No. 10-5253
ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

AIR TRANSPORT ASSOCIATION OF AMERICA, INC.,
Appellant,

ASHTON THERREL, ET AL.,
Appellants

v.

NATIONAL MEDIATION BOARD, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 1:10-CV-00804 (PLF)
HON. PAUL L. FRIEDMAN, UNITED STATES DISTRICT JUDGE

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Dated: May 11, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), undersigned counsel certifies that:

(A) *Parties and Amici*. The parties in these consolidated cases are Appellants, Air Transport Association of America, Inc., Chamber of Commerce of the United States of America, Robert P. Baker, III, Ginger Kelley, Mathew R. Palmer, Jay D. Parsley, and Ashton Therrel, and Appellee, National Mediation Board.

The following persons were permitted to intervene as Plaintiffs in the District Court for the District of Columbia: Chamber of Commerce of the United States of America, Robert P. Baker, III, Ginger Kelley, Mathew R. Palmer, Jay D. Parsley, and Ashton Therrel. The following persons were permitted to intervene as Defendants in the District Court: Aircraft Mechanics Fraternal Association, International Brotherhood of Teamsters, and US Airlines Pilots Association.

The following persons appeared as movants in the District Court: Association of Flight Attendants, CWA; International Association of Machinists & Aerospace Workers, AFL-CIO; and Transportation Trades Department, AFL-CIO.

Counsel for Appellant is not aware of any *amici*.

This action challenges a Final Rule promulgated by the Appellee, National Mediation Board, and numerous persons and entities filed comments related to that action in the agency's Docket No. C-6964.

(B) *Rulings Under Review*. The rulings of the District Court (Judge Paul L. Friedman) under review are (i) the District Court's Amended Order and Entry of Judgment dated June 25, 2010, in Docket No. 1:10-cv-0804 (PLF), and accompanying opinion, dated June 28, 2010, and available at 2010 WL 2572685, which granted the Appellee summary judgment; and (ii) the District Court's June 4, 2010, Order denying the appellant's Motion for Discovery in the same action, which is not reported.

The action in the District Court challenged a Final Rule promulgated by the Appellee, National Mediation Board, in Docket No. C-6964. The Final Rule is published at 75 Fed. Reg. 26,062 (May 11, 2010).

(C) *Related Cases*. This case has not previously been before this Court or any other court, other than the District Court.

This Court docketed ATA's appeal as Case No. 10-5253, and, by Order dated September 7, 2010, consolidated ATA's appeal with the appeal filed by the Chamber of Commerce of the United States of America (Case No. 10-5255) and the appeal filed by Robert P. Baker, III, Ginger Kelley, Mathew R. Palmer, Jay D. Parsley, and Ashton Therrel (Case No. 10-5254).

Appellants are not aware of any other related cases pending before this or any other court.

Dated: May 11, 2011

/s/ Robert A. Siegel
Robert A. Siegel

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INTRODUCTION

For seventy-five years the National Mediation Board ("NMB" or "Board") required a majority of the employees in a craft or class to determine they want union representation before the Board would certify a union as the collective bargaining representative in elections under the Railway Labor Act ("RLA"). By requiring a majority of the craft or class to vote for representation before certifying a representative, the Board implemented the unambiguous directive of Congress, which provides that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class." RLA § 2, Fourth; 45 U.S.C. § 152, Fourth. For decades, both Democratic and Republican-led Boards uniformly rejected requests from unions for a rule allowing a mere majority of the votes cast to determine whether employees must bargain collectively, even if far less than a majority of the craft or class votes in favor of union representation. During the Carter Administration, for example, the Board concluded that it could not adopt such a rule unless Congress amends the RLA.

But in 2009, following the appointment of a new Board member and reappointment of another, the Board announced its intention to replace the 75-year-old majority-of-the-craft-or-class rule with a majority-of-votes-cast rule under which a minority of a craft or class has the right to select union representation. In their determination to promulgate their notice of proposed rulemaking, the Board's

majority discarded Board precedent and ignored the instruction of accumulated Board experience spanning twelve Presidential administrations. Their actions prompted then-Chairman Elizabeth Dougherty to draft a vigorous dissent—which the Board's majority then sought to prevent her from publishing.

Appellant Air Transport Association of America, Inc. ("ATA") filed this suit, alleging that the Board's rule change violated Section 2, Fourth of the RLA and was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The Chamber of Commerce of the United States of America ("Chamber") and five individual employees ("individual appellants") of Delta Air Lines, Inc. ("Delta") intervened as plaintiffs.[1] Based upon publicly available evidence that raised serious questions about the good faith of the other two Board members, the ATA sought limited discovery in support of its allegations that the Board majority predetermined the rule change. Those facts included then-Chairman Dougherty's public statements about how the Board's majority improperly excluded her from deliberations over the proposed rule change, as well as publicly-available evidence supporting the inference that the Board's majority

[1] The ATA's members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. American Airlines, Inc., Continental Airlines, Inc., Southwest Airlines Co., UPS Airlines, and US Airways, Inc. do not join this action.

engaged in a coordinated effort with two large unions to ensure that important representation elections at Delta would be processed under a new voting rule. The District Court denied the ATA's motion because it concluded this publicly available evidence was not a "smoking gun." The District Court then granted summary judgment to the Board, reasoning that the RLA permits the Board to transfer the majority's right to determine the question of representation to a minority—indeed, potentially a handful—of employees. The District Court also held the Board majority had adequately explained its departure from prior Board precedent in abandoning the 75-year-old majority-of-the-craft-or-class rule.

This appeal requires this Court to determine whether the Board's construction of the RLA is impermissible and unreasonable, whether the Board adequately justified its abrupt reversal in the face of its precedent, and whether the District Court abused its discretion in denying the ATA's motion for discovery.

JURISDICTIONAL STATEMENT

The Board promulgated the challenged rule on May 11, 2010, and pursuant to the RLA, 45 U.S.C. §§ 151 *et seq.* Appellants' causes of action arise under the APA, 5 U.S.C. §§ 551 *et seq.*, the RLA, 45 U.S.C. §§ 151 *et seq.*, and the First Amendment to the U.S. Constitution. The District Court had subject-matter jurisdiction over the action pursuant to 28 U.S.C. § 1331. *See also* 28 U.S.C. §§ 2201, 2202. Venue was proper in the District Court pursuant to 28 U.S.C. §

1391(e).

The District Court denied appellant ATA's motion for discovery in a June 4, 2010 order, and issued a final judgment on June 25, 2010, with an accompanying opinion on June 28, 2010. Appellants filed timely notices of appeal from both the District Court's discovery order and its final judgment on July 21, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

Whether Congress authorized the Board to adopt its new rule turns on Section 2, Fourth of the RLA, which provides, in relevant part:

> 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.

45 U.S.C. § 152, Fourth.

STATEMENT OF ISSUES PRESENTED

1. Whether the Board's new voting rule, which permits a minority of a craft or class to make representation determinations, is an impermissible or unreasonable construction of Section 2, Fourth of the RLA, and whether it violates the individual appellants' First Amendment rights to free association.

2. Whether the Board's rule change was arbitrary and capricious under the APA, because the Board (i) failed to apply its precedent requiring "compelling reasons" for a rule change of this significance; (ii) changed its rule for reasons that

are unsupported by record evidence and facially arbitrary; (iii) failed to identify any changed circumstance, new evidence, or rational basis to doubt its long-standing conclusion that the majority-of-the-craft-or-class rule promotes labor stability; and (iv) made its rule change while preserving or creating irreconcilable policies in its decertification and run-off procedures.

3. Whether the Board's majority (i) acted arbitrarily and capriciously and unlawfully under the APA by refusing to conduct an evidentiary hearing as required by its precedent and (ii) predetermined the issues in violation of the requirements of due process and reasonable decisionmaking under the APA.

4. Whether the District Court improperly denied limited discovery to allow the ATA the opportunity to support its allegations of predetermination.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The airline and railroad industries are key arteries of the nation's interstate commerce. Recognizing their critical significance, the federal government has long tailored legal frameworks to the unique features of these industries. The shortcomings of earlier labor relations frameworks led to the 1926 enactment of the RLA, the 1934 amendments to the RLA creating the Board and adopting the rights-granting language of Section 2, Fourth at issue in this appeal, and the 1936 extension of the RLA to airlines.

1. a. Targeted federal regulation of labor relations in the railroad industry began with the Arbitration Act of 1888 and proceeded through a succession of largely unsuccessful statutory revisions. *See The Railway Labor Act* 30-41 (2d ed. 2005); Frank N. Wilner, *The Railway Labor Act & the Dilemma of Labor Relations* 31-41 (1990) (hereinafter "Wilner"). And after the First World War, Congress enacted the Transportation Act of 1920, 41 Stat. 456 (Feb. 28, 1920), and created the U.S. Railroad Labor Board ("RLB").

The RLB was a failure. In its early years, it articulated various "principles" for resolving representation disputes. Most significantly, the RLB in 1921 announced "principle 15," which would later be adopted, nearly verbatim, as Section 2, Fourth of the RLA: "[a] majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class." Decision No. 119, *Int'l Ass'n of Machinists v. Atchison, T & S.F. Ry.*, 2 Dec. U.S. Railroad Labor Bd. 96, ¶ 15 (Apr. 14, 1921) [JA54]. But the RLB lacked any legal power to enforce its principles, and "[t]he only sanction of its decision [was] to be the force of public opinion." *Pa. R.R. Co. v. U.S. R.R. Labor Bd.*, 261 U.S. 72, 79 (1923). Its views on representation and wage issues were routinely ignored, resulting in the rise of company unions lacking the support

of a majority of employees,[2] and culminating in a "national shop craft strike in 1922 and the boycott of RLB procedures that followed."[3]

b. A year after the national shop craft strike, the RLB was asked to revisit principle 15. *See* Decision No. 1971, *Bhd. of Ry. & S.S. Clerks v. S. Pac. Lines*, 4 Dec. U.S. Ry. Labor Bd. 625 (Sept. 21, 1923) [JA55-59]. The case came to the RLB after an election featuring two unions, in which a majority of those in the craft participated and an initial vote count showed that one of the unions obtained a majority of the votes cast. *Id.* The votes were closely split between the two unions, however, and the prevailing union did not obtain the votes of a majority of the entire craft. *Id*. Given the split vote, both the rail carrier and the defeated union contended that principle 15 required that a majority of a craft or class concur in the selection of a particular union. *Id.* at 626-629 [JA56-59].

