CHANGED TIME AND CIRCUMSTANCES JUSTIFY AMENDING NMB REPRESENTATION VOTE PROCEDURES

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By Notice of Proposed Rule Making (NPRM) dated Nov. 3, 2009, the National Mediation Board (NMB) proposes to amend its rules interpreting and administering the *Railway Labor Act* (RLA)[1] "to provide that, in representation disputes [determinations as to who will be the bargaining agent for airline and railroad and commuter railroad employees[2]], a majority of valid ballots cast will determine the craft or class representatives."[3]

The long-standing procedure of the NMB requires a majority of eligible voters (as opposed to those actually voting) to vote affirmatively in favor of representation, meaning a failure or refusal of an eligible voter to participate is the equivalent of a "no union" vote.

The NMB proposes to change its procedure so that, in the future, only ballots of those actually voting will be counted, and each voter will make a choice between representation by a specified union or "no union." This will comport with the long-standing procedures of the National Labor Relations Board, which interprets and administers the *National Labor Relations Act*.[4]

The NMB has authority to make this change in policy. As the Supreme Court observed:[5]

> [N]ot only does the statute [RLA] fail to spell out the form of any ballot that might be used but it does not even require selection by ballot. It leaves the details to the broad discretion of the [National Mediation] Board with only the caveat that it 'insure' freedom from carrier interference.

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[1] 44 *Stat*. 577 (1926); 45 U.S.C. 151 *et seq*.

[2] Carrier by rail is described at 45 U.S.C. § 151, First of the RLA. Carrier by air is described at § 181.

[3] "National Mediation Board, 29 CFR Parts 1202 and 1206," *Federal Register*, Nov. 3, 2009, pp. 56750-56754.

The terms "craft or class" is fixed by the RLA as the unit for collective bargaining. The term is used simply to define the bargaining unit, either developed through past bargaining history or designated by the NMB in connection with an election of representatives. *See*, for example, NMB Case R-358, *Determination of Craft of Class* (1937); *Richmond, Fredericksburg & Potomac Railroad Co.*, 5 NMB 302 (1972); and, Harry Lustgarten, *Principles of Railroad and Airline Labor Law* (Omaha: Rall Publications, 1984), pp. 28-29.

[4] 49 *Stat*. 449 (1935); 29 U.S.C. 151 *et seq*.

[5] *Bhd. Of Ry. And S.S. Clerks v. Assn. for the Benefit of Non-Contract Employees*, 380 U.S. 650, 668-669 (1965).

Says the NMB in its NPRM:[6]

> The Board's current policy requires that a majority of eligible voters in the craft or class must cast valid ballots in favor of representation. This policy is based on the Board's original construction of Section 2, Fourth of the RLA, 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 ...

This interpretation was made in the NMB's first annual report in 1935 "... not on the basis of legal opinion and precedents, but on what seemed to the Board best from an administrative point of view."[7]

In its November 2009 NPRM, the NMB says:[8]

> .... under its broad statutory authority, [the board] may also reasonably interpret Section 2, Fourth to allow the Board to certify as collective bargaining representative any organization which receives a majority of votes cast in an election.

And the NMB has done just that in the past, although infrequently. As the NMB said in its first annual report in 1935 that, "Where, however, the parties to a dispute agreed among themselves that they would be bound by a majority of the votes cast, the Board took the position that it would certify on this basis ..."[9]

The Supreme Court has held that while the words of Section 2, Fourth " confer the right of determination upon a majority of those eligible to vote," the statute "is silent as to the manner in which that right shall be exercised."[10]

The U.S. Fourth Circuit Court of Appeals held, in 1936:[11]

> The universal rule as to elections of officers and representatives is that a majority of the votes cast elects, and that those not voting are presumed to acquiesce in the choice of the majority who do vote.

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[6] "National Mediation Board, 29 CFR Parts 1202 and 1206," *Federal Register*, Nov. 3, 2009, p. 56751.

[7] *First Annual Report of the National Mediation Board* (1935), p. 19.

[8] " National Mediation Board, 29 CFR Parts 1202 and 1206," *Federal Register*, Nov. 3, 2009, p. 56751.

[9] *First Annual Report of the National Mediation Board* (1935), p. 19.

[10] *Virginian Railways Co. v. Sys. Fed'n*, 300 U.S. 515, 560 (1937). *See,* also, *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965).

