Chairman Dougherty dissented from the action of the Board majority in approving this proposed rule. Her reasons for dissenting are set forth below.

I dissent from the proposed rulemaking for several reasons. Our current election rules have a long history and are supported by important policy reasons. I do not believe there is any evidence or legal analysis currently before the Board to support making the change proposed by my colleagues. Serious questions exist about the Board's statutory authority to make the rule change and its ability to articulate a rationale for change that complies with the Administrative Procedures Act. Moreover, I believe the process by which this rule was drafted is flawed. Perhaps most importantly, the proposed rule makes no reference to other requests the Board has received to consider decertification and Excelsior list issues. For these and the following reasons, I believe it is, at a minimum, premature to propose a rule change of this magnitude, and a more prudent course of action would be for the Board not to prejudge this issue, but rather to give all interested parties an opportunity to comment on the request made by the Transportation Trades Division of the AFL-CIO (TTD), together with subsequent requests regarding decertification and other issues, before making any proposals.

The rule in question has been applied consistently for 75 years – including by Boards appointed by Presidents Roosevelt, Truman, Johnson, Carter, and Clinton. Making this change would be an unprecedented event in the history of the NMB, which has always followed a policy of making major rule changes with consensus and only when required by statutory amendments or essential to reduce administrative burdens on the agency. Chamber of Commerce of the United States, 14 NMB 347, 356 (1987). Regardless of the composition of the Board or the inhabitant of the White House, this independent agency has never been in the business of making controversial, one-sided rule changes at the behest of only labor or management.

No one, including my colleagues, has suggested that the Railway Labor Act mandates the change in the proposed rule or that the rule change is necessary to reduce administrative burdens on the Agency. In fact, a serious question exists as to whether the NMB even has the statutory authority to make this reversal. A Board appointed by President Carter unanimously decided that the Board is of the view that it does not have the authority to administratively change the form of the ballot used in representation disputes and that such a change, if appropriate, should be made by Congress. [1]

I also believe that my colleagues have not articulated a rationale for this rule change as required by the Administrative Procedures Act. With this notice of proposed rulemaking, my colleagues seek to radically depart from long-standing, consistently applied administrative practices. Under the Administrative Procedure Act, a change in such a long-standing policy must be supported by a strong rationale. While administrative agencies are not bound by prior policy, there is a duty to explain adequately "departures

[1] In addition, the only court ever to rule specifically on the question of whether the Board has the authority to certify a representative where less than a majority of the eligible voters participates in an election found that it did not. Virginian Railways Co. v. Sys. Fed'n, 11 F. Supp. 621, 625 (E.D. Va 1935). That ruling was not appealed and no court has ever specifically held that the Board has this authority.

from agency norms." Pre-Fab Transit Co. v. Interstate Commerce Comm'n, 595 F.2d 384, 387 (7th Cir. 1979). A change in the majority voting rule must be based on more than the preferences of the current Board. "An agency's view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . (I)f it wishes to depart from its prior policies, it must explain the reasons for its departure. " Panhandle E. Pipeline Co. v. Fed. Energy Regulatory Comm'n, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (internal citations omitted). "Conclusory statements" and "conjecture cannot substitute for a reasoned explanation" for such a change in precedent. Graphic Comm. Int'l Union v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490, 1494 (D.C. Cir.

There is nothing in the proposed rule to support changing this long-standing Board tradition. The Board has repeatedly articulated important policy reasons for our current majority voting rule – including our duty to maintain stability in the air and rail industries. 16 NMB ANN. REP. 20 (1950); Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). This duty stems directly from our statutory mandate to "avoid interruption to commerce or the operation of any rail or air carrier." Id. The Majority attempts to ignore this important statutory mandate by claiming that only our mediation function is relevant to keeping stability in the air and rail industries. This argument has no merit. The statute does not limit our mandate to only mediation, and it is disingenuous to suggest that our representation function does not play an important role in carrying out our duty to maintain stability in these industries. Moreover, the Board has repeatedly in the past raised this policy issue in conjunction with our representation function. 16 NMB ANN. REP. 20 (1950); Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). As the Board stated in 1987, "(a] union without majority support cannot be as effective in negotiations as a union selected by a process which assures that a majority of employees desire representation." Chamber of Commerce of the United States, 14 NMB 347, 362 (1987). Assuring that a representative certified by the NMB enjoys true majority support is even more important given that union certifications under the RLA must cover an entire transportation system[2] -- often over enormously wide geographic areas with large numbers of people. I also note that there is no process for decertifying a union under the Railway Labor Act. These unique aspects of the RLA do not exist under the National Labor Relations Act or elsewhere, and they render irrelevant comparisons between the RLA and other election procedures.[3]