The RLB disagreed. Given that the majority of the craft or class had sanctioned the election by participating in it and voting for union representation,

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[2] *See* Wilner, *supra* at 43-44; *To Amend the Railway Labor Act Approved May 20, 1926*, hearing on H.R. 9861 before the House Committee on Rules, 73d Cong., 2d Session, June 12-13, 1934, at 14 (statement of Rep. Crosser) (explaining that a key purpose of the RLA was to do away with "company union[s]" and "fake organization[s]" lacking the support of the majority of employees).

[3] *The Railway Labor Act* 58; Wilner, *supra*, at 44 (recounting that after the RLB "found in favor of additional wage reductions," the affected unions "demanded management ignore the [RLB's] decision," and a "bargaining impasse followed, leading to a July 1922 nationwide strike of more than 400,000 shopcraft workers that the [RLB] branded 'illegal'").

the RLB concluded that "a majority of the legal votes cast in this election will determine who shall be the representatives of the employees." *Id.* at 629 [JA59]; *accord Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 561 (1937) (noting that Decision No. 1971 allowed a majority of ballots cast to determine the outcome "where it appeared that a majority of the craft participated in the election"). As the RLB explained, allowing a majority of a craft or class to select its representative through an election in which a majority had participated "was obviously the meaning and the purpose" of principle 15. 4 Dec. U.S. Ry. Labor Bd. at 629 [JA59]. Decision No. 1971 did not, however, take a position on whether the majority of votes cast should determine the outcome of a representation dispute if a majority of a craft or class does not participate in the election. Nor did it have to do so: a majority of the craft or class *did* participate in the election in that case. *Id.*

2. In contrast to the pre-RLA regulation of railroads, the RLA has been a success and has "remained essentially unchanged" since its 1936 extension to the airline industry. *The Railway Labor Act* 29-30.

a. The RLA was drafted "jointly by labor and management so as to be acceptable to both," and was signed into law by President Coolidge in 1926. *See* Wilner, *supra* at 47. It eliminated the RLB. 45 U.S.C. §§ 151 *et seq.* In 1934, it was amended to incorporate the language of the RLB's principle 15: "[t]he majority of any craft or class of employees shall have the right to determine who

shall be the representative of the craft or class for the purposes of this chapter." *Id.* at § 152, Fourth.

The 1934 amendments also created the Board, *id.* at § 154, and charged it with investigating representation disputes and ascertaining "who are the representatives of such employees," *id.* at § 152, Ninth ("Section 2, Ninth"). The Board's duty under Section 2, Ninth would be to "protect[]" the right of the majority of any craft or class codified in Section 2, Fourth. *Bhd. of Ry. & S.S. Clerks v. Ass'n for Benefit of Non-Contract Employees ("ABNE")*, 380 U.S. 650, 659 (1965). Unlike the decrees of the RLB, the Board's decrees create binding legal duties and are judicially enforceable. *See, e.g.*, *Virginian Ry.*, 300 U.S. at 548 (carriers have statutory obligation to "treat with" certified representatives).

b. Since its inception, the Board followed the textual command of Section 2, Fourth and would not certify a union representative unless the majority of a craft or class determined that one should be certified. As the Board's first Chairman explained one year after Section 2, Fourth was enacted, "[o]ur Board has felt that it was good administration at least *to read the Act strictly in accordance with its terms*," because "[t]he organization that obtains the contract by reason of a minority of the votes in a class will generally have rough sledding in the administration of the contract for the employees." *Railway Clerk, in Official Journal of Bhd. of Ry. & Steamship Clerks, Freight Handlers, Express & Station*

Employees at 473 (Dec. 1935) (then-Chairman Carmalt) (emphasis added; hereinafter "Carmalt"), *quoted in* Br. of Petr. at 58 n.*, *Virginian Ry.*, 300 U.S. 515 (No. 324), 1937 WL 40466.

In addition to following the text of Section 2, Fourth—by refusing to certify a union as representative unless the majority of a craft or class has determined that a union should be certified—the Board had long employed a unique election ballot. The ballot did not allow employees to vote against a union, but instead contained only an option to vote in favor of union representation. Employees who preferred not to have union representation were instructed not to vote. Since 1965, instructions to employees made it clear that not voting constitutes "a vote for no representation." *ABNE*, 380 U.S. at 670. This ballot was not required by Section 2, Fourth; the Board could have changed its ballot without abandoning its voting rule. The Board could, for instance, have employed a ballot with options for and against union representation, while still requiring that a majority of a craft or class vote for union representation before a union could be certified.

c. Over the years, the Board was repeatedly asked to abandon its voting rule in favor of a rule that would allow a union to be certified based on the majority of votes cast, even if less than a majority of eligible employees voted in favor of union representation. The Board consistently rejected those requests. *See, e.g.*, *Chamber of Commerce of the U.S.*, 14 N.M.B. 347, 362 (1987); *Delta Air Lines*,

35 N.M.B. 129 (2008). Indeed, the Board in 1978 explicitly recognized that Congress had not authorized it to abandon its majority-of-the-craft-or-class rule. *See* Minutes of National Mediation Board Meeting, at 78-15 (June 7, 1978) [JA164].

B. Agency Proceedings

On September 2, 2009—a few months after a change in the Board's composition[4]—the AFL-CIO's Transportation Trades Department ("TTD") sent the Board a private letter requesting that the Board abandon its 75-year-old voting rule and replace it with a rule under which a union could be certified based on the majority of votes cast—even if only a small percentage of employees participated in the election. *See* TTD, Revisions to Representation Manual (Sept. 2, 2009) [JA209-11].

At the time of the TTD's request, both the Association of Flight Attendants-CWA ("AFA") and the International Association of Machinists and Aerospace Workers ("IAM") had applications pending with the Board seeking to represent portions of Delta's workforce. These work groups included more than 50,000

[4] Board Member Linda Puchala was nominated by President Obama, and sworn into office on May 26, 2009. She joined then-Chairman Dougherty, who was nominated by then-President Bush and confirmed in 2006, and Member Harry Hoglander, who had already been serving as a Member, and was re-nominated by President Obama, and reconfirmed on July 24, 2009.

employees.[5] Although the Board continued to schedule and process elections under the majority-of-the-craft-or-class rule,[6] it delayed without explanation action on the AFA's application at Delta.

On September 10, 2009, the ATA submitted a letter to the Board opposing the TTD's request. *See* Airline Industry Preliminary Response to Unions' Request for Fundamental Change to Majority Rule Voting Process (Sept. 10, 2009) [JA212-16]. The ATA noted the Board's prior recognition that only Congress could revise the Board's voting rule and that, even if the Board had the statutory authority to make the change, its own precedent required a robust briefing and evidentiary-hearing process and a finding of compelling circumstances to justify such a change in the voting rules. *Id.* The Chamber submitted its own opposition on September

[5] *See In re Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 54 (Aug. 17, 2010) (20,120 flight attendants); *In re Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 61 (Aug. 25, 2010) (14,083 fleet service employees); *In re Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 66 (Sept. 7, 2010) (16,435 passenger service employees); *In re Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 N.M.B. 67 (Sept. 9, 2010) (706 stock and stores employees).

[6] *See, e.g., In re N. Am. Airlines*, 37 N.M.B. 79 (Dec. 3, 2009) (certifying the results of an election that was requested on September 22, 2009); *In re Port Auth. Trans-Hudson Corp.*, 37 N.M.B. 75 (Dec. 1, 2009) (certifying the results of an election that was requested on July 14, 2009); *In re Compass Airlines*, 37 N.M.B. 63 (Nov. 19, 2009) (certifying the results of an election that was requested by the AFA on September 22, 2009); *In re Liberty Helicopters, Inc.*, 37 N.M.B. 33 (Nov. 13, 2009) (certifying the results of an election that was requested on September 3, 2009); *In re Chi., Ft. Wayne & E. R.R.*, 37 N.M.B. 23 (Nov. 4, 2009) (certifying the results of an election that was requested on September 2, 2009); *In re USA 3000 Airlines*, 37 N.M.B. 1 (Oct. 7, 2009) (certifying the results of an election that was requested by the AFA on August 7, 2009).

30, 2009, arguing that the proposed change would require changes to interrelated aspects of the Board's election procedures—most significantly, the adoption of a parallel decertification procedure. *See* Revisions to NMB Provisions in Representation Disputes (Sept. 30, 2009) [JA217-19]. The Board did not respond to either letter.

On November 3, 2009, the Board issued a Notice of Proposed Rulemaking in Docket No. C-6964, 74 Fed. Reg. 56,750 (Nov. 3, 2009) (the "NPRM") [JA250-54], in which it proposed to abandon its 75-year-old voting rule, and replace it with the rule proposed by the TTD. Members Hoglander and Puchala published the NPRM by means of an improper internal process, which prompted then-Chairman Dougherty to detail the Board majority's "exclusionary behavior" in a letter to several U.S. Senators. *See* Letter from Chairman Dougherty to Senators McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009) [JA234-39]. As the letter explained, the Board's majority surprised then-Chairman Dougherty with a draft proposed rule on October 28, 2009, allowed her 1.5 hours to consider it, and informed her that, contrary to Board practice, she could not publish a dissent. [JA234-35.] When then-Chairman Dougherty protested, the Board's majority allowed her a brief additional period in which to review the rule, but continuing to bar her from publishing a dissent. [JA235.] The Board's majority finally permitted her to dissent but only if she agreed to delete

any references to the majority's extraordinary behavior. *Id.* They gave no explanation for their rush to publish the proposed rule or their extraordinary conduct. As then-Chairman Dougherty explained, the Board majority's conduct gave the unmistakable "perception that the majority is attempting to push through a controversial election rule change to influence the outcome of several very large and important representation cases" at one of the ATA's member airlines (*i.e.*, Delta). *Id.*

Instead of providing the robust evidentiary hearing process required by the Board's precedents, the NPRM provided only a 60-day notice-and-comment period, which closed on January 4, 2010. The Board also conducted a limited public "meeting" on December 7, 2009, but did not offer an opportunity for cross-examination of witnesses under oath or for rebuttal. Moreover, the Board majority's NPRM did not even acknowledge the Chamber's request for consideration of a parallel process for decertification—even though then-Chairman Dougherty, in dissent from the NPRM, explained that any proposal to abandon the prior rule would "necessitate[] some sort of decertification mechanism or else it deprives employees of the right to be unrepresented." 74 Fed. Reg. at 56,754/1 [JA254].