[11] *Virginian Ry. Co. v. System Federation No. 40, Railway Employees of the American Federation of Labor et al*., 84 F.2d 641 (1936).

And Chief Justice Morrison Waite held, in 1877:[12]

> All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience and ought not to be adopted, unless the legislative will to that effect is clearly expressed.

Moreover, courts give the decisions of expert federal agencies great deference; and are, in the words of the Supreme Court (*Chevron* doctrine), "reluctant to preclude any federal agency's deliberations of policy because a federal agency, which is controlled by the political branches of the federal government, is constitutionally better suited than a federal court to render policy decisions."[13]

The NMB enjoys even greater insulation from second-guessing by the courts. The Supreme Court observed in 1943 that Congress left to the discretionary authority of the NMB the determination of certifying bargaining representatives.[14]

Perhaps a more pregnant question is why the NMB for so long has permitted its voting procedures in representation elections to be out of sync with the standard for all other democratic elections, where a majority of those voting makes the determination. This is especially relevant where the result of such a procedure is that the failure or refusal of an eligible voter to participate is the equivalent of a "no union" vote.

It makes for sound administrative procedure, however, to provide reasonable justification – rather than willy-nilly desire – for changing a long-standing public policy.[15]

Determining a reasonable justification logically begins with the NMB's observation, in its November 2009 NPRM, that Section 2, Fourth "was adopted in a much earlier era, under circumstances that differ markedly from those prevailing today."[16]

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[12] *County of Cass v. Johnston*, 95 U.S. 360, 369 (1877).

[13] *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 865-866 (1984).

[14] *Switchmen's Union v. National Mediation Board,* 320 U.S. 297 (1943). *See*, also, Dana E. Eischen, "Representation Disputes and their Resolution in the Railroad and Airline Industries," in, *The Railway Labor Act at Fifty: Collective Bargaining in the Railroad and Airline Industries* (Washington, D.C.: Government Printing Office, 1976), p. 28.

[15] Although NMB representation determinations are insulated from judicial review, the *Administrative Procedure Act* (60 *Stat*. 237, 1946) has been interpreted by the Supreme Court to require an agency to "articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.,* 129 S.Ct. 1800, 1810 (2009).

[16] "National Mediation Board, 29 CFR Parts 1202 and 1206," *Federal Register*, Nov. 3, 2009, p. 56752.

THE EARLIER ERA

Time and circumstances have, indeed, changed since the NMB adopted, during the 1930s, its current policy – not always followed, as will be explained – that requires a majority of eligible voters in the craft or class must cast valid ballots in favor of representation.

Consider:

* In 1930, there were 156 major (Class I) railroad systems. In 2008, the number of major (Class I) railroad systems was just 7, a 96 percent reduction since 1930.[17]

* In 1930, there were 1.5 million employees in the railroad industry. In 2007, employment in the railroad industry had declined to just 236,000, an 84 percent reduction since 1930.[18]

* In 1930, there were 249,000 miles of railroad line in the United States. In 2007, the miles of railroad line in the United States had declined to just 94,440, a 62 percent reduction since 1930.[19]

While it is instructive that there has been a significant decline in the number of major railroads, railroad employees and miles of railroad trackage, those considerations alone are not enough to justify a change in the NMB's long-standing voting procedures for representation elections, except to demonstrate that the environment in which the NMB made its initial determination to require a majority of eligible voters was much different than today's environment.

However -- and this is crucial – as the NMB conducted representation elections during the 1930s, the Interstate Commerce Commission was wrestling with a congressional directive in the *Transportation Act, 1920*, to formulate a plan of merging the nation's railroads into just 19 systems.[20]

Thus, lurking in the shadows of each representation election during the 1930s was, "What is the mood of employees on the other railroads that might become a merger partner of the railroad on which employees were voting for representation?" This concern likely steered the NMB toward seeking a demonstration in each representation election that the outcome was a result of votes from a majority of those eligible to vote.

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[17] *Interstate Commerce Commission, Transport Statistics of Railways in the United States* (1931); and, Association of American Railroads, *Railroad Facts*, 2008 edition, p. 3.

[18] Eastern Railroad Presidents Conference, *A Yearbook of Railroad Information*, 1943, p. 62; and, Association of American Railroads, *Railroad Facts*, 2008 edition, p. 56.

[19] Eastern Railroad Presidents Conference, *A Yearbook of Railroad Information*, 1943, p. 6; and, Association of American Railroads, *Railroad Facts*, 2008 edition, p. 45.

