Comments of Watco Companies, Inc. and Genesee & Wyoming, Inc.
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

Watco Companies, Inc. ("Watco") and Genesee & Wyoming, Inc. ("GWI") hereby jointly submit these comments in response to the National Mediation Board's Notice of Proposed Rulemaking ("NPRM") regarding the proposed elimination of the Board's long-standing majority participation rule for representation elections under the Railway Labor Act ("RLA"). Watco and GWI are two of the largest owners of short-line railroads in the United States.[1]

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[1] Watco owns Watco Transportation Services, which owns the following railroads: Alabama Southern Railroad, Alabama Warrior Railroad, Arkansas Southern Railroad, Austin Western Railroad, Baton Rouge Southern Railroad, Boise Valley Railroad, Eastern Idaho Railroad, Great Northwest Railroad, Grand Elk Railroad, Kansas & Oklahoma Railroad, Kaw River Railroad, Louisiana Southern Railroad, Mission Mountain Railroad, Mississippi Southern Railroad, Pacific Sun Railroad, Palouse River & Coulee City Railroad, Pennsylvania Southwestern Railroad, South Kansas & Oklahoma Railroad, Stillwater Central Railroad, Timber Rock Railroad, Vicksburg Southern Railroad, Yellowstone Valley Railroad, Combined Midwest System. GWI owns the following railroads: Genesee & Wyoming Railroad, The Dansville & Mount Morris Railroad, Rochester & Southern Railroad, Louisiana & Delta Railroad, Buffalo & Pittsburgh Railroad, Allegheny & Eastern Railroad, Bradford Industrial Rail, Williamette & Pacific Railroad, Portland & Western Railroad, Illinois & Midland Railroad, Commonwealth Railroad, Talleyrand Terminal Railroad, Corpus Christi Terminal Railroad, Golden Isles Terminal Railroad, Savannah Port Terminal Railroad, South Buffalo Railroad, St. Lawrence & Atlantic Railroad (Maine, New Hampshire and Vermont), York Railway, Utah Railway, Chattahoochee Industrial Railroad, Arkansas Louisiana and Mississippi Railroad, Fordyce and Princeton Railroad, Tazewell & Peoria Railroad, Golden Isles Terminal Wharf Railroad, First Coast Railroad, AN Railway, Atlantic & Western Railroad, The Bay Line Railroad, East Tennessee Railway, Galveston Railroad, Georgia Central Railway, KWT Railway, Little Rock & Western Railway, Meridian & Bigbee Railroad, Riceboro Southern Railway, Tomahawk Railway, Valdosta Railway, Western Kentucky Railway, Wilmington Terminal Railroad, Chattahoochee Bay Railroad, Maryland Midland Railway, Chattooga & Chickamauga Railway, Luxapalia Valley Railroad, Columbus and Greenville Railway, The Aliquippa & Ohio River Railroad, The Columbus and Ohio River Railroad, The Mahoning Valley Railway, Ohio Central Railroad, Ohio and Pennsylvania Railroad, Ohio Southern Railroad, The Pittsburgh & Ohio Central Railroad, The Warren & Trumbull Railroad, Youngstown & Austintown Railroad, The Youngstown Belt Railroad, Georgia Southwestern Railroad.

Together, their subsidiary railroads employ a number of both represented and unrepresented individuals in a wide range of crafts, and thus both GWI and Watco have a significant interest in this issue.

Introduction

Watco and GWI support continued application of the Board's existing policy requiring that a majority of eligible votes in the craft or class submit valid ballots in order to certify a representative. They are firmly opposed to adoption of a rule that would permit certification based on a simple majority of votes cast. As many other commentators have noted, the current rule has served the air and rail industries well for many decades. The experience of the short-line railroads is consistent with that theme. As matters now stand, the unions have a more-than-fair opportunity to convince a majority of employees that they should be represented, as exhibited by the fact that the major railroad unions have a strong and growing presence in the short-line industry. There is, in short, no compelling need to change the rule. In fact, doing so will only exacerbate tensions and introduce the potential for greater instability in labor relations, results that are contrary to the Board's statutory mission.

For these reasons, GWI and Watco urge the Board to refrain from imposing the proposed rule on the carrier community, and instead allow labor and management to attempt to negotiate a resolution of the issue. But if the Board is determined to act unilaterally, then it should at the very least modify its proposed rule to include both a threshold majority participation requirement and a decertification procedure. Anything less would send the message that this is simply an exercise of political power, and would undermine the Board's reputation for neutrality.

Argument

The proposed rule is ill-advised and should be rejected. It would not serve the interests of employees of short-line railroads, and indeed would be detrimental to their rights under the Railway Labor Act to choose a representative. This is so for several reasons.