The ATA submitted a comment letter and delivered a pre-submitted oral statement at the December 7, 2009 "meeting." *See* ATA, Comments Re: Notice of

Proposed Rulemaking in Docket No. C-6964 (Jan. 4, 2010) [JA275-85]. On January 8, 2010, certain members of the ATA moved to disqualify Members Hoglander and Puchala, based on publicly available facts—including the Board's exclusion of then-Chairman Dougherty from internal deliberations over the NPRM—indicating that those two Members had impermissibly predetermined the issues raised in the NPRM. *See* ATA, Motion for Disqualification in Docket No. C-6964 (Jan. 8, 2010) [JA371-76].

On May 11, 2010, the Board issued a Notice of Final Rulemaking ("NFRM"), denying the Motion for Disqualification and adopting the majority-of-votes-cast rule that the TTD had requested in its private letter. 75 Fed. Reg. 26,062 (to be codified at 29 C.F.R. §§ 1202.4, 1206.4) [JA377-404]. Then-Chairman Dougherty filed a dissent. *See id.* at 26,083 [JA378].

C. District Court Proceedings

On May 17, 2010, the ATA filed a complaint in the U.S. District Court for the District of Columbia, alleging that the Board's rule change violated the plain text of Section 2, Fourth and was arbitrary and capricious under the APA. Two days later, the ATA filed a motion to enjoin implementation of the new voting rule, and a separate motion seeking limited discovery in order to further substantiate its allegations that the Board majority had impermissibly predetermined the issues. The Chamber and the individual appellants intervened as plaintiffs.

The District Court denied the ATA's request for discovery on June 4, 2010. [JA15-25.] It denied the motion because it concluded that the publicly available evidence was not a "smoking gun" and did not "ineluctably require" an inference of predetermination. *Id.* In light of the denial of discovery, the parties moved for summary judgment. After a hearing, the District Court issued a final order on June 25, 2010, denying the ATA's motion for summary judgment and granting the Board's cross-motion for summary judgment. [JA43-44.] In a corresponding opinion issued on June 28, 2010, the court held that the Board's new rule is permissible under Section 2, Fourth; that it does not violate the individual appellants' constitutional rights; that it is not arbitrary and capricious under the APA; and that the Motion for Disqualification was properly denied.

SUMMARY OF ARGUMENT

I. A. The text of Section 2, Fourth is clear: "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class." 45 U.S.C. § 152, Fourth. And for nearly eight decades—through both Democratic and Republican Administrations—the Board followed Section 2, Fourth's text and applied a rule under which a union would be certified as representative only if the majority of a craft or class determined that a union should be certified.

The Board has now cast that longstanding rule aside. Under the Board's

new voting rule, the majority of valid ballots cast will determine the outcome of a representation dispute, regardless of whether only a small minority of the craft or class participated in the election. This is neither a permissible nor a reasonable interpretation of Section 2, Fourth.

B. The Board argues that Section 2, Fourth left two gaps for it to fill. Neither gap exists. First, the Board contends that Section 2, Fourth does not specify that the majority holds the right to make representation determinations. But the Supreme Court has recognized that the statute unambiguously gives the majority that right. Second, the Board asserts that a nonvoting majority may be deemed to have exercised its right to determine representation by acquiescing in the will of a voting minority. But the statute's meaning is plain. To "determine" an outcome requires a formal or authoritative declaration—not just silence. Contemporary use of the word "determine" confirms its ordinary meaning, as does the structure, purposes, and history of Section 2, Fourth. The Board's reliance on the National Labor Relations Board's ("NLRB") practice of certifying unions based on a majority of votes is misplaced given the differences between the RLA and the National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. § 151 *et seq*.

In addition, the individual appellants contend that the Board's new voting rule is impermissible because it violates their rights to free association under the First Amendment to the U.S. Constitution.

C. The Board's new rule is also an unreasonable construction of Section 2, Fourth. The Board fails to explain how its new rule could more accurately measure whether the majority of a craft or class has made a determination as to union representation. Moreover, the Board unreasonably based its rule change on a desire to allow employees to vote against union representation. Although the Board's prior ballot did not include a "no union" voting option—and employees who preferred not to be represented by a union were instructed not to vote—the Board did not have to change its prior voting rule in order to change its prior ballot. The Board could easily have adopted a ballot with a "no union" box while still requiring that a majority of a craft or class determine who shall be the representative. It was unreasonable for the Board to mandate otherwise.

II. A. The Board's rule change is also arbitrary and capricious under the APA. In suddenly altering a decades-long course, the Board was obligated to supply a reasoned and reasonable explanation for its action, including a sufficient reason for abandoning its prior precedent. It failed to do so.

The Board departed, without adequate explanation, from its long-held "compelling reasons" standard under which the Board will not make a significant change to the voting rules unless the rule change is mandated by the RLA or essential to administering the statute. Despite having repeatedly rejected, under this standard, the argument that the majority-of-votes-cast rule would more

accurately measure employee intent, the Board has now adopted that rule solely on the ground that it allegedly will more accurately determine employee preference.

The Board's accuracy theory does not even satisfy the APA's basic requirement of reasoned decisionmaking. The Board asserted that its 75-year old voting rule "imposes" a viewpoint upon employees who do not vote. But since 1965, the Board has explained on every ballot that abstaining will be counted as a "no vote," and the Board offered no evidence that employees suddenly have begun to misunderstand its instructions. Moreover, the Board's rule change rests on a new acquiescence presumption about employee intent—*i.e.*, that nonvoters acquiesce in the will of voters, regardless of the outcome. It is therefore incompatible with the Board's goal of more accurately measuring employee intent.

While on the one hand the Board suddenly and without adequate explanation concluded its prior rule was inaccurate, on the other the Board abruptly abandoned its long-standing conclusion that its prior rule was necessary to ensuring labor stability in the airline and railroad industries. Reversing a principle it had held for decades—from President Franklin Roosevelt's administration through George W. Bush's administration—the current Board has concluded that the prior rule has no bearing on labor stability. The Board's reasons for this abrupt reversal do not withstand scrutiny.

This is particularly true because the Board cited stability as the reason to

refuse to conform its "decertification" process to its new voting rule. The Board has a confusing "straw-man" substitute for decertification under which it has proved nearly impossible for employees to reverse a decision to have union representation—even if a majority of the craft or class wants to do so. And the Board's adoption of the new voting rule, which makes it possible for a minority of the craft or class to compel certification of a union, results in an even more asymmetrical and discriminatory regime that the Board justified based upon the stability rationale the Board had rejected in abandoning its prior rule.

The Board's treatment of decertification also reveals the arbitrariness of its accuracy theory: despite its assertion that it needed to abandon its prior voting rule to promote accurate measurements of employee sentiment, the Board's decertification procedures arbitrarily count certain votes *against* unionization as being votes *for* unionization. And the Board will now use a "no union" option in decertification elections (where it will cause confusion) while refusing to use a "no union" option in run-off elections (where it is essential for accuracy).

B. The Board's rule change is also procedurally unlawful. The Board's precedent requires it to conduct formal rulemaking—which it had previously interpreted to include evidentiary proceedings—before making a significant change to its prior voting rule. The Board abandoned that precedent here. It defended this action by arguing that when it specified formal rulemaking in its

precedent, it actually meant *informal* rulemaking. This Orwellian (but convenient) reading of history is arbitrary and capricious.

The Board's creative approach to its prior precedent, and its abrupt rejection of 75 years of its accumulated experience, is potentially explained by the Board majority's predetermination of the issues. Publicly available evidence—including an unprecedented public letter from then-Chairman Dougherty to several U.S. Senators—gives the indelible impression that Board Members Hoglander and Puchala pre-committed to the rule change as part of a coordinated effort with TTD, IAM, and AFA to ensure that IAM and AFA would have the benefit of the new voting rule during several important elections at Delta. Notwithstanding this publicly available evidence of predetermination, the District Court denied the ATA's request for limited discovery on the ground that the evidence was not a "smoking gun" that would prove improper behavior. But Circuit law does not require the ATA to prove its case on the merits—to prove that it was "ineluctably" right—just to obtain discovery. In any event, the publicly available information is strong evidence that the Board's majority acted arbitrarily and capriciously in abandoning a voting rule embraced by twelve Presidential administrations.

ARGUMENT

I. The Board's New Voting Rule Is Not a Permissible or Reasonable Interpretation of Section 2, Fourth

The text of Section 2, Fourth is clear: it provides that "[t]he *majority* of any craft or class of employees shall have *the right to determine* who shall be the representative of the craft or class." 45 U.S.C. § 152, Fourth (emphasis added). And for nearly eight decades—beginning in President Franklin D. Roosevelt's first term and continuing through all subsequent administrations—the Board followed the text of Section 2, Fourth and certified a union only if the majority of a craft or class determined that a union should be certified. This voting rule is part of the fabric of the RLA. It is dictated not only by the text of Section 2, Fourth, but also by the unique scope and structure of the statute—which covers two industries that are critical to the flow of interstate commerce, and which provides for the certification of union representatives for entire crafts or classes (*e.g.*, all of an air carrier's flight attendants throughout the entire country) rather than for local bargaining units.