[20] *See,* for example, Frank N. Wilner, *Railroad Mergers: History, Analysis, Insight* (Omaha: Simmons-Boardman Books, 1997), chapters 4 and 6.

There are more important facts of changed circumstances:

Company Unions

* Among amendments to the *Railway Labor Act* in 1934 was one outlawing company unions – a change intended better to protect employee rights to organize.[21] Company unions were under the control of carrier officers, with the carriers paying the wages of the employee representatives.

* The House Committee on Interstate and Foreign Commerce observed at the time (1934) that "a prolific source of dispute" between management and employees was "the denial by railway management of the authority of representatives chosen by their employees."[22]

* So substantial was this conflict that then-NMB Chairman William M. Leiserson subsequently testified that, were there a strike occasioned by a dispute over wages and hours, "we usually find we can settle those by arbitration or otherwise ... But if the issues involved were discrimination or discharge of men because they had joined the organization, or the question would be the right of the organization to represent them, we could not have settled those strikes."[23]

* Between 1933 (the year prior to an RLA amendment that outlawed company unions) and 1935, some 550 company unions on 77 Class I railroads were replaced by independent national unions.[24] Indeed, two thirds of the work of the NMB from 1934 until the start of World War II involved investigations and purging of company unions.[25]

This was no simple task, as railroads were not anxious to cede negotiating power to an independent labor union. *The New York Times* observed as early as 1922:[26]

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[21] 48 *Stat.* 1185 (1934).

[22] *Report of House Committee on Interstate and Foreign Commerce*, No. 1944, 73rd Cong., 2d sess., pp. 1-2.

[23] Testimony of NMB Chairman William E. Leiserson before Division of Economic Research, National Labor Relations Board, "Governmental Protection of Labor's Right to Organize," Bulletin No. 1, August 1936, pp. 17-18, reporting on *Jones & Laughlin Steel Corporation*, 301 U.S. 57 (1936).

[24] Leonard A. Lecht, *Experience Under Railway Labor Legislation* (New York: Columbia University Press, 1955), p. 155.

Company unions, controlled by management, were first introduced during the period of federal control of railroads (1917-1920) by the Pennsylvania Railroad. *See*, Frank N. Wilner, *Understanding the Railway Labor Act* (Omaha: Simmons-Boardman Books, 2009), p. 50.

[25] Lecht, *op. cit*., p. 155.

[26] "Company Unions As Strike Cure," *The New York Times*, Sept. 24, 1922.

When the railroads were handed back to their owners by the Government [following federal takeover during World War I] they were working under national agreements made with union representatives. That was a yoke from which the roads constantly tried to escape.

Moreover, employees, fortunate to be working during the Great Depression were frightened – if not terrified – over the prospect of angering management by not supporting a company union and, as a result, losing their jobs.

As the U.S. Fourth Circuit Court of Appeals observed in 1936:[27]

... any sort of influence exerted by an employer upon an employee, dependent upon his employment for means of livelihood, may very easily become undue, in that it will coerce the employee's will in favor of what the employer desires against his better judgment as to what is really in the best interest of himself and his fellow employees.

Although there is no accessible source to determine the thinking of NMB officials at the time, it is logical to conclude that requiring a majority of those eligible to vote (as opposed to a majority of those voting) more conclusively established on the part of the eligible employees a desire to be represented by a labor union independent of company influence.

This conclusion is given validity by a comment of the nation's Federal Coordinator of Transportation (1933-1936), Joseph Eastman, who proposed that in organizing employee unions, "a majority shall speak for all."[28]

Racial Discrimination

There was, during the 1930s, a national shame of racial discrimination.

It was not until 1955 that the Interstate Commerce Commission, taking instruction from *Brown v. Board of Education of Topeka, Kansas,*[29] ruled that the very practice of segregation in interstate commerce was a violation of the *Interstate Commerce Act*.[30]

For sure, discrimination against African-Americans existed also in railroad employment practices.

* On Atlanta Terminal Co., for example, there was an effort to separate, for representation, Caucasian and African-American employees. Management said it wanted a demonstration that

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[27] *Virginian Ry. Co. v. System Federation No. 40, Railway Employees of the American Federation of Labor et al*., 84 F.2d 641 (1936).

[28] "Supervision of Union Balloting," *Railway Age* magazine, April 14, 1934, p. 554.

[29] 347 U.S. 483 (1954).

[30] *National Association for the Advancement of Colored People v. St. Louis-San Francisco Railway*, 297 I.C.C. 335 (1955).

the Brotherhood of Railroad and Steamship Employees represented the "white employees." The NMB ordered that one ballot be issued "among all the employees involved in the dispute regardless of color to afford all of them an equal opportunity to indicate their choice of representatives."[31]

* As another example, the Brotherhood of Locomotive Firemen and Enginemen had an agreement with 10 railroads in the South to restrict hiring and promotion of African-Americans,[32] and the BLF&E, according to President Roosevelt's Committee on Fair Employment Practices, "refuses to represent them with respect to their grievances when such grievances are in conflict with the interests of junior white firemen."[33]

The national shame of racial discrimination surely created a unique challenge for the NMB – a challenge best met by requiring that representation elections be determined by a majority of those eligible rather than of those voting to guard against racial discrimination in the voting process.

Conflict among labor unions and crafts

Also unique to the period of the 1930s was the large number of competing labor organizations and crafts. Where representation of craft and class today is generally established in bright line fashion on the larger railroads (which employ almost 90 percent of rail workers[34]), that was not the case during the 1930s.

* In 1935, on New York, Chicago & St. Louis Railroad, a dispute arose between the Brotherhood of Railroad Trainmen (BRT) and the Switchmen's Union of North America (SUNA) regarding representation of switchmen.[35] The BRT claimed representation of switchmen systemwide; and the SUNA sought a separate vote of switchmen in Buffalo and those in Cleveland, rather than systemwide.

* In 1937, on Indiana Harbor Belt Railroad, a dispute arose between the Brotherhood of Railroad Trainmen and the Order of Railroad Telegraphers regarding representation of operators, towermen, levermen, train directors and operator-switchtenders.[36]

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[31] *In the Matter of Representation of employees of the Atlanta Terminal Co. – Clerical and Station Employees*, 1 NMB 8 (1936).

[32] "Issues Directives to RRs, Unions: 30 days allowed to cease and desist from alleged discrimination ," *Railway Age* magazine, Dec. 4, 1943, p. 909.

[33] "The Elimination of Negro Firemen on American Railways – A Study of the Evidence Adduced at the Hearing before the President's Committee on Fair Employment Practices," *Lawyers Guild Review* 4, March-April 1944, pp. 32-37.

[34] Association of American Railroads, *Railroad Facts*, 2008 edition, p. 3.

[35] *In the Matter of Representation of Employees of the New York, Chicago & St. Louis Railroad Co. – Switchmen*, 1 NMB 1 (1935).

[36] *In the matter of Representation of Employees of the Indiana Harbor Belt Railroad Company – Operators, Towermen, Levermen, Train Directors and Operator-Switchtenders*, Case No. R-207, Aug. 10, 1937.

* In 1935, the Brotherhood of Railroad Trainmen complained that the NMB had denied certain brakemen a representation ballot in a dispute involving road conductors.[37]

The NMB observed in its first annual report in 1935:[38]

[Representation disputes] arose mainly because of overlapping jurisdiction ... the antagonism engendered by the contests has developed a tendency for employees who are members of one organization to challenge the representation of the other organization ....

The NMB since has made clear that Section 2, Ninth of the RLA requires a systemwide election by craft or class; but, in those early years, the NMB, in decisions of first impression, surely recognized that to assure a perception of equity that the vote results had to be based on a majority those eligible to vote – that the NMB had to get it right.

Also, technology has eliminated what were some 291 crafts or classes in 1935,[39] and merger among unions reduced what had been some 21 separate craft unions in 1935[40] to many fewer today.[41]

Also notable is that it was not until 1954 that the AFL amended its constitution to prohibit raiding by AFL member unions of other AFL-member unions[42] (now memorialized by Article 20 of the AFL-CIO constitution).

Communication and education

Times and circumstances also have changed with regard to education and communication.

* In 1930, only 30 percent of Americans were graduated from high school, while, today, the number exceeds 70 percent.[43] During the 1930s, representation elections were carried out by mail ballot, with each eligible voter being sent a ballot along with an instruction sheet

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[37] *In the matter of Representation of Employes of the Norfolk & Western Railroad Co. – Road Conductors*, R-125, Dec. 24, 1935.

[38] *First Annual Report of the National Mediation Board* (1935), p. 19.

[39] *First Annual Report of the National Mediation Board* (1935), p. 15.

[40] "Union Labor Massing on Legislative Front," *The New York Times*, April 28, 1935.

[41] For example, the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors, the Switchmen's Union of North America, the International Association of Railroad Employees and the Railroad Yardmasters of North America all merged into today's United Transportation Union. Also, the Order of Railroad Telegraphers, the Railway Patrolmen's International Union and the Brotherhood Railway Carmen merged into today's Transportation Communications International Union.

[42] "Union Raiding Ban Drafted By A.F.L.," *The New York Times,* Aug. 14, 1954.

[43] Washington State Institute for Public Policy, "High School Graduate Rates in Washington and the U.S.," March 2005, fig. 1 (accessible at www.wsipp.wa.gov/rptfiles/05-03-2201.pdf).

explaining the procedures for a secret ballot election.[44] A significant number of blue collar workers during the 1930s may well have been unable to read at a level sufficient to ensure they understood the ballot procedures, much less the subject matter of the election.

* It was not until 1943 that a single AT&T operator could complete a long distance telephone call; previously, as many as five operators and 23 minutes were required to connect a telephone in San Francisco with one in New York.[45] As late as 1950, the cost of a five-minute long distance telephone call between New York and Los Angeles cost $3.70, which is equivalent to $32.73 in 2009.[46] This affected the ability of independent unions – and union supporters -- to communicate with railroad employees over a wide geographic area.

* Today, railroad employees have near universal access to hard-wired and wireless telephones, as well as e-mail, with the costs of communicating relatively insignificant. In the words of former NMB Chairperson Maggie Jacobsen, the Internet has become "a 24-hour, seven-day-a-week union meeting."[47] Indeed, the U.S. Census Bureau reports that 74 percent of Americans 18 years and older in the workforce use the Internet.[48] As airlines and railroads are among the most computerized industries in America, the percentage of airline and railroad employees who are Internet savvy is likely higher than 74 percent.

During the 1930s, there was a communications challenge – in employee reading comprehension as well as the ability to communicate by electronic means (including telephone). That communications challenge could well have affected the ability of voting-eligible employees to be aware of the subject matter, while lower standards of reading comprehension impeded the ability of employees to understand the subject matter, mechanics and rules of a representation election.

By requiring that a majority of eligible employees vote in favor of representation, the procedure better assured that the majority would be made aware of the election and for what they were voting. The matter of employee reading comprehension is far less a problem today, and there no longer exists impediments to dissemination of information by electronic means (including voice).

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[44] Dana E. Eischen, "Representation Disputes and their Resolution in the Railroad and Airline Industries," in, *The Railway Labor Act at Fifty: Collective Bargaining in the Railroad and Airline Industries* (Washington, D.C.: Government Printing Office, 1976), p. 47.

[45] www.corp.att.com/attlabs/reputation/timeline/51trans.html

[46] http://answers.google.com/answers/threadview/id/259641.html. The CPI calculation was made using the CPI calculator of the Federal Reserve Bank of Minneapolis, accessible at www.minneapolisfed.org/index.cfm.

[47] Frank N. Wilner, *Understanding the Railway Labor Act* (Omaha: Simmons-Boardman Books, 2009), p. xi.

[48] "Internet Use Triples in Decade," U.S. Census Bureau News, June 3, 2009.

Conflicts in ideology

Not readily recognized today is that there was great social upheaval during the period of the Great Depression.

Communism was viewed by many workers at that time as superior to capitalism, and communists were active agents for change. In 1938, for example, communist agitator William Z. Foster advocated worker militancy.[49]

The president of the Switchmen's Union of North America responded that communist efforts are intended "to create disharmony, discord and disunity among the members of standard railroad labor organizations."[50]

Here, again, was reason for the NMB to certify representation votes on the basis of a majority of those eligible to vote rather than to permit, perhaps, a handful of agitators to determine representation votes for a radical organization by intimidating a majority of workers from casting ballots.

CONCLUSION

The National Mediation Board proposes to bring its 75-year-old representation election voting procedures in sync with those of the National Labor Relations Board, and what the federal courts term, the "universal rule as to elections of officers and representatives."

The change would provide that the outcome of an election is determined by a majority of those voting, scrapping the archaic majority-of-those-eligible rule, which arbitrarily assumes that those not voting be counted as a "no vote."

Circumstances have changed since the NMB instituted such voting procedures in 1934. The reasons then included:

* An effort by the