Comments of the National Railway Labor Conference
Regarding the National Mediation Board's Proposed
Changes in Representation Election Procedures

Docket No. C-6964
74 Fed. Reg. 56750, RIN 3140-ZA00

January 4, 2010

Introduction

The National Railway Labor Conference ("NRLC") respectfully submits these comments to the National Mediation Board ("NMB" or "Board") in response to the Board's Notice of Proposed Rulemaking and Request for Comments ("NPRM") regarding representation election procedures under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. The NRLC represents the nation's major freight railroads, including BNSF Railway, CSX Transportation, Grand Trunk Corporation (Canadian National Railway), Kansas City Southern Railway, Norfolk Southern Railway, Soo Line Railroad (Canadian Pacific), and Union Pacific Railroad as well as many smaller carriers. Together, these railroads employ 90 percent of the employees and account for 93 percent of the revenue of all freight railroads in the United States.

As explained in detail below, the NRLC supports retaining the NMB's long-standing rule in representation elections that a majority of eligible voters must cast valid votes in favor of representation in order to certify a representative. There is no evidence to support the need for the change proposed in the NPRM, under which the Board would certify a representative based on a simple majority of ballots cast. There is certainly no evidence to suggest that such a change is "essential to the administration of the Act," which is the standard to be applied in this case. In particular, there is no evidence that the current system is undemocratic, suppresses employee participation rates, or fails to keep pace with developments in the air and rail industries. Nor is there evidence that a change is justified by a need to combat election interference; the Board has proven more than capable of policing interference through review of specific charges in individual cases. Indeed, so far as the railroads are aware, all of the available evidence suggests that the current system is a fair and rational approach to the resolution of representation disputes. It has resulted in high rates of union representation in both the air and rail industries, as well as stable long-term relationships between carriers and unions that promote effective collective bargaining.

In these comments, the NRLC will first briefly summarize its concerns about the process that had led to the proposed change in election procedures, including the lack of any public fact-finding or other evidentiary procedures. We will then examine the five primary arguments for the proposed change, demonstrating that there is no evidentiary basis for such a drastic shift in the NMB's fundamental election rules.

Process Concerns

At the NMB's Open Meeting on December 7, 2009, the NRLC presented the railroads' concerns about the administrative process that has led to the proposed change in representation election procedures. *See* Statement of Joanna L. Moorhead, NMB Open Meeting of Dec. 7, 2009, at 3-5. We will not repeat that entire discussion here, but rather summarize the central points as follows:

- The Board has long maintained a highly effective tradition of operating by consensus, and in a measured and deliberative fashion. It has, moreover, always provided both labor and management with a full and fair opportunity to present evidence in support of their respective positions, especially on highly contentious issues. These practices are critical to the Board's reputation as an honest and neutral broker.

- When it comes to major changes to the Representation Manual or other fundamental rules, both the Board and the parties have historically avoided taking advantage of political opportunities to force through changes unilaterally. Rather, labor and management have sought to reach agreement, following the pattern established by the negotiation of the RLA itself. Examples include the Dunlop Commission, the joint labor-management Section 3 Committee, and the recent advisory panel denominated as "Dunlop II."

- In this case, the perception among many is that the proposed change is driven by a divisive representation dispute on one particular carrier. The NPRM suggests, moreover, that Board members have formed at least preliminary views on this issue prior to hearing the evidence for and against the change.

- In these circumstances – and especially given the significance of the change under consideration – the Board should engage in a careful, deliberative, fact-based, and non-partisan process. Doing so will reassure both sides that the Board's decision-making is driven solely by the evidence, rather than the desires of either labor or management alone.

For these reasons, the NRLC again asks the Board to proceed with "a full, evidentiary hearing with witnesses subject to cross-examination," which the NMB has repeatedly stated is "the most appropriate method of gathering the information and evidence" when deciding whether there is sufficient grounds to alter the long-standing election rules. *Chamber of Commerce of the United States*, 13 NMB 90, 94 (1986) ("*Chamber of Commerce I*"); *Chamber of Commerce of the United States*, 13 NMB 194 (1986) ("*Chamber of Commerce II*"). Indeed, the Board has only recently reaffirmed the need for an evidentiary hearing in this context, noting that it cannot justify fundamental changes in representation election procedures without "first engaging in a complete and open administrative process to consider the matter." *Delta Air Lines, Inc.*, 35 NMB 129, 132 (2008) ("*Delta*"). If given the opportunity to do so, the railroads would be pleased to participate in an appropriate evidentiary hearing.