The Board has suddenly cast aside its longstanding rule. Under its new voting rule, a union will be certified as the representative of a craft or class if it receives a majority of the votes cast, even if only a small percentage of eligible employees participate in the election or vote in favor of union representation. The Board will not require that the majority of a craft or class sanction the election by

participating in it and voting for unionization.[7] To the contrary, the Board will now certify a union even if the majority does nothing at all. In effect, a *minority* of a craft or class may now determine who shall be the representative of the craft or class, so long as the minority constitutes a majority of voters. But this is neither a permissible nor reasonable construction of Section 2, Fourth. The Board's new rule must therefore be vacated.

A. The *Chevron* Two-Step Framework

When reviewing an agency's interpretation of a statute the agency administers, this Court applies the two-step framework of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

At *Chevron* Step One, this Court applies "the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (citation and quotations omitted). When the statute's text answers the question, the analysis is at an end. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009). If the text is on its face unclear, its meaning should be discerned through examination of the statute's structure, purposes, and legislative history. *Bell Atl. Tel. Cos.*, 131 F.3d at 1047. And if the Court concludes that an agency's construction is a "sufficiently

[7] Nor will the Board necessarily require that the majority of a craft or class authorize the election in the first place. Under Board rules, a mere 35 percent of a craft or class can initiate a union election—but only if there is currently no representative. 29 C.F.R. § 1206.2(b).

poor fit with the apparent meaning of the statute," then the agency's interpretation is struck down. *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 401 (D.C. Cir. 2004) ("[W]here the text *and reasonable inferences from it* give a clear answer against the government that is the end of the matter" (emphasis in original; citation and alterations omitted)); *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006) (inquiring into "'fit' with the statutory language" and "conformity" with statutory purposes).

If the statute leaves "a gap for the agency to fill," *Chevron*, 467 U.S. at 843, the Court proceeds to *Chevron* Step Two. At this step, the Court defers to the agency only when it "has offered a reasoned explanation for why it chose [its] interpretation." *Village of Barrington v. Surface Transp. Bd.*, —F.3d—, 2011 WL 869904, at *9 (D.C. Cir. Mar. 15, 2011).

B. The Board's New Rule Is Not a Permissible Interpretation of Section 2, Fourth at *Chevron* Step One

Section 2, Fourth provides that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class." RLA § 2, Fourth; 45 U.S.C. § 152, Fourth. These textual commands are clear. The "majority of any craft or class of employees" is granted a "right." And it is not merely a right to participate in the decisionmaking process, but "the right" to "determine" the outcome of that process.

The Board's NFRM nonetheless maintains that its new voting rule is consistent with the text of Section 2, Fourth. 75 Fed. Reg. at 26,067/3-26,070/1 [JA382-85]. It argues that the new rule fills two gaps in Section 2, Fourth: a gap as to who holds the right, and a gap as to whether the right must be exercised. These arguments should be rejected. The Board's new rule is a "sufficiently poor fit with the apparent meaning of the statute" that it fails at *Chevron* Step One. *Cal. Indep. Sys. Operator Corp.*, 372 F.3d at 401.

1. Section 2, Fourth Does Not Authorize the Board to Construe the "Right to Determine" as Belonging to a Majority of Voters

The Board first argues that Section 2, Fourth does not specify *who* within a craft or class holds the right to make representation determinations. Given this alleged ambiguity, the Board contends that it may construe the right as belonging to a majority of voters, rather than a majority of the entire craft or class. 75 Fed. Reg. at 26,067/3 [JA382].

The text of Section 2, Fourth, however, specifies that the "majority" of a "craft or class" holds "the right to determine who shall be the representative of the craft or class." The right does not belong to all employees within a craft or class, it does not belong to a minority of employees within a craft or class, and it does not belong to the employees within a craft or class who happen to vote. Instead, and as the Supreme Court has recognized, the right is held by the majority of the craft or

class. *See Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560 (1937) (Section 2, Fourth "confer[s] the right of determination upon a majority of those *eligible* to vote" (emphasis added)).

Furthermore, by granting the majority "*the* right to determine," rather than "*a* right," Section 2, Fourth confirms that *only* the majority of a craft or class is authorized to make representation determinations. *See Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010) ("[T]he word Congress did use, 'the,' is evidence that what follows … is specific and limited to a single party."), *reh'g denied*, 2011 U.S. App. LEXIS 4443 (Fed. Cir. Feb. 24, 2011); *see also* Webster's New Int'l Dictionary ("Webster's") 2617 (2d ed. 1955) (defining "the" as, *inter alia*, a word "[d]esignating an individual or thing that has no fellow; as, *the* moon; *the* ground; *the* Lord"); 2 G. Curme, *A Grammar of the English Language* 511 (1931) (explaining that the definite article "the" is used "to mark a person or thing as unique"). The statute's use of the word "right" confirms that Section 2, Fourth not only empowers the majority, but also acts as a legal constraint on the Board's authority to certify a representative. *See* J. Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* 483 (1856) ("Right is the correlative of duty, for, wherever one man has a right due him, some other must owe him a duty."); *Ullman v. United States*, 350 U.S. 422, 427 n.2 (1956) (affirming that "rights and duties are correlative").

The Board nonetheless argues that it may transfer the Section 2, Fourth right from the majority of the craft or class to a majority of voters. It asserts that the RLB's Decision No. 1971 construed principle 15's "majority of any craft or class" language as referring to a majority of voters, and that Congress adopted this specialized meaning when it later enacted Section 2, Fourth. *See* 75 Fed. Reg. at 26,068/1 [JA383]. This argument fails.

The RLB's Decision No. 1971 indicated that the RLB would require that "all the employees [be given] the privilege of expressing their choice" and "a fair opportunity." 4 Dec. U.S. Ry. Labor Bd. at 629 [JA59]. But nothing in these statements supports the conclusion that "majority of a craft or class" refers to a majority of voters. To the contrary, they are consistent with the ordinary meaning of the phrase. Principle 15 grants the majority of a craft or class the right to determine the outcome of representation disputes. And if the *majority* of a craft or class holds that right, then *all* employees should be ensured a fair opportunity to express their choice, because it may not be possible to predict which employees will end up in the majority of the craft or class.

2. Section 2, Fourth Does Not Authorize the Board to Certify a Union Representative When the Majority of a Craft or Class Has Not Determined a Union Should Be Certified

As an alternative defense for its new voting rule, the Board argues that Section 2, Fourth does not directly speak to whether the "right to determine" must

in fact be exercised before a union representative may be certified. 75 Fed. Reg. at 26,068/3-26,069/2 [JA384]. And it argues that the majority of a craft or class can be deemed to have "determine[d]" the outcome of an election even when the majority has not participated in the election. *Id.* This argument also fails.

a. The Plain Text of Section 2, Fourth Requires that the Majority of a Craft or Class "Determine" the Outcome of Representation Disputes

Section 2, Fourth does not grant a mere *opportunity* to participate in the decisionmaking process. Nor does it call for an interpretation of unexpressed intentions of nonvoters. Instead, Section 2, Fourth empowers the majority of a craft or class to "*determine*" the result. And the ordinary meaning of the word "determine" contemplates an authoritative pronouncement—a declaration rather than mere silence or acquiescence. *See, e.g.*, Webster's, *supra*, 711 ("determine": "To settle a question or controversy about; to decide by authoritative or judicial sentence; as, the court has determined the cause"); 1 The New Shorter Oxford English Dictionary 651 (1993) ("determine": "[l]ay down authoritatively; pronounce, declare," or "[s]ettle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter"). For instance, one would not ordinarily say that a "court has determined the cause," Webster's, *supra*, 711, if the court has said nothing at all. Nor would one say that a court has already determined a cause when the court *intends* but has not yet pronounced a result.

Contemporaneous usage confirms that the term "determine" should be given its ordinary meaning. Four years after the enactment of Section 2, Fourth, the Supreme Court in *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177 (1938), interpreted a provision of the RLA that authorized the Interstate Commerce Commission to "determine after hearing" whether an exemption to the RLA's definition of "carrier" applied to particular electric railways, *id.* at 179. In the course of analyzing the statutory provision, the Supreme Court observed that the word "determine" calls for "definitive action." *Id.* at 182; *see also id.* ("The language of the provision points to definitive action. The Commission is to '*determine.*'" (emphasis in original)). The Commission would not have "determine[d]" anything if it had simply remained silent after the hearing. The same is true of members of a craft or class who remain silent during an election—they have not "determined" who shall be their representative.

Moreover, the very fact that Section 2, Fourth grants a right to the *majority* of a craft or class, *see supra* Part I.B.1., means that the majority must actually determine the outcome of representation disputes. If Section 2, Fourth merely created a right to have the opportunity to vote, then that right would have been granted to *every* employee in a craft or class; it would make no sense to limit an opportunity to vote to the majority of a craft or class. Section 2, Fourth's grant of

the right to the majority makes sense only because the majority is empowered to make *determinations*.

Accordingly, the majority of a craft or class will not have exercised its right to "determine" the representative unless it *declares* its preferences—by, for example, authorizing an election or sanctioning an election by participating in it. The Board may not certify a minority's choice simply because the majority of a craft or class is split between those who vote against unionization and those who choose not to vote. Nor may the Board certify the minority's choice simply because the Board views that minority vote as an accurate reflection of what the majority intends. As the Supreme Court recognized in *Virginian Railway*, Section 2, Fourth does not specify *the manner* in which the majority must exercise its right to "determine" the representative (whether through secret ballot, interviews, or some other process), but it does make clear that the right "shall be exercised" by the majority of a craft or class before a union may be certified. 300 U.S. at 560.