1. *First*, the proposed rule would be especially ill-suited to representation elections on short-line railroads. Many of the employee crafts on small carriers are composed of only a handful of individuals.[2] Because these crafts are so small, elections are often settled by a matter of only one or two votes. *See, e.g., Austin Western Railroad*, 35 NMB 241 (2008) (9 of 18 employees vote for representation). However, under this system, all employees can take comfort in the fact that, regardless of the outcome, every single individual's choice to vote or not vote actually matters.

The proposed rule would, by contrast, produce outcomes that are as much a function of randomness – or the views of just one or two individuals – than a collective decision by the entire group of employees. For example, in a craft of ten unrepresented employees, suppose only two employees favor representation – but feel very strongly – while the other eight have a mild preference for the status quo. In those circumstances, the proceeding could very well result in certification of a union solely because the pro-union employees are the only ones willing to incur the costs of voting. Likewise, if only a *de minimus* percentage of the entire craft votes, it says nothing about the true majoritarian preferences of the employees. In other words, counting a simple majority of votes cast may often not reflect anything meaningful about the aggregate will of the employees. At a minimum, some sort of quorum is necessary to ensure that a vote is meaningful, especially in the sort of very small crafts that are common in the short-line rail industry.[3]

To be sure, the NPRM suggests that a change is necessary to comport with "basic principles of democratic elections," including the notion that a "majority of valid votes cast" must prevail. 74 Fed. Reg. 56752. But that is clearly not so. The Supreme Court has approved election rules that require *more* than a majority of votes for passage, noting that "there is nothing in the language of the Constitution,

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[2] Records of recent representation proceedings on short-line railroads evidence the small size of these crafts. *See, e.g., Stillwater Central Railroad*, 36 NMB 132 (2009) (26 eligible employees); *Alabama & Gulf Coast Ry.*, 36 NMB 130 (2009) (14 employees); *Jefferson Warrior Railroad*, 36 NMB 117 (2009) (12 employees).

[3] *See, e.g.*, Henry M. Robert III et al., ROBERT'S RULES OF ORDER NEWLY REVISED § 3, at 20 (10th ed. 2000) ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.").

our history, or our cases that requires that a majority [of votes cast] always prevail on every issue. . . . The Federal Constitution itself provides that a simple majority vote is insufficient on some issues . . . ." *Gordon v. Lance*, 403 U.S. 1, 6 (1971). In doing so, the Court observed that it is entirely legitimate to require "that a given issue be approved by a majority of all registered voters." *Id.* at 7-8 (citing *Clay v. Thornton*, 169 S.E.2d 617 (S.C. 1969) (upholding provision in South Carolina law requiring the assent of a majority of all eligible voters), *appeal dismissed sub nom. Turner v. Clay*, 397 U.S. 39 (1970).

2. *Second*, a change in voting procedures to permit control based on a simple majority of votes cast would likely increase opportunities for inter-union conflict and raiding. Given the small craft sizes on short-line railroads, Watco and GWI are deeply concerned that unions would seize upon situations where they have a small number of very vocal supporters in order to supplant rivals that are more-or-less invulnerable under the Board's current rules. In other words, raiding is a major concern where the size of the crafts creates the possibility of frequent and rapid turn-over of representatives. Conflict between unions can be highly disruptive to carrier operations. Such matters are often a matter of deeply felt emotions among employees. It erodes the cohesiveness of employee teams and degrades efficient movement of rail traffic. Thus, GWI and Watco are strongly opposed to any changes that create the potential for increased inter-union conflict.

It is also worth noting, in this regard, that the proposed rule says nothing about how the Board would treat representation disputes in cases involving a union raiding challenge to an existing union. It is unclear whether an incumbent union that receives less than the majority of votes, but more than the challenger or the "no union" option, would be certified. There are procedures for dealing with this issue under the National Labor Relations Act ("NLRA"), but we are left to guess whether and to what extent the Board would adopt such procedures.

3. *Third*, imposition of the proposed rule could very well leave short-line employees with unions elected by a minority of the workforce, but without any effective mechanism to remove such unions if they fail to conform to the demands of the majority. Decertification is a topic that many others have raised – including the Chairman in her dissent to the NPRM – but we wish to emphasize it here because it is a truly critical issue for employees of short-line railroads.

Everyone agrees that employees should have the right to remain (or become) unrepresented. *See Russell v. National Mediation Board*, 714 F.2d 1332, 1343 (5th Cir. 1983) (noting that "employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well"). However, even under the current system, it is arguable that employees lack an effective mechanism to remove a representative. At the very least, there is no clear or obvious way for employees to remove a union and return to an unrepresented state. This means that a union can be, as a practical matter, impossible to remove. This stands in stark contrast to the procedures available under the NLRA, which permits certification by majority vote but also allows for decertification. (We note that proponents of change rely heavily on the NLRA's procedures for certification, but are notably silent when it comes to its provisions for decertification.)