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[2] It is well settled that the Board applies the term "craft or class" under the RLA on a system-wide basis. Delta Air Lines Global Servs., 28 NMB 456, 460 (2001); American Eagle Airlines, 28 NMB 371, 381 (2001); American Airlines, 19 NMB 113, 126 (1991); America West Airlines, Inc., 16 NMB 135, 141 (1989); Houston Belt & Terminal Railway, 2 NMB 226 (1952).

[3] As the Supreme Court has long recognized, "that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Railroad Trainmen v. Jacksonville Terminal Co., 394 US 369, 383 (1969).

The only other rationale offered by my colleagues is changed circumstances and an increasingly participatory workforce. I fail to see how these changes, if true, support changing a 75-year-old practice based on important statutory mandates that have not changed. Moreover, any arguments that changed labor relations support changing our election practices are definitively rebutted by the facts: the percentage of rail and air employees who are union members is dramatically higher than in other industries, and the percentage of air and rail employees participating in elections has increased by almost 20% over the last decade.

The Majority has not articulated a sufficient rationale for making the change. Moreover, the request from the Transportation Trades Division of the AFL-CIO that prompted this rule change was made in an informal, two-page letter with no legal analysis, no mention of changed conditions, and no discussion of our statutory authority. In light of these facts, the Board's history, and the lack of support for the change, I don't see how the Board could propose a rule change this controversial and divisive without the benefit of a full briefing from all interested parties.

I also dissent because I am concerned about the timing of the Majority's proposal. The Board recently established a bi-partisan, labor-management committee (which we are calling Dunlop II) to examine the RLA and the NMB and recommend changes. The committee has not yet delivered its report. In my view, it would be premature and irresponsible for the Board to propose any change to one of its most long-standing procedures before this committee has made its report.

Moreover, the Board has received requests to begin representation proceedings involving close to 40,000 employees at two major airlines – the largest group of elections in the history of the NMB. I believe it is harmful to the reputation and credibility of the Board for it to take a position in favor of a change to our election rules during these elections, which the Majority does by proposing this change. As I have previously stated, I believe the more impartial and responsible approach would be to seek comment on the TTD's request, together with other related issues, so that we could have the benefit of a full briefing on all the issues before without making proposals in favor of the change.

I also dissent because the Majority's proposed rule does not request comment on several related issues that have been raised by our constituents in connection with the TTD's request. I believe firmly that the Board should not consider the TTD petition in a vacuum. Several parties have requested that we consider a decertification procedure, noting that a minority voting rule necessitates some sort of decertification mechanism or else it deprives employees of the right to be unrepresented. We have also received a request to consider providing Excelsior lists to unions. And there are also other areas of our representation policy and procedures that would be implicated by a change in voting rules. For example, we currently require a union seeking to challenge an incumbent union to submit authorization cards from more than 50% of eligible voters. If we were to change our voting rules to permit fewer than 50% of eligible voters to select a representative, we must contemporaneously consider whether we should still require a greater than 50% showing of authorization cards to challenge an incumbent union. In order in order to be fair to all interested parties, I believe that Board must consider all of these issues together, and I am surprised that my colleagues have ignored these other requests and are addressing

only the TDD's request. I encourage interested parties to submit comments addressing these other issues.

Finally, I dissent because I believe that the process by which this rule was drafted is flawed. The rule was drafted without my input or participation. I was notified of the existence of a final proposed rule at 11:30 am on October 28, and I was given only 24 hours to review the rule and draft a dissent. I believe this sort of rushed, exclusionary rulemaking does not produce the best results for the agency, and I believe a better way of conducting business would be to have a comment period on all the relevant proposals before taking a position, review those comments together, and craft a decision collaboratively.

Chairman Elizabeth Dougherty.