The Board's NFRM responds that *Virginian Railway* allows acquiescence to count as an exercise of the "right to determine." 75 Fed. Reg. at 26,068-69 [JA383-84]. But that conclusion appears nowhere in the opinion. The Supreme Court in *Virginian Railway* did not consider whether a majority's silence could be construed as an exercise of the "right to determine" because the majority in that case *did* participate in the election and voted for unionization. *See* 300 U.S. at

559-60. The issue in *Virginian Railway* was whether participating in an election and voting for unionization was *enough* of an exercise of the Section 2, Fourth right to make a representation determination. The Supreme Court concluded that it was: the majority may sanction the results of an election by participating in it and voting for unionization. If the majority of a craft or class determines that it wants a representative, its attempt to choose between competing unions through means of an election should not be "obstructed" by a non-participating minority. *Id.* at 560.

Virginian Railway also held that the *minority* of a craft or class may be treated as having "acquiesced" in the determination of the majority—even if the majority's determination is simply to sanction an election as the mechanism of choice. *Id.* But this holding was permissible because the minority does not have a Section 2, Fourth right to make representation determinations,[8] and because this acquiescence presumption furthers the RLA's purpose of empowering the *majority*, *see* 300 U.S. at 560 ("If, *in addition to participation by a majority of a craft*, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest" (emphasis added)).

[8] As a further illustration of this point, *Virginian Railway* cites 19th century cases involving statutes that allowed certain action in the event a specified number of "voters" approved of the action. *See* 300 U.S. at 560. These cases concluded that the word "voters" referred to individuals who in fact voted; and because only "voters" were empowered by the statute, the nonvoters who lacked any statutory rights were properly treated as having acquiesced in the will of the voters.

Nothing in *Virginian Railway* supports the Board's current view that a nonvoting *majority*—or a majority split between those who vote against unionization and those who choose not to vote—may be treated as having made a "determin[ation]" through silent acquiescence in the will of the voting *minority*. *Virginian Railway* sought to *strengthen* the right of a majority of a craft or class to determine the outcome of representation disputes; it does not support the Board's attempt to *weaken* the majority's right.

b. The Board's New Rule Cannot Be Justified By Analogy to the NLRA

In its NFRM, the Board embraces the NLRB's approach, which provides for certification of a union based on the majority of votes cast. The Board notes that the NLRB's rule has been upheld on the ground that, under the NLRA, the majority of a bargaining unit may be treated as having acquiesced in the will of a voting minority. 75 Fed. Reg. at 26,069 [JA384] (citing cases).

But the Supreme Court has cautioned that the NLRA's principles "cannot be imported wholesale into the railway labor arena" and that "[e]ven rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes." *Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 439 (1989) (quotation omitted). And a comparison of the text, structure, purposes, and legislative history of the two statutes confirms that the RLA does not authorize the Board's new majority-of-votes-cast rule.

As an initial matter, the text of the RLA is materially different from that of the NLRA. The cases cited by the Board construe the text of Section 9(a) of the NLRA, 29 U.S.C. § 159(a). Unlike Section 2, Fourth of the RLA, Section 9(a) of the NLRA does not grant the majority of a bargaining unit a "right to determine" the outcome of representation disputes, much less the *exclusive* right to make those determinations. Section 9(a) merely provides that *if* the majority has "selected or designated" a union as its representative, *then* that union will represent the entire unit. 29 U.S.C. § 159(a). Although a separate provision of the NLRA, Section 7(a), creates a "right to self-organization," 29 U.S.C. § 157, that provision grants this right to "[e]mployees" generally, rather than to the majority of the bargaining unit. That is not the voting rule enacted in Section 2, Fourth.[9]

These textual differences between the NLRA and the RLA reflect important differences in the structure and purposes of the statutes. A key purpose of the RLA is to eliminate unstable, ineffective company-dominated unions and other "fake

[9] The Board points to a statement in the House Report on the NLRA that describes the NLRA as "merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7(a) of the National Industrial Recovery Act ["NIRA"], with the addition of enforcement machinery of familiar pattern." 75 Fed. Reg. at 26,069 [JA 384]. But that House Report referred only to the similar manner in which the NIRA, the NLRA, and the RLA all protect employees' basic right to "organize and bargain collectively," NIRA, ch. 90, tit. I, § 7(a), 48 Stat. 195, 198 (June 16, 1933). That general statement, in any event, could not override the specific textual differences between the NLRA and the RLA.

organization[s]" lacking the true support of the majority of a craft or class. *See supra* p.7 n.2; *see also* 45 U.S.C. § 151a (key purpose of RLA is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein"). At the same time, Congress in 1934 recognized that in light of the critical importance of the railway industry to the flow of interstate commerce, there was a need to promote the expeditious resolution of representation disputes. Congress balanced these considerations by eschewing case-by-case judicial review of the outcomes of representation elections, *Switchmen's Union v. NMB*, 320 U.S. 297, 305 (1943), and instead requiring the Board to apply the easily-administered rule that the majority of a craft or class must determine the outcome.

The NLRA, in contrast, does not grant the majority of a bargaining unit the right to determine the outcome of representation disputes. Instead, to ensure that a union prevailing in an election holds the true support of the majority of employees, the NLRB must examine carefully whether the results of an election are meaningfully representative of the preference of the employee group as a whole, *see Lemco Constr., Inc. & Int'l Bhd. of Elec. Workers*, 283 N.L.R.B. 459, 459 (Apr. 14, 1987), and this determination is ultimately subject to judicial review, *see NLRB v. Cent. Dispensary & Emergency Hosp.*, 145 F.2d 852, 854 (D.C. Cir. 1944). This structure gives the NLRB greater flexibility in holding elections and counting votes, *see, e.g.*, *id.* ("[T]he standards by which the [NLRB] determines

whether a minority election is truly representative are necessarily vague."), but also tolerates greater delay in the final resolution of disputes. As noted, the RLA adopts a fundamentally different approach.

The structure of the RLA differs from the NLRA in yet another significant respect, which further heightens the importance of Section 2, Fourth's requirement of majority determination. Under the NLRA, unions are generally certified as the representatives of local, rather than companywide, bargaining units. *See* 29 U.S.C. § 159(b). For that reason, an ineffective or unstable union may pose little or no threat to interstate commerce. Under the RLA, however, crafts and classes are defined on a companywide or systemwide basis. *See Railway Labor Act* 122-124. As a result, rather than representing a local group of pilots, for example, a certified union would represent *all* of an air carrier's pilots throughout the United States. Given the nationwide nature of RLA crafts and classes, the consequences of putting in place an ineffective or unstable union at an air carrier or rail carrier are far more potentially disruptive to interstate commerce.

The NLRA also lacks the RLA's critical legislative history. In particular, the views of James W. Carmalt, the Board's first Chairman, confirm that the RLA adopted a different approach from the NLRA. In 1935, merely one year after the enactment of Section 2, Fourth, then-Chairman Carmalt explained that the Board's majority-of-the-craft-or-class rule reflected the Board's effort to "read the Act

strictly in accordance with its terms." Carmalt, *supra*, pp.9-10. That view was correct, and should not have been disregarded by the current Board. *See Carcieri*, 129 S. Ct. at 1065 & n.5 (considering the views of an agency member whose "responsibilities related to implementing the [relevant statute] ma[d]e him an unusually persuasive source as to the meaning of the relevant statutory language").

3. The Individual Appellants Contend that the Board's New Rule Violates their Rights of Free Association

The individual appellants join the ATA and Chamber's claim that the Board's new rule is an impermissible construction of Section 2, Fourth. But they also claim the rule violates their First Amendment rights to free association.

Certification of a union "extinguishes the individual employee's power to order his own relations with his employer" and "strip[s employees] of traditional forms of redress." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 181 (1967). Yet the Board's new rule would allow a minority of a craft or class to select a union, without providing any post-election inquiry into whether the election results are sufficiently representative of the majority's views. As a result, a mere 8 percent—or 1 percent—of a craft may compel the unionization of the entire craft. This is unconstitutional. Given the lack of post-election review, the Board's new rule is not reasonably tailored to the interest in safeguarding the choices of the majority of a craft or class. Moreover, the government has no legitimate interest in allowing small minorities of a craft to compel the

unionization of the entire craft. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-36 (1977).

C. The Board's New Rule Is Not a Reasonable Construction of Section 2, Fourth at *Chevron* Step Two

Even assuming that the Board's new rule is a permissible construction of Section 2, Fourth at *Chevron* Step One, it should still be vacated as an unreasonable construction at *Chevron* Step Two. *See Village of Barrington*, 2011 WL 869904, at *9 (a permissible interpretation is unreasonable at *Chevron* Step Two if the agency has failed to "offer[] a reasoned explanation for why it chose [its] interpretation").

1. The Board's NFRM altogether fails to explain how the new rule could be a more accurate measure of whether the majority of a craft or class has "determine[d]" the outcome of a representation dispute. In fact, by treating individuals who have not elected to make a representation determination as having done so, the Board's new rule is clearly a *less* accurate measure of whether the Section 2, Fourth right has been exercised. Unlike the prior rule, the new rule assumes that the majority of a craft or class has made a determination when it has made no determination at all.

Having asserted that the word "determine" is ambiguous, the Board did not explain why its new rule is a reasonable approach in light of the RLA's structure, purposes, and legislative history. The Board's failure to offer a reasoned

explanation is fatal at *Chevron* Step Two.

2. In addition, the Board unreasonably relied on a stated desire to revise its form of ballot. The Board's prior ballot did not contain a "no" option, and an employee who did not want union representation was instructed not to vote. *See supra* p.10. By contrast, the Board's new ballot contains both a "yes" and "no" option. According to the Board, its new rule is necessary to ensure that employees are given the opportunity to express their opposition to a union through a "no" vote. 75 Fed. Reg. at 26,072-73 [JA387-88].

That is a *non sequitur*. The form of the Board's ballot is a separate issue from what rule the Board uses to determine whether a union has won in an election. For instance, the Board could have revised its ballots to allow for "yes" and "no" options, while still requiring that a majority of the craft or class vote in favor of unionization before a union is certified. Likewise, the Board could have revised its showing-of-interest rules to require that a majority of a craft or class first authorize the election as the mechanism of choice.