Regardless of what one might say about whether the Board has done enough in the past to guarantee the right to be unrepresented, the problem becomes even more acute if the Board permits certification based on nothing more than a simple majority of ballots cast. In those circumstances, a union may *never* have majority support, even at the outset, and yet cannot be removed. Thus, as the Board itself has recognized, these two issues are closely intertwined. *See Chamber of Commerce*, 13 N.M.B. 1 (1987) (notice of consolidation). If the Board changes the rules to allow unions to obtain representation rights based on a simple majority of votes cast, it should likewise create a robust decertification mechanism that allows for easy removal of representatives that lose majority support.

4. *Fourth*, the proposed change would be highly divisive and could damage relations between labor and management in the short-line rail industry. The perception among the short-line railroads is that this issue has arisen because of a series of particular organizing campaigns on large national airline carriers. *See* 74 Fed. Reg. 56753 (noting that timing of NPRM coincides with certain airline representation proceedings). The proposed rule is apparently designed with those disputes in mind, and, as noted above, is especially ill-suited to small rail carriers. So far as we are aware, the unions that represent short-line railroad employees have never sought this sort of change in election procedures, which suggests that they have been comfortable operating under the existing rules. Nor has there been any discussion or acknowledgement by the Board of the different characteristics of short-line railroads (and small airline carriers, for that matter) In these

circumstances, Watco and GWI cannot help but believe that they have been swept up in a dispute that does not concern them.

Accordingly, if the proposed rule is applied to short-line railroads, it will only engender bitterness and distrust. The short-line railroads' largely positive relations with their unions could suffer, especially given the lack of negotiation of the issue between labor and management. The proposed change smacks of unfairness, unilateralism, and partisan politics.

5. *Fifth*, there has been no showing that the proposed change is mandated by statute, is "essential" to the Board's administration of the RLA, or is otherwise supported by a "clear showing of necessity." *See Chamber of Commerce of the United States*, 14 NMB 347, 355, 362 (1987). Indeed, if anything, the proposed change is clearly not "essential," given that the current standard has worked for many years. Thus, even if forcing through this change would be within the Board's discretion, it would require a radical departure from the Board's fundamental procedures and standards of review. It would be incongruous, to say the least, to change a basic rule that has been in place for decades using the sort of abbreviated process that is contemplated by the NPRM. Such action would undermine the Board's reputation for neutrality, damage its relationship with the carriers, and reinforce the conclusion that this is nothing but an exercise of raw political power.

Forcing through a divisive change in these circumstances will, moreover, only encourage reciprocal changes when the political winds shift again. The experience of Congress and the NLRB should be a sufficient warning to those who seek to take advantage of circumstances – power is always temporary. It would be deeply unfortunate if this proposed change was the beginning of a downward spiral of politically motivated, tit-for-tat rule-makings. Initiating an endless recurring battle of this kind is in no one's interest.

Recommendations

For these reasons, Watco and GWI recommend that the Board decline to impose the rule proposed in the NPRM. Rather, the Board should establish a series of joint labor-management study groups to examine representation issues in the air and rail industries and offer consensus proposals for change. Moreover, rather than the monolithic commission that others have proposed, GWI and Watco suggest that the Board should establish a series of sub-committees to study the issue in four separate contexts: (1) large Class I railroads, (2) small Class II and III railroads, (3) large national airlines, and (4) small regional airlines. These sub-committees should include both labor and management representatives from each of the affected constituencies. This approach acknowledges the fact that the issues facing employers and employees are not the same across all categories of carriers subject to the RLA. The Board and the parties may determine, at the end of the day, that standards should continue to be uniform across all categories of carriers, but they should at least consider the alternative as well.

If, contrary to this recommendation, the Board presses ahead with an ill-advised rush to alter its representation procedures without the consent of both labor and management, it should, at a minimum, include certain modifications to the rule proposed in the NPRM. In particular, any change to the current majoritarian system should be accompanied by a clearly defined decertification procedure. In particular, the Board should create a new section in the Representation Manual that explains how employees can seek to decertify an existing representative. Such a procedure should mirror the rules for certifying a representative, such that if a simple majority of votes cast is sufficient to certify, a simple majority of votes cast would be sufficient to decertify as well. In other words, the rules should be the same for both certification and decertification.

In addition, the Board should consider a hybrid system under which a majority of votes cast will determine the outcome only if a majority of the eligible voters participate. Such a rule would minimize the distortions of a simple majority rule – such as representation in a craft of 50 employees being decided by a small handful of votes. It would also be a substantially less radical change than the one proposed in the NPRM.

Conclusion

WCI and GWI strongly support continued use of the Board's current rules for representation elections. These rules provide short-line railroad employees with a fair process for deciding their representation status on a true majoritarian basis. Because these rules have been in place for so many years – and have been repeatedly upheld against many past legal and policy challenges – they are a key element of the settled expectations of labor and management in any representation dispute. There is no compelling reason to alter the fundamental rules at this point. Indeed, doing so would be inconsistent with the Board's principal responsibilities under the Railway Labor Act.

Respectfully submitted,

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