December 21, 2009

Ms. Mary Johnson
General Counsel
National Mediation Board
1301 K Street, NW
Suite 250E
Washington, D.C. 20005

RE: RIN 3140-ZA00: Representation Election Procedure; Notice of Proposed Rulemaking

Dear Ms. Johnson:

I write in strong opposition to the amendment of the Railway Labor Act rules published in the Federal Register on November 3, 2009, (74 FR 56750), which would change the procedure through which employees covered by the Railway Labor Act (RLA) resolve representation disputes. Despite lacking the authority or providing a reasoned analysis, the Administration has proposed to change a rule that has been in place for 75 years to make it easier for unions to organize employers covered by the RLA.

History of Success

By the 1920s, the railroad industry employed more than 2 million workers, a substantial number of which were represented by newly formed unions.[1] On July 1, 1922, in response to the Railroad Labor Board's announcement that hourly wages would be cut by seven cents, roughly 400,000 railroad shop workers held a nationwide strike known as the "Great Railroad Strike," the largest railroad work stoppage since 1894.[2] By the end of July, tensions between strikebreakers and the unionized shop workers forced the government to send the National Guard to seven states and 2,200 deputy U.S. Marshals were deployed to clamp down on union meetings and picketing.[3] After the

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[1] Hastings, Paul, An Introduction to the Railway Labor Act, Paul, Hastings, Janolsky & Walker LLP, August 2005, available at http://www.bna.com/bnabooks/ababna/annual/2005/015.pdf.
[2] See generally Davis, Colin J., Power at Odds: The 1922 National Railroad Shopmen's Strike, University of Illinois Press (1977).
[3] Id.

settlement proposed by President Harding was rejected, on September 1, 1922, Judge James H. Wilkerson issued injunctions against striking, assembling, picketing, and a variety of other union activities.[4] In opposition to the injunctions, entire railroads went on strike.[5] Eventually, the shopmen made deals with the railroads on the local level, ending the strikes.[6] However, the danger of labor unrest on interstate commerce was clear.

In 1926, to avoid future interruptions to commerce and foster stability in the railroad industry, Congress passed the first modern American labor law the Railway Labor Act (RLA).[7] To delay or avoid strikes, the RLA provided for mandatory mediation and voluntary arbitration of railroad disputes in contract negotiations and created the Presidential Emergency Boards to enhance dispute resolution.[8] Additionally, the RLA provided for the right of employees to choose union representation free from carrier interference or retribution.[9] Section 2, Fourth states:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative... No carrier...shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization.[10]

Eight years later, in 1934, the RLA was amended to increase protection against interruptions and maintain stability,[11] through the establishment of the three-member National Mediation Board (NMB or Board). The Board was given sole discretion on the timing of a release to strike, effectively ending lawful railroad strikes, and control of all aspects of representational disputes.

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the

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[4] Id.
[5] Id.
[6] Id.
[7] 45 U.S.C. § 151a (1934).
[8] 45 U.S.C. § 152, Sixth (1934).
[9] 45 U.S.C. § 152, Fourth (1934).
[10] Id.
[11] 16 NMB Ann. Rep. 20 (1950).

> individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier...In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.[12]

In compliance with the language found in section 2, Fourth of the RLA, the NMB created its current election procedures. A majority of all eligible employees must cast valid ballots in the election in order for a representative to be certified.[13] In the absence of a majority, the NMB will dismiss the representational petition.[14] If a majority of eligible voters cast ballots, the NMB will certify the union that receives the majority of votes cast.[15]

Although the success of representational elections is best judged by determining whether or not the vote represented the will of the employees, something the Administration has not pursued, the unions who have petitioned for the change in rules have been very successful under the current procedure. From 1999 to 2009, unions won almost 48% of NMB representational elections.[16] In 2009, unions won more than 65% of NMB representational elections, compared to 68% of NLRB representational elections that use the majority of votes cast rule.[17] Today, rail transportation has the second highest union density among industry at 66.1%, exceeded only by the postal service.[18] Air transportation has the fourth highest union density among industry at 47.7%.[19] Despite the apparent success of the current rules, the Transportation Trades Division of the AFL-CIO has requested that the NMB representational election procedures be changed to permit certification based on a majority vote by those who vote, not those who are eligible to vote.