II. The Board's Rule Change Is Arbitrary and Capricious

The Board's rule change not only is irreconcilable with the RLA, but also is "arbitrary" and "capricious" under the APA. 5 U.S.C. § 706(2)(A), (E). For 75 years, the Board held the "firm conviction that its duty" to investigate representation disputes could "be more readily fulfilled and stable relations

maintained by a requirement that a majority of eligible employees cast valid ballots." *See Chamber of Commerce*, 14 N.M.B. 347, 362-63 (1987) (citation and internal quotation marks omitted). Because the Board "chang[ed] its course" when it adopted the majority-of-votes-cast rule, it was "obligated to supply a reasoned analysis for the change," including a reasonable explanation for why it abandoned its precedent and prior conclusions. *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010). In determining whether the Board has provided the necessary explanation, a court must conduct a "thorough, probing, in-depth review" of the rulemaking record—which the District Court failed to do. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Here, the Board's rulemaking was both substantively unreasonable and procedurally unlawful, and the new rule should therefore be vacated.

A. The Board's Rule Change Is Substantively Unreasonable

The Board's sole stated reason for preferring the new rule—that it is a more accurate barometer of the preferences of individual employees—does not satisfy the Board's "compelling reasons" standard for significant rule changes or even the lower threshold imposed by the APA. In addition, the Board did not reasonably explain its rejection of its long-standing conclusion that the prior rule was necessary to preserve labor relations stability in the critically important airline and railroad industries. Finally, the Board's arbitrary and discriminatory

decertification procedures result in a facially irrational regime that violates the APA and the RLA.

1. The Board's New Voting Rule Is Not Supported by Compelling Reasons or any Adequate Justification

The Board's stated reason for preferring the majority-of-votes-cast rule was the Board's goal of "determin[ing] each individual's true intent with regard to representation." 75 Fed. Reg. at 26,073 [JA388]. But the Board did not explain how this accuracy theory satisfies the Board's "compelling reasons" rule change standard. Moreover, the Board's accuracy theory does not rest upon "rational" and "neutral principles." *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment); *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009).

a. The Board Failed to Apply Its "Compelling Reasons" Rule Change Standard

As the District Court held, the Board was bound by its long-standing standard for all significant rule changes, under which the Board must offer "compelling reasons" that a proposed rule change is either "mandated by the [RLA] or essential to the Board's administration of representation matters," *Chamber of Commerce*, 14 N.M.B. at 360, 362. *See* 719 F. Supp. 2d at 43 [JA26-42]. But the NFRM offers only a conclusory application of this "compelling reasons" standard, as well a conclusory justification for abandoning the standard.

The Board wrote:

> The Board does believe this change is essential but also notes that it is not bound by its prior statements on this issue and is free to consider changed circumstances, such as those discussed [in the NFRM], in determining whether to change representation procedures, despite refusing to do so in the past.

75 Fed. Reg. at 26,075/3 [JA390]. According to the Board and the District Court, these generalized assertions are sufficient to sustain the Board's rulemaking under the APA. *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1183 (D.C. Cir. 2004) ("The Board's brief, generalized statement fails to provide an 'adequate explanation' to allow the [Board] to ignore factors and reasoning it has previously— and consistently—found controlling."). But an agency must "clearly disclose[]" and "adequately sustain[]" its reasoning during a rulemaking, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), and the Board's bare assertion does neither.

The Board's statement that "this change is essential" does not satisfy the APA's requirement that an agency *explain* its conclusions. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Board carefully considered proposals to change its voting rule in 1987, and again in 2008, and was not persuaded that the accuracy theory made the proposed rule change "essential to the Board's administration of representation matters." *Chamber of Commerce*, 14 N.M.B. at 360; *Delta Air Lines*, 35 N.M.B. at 132. The Board

nowhere explained why it now disagrees with those prior conclusions. Nor did it identify any "changed circumstances" between its 2008 decision in *Delta Air Lines* and its decision to change its voting rule in 2010. And given the Board's 75 years of success with the majority-of-the-craft-or-class rule, and the Board's decision to conduct some elections under that rule *while the rulemaking under review was pending*, *see supra* p.12 & n.6, the Board's unadorned assertion that its new voting rule is "essential" to the administration of representation elections is not credible.

Nor can the Board justify its action by asserting that it is not bound by its precedent. The Board argued, and the District Court held, that "the Board has … explained why it does not believe it must follow" its rule change standard. 719 F. Supp. 2d at 44 [JA41]. But the Board's purported explanation amounts to the *ipse dixit* that an agency "is not bound" by its precedent. *Id.* (quoting 75 Fed. Reg. at 26,075). That is inaccurate: the APA binds an agency to follow its precedent or to explain why it is not. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (Roberts, J.). The Board's failure to "come to grips" with its precedent "constitutes an inexcusable departure from the essential requirement of reasoned decision making" and its rulemaking should be vacated on that basis alone. *Manin v. Nat'l Transp. Safety Bd.*, 627 F.3d 1239, 1243 (D.C. Cir. 2011) (quotations omitted).

b. The Board's Accuracy Theory Was Applied Selectively and Does Not Satisfy The APA's Requirement of Reasoned Decisionmaking

The Board's accuracy theory is also unreasonable on its face. According to the Board, the majority-of-the-craft-or-class rule is inaccurate because it "impose[s] a position on those who abstain" from voting. 75 Fed. Reg. at 26,073 [JA378]. The Board speculates that there are many reasons that persons might not vote besides disfavoring unionization, including "travel, illness, [] apathy," or religious objections. *Id.* And, the Board asserts, by not imposing a position on individuals who abstain, the new voting rule will better determine each individual employee's preferences regarding representation. *Id.*

As explained above, however, *see supra* Part I.C.1., the Board did not explain why its new rule will more accurately measure whether the majority of a craft or class has exercised its right to determine the outcome of a representation dispute. Even taken on its own terms—rather than on the statute's terms—the Board's accuracy theory is arbitrary. The Board asserts that the majority-of-the-craft-or-class rule "imposes" a viewpoint upon employees who do not cast ballots. *Id.* at 26,073/2 [JA388]. But since 1965, instructions to employees have made it clear that "no vote is a vote for no representation." *ABNE*, 380 U.S. at 670. The Board offered no evidence that employees suddenly began to misunderstand the Board's clear voting instructions.

Nor has the Board offered a reasonable explanation for why it believes presuming those who do not vote acquiesce in the outcome will more accurately identify individual employees' preferences. By the Board's hypothesis, employees who do not vote because of travel, illness, or religious objections *do* have a preference, but are prevented from expressing it.[10] Treating these employees as having acquiesced in the preference of the voting majority is arbitrary in light of the Board's purported reason for changing its rule. And employees who do not vote because of apathy are "appropriately measured as *not* affirmatively desiring a change in the status quo"—which is precisely what the majority-of-the-craft-or-class rule does. 75 Fed. Reg. at 26,084 (Dougherty, dissenting) [JA399]. Thus, the Board's argument is inconsistent with its own stated goal of accurate voting results.

2. The Board's Inconsistent Treatment of Stability Is Arbitrary and Capricious

In order to clear the way for its new rule, the Board arbitrarily and capriciously abandoned its longstanding belief that the majority-of-the-craft-or-class rule ensures craftwide support for a union and thus promotes labor stability.

[10] The suggestion that employees may be prevented from voting because of travel or illness is itself without foundation. The Board's typical voting period lasts between three and six weeks, and voting is done not at a polling place, but rather from any telephone (via a toll-free number) or computer of the employee's choice anywhere in the world. *See* National Mediation Board Representation Manual §§ 12-14, *available at* http://www.nmb.gov/representation/representation-manual.pdf.

a. The Board first asserts that stability was never a basis for the majority-of-the-craft-or-class rule; rather, the Board claims, it adopted the rule as best "from an *administration* point of view." 75 Fed. Reg. at 26,074/1 (emphasis added) [JA398]. This revisionist history—which the District Court accepted wholesale, 719 F. Supp. 2d at 40 [JA38]—is arbitrary and capricious. *See Nat'l Fed'n of Fed. Employees v. FLRA*, 412 F.3d 119, 123 (D.C. Cir. 2005) (rejecting agency's "revisionist" view of its precedents).

Stability was a reason for the majority-of-the-craft-or-class rule from the very beginning: the Board's former Chairman James W. Carmalt explained in 1935 that the Board adopted the view that the majority-of-the-craft-or-class rule "prevents slipshod organization work and leads to stability." Carmalt, *supra*, 473. The Board reaffirmed that stability rationale in 1948, again in 1987, and yet again in 2008. *Pan American Airways*, 1 N.M.B. 454, 455 (1948); *Chamber of Commerce*, 14 N.M.B. at 362; *Delta*, 35 N.M.B. at 131. After conducting an extended evidentiary hearing process in *Chamber of Commerce*, the Board explained that the majority-of-the-craft-or-class rule promotes collective bargaining and reduces the risk of strikes because "[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." 14 N.M.B. at 362-63. More recently, the United States has explained in filings with the

International Labor Organization ("ILO") that the majority-of-the-craft-or-class rule is "true to the RLA's" purpose, because "maintain[ing] harmonious labor relations . . . is more effectively accomplished if the union involved represents a majority of the workers on whose behalf it is negotiating."[11]

b. Given that the Board had viewed the majority-of-the-craft-or-class rule as necessary to promote labor stability for 75 years, it would take something more than the new Board majority's say-so to justify a different conclusion. *See N.Y. Cross Harbor R.R.*, 374 F.3d at 1183 (an agency's generalized statements failed to provide an "adequate explanation" to allow it to ignore factors and reasoning it had previously found controlling). The Board offers four reasons for disregarding labor stability, but does not explain why these reasons would have been unconvincing in 1935 (and 1948, and 1987, and 2008) and yet should be treated as convincing today.