The Lack of Evidence Supporting the Proposed Rule Change

For more than 75 years, the air and rail industries have utilized the majority vote standard, under which representation can change only with the support of "the majority of any craft or class." 45 U.S.C. § 152 Fourth; *see also Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 561 (1937) (discussing origin of the majority vote rule in the Transportation Act of 1920). The Board has repeatedly affirmed its "conviction that its duty under Section 2 Ninth, 'can more readily be fulfilled and stable relations maintained by a requirement that a majority of eligible employees cast valid ballots . . . ." *Chamber of Commerce of the United States*, 14 NMB 347, 362 (1987) ("*Chamber of Commerce III*") (quoting Sixteenth Annual Report of the Board (1950)). The Board has also explained that the "majority participation" rule better serves the interests of "harmonious labor relations," as "[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." *Id.*

The NMB's standard of review when considering proposals for altering the majority vote rule has always been that changes must be justified by "a clear showing of necessity therefore in the administration of the Railway Labor Act." *Chamber of Commerce III*, 14 NMB at 355. More specifically, the Board "has a long-standing policy of amending its rules *only when required by statute or essential to the administration of the Act*." *Id.* (emphasis added). The proponent of the change bears a "heavy burden of persuasion." *Id*. at 356. *See also id.* at 357 ("the standard of persuasion on behalf of the moving party must be very high"); *id.* at 363 ("The level of proof required to convince the Board that the changes proposed are essential, then, is quite high and has not been met.").

It is clear, moreover, that in applying this standard, the Board demands actual *evidence* that the change is "essential" to the administration of the Act. It is not sufficient for proponents of change to rely solely on case law, Board precedent, or policy arguments. *Delta*, 35 NMB at 132. Rather, the Board has always required oral or written sworn witness testimony and/or documentary support. *Id.* at 132 (requiring "substantive evidence or other compelling circumstances that the changes [sought] are essential"); *see also Chamber of Commerce III*, 14 NMB at 357-58 (concluding that proponents failed to present any witnesses or persuasive evidence in favor of decertification proposal); *id.* at 360-61 (concluding that while proponent of address list proposal provided "oral testimony and evidence" purporting to show a need for a change, it had not met "the burden of persuading the Board" that the change was necessary); *id.* at 362 (concluding that proponent of change in balloting procedure "has not proven that these changes are essential").[1]

[1] The Board has employed a similar methodical, even-handed, and evidence-based approach to other highly contentious issues that come before it, including, for example, disputes about the proper definition of a craft or class. *See, e.g., Union Pacific Railroad*, 27 NMB 171-72 (2000) (describing evidentiary proceedings in dispute over craft or class definition, including witness testimony, documents, and post-hearing submissions); *New York and Long Branch R.R.*, 5 NMB 331, 332 (1974) (describing evidentiary proceedings in dispute over consolidation of crafts).

In this case, there is no evidence that a change in the majority vote rule is "essential" to the administration of the RLA. While various policy-based justifications for the change have been articulated by proponents of the proposed rule, no one has proffered sworn testimony or documentary materials showing such a change was "essential." In fact, if anything, the available evidence suggests that the current election procedures are more than adequate to uphold the statutory mandates of the RLA.