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[12] 45 U.S.C. § 152, Ninth (1934).
[13] The Railway Labor Act, pg. 125-6, Bureau of National Affairs (1995).
[14] Id.
[15] Id.
[16] NMB election determination available at http://www.nmb.gov/representation/decmenu.html.
[17] NLRB Election Report, NLRB, April 2009 and September 2009, available at http://www.nlrb.gov/publications/reports/election_reports.aspx.
[18] Available at http://www.unionstats.com/.
[19] Available at http://www.unionstats.com/.

Statutory Authority

The plain language of the RLA clearly states that an employee representative cannot be chosen without a majority vote by a majority of eligible voters.[20] Under the tenets of the plain language doctrine of statutory construction, it is assumed that Congress expresses its intent through the ordinary meaning of its language.[21] Therefore, where the meaning of the relevant statutory language is clear, then no further inquiry is required. Section 2, Fourth of the RLA states that "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."[22] Clearly, the RLA requires a majority of any craft or class of employees, not a majority of those voting. The only court to rule on this issue agreed. It held that the Board does not have the authority to certify a representative where less than a majority of the eligible voters participate in an election.[23] In the absence of statutory authority, the current rulemaking must be abandoned.

Reasoned Analysis

The Administration has failed to provide a reasoned analysis, as required by the Administrative Procedures Act (APA), justifying the proposed change to the NMB's representational election procedure. Under the APA, an agency is not bound by prior policy, but there is a duty to adequately explain departures from agency norms.[24] "The public interest may change either with or without a change in circumstances…but an agency changing its course must supply a reasoned analysis…if it wishes to depart from its prior policies, it must explain the reasons for its departure."[25] The Administration's conclusory statements that labor stability is primarily due to NMB's power over mediation and labor conditions have changed since the RLA was passed in 1934, do not meet the APA requirements for a reasoned analysis.

As noted above, the overriding policy behind the RLA was stability in interstate commerce. To meet these ends, Congress vested the NMB with broad powers over employee and employer relations both before and after certification. The fact that one power is more associated with the low incidence of instability, in this case mediation, does not mean that representational petitions are not essential to interstate commerce stability. The Administration has failed to present evidence that representation procedures are not an essential part of promoting stability in interstate commerce. In the absence of such evidence the Administration cannot just abandon the current NMB election procedure.

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[20] 45 U.S.C. § 152, Fourth (1934).
[21] *United States v. Diallo*, 575 F.3d 252, 256 (3rd Cir. 2009).
[22] 45 U.S.C. § 152, Ninth (1934).
[23] *Virginian Railways Co. v. Sys. Fed'n,* 11 F. Supp. 621, 625 (E.D. Va 1935).
[24] *Pre-Fab Transit Co. v. Interstate Commerce Comm'n,* 595 F.2d 384, 387 (7th Cir. 1979).
[25] *Panhandle E. Pipeline Co. v. Fed Energy Regulatory Comm'n,* 196 F.3d 1273, 1275 (D.C. Cir 1999).

It is without question that the railroad and airline industry have changed in the last 75 years. However, the Administration has failed to identify how those changes necessitate the proposed changes in the NMB election procedures. It is true that the railroad industry was going through a transition between 1933 and 1935 when approximately 550 company unions on 77 Class I railroads were replaced by national unions.[26] However, as clearly indicated by the nearly 500 NMB elections held in the last 10 years and the most recent problems with the Delta Air Lines, Inc. and Northwest Airlines, Inc. merger and union elections, both the railway and airline industries are still in the process of unionizing and stability is a continuing issue. The passage of time is not a reason to change a rule that has successfully ensured labor peace and stability for 75 years.

In the absence of a reasoned analysis the proposed rulemaking must be abandoned.

Conclusion

The Administration lacks statutory authority and has failed to present a rational basis upon which the current NMB election procedures can be amended. In the absence of such authority and reasoned analysis, the current procedures must be retained.

Respectfully submitted,

Darrell Issa
Ranking Minority Member
Committee on Oversight and Government Reform

[26] 74 FR 56750, 56752.