First, the Board claims that unions with only minority support will not strike because a "union will only strike when it has the strong support of its members." 75 Fed. Reg. at 26,076. But the risks posed by the Board's new voting rule do not depend only upon whether it will lead to more *authorized* strikes. Instead, the

[11] Observations of the U.S. Government in Case No. 2683 to ILO Governing Body Comm. on Freedom of Association ("ILO Observations") ¶ 12 (Oct. 8, 2009) [JA 223-24]. The United States also explained that the majority-of-the-craft-or-class rule has not impeded union organization: "84% of rail employees and 60% of airline employees are unionized, whereas less than 10% of [NLRA] sector employees … are unionized." *Id.* ¶ 16, at 5 [JA 225].

certification of weak unions may lead to more *unauthorized* strikes or disruptive job actions, a point then-Chairman Dougherty raised in her dissent and that the Board failed to address. 75 Fed. Reg. at 26,086/3 & n.11 [JA401]. Moreover, minority-supported unions will be a weaker bargaining participant and less likely to obtain ratification of collective bargaining agreements. *See id.* at 26,086/2-3 (Chairman Dougherty, dissenting).

Second, the Board argues that because other factors promote stability—such as the Board's mediation of collective bargaining disputes—"the current representation election procedures are not a contributing factor" to stability. 75 Fed. Reg. at 26,077/2 [JA392]. The Board's conclusion does not follow from its premise. Labor stability has multiple causes, and the Board has repeatedly found the majority-of-the-craft-or-class rule is one of them. *See Chamber of Commerce*, 14 N.M.B. at 362. And because the Board must promote stable labor relations in *both* its mediation and representation capacities, it is beside the point that the Board's mediation function promotes stability. Likewise, however, the Board cannot credibly deny the role of its voting rule in contributing to stability, and it cannot disregard labor stability when designing a voting rule. *See* 45 U.S.C. § 151a (noting the RLA's "general purpose[]" of "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein").

Third, the Board asserts that the bargaining process will not be affected by

certification of a weak union because "carriers are required by law to treat with Board-certified representatives." 75 Fed. Reg. at 26,077/2 [JA392]. This assertion ignores the Board's finding in *Chamber of Commerce* that, as a practical matter, the manner in which a carrier bargains with a union is necessarily affected by that union's level of support. For example, a union elected with majority support is "effective in negotiations," *Chamber of Commerce*, 14 N.M.B. at 362, because it can convince the employees that negotiations will be worthwhile; bargains reached by a majority union are more likely to be ratified by employees.

Fourth, to defend its newfound conclusion that labor stability is not a relevant concern, the Board points out that strikes are not more common in the wake of elections held using so-called *Laker* and *Key* ballots, in which unions have been certified based on a majority of votes cast in a rerun election to remedy gross carrier interference in the initial election. *See* 75 Fed. Reg. at 26,076/2 [JA391]. But the lack of strikes following those elections says nothing about whether the majority-of-the-craft-or-class rule promotes stability. When a carrier has previously prevented members of the majority from casting ballots in favor of unionization, the majority of votes cast in the rerun election may be more likely to reflect majority support for representation.

3. The Board's New Rule Is Inconsistent With the Board's Treatment of Decertification and Its Run-Off Procedures and Is Therefore Arbitrary and Capricious

a. The Board's rulemaking is marked by a telling inconsistency. While it discounts stability as a rationale for its majority-of-the-craft-or-class rule, the Board is "happy to acknowledge the stabilizing role of [its] representation procedures" as a rationale for refusing to adopt a parallel decertification procedure to allow employees to reverse a prior decision to have union representation. 75 Fed. Reg. at 26,086/2 (Dougherty, dissenting) [JA401]; *see also* JA217-19 (Chamber request for parallel decertification procedure).

Even prior to promulgating the new Rule, the Board employed a "confusing and obfuscatory process" for employees seeking to reverse a prior decision to have union representation. 75 Fed. Reg. at 26,086/3-87/1 (Dougherty, dissenting) [JA401-02]. Employees cannot simply request a decertification election; they must designate a "straw-man" to run ostensibly to be the employees' new "representative," with the straw-man expected (though not legally bound) to disclaim that representative status if he could get elected. 719 F. Supp. 2d at 41 [JA39]. To trigger such an election, the straw-man must obtain signed authorizations from "at least a majority of the craft or class." 29 C.F.R.

§ 1206.2(a); *see also* 719 F. Supp. 2d at 41 [JA39].[12] The straw-man, moreover, must conduct this campaign using his own resources, while the union the straw-man seeks to unseat has the resources of the organization to aid its effort. There is no evidence that the Board's procedures have *ever* resulted in decertification of a representative of a craft or class of more than a few hundred members.

The Board has now abandoned its majority-of-the-craft-or-class rule for *unrepresented* crafts or classes. At the same time, the Board has retained its rule that a *represented* craft or class cannot initiate the decertification process without the authorization of a majority of the craft or class. As a consequence, as few as 35% of the members of an unrepresented craft or class can initiate a union election and an even smaller percentage of the craft or class—25%, 10%, or even less—could compel certification. Yet any effort to initiate the straw-man process in order to vote out union representation is governed by the "old" rule and requires individually signed cards from a majority of the craft or class—even if the union the employees seek to remove never garnered support from a majority of the class or craft.

The Board's decision to maintain these two "irreconcilable policies"—*i.e.*, to abandon the majority-of-the-craft-or-class rule while adhering to it—is arbitrary

[12] The NLRA's decertification process, by contrast, allows 30% of the eligible voters to initiate a decertification election to return to non-union status. *See* NLRB Rules and Regulations and Statements of Procedure § 101.18 (2002).

and capricious. *See Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 935 (D.C. Cir. 2008). It also violates the RLA, which prohibits discrimination in favor of the right to select a representative over the right to reject one, or to favor the exercise of the right for a union to *become* certified while making it more difficult for employees to *discard* union representation. *ABNE*, 380 U.S. at 669 n.5; *Russell v. NMB*, 714 F.2d 1332, 1343 (5th Cir. 1983); *BRAC*, 402 F.2d at 202-03.

In an attempt to justify this asymmetrical regime, the Board here invokes labor stability, saying that the headwind its rule imposes on decertification is necessary to discourage unions from raiding an already-represented workplace. 75 Fed. Reg. at 26,079/1 [JA394]. This opportunistic reliance upon its stability rationale only highlights the Board's inconsistency. The inevitable result of the Board's new voting rule will be to encourage unions lacking majority support in an unrepresented craft or class to "raid" the craft or class, given that they no longer need to obtain majority support to prevail. And the workplace disruption that will result from the election of a union by a minority of the employees is even more of a threat to the operation of interstate commerce.

b. The Board's new voting rule also highlights the Board's arbitrary and capricious treatment of its accuracy rationale. The Board's ballot in decertification elections previously contained three choices: the incumbent union, the straw-man and a write-in option. But under the Board's new voting regime, the

decertification ballot will also contain a "no union" option. *Id.* at 26,079 [JA394]. The Board acknowledges that the straw-man serves solely as the proxy for a "no union" vote, *id.* at 26,078 [JA393], yet it nevertheless retains this completely redundant option that serves no purpose other than to dilute the no-representation vote. If no single "no union" option receives a majority of the votes outright, the Board will treat the votes placed for the straw-man *as votes for representation*, and aggregate them with those cast for the union based on the assumption that votes cast for the straw-man came from employees who favored "some form" of representation. This is so even though the Board elsewhere acknowledges that the straw-man exists only as a mechanism for *rejecting* representation. Nonetheless, if the combined votes for the incumbent union and the straw-man exceed 50 percent, the Board would proclaim that "a majority of employees have cast valid ballots for representation" and allow the incumbent union to compete in a run-off where the "no union" option would *not* be available. *Id.* at 26,082 & n.33 [JA397]; *see also id.* at 26,087-88 [JA402-03] (Dougherty, dissenting). This is irreconcilable with the Board's stated goal of promoting accurate assessments of employee choice.

The Board's accuracy theory is irreconcilable with another feature of the Board's NFRM. Although the Board goes to great lengths to justify the need for a "no union" option on the ballot in most elections, it refuses to offer that option in any run-off election. When neither an individual union nor the "no union" option

wins a majority of votes cast, the Board will hold a runoff election. But in that runoff, the Board will deny employees an opportunity to vote for "no union"—*even if* the "no union" option received the largest number of votes during the initial election. In practice, this approach virtually guarantees that the union that initially received the highest number of votes is ultimately certified, even if most employees casting votes in the initial election voted *against* representation—because the Board's run-off rules have removed the strongest alternative option from the ballot.[13]

The Board asserts that it is reasonable to assume, based upon the initial election, that the majority of the craft or class favors union representation. *Id.* at 26,082/1 [JA397]. But that assumption is irreconcilable with the Board's accuracy theory, which explicitly rests on the refusal to make assumptions regarding employee intent. *Id*. As then-Chairman Dougherty explained, "[i]t is impossible to see how [the Board's new regime] serves the Majority's stated goal of better measuring employee intent." *Id.* at 26,088/1 [JA403].

[13] For example, in the AFA's 2010 election at Delta, the AFA received 8,786 votes, the "No Union" option received 9,544, and various write-in choices received 430 votes. 38 N.M.B. 20, 21 (Nov. 4, 2010). Under the Board's new voting regime, only 165 more votes for the AFA and/or write-in choices would have guaranteed a run-off between the AFA and the top write-in choice, who received at most 430 votes. The NMB would scrub the option that was the choice of the most voters—the no-union option—from the ballot and hold a run-off between the less popular AFA and the vastly less popular top write-in choice, all but ensuring electoral success for AFA.

B. The Board's New Voting Rule Is Procedurally Unlawful

The Board's rulemaking was also the result of arbitrary and capricious procedures. First, the process the Board's majority used to propose and then to promulgate the new rule was fatally deficient under the Board's precedent and the APA. Second, the Board's majority impermissibly predetermined the issues, and the District Court's order denying discovery into the issue of predetermination was premised upon a flat misinterpretation of Circuit law.

