the face of anticipated or potential representational disputes would effectively foreclose any exercise of administrative discretion over RLA representation processes. In the past, the Board has not hesitated to adopt significant changes in its election procedures –

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[6] Given the APA's provisions, there is no merit to opponents' suggestions that the Board acted improperly by issuing a specific, substantive proposal and simultaneously setting forth reasons why it deems the proposed change lawful and desirable. Agencies are not limited to inviting public reaction to the possibility of regulation in the abstract. Rather, the APA expressly provides for an agency to notify the public of "the terms and substance of *the proposed rule*." 5 U.S.C. § 553(b)(3) (emphasis added). And when an agency properly proposes specific administrative policies or practices, as the NMB has done here, providing detailed explanation and justification for the proposal is entirely lawful and appropriate, both to enable informed public comment and to satisfy the APA's standards of judicial review. Indeed, had the Board failed to include and discuss policy considerations and justification, opponents undoubtedly would have challenged the notice as legally deficient.

such as telephonic and internet voting – regardless of the potential advantages, disadvantages or other implications for actual and contemplated organizing activity. The Board's latest public proposal puts everyone on fair notice of the nature of the potential changes, and it allows a reasonable time to react. The Board should follow through as proposed, without speculating about the strategy implications for any interested party or campaign.

CONCLUSION

Based on the foregoing reasons, the discussion in the Board's formal notice of proposed rulemaking, and the presentations and submissions to the record from the TTD and other commentators in support of the Board's proposal, we urge the Board to adopt and implement, without delay, the proposed changes in election processes for the benefit of employees covered by the Railway Labor Act.

Respectfully submitted,

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TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)
United Transportation Union (UTU)

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