There are five main arguments offered by those who advocate changing the current voting rules. As we now show, none of them have adequate factual support:

1. Democratic Principles and the "Modern Participatory Workplace Philosophy"

The main rationale set forth in the NPRM for elimination of the current election standards is that "the Board's current election procedure appears to be at odds with the modern participatory workplace philosophy that has evolved in the air and rail industries and the basic principles of democratic elections." 74 Fed. Reg. 56752. In particular, the NPRM states that the proposed change will "discourage employee non-participation by giving every employee a chance to affirmatively express their preference for or against representation." *Id.* It further states that the current system is tantamount to "compulsory voting," which "denies individuals the right to abstain from participating in an election." *Id.* The NPRM observes that "few if any democratic elections are conducted in this manner." *Id.*

None of the advocates for change have, however, provided any evidence that the current system is "undemocratic," contrary to a "modern participatory workplace philosophy," or otherwise unfair to any particular group of employees. On the threshold issue of whether a "new" workplace philosophy exists, the NPRM cites two news stories and one statement to a congressional committee, none of which involve the issue of participation in representation elections (and all of which involve airlines). *See* 74 Fed. Reg. 56752. There is certainly no evidence that railroads have changed with respect to "employee participation in workplace matters." Indeed, the railroads' perspective is that the nature and degree of employee participation has changed very little over the years.

But even leaving that aside, there is no reason to believe that the current system discourages participation in representation elections. The whole point of the current rule is that if employees are satisfied with the status quo, they need not cast a ballot. The decision not to cast a vote, therefore, cannot be fairly characterized as "non-participation." It is a choice. In fact, the practical reality of modern elections is that both sides – labor and management – go to great lengths to explain to employees how the system works and what it means to cast a vote or not cast a vote. *See, e.g.*, Tom A. Jerman & Michael Murphy, "Recent NMB Developments – The Carrier's Perspective," 1 Airline and Railroad Labor and Employment Law 85, 87 (ALI-ABA 2003). The Board itself has frequently addressed this topic in the context of election interference charges, and has affirmed that unions and carriers have the right to explain the voting system to the electorate. *Delta*, 30 NMB at 131 ("The Board has repeatedly stated that accurately portraying the way an employee can vote no is not interference.") (citing cases); *Piedmont Airlines*, 31 NMB at 270-72; 282-83; *America West*, 30 NMB at 331-32, 343. Accordingly, employees are generally aware of what it means to either vote or not vote, which

reinforces the conclusion that choosing not to cast a vote is just as "participatory" as casting a vote. At a minimum, there is no evidence for the assumption that any significant percentage of employees who do not vote do so because of reasons other than a desire to maintain the status quo.

Nor is there any evidence to suggest that a system based on a majority of votes cast is more "democratic" than the current rule. Three related points are worth mentioning here. First, the current rule has the virtue of preventing voter apathy from distorting election results. As matters now stand, employees have to take the minimal affirmative step of casting a ballot to alter the status quo. The NPRM suggests that this policy "could allow those lacking the interest or will to vote to supersede the wishes of those who do take the time and trouble to case ballots." 74 Fed. Reg. 56752. But under the proposed change, the opposite is true: a small minority of voters with unusually strong views could easily trump the wishes of a large majority with a more muted preference for the status quo. [2]

In recognition of this problem, there is a well-established body of academic support for so-called "approval quorums" – such as the Board's current majority participation rule – which limit the ability of small factions to dictate the outcome of elections. *See, e..g.*, Lawrence LeDuc, THE POLITICS OF DIRECT DEMOCRACY: REFERENDUMS IN GLOBAL PERSPECTIVE (2003) at 172 (quorum rules help avoid distortions in outcomes resulting from low turnout); Mads Qvortrup, A COMPARATIVE STUDY OF REFERENDUMS (2005) at 173 (quorum rules operate as safeguard against minority exploitation of voter apathy). There is no empirical data suggesting that quorum requirements are ineffective or otherwise inappropriate in the RLA context. Thus, there is only the assertion, as opposed to hard evidence, that the proposed rule would do a better job of measuring the "true" preferences of the electorate.

Second, it is not the case that all other democratic elections are based on a simple majority of valid votes cast. In fact, rules requiring a quorum are quite common in a variety of contexts. *See, e.g.*, Luis Aguiar-Conraria & Pedro C. Magalhaes, *Referendum Design, Quorum Rules and Turnout* (2009) *available at* http://ssrn.com/abstract=1451131, at 1-2 (noting that fourteen European Union members and at least five American states require either participation quorums or approval quorums); *see also, e.g.*, U.S. Const. Art. I, § 5, Cl. 1 (providing that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business"). In the labor context in particular, the statutory union recognition procedure introduced in the United Kingdom in 2000 provides that a union can prevail in a representation election by receiving support from a majority of those voting, but only if such support constitutes at least 40 percent of all workers in the bargaining unit. *See* Trade Union and Labour Relations (Consolidation) Act, 1992 c.53 (Eng.); *see also generally* Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States*, 25 Comp. Lab. L. & Policy J. 227 (2004).

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[2] Stated in slightly different terms, one potential problem with the proposed rule is that it may do nothing to encourage voter participation, and in fact might have the opposite effect. The added "cost" of voting for those who prefer the status quo could very well drive down the number of individuals who make an affirmative choice. *See, e.g.*, Andre Blais, TO VOTE OR NOT TO VOTE: THE MERITS AND LIMITS OF RATIONAL CHOICE THEORY (2000). Once again, there is no way to know without reviewing evidence on this point.

Third, the "democratic principles" argument is undercut by the positions taken by unions in the context of representation elections outside the air and rail industries. The AFL-CIO, for example, has been supporting legislation that would abandon balloting in favor of a "card check" system for all industries subject to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 201 *et seq. See http://www.aflcio.org/joinaunion/voiceatwork/efca/10keyfacts.cfm.* This suggests that the current proposal is less about "democracy" and more about efforts to obtain a system that offers a perceived advantage. If democracy were the real issue, then proponents of the rule change should support decertification of any union that no longer has the support of a majority of employees, but there is no mention of a decertification procedure in the NPRM.

2. Changed Circumstances

The other principal rationale mentioned in the NPRM is that the current rule was "adopted in a much earlier era, under circumstances that differ markedly from those prevailing today." 74 Fed. Reg. 56752. The NPRM mentions, in particular, that "widespread company unionism undermined collective bargaining and incited labor unrest" during the 1920s and 1930s, when the current standards were developed. *Id.* It suggests that a change in voting rules is justified because "[l]abor relations in the air and rail industries have progressed since the early days of the RLA, but many of the Board's election procedures have not." *Id.*

Here again, there is a lack of evidence that changed circumstances make alteration of the Board's rules "essential." In fact, as a threshold matter, there is no evident connection between a decline in company unionism and a need to change representation election rules. The problem of company unionism was addressed through the 1934 amendments to the RLA, including the adoption of Section 2 Fourth, which prohibits carrier "interference" in elections. 45 U.S.C. § 2 Fourth; *see also Virginian Railway v. Railway Employees*, 300 U.S. 515, 543 (1937) ("[T]he employees' freedom 'to organize and to make choice of their representatives without the 'coercive interference' and 'pressure' of a company union . . . was continued and made more explicit by the amendment of 1934."). There has never been any suggestion by the Board or the courts that the NMB's majority participation rule was adopted in order to combat company unionism (or that the justification for the majority rule has diminished with the waning of company unionism).

Moreover, there is no evidence of any other changed circumstances that would mandate alteration of the current system. No other such changes are mentioned in the NPRM. If anything, the evidence suggests that at least some of the factors that led to adoption of the majority participation rule – including the fact that carrier workforces are often geographically distributed across broad systems – are still in place. This unique characteristic of system-wide employee bargaining units in the air and rail industries may, at least in some cases, make it harder for groups of employees who oppose representation to respond to organizing campaigns led by unions with the experience and resources to conduct an election over a wide area.[3]

[3] Some commentators have suggested that modern technology obviates this concern. *See* Statement of Carmen Parcelli, Transportation Trades Department, AFL-CIO at 17. While modern technology no doubt improves communication, it does not necessarily enable *ad hoc* groups of employees

Furthermore, even if there were evidence of changed circumstances since the rules were originally adopted, the more pertinent question is whether circumstances have changed since the last time the Board considered and rejected this proposal. It was less than two years ago – in 2008 – that the Board rejected a similar suggestion. *See Delta*, 35 NMB at 132. And it was just over twenty years ago that the Board heard evidence on this same issue. *See Chamber of Commerce III*, 14 NMB at 347. Since that time, the debate has remained essentially the same. The railroads doubt that anything has changed since 1987 – much less since 2008 – to make the proposed new rule "essential" to administration of the RLA. In any event, there is no evidence of such a change.

3. Bias Against Unionization

While it is not mentioned in the NPRM, another chief rationale for the proposed change is that it is necessary to "level the playing field." *See, e.g.*, Statement of John Prater, President. Air Line Pilots Association at 1. Proponents of change contend that there is a "fundamental bias" in the current system against union representation. *Id.; see also, e.g.*, Statement of Robert Roach, Jr. General Vice President, IAMAW, at 2; Statement of Joel Parker, Transportation Communications International Union at 3, 7-9; Statement of John F. Murphy, Vice President, Teamsters Rail Conference at 8.

Here again, there is no evidence to support such views. To the contrary, the statistics show that, if anything, the current system provides unions with a more than fair opportunity to win representation elections. Among the Class I railroads, more than 85 percent of the total workforce is unionized – a higher percentage than virtually any other industry. We understand that the incidence of union representation on the major air carriers is similarly very high and has been increasing in recent years. As the NMB itself has stated, "the degree of organization among employees covered by the Railway Labor Act is significantly higher than that among employees covered by the NLRA. This fact is one of many factors which persuade the Board that it should not alter its current representation election procedures." *Chamber of Commerce III*, 14 NMB at 362; *see also Pan American Airways*, 1 NMB 454 (1948) ("[T]he establishment of representatives by employees for purposes of the Act has not been seriously handicapped under the Board's long established policy.").

Moreover, the success rate of unions in elections under the RLA is higher than for unions under the NLRA. The overall average rate of success for rail and air unions is close to 70 percent. In addition, the rate of union success in representation election proceedings has remained remarkably stable over the years; there has not been a decline in recent years, as some have suggested. By contrast, the success rate for unions under the NLRA ranges from roughly 44 percent to 60 percent on a year-to-year basis. *See* NLRB Annual Reports 1970-2008, available at http://www.nlrb.gov/publications/reports/annual_reports.aspx. Unions have, by any measure, done quite well under the Board's current rules. It is hard to understand, therefore,

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opposed to representation to act together in a concerted fashion to the same degree that would be possible if the employees were all based in a single location. Again, there is no evidence either way.

what possible evidence there could be that the NMB's majoritarian participation standard creates or perpetuates a bias against union representation.[4]

Both unions and management are perhaps guilty of occasional grumbling that the other side has an unfair advantage in election proceedings. For carriers, the fact that they are not permitted to engage in the range of direct campaigning that unions employ – and are subject to higher standards of accuracy and restraint in campaign materials – is often a source of concern. But the current system has proven over the years to be fair and equitable, balancing the rights of employees who favor representation with the rights of those who do not. *See, e.g., Railway Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 669 n.5 (1965) ("The legislative history supports the view that the employees are to have the option of rejecting collective representation. The ballot that the Board proposes to use in future elections fully comports with this conception of the Act.").

4. Interference or Voter Suppression

Several commentators have also argued that the current majority vote rule leads to "voter suppression," which presumably is a reference to interference by carriers in representation elections. *See, e.g.,* Statement of Edward Wytkind, President, Transportation Trades Department, AFL-CIO at 2-3; Statement of Carmen Parcelli, Transportation Trades Department, AFL-CIO at 15. Unions complain, in particular, about carrier messages urging employees to refrain from voting. *E.g.,* Statement of Marianne Bicksler, Association of Flight Attendants at 2 (discussing airline "Give a Rip" campaign in 2002).

There is simply no evidence that the current rule fosters interference. To the contrary, the Board has rejected the argument that carrier instructions to employees on how to "vote no," *i.e.*, by not casting a ballot, constitute election interference. *Express I Airlines*, 28 NMB 431 (2000); *Delta Air Lines, Inc.*, 27 NMB 484 (2000); *American Air Lines*, 26 NMB 412 (1999). In the Delta case from 2002, for example, the Board specifically addressed the "Give a Rip" campaign by the carrier, noting that "urging employees to vote no" by tearing up a ballot does *not* constitute interference. *Delta*, 30 NMB at 131-32. *See also, e.g., American*, 26 NMB at 448 (carrier did not "misrepresent Board's voting procedures or how to vote against the union"); *Piedmont Airlines*, 31 NMB 257, 270-72, 282-83 (2004) (urging employees to refrain from

[4] In comments made at the December 7, 2009 meeting, several advocates argued that recent narrow defeats of representation petitions demonstrate that the Board's rules have prevented unions from winning elections. *E.g.* Statement of Joel Parker, Transportation Communications International Union at 7-9. In making this argument, however, proponents of the proposed rule simply assume that the outcome would have been different under a system that counts only votes cast. There is no basis for such an assumption. To take one recent railroad example, the last election on Union Pacific resulted in 252 votes for representation out of a eligible voter population of 605 employees. *Union Pacific Railroad*, 35 NMB 182 (2008). The unions complain that because all of the non-voting population (353 individuals) were counted against representation, the "employees' desires were thwarted." Statement of Joel Parker at 9. But in fact, even under the proposed alternative, the result could very well have been the same. There is no reason to assume that the union would have received a majority of ballots cast. Any conclusion on this point is simply speculation.

casting a ballot is not interference); *America West*, 30 NMB 310, 330-32, 343 (2003) (same). Indeed, given that employees who do not desire representation vote against it by *not* voting, accurately advising them about this cannot be viewed as election interference.

Perhaps more importantly, the argument that the existing system allows or encourages carrier interference ignores the Board's diligent investigation of and broad remedial powers in cases of election interference.[5] The NMB's Office of Legal Affairs has repeatedly demonstrated its dedication to fair, timely, and thorough review of charges, even in complex and highly contentious cases. *E.g. Delta*, 30 NMB at 104, 128-42 (noting that investigation included on-site visits and interviews of 214 witnesses, with issues including allegations of illegal employee committees, misrepresentation of Board procedures, videotape communications, pervasive carrier publications, solicitation, discriminatory access to employees, uniform restrictions, harassment, interrogation and discipline, and pay and benefit increases).[6] The Board's personnel are experts in examining charges of interference and weighing what are often hotly disputed facts. They are empowered to interview witnesses under oath, subpoena carrier records, and inspect carrier premises.[7] Moreover, the Board has a wide range of tools at its disposal if it finds interference. *See, e.g.*, *Florida East Coast Railway Co.*, 17 NMB 177 (1990) ("The Board has "broad discretion in fashioning appropriate remedies for carrier interference."); *Laker Airways*, 8 NMB 236, 253 (1981); *Key Airlines*, 16 NMB 296, 313 (1989). Thus, it is inaccurate to suggest that a change in Board rules is "essential" because the NMB is unable to effectively respond to alleged carrier interference.

In any event, allegations of "voter suppression" make no sense in this context. The only way to vote "no" under the current rule is to not vote. Hence, it should be unremarkable that carriers instruct employees to refrain from voting (including by ripping up their ballots) if they do not wish to be represented. Commentators who complain that the current system "encourages" vote suppression seem to lack an understanding of this process. *See* Statement of

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[5] In general, the Board's duty is to ensure that all elections are conducted in accordance with "laboratory conditions" – free from any undue or improper influence by the carrier or any other entity. Representation Manual § 17.0. This standard derives from the Supreme Court's decision in *Texas & N.O. R.R. v. BRAC*, 281 U.S. 548 (1930), wherein the Supreme Court held that the restriction on "interference, influence, or coercion" under the RLA simply means that a carrier may not "pressure" employees or use its "authority or power" to "induce action . . . in derogation of what the statute calls 'self-organization.'" *Id.* at 568. *See also, e.g., United Airlines, Inc.*, 27 NMB 417, 428 (2000). By contrast, the prohibition on "influence" does not extend to "normal relations" or "innocent communications." *Texas & N.O.*, 281 U.S. at 568.

[6] *See also, e.g., Aeromexico*, 28 NMB 55 (2001) (describing on-site investigations and statements from over 28 witnesses); *American Trans Air*, 28 NMB 163, 164-65 (2000) (describing on-site investigations and statements from over 40 witnesses); *Delta Air Lines, Inc.*, 27 NMB 484 (2000) (describing complex investigation at multiple carrier sites).

[7] Indeed, the NMB has proven to be much more effective and efficient in handling charges of interference than its counterparts at the NLRB. Charge investigations under the RLA are ordinarily handled within a few months, if not less. By contrast, the NLRB often takes much longer to investigate charges of election interference.

Kate Bronfenbrenner, Cornell School of Industrial and Labor Relations, at 1-5. A correlation between union "win rate" and "turnout" under the current rules is no more surprising than a correlation between a general election candidate's win rate and the number of ballots he or she receives. *Id.*

5. Relationship of the Current Rule to Stable Labor Relations

The Board has, for many years, consistently expressed the view that "its duty [under Section 2 Ninth] can more readily be fulfilled and stable relations maintained by carriers' and employees' representatives by a requirement that a majority of eligible employees cast valid ballots in elections conducted under the Act before certifications of employee representatives are issued." *Pan American Airways*, 1 NMB at 455. However, the NPRM suggests that the current rule does not, in fact, serve the interests of stable labor relations in the air and rail industries, observing that the "low incidence of strikes is more directly related to the Board's mediation function than to its representation function." 74 Fed. Reg. at 56752. Likewise, several union commentators have dismissed the idea that the current rule enhances stability, arguing that it does not function to limit strikes or other disruptions in commerce. Statement of Edward Wytkind, President, Transportation Trades Department, AFL-CIO at 3-4; Statement of John Prater, President, Air Line Pilots Association at 3-4.

The argument that the Board's majority participation rule enhances stability is not, as the unions suggest, predicated on the notion that the rule itself directly prevents strikes. Rather, the argument is that majority participation guarantees that representatives have broad support among the employees, which in turn results in stable, long-term, and productive relationships between representatives and carriers. *See Chamber of Commerce III*, 14 NMB at 362. In the rail industry, collective bargaining relationships have been maintained for decades. As early as 1934, 71 percent of the employees of large railroads were represented by the standard railroad unions. *See* L.A. Lecht, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION (1968) at 75. These long-term relationships have proven enormously effective in collective bargaining, resulting in voluntary agreements in all but a handful of cases in the last quarter-century. Thus, if anything, the facts suggest that retaining (not abandoning) the current rule is "essential" to the goals of the RLA.

Moreover, it is logical to conclude that the majority participation rule may also enhance stability by reducing opportunities for replacement of incumbent unions by rival organizations. Union raiding remains relatively common in other industries that are subject to election rules similar to those proposed in the NPRM. *See* Annual Report of National Labor Relations Board, FY2008, at 13. It is likely, therefore, that changing the NMB's current rule as proposed could serve as an invitation to union rivals to try to unseat their counterparts, with all of the attendant disruptions and strife that such campaigns produce. Inter-union conflict has the potential to substantially degrade carrier operations, and thus is a serious concern for the railroad industry. Likewise, and more generally, it is possible that changing the rule would produce an increase in the frequency or bitterness of election campaigns. Increased conflict among employees is in no one's interest. This is yet another subject that should be investigated through an evidentiary process.

Conclusions

In closing, it is worth noting that both the Board and Congress have, over the years, considered substantive changes to the RLA, including the basic rules for representation elections. The temptation to tinker has, however, always been resisted if the parties themselves cannot agree on the proposed change. Unilateral imposition of contested changes undermines the central tenet of labor-management cooperation that defines the RLA. *See, e.g.,* The Dunlop Commission on the Future of Worker-Management Relations – Final Report (1994) at 92-93 (declining to recommend any changes to the RLA in the absence of labor-management consensus).

This is why the Board has always demanded evidence that any proposed change to election procedures must be *essential* to the administration of the Act. There is no such evidence here. To the contrary, the best evidence is that the Board's current policies and procedures – including the principle of majoritarian participation – have helped to maintain labor peace in the railroad industry for decades. Indeed, the proposed change cannot possibly be "essential" to the administration of the RLA when the current rule has served so well for so long. Therefore, the NRLC respectfully asks the Board to decline to impose the proposed changes.

Respectfully submitted,

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