1. The Board Failed To Follow Its Own Procedural Rules

It was arbitrary and capricious for the Board to abandon the majority-of-the-craft-or-class rule without conducting the robust evidentiary hearing required by its own precedent. *See, e.g.*, *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 396 (D.C. Cir. 1992); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Here, the Board made a firm commitment that it would change its standards for union elections only after engaging in a "complete and open administrative process" including "a full evidentiary hearing with witnesses subject to cross-examination." *Delta Air Lines, Inc.*, 35 N.M.B. 129, 132 (2008); *see also Chamber of Commerce*, 14 N.M.B. 347, 360-62 (1987); *Chamber of Commerce*, 13 N.M.B. 90, 94 (1986). This evidentiary hearing process, the Board had held, is "the most appropriate method of gathering the information and evidence it will need" to decide whether even to propose amending its election rules. *Id.* In 2008,

the Board held in *Delta Air Lines* that it "would not make such a fundamental change without utilizing a process similar to the one employed in *Chamber of Commerce*." 35 N.M.B. at 132. The ATA requested that the Board follow its precedent [JA275-85], but it refused.

The Board argued, and the District Court held, that *Delta Air Lines* requires only a "complete and open administrative process," which the Board asserts is satisfied by informal APA rulemaking. *See* 719 F. Supp. 2d at 43 [JA40]. To the contrary, the Board in *Delta Air Lines* expressly held that a robust evidentiary-hearing process—*i.e.*, "a process similar to the one employed in *Chamber of Commerce*"—is required for a "fundamental change" to the Board's voting rules, and it denied the request for a majority-of-votes-cast rule in part upon that basis. 35 N.M.B. at 132. The Board's later reference in *Delta Air Lines* to a "complete and open administrative process" referred back to the Board's holding, *id.*, not to an entirely different, informal rulemaking process. The Board's only reason for not holding an evidentiary hearing in connection with the NPRM was its belief that it did not have to do so. This misreading of its precedent was arbitrary and capricious and prejudicial: by the Board's own conclusion in *Chamber of Commerce* and *Delta Air Lines*, a robust evidentiary-hearing process was necessary to making an informed decision.

The Board also contends that the process it employed in *Chamber of*

Commerce was designed solely for "a pre-rulemaking petition," and not for "'the actual rule-making process.'" 719 F. Supp. 2d at 43 (quoting *Chamber of Commerce*, 13 N.M.B. at 93) [JA40]; *see also* 75 Fed. Reg. at 26,070 [JA385]. But it is arbitrary for the Board to commit to full evidentiary hearing with cross-examination "to determine whether to propose any of the [requested voting] changes" (*i.e.*, to initiate rulemaking), but then to dispense with this requirement entirely if the Board "d[oes] not receive an official rulemaking petition" but decides to initiate the rulemaking in any event. *Id.*

To the extent the Board thought it could depart from *Chamber of Commerce* simply because it no longer thought an evidentiary-hearing process was necessary, this was also arbitrary and capricious. Under *Accardi*, 347 U.S. 260, an agency may not change its mind with respect to the procedures it prefers to follow while simultaneously applying the new procedures in the very rulemaking at issue. That is because, while an agency can "amend or revoke" procedures "defining their authority," the agency is bound by its procedures so long as they "remain[] in force." *United States v. Nixon*, 418 U.S. 683, 696 (1974).

2. The Board's Majority Predetermined The Issues

Based upon publicly available facts indicating the Board's majority had predetermined the issues in the NPRM, ATA moved for permission to conduct limited discovery of the Board and TTD, AFA, and IAM. And ATA argued that

the publicly available facts showing predetermination are further evidence that the Board majority acted arbitrarily and capriciously. The District Court denied ATA's discovery request based upon the court's erroneous view of Circuit law, and then dismissed ATA's arbitrary and capricious claim on the same basis. These rulings were in error.

a. Decisionmakers who have predetermined issues necessarily fail to exercise the reasoned decisionmaking required by the APA. Indeed, decisionmakers violate the Due Process Clause when they act with an "unalterably closed mind" and are "unwilling or unable to consider rationally argument that [the proposed rule] is unnecessary." *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979). And because Congress charged the Board to maintain strict neutrality vis-à-vis carriers and labor organizations, *see, e.g.*, *US Airways Inc. v. NMB*, 177 F.3d 985, 989 n.2 (D.C. Cir. 1999), the duty to avoid prejudgment applies with special force to the Board's members, *cf. Cinderella Career & Finishing Schs. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970).

According to the District Court, ATA could not obtain even limited discovery into predetermination unless it produced evidence that "ineluctably require[s] the inference that the majority Board members were acting with closed minds, in bad faith, or in collusion with outsiders regarding issuance of the New Rule." (Order at 6 [JA20].) Absent "smoking guns," the court held, the ATA was

not entitled to any discovery into the Board majority's predetermined minds. (*Id.* at 10 [JA24].) This error of law justifies *de novo* review. *See United States v. Deloitte LLP*, 610 F.3d 129, 134 (D.C. Cir. 2010) (court "generally review[s] the district court's discovery orders for abuse of discretion," but "[i]f the district court applied an incorrect legal standard, . . . [it] review[s] de novo").

Circuit law does not require ineluctable proof before a plaintiff can obtain discovery into predetermination or other improper behavior by an administrative agency. *Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990). Although discovery is the exception in an APA case, a court cannot conduct its critical review function if a plaintiff must *prove* improper behavior in order to obtain *discovery* into improper behavior. Accordingly, a plaintiff seeking discovery outside the administrative record may proceed upon a "significant showing—variously described as a 'strong,' 'substantial,' or 'prima facie' showing"—of improper behavior. *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001); *see also Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44 (D.C. Cir. 1986). Courts have granted targeted discovery when a plaintiff presented serious allegations or specific evidence of improper behavior. *See MCI Constructors, Inc. v. U.S. Army Corps of Eng'rs*, 90-cv-3091, 1991 WL 73182 (D.D.C. Apr. 26, 1991); *Corel Corp., Inc. v.*

United States, No. 99-cv-3348, slip op. at 18-19 (D.D.C. Aug. 4, 2000).

b. In this case, appellants presented publicly available facts that adequately supported their request for discovery; moreover, those fact demonstrate that the Board's majority acted arbitrarily and capriciously.

First, Members Hoglander and Puchala published the NPRM by means of an internal process that inappropriately excluded then-Chairman Dougherty. [JA234]. The facts set forth in then-Chairman Dougherty's November 2, 2009 letter show that the Board's majority was unwilling to consider views and arguments inconsistent with their own and had reached an irreversible decision to adopt the proposed rule. *See supra* 13-14. The Board's majority gave the Chairman no explanation for its rush to publish the proposed rule or its extraordinary treatment of her. Then-Chairman Dougherty could only conclude that Members Hoglander and Puchala were in a rush to publish the rule and had no interest in her input because they had predetermined the issues. [JA235]. This evidence is particularly probative given the Board majority's tacit concession that then-Chairman's Dougherty's account is accurate and their failure to offer any contrary explanation for their behavior. *See* 75 Fed. Reg. at 26,065/2 [JA380].

Second, the publicly-available evidence supports the inference that the Board's majority engaged in a coordinated effort with two large unions to ensure that important representation elections at Delta would be processed under a new

voting rule. Weeks after the AFA and IAM filed applications to represent large groups of employees at Delta, the TTD sent the Board a private two-page letter in which it asked the Board to adopt the new voting rule based upon the same reasons the Board had rejected just one year earlier in *Delta Air Lines*, 35 N.M.B. at 132. During the summer and fall of 2009, the Board continued to process representation applications and schedule elections under the majority-of-the-craft-or-class rule. *Supra* p.12 & n.6. After the TTD sent its missive, however, the Board delayed its investigation into the AFA's and IAM's representation applications at Delta.[14] *Id*. And the AFA suddenly withdrew its application on November 3, 2009, the day the NPRM was published in the Federal Register, and simultaneously issued a press release stating "we want this election at Delta [] to occur under the new democratic procedures."[15] AFA Press Release (Nov. 3, 2009) (filed at Dist. Ct. Dkt. No. 11-19). The timing of the IAM's withdrawal of its Fleet Service application at Delta was equally, if not more, suspicious: although the NPRM became publicly available on Monday, November 2, 2009, the IAM withdrew its application the

[14] The RLA requires the Board to certify the results of its investigation within 30 days of the filing of a representation application, 45 U.S.C. § 152, Ninth, and the Board concedes it delayed the processing of the AFA investigation well beyond that period.

[15] The AFA also boasted about union efforts to change the rules "before this election between the Northwest and the Delta flight attendants [took] place." Tr. at 6 "The Union Edge," Aug. 24, 2009 (filed at Dist. Ct. Dkt. No. 11-14).

previous Friday, October 30th. *See Delta Air Lines*, 37 N.M.B. 21 (2009).[16]

These facts not only are sufficient to justify discovery, but also demonstrate that the Board's majority acted arbitrarily in violation of the APA.

CONCLUSION

The Board's new voting rule should be vacated.

Respectfully submitted,

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[16] The inference of a coordinated, predetermined effort to promulgate the NPRM is further supported by the Board majority's arbitrary explanation of its decision to delay action on the AFA's application. The Board's majority claimed it could not investigate the AFA's application until it resolved the "issue of the use of hyperlinks in representation elections" raised by the AFA's July 22, 2009 request for reconsideration of the Board's hyperlink policy. 75 Fed. Reg. at 26,067/2 [JA 382]. But the AFA's request raised a general policy question not tied to any specific application. Unless the Board was prepared to adopt an AFA-specific rule—which would have been inconsistent with its duty as a neutral referee—its delay cannot be explained by the hyperlink issue.

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Dated: May 11, 2011

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations imposed by this Court's briefing order because this brief contains 15,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

/s/ Robert A. Siegel
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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties registered with the CM/ECF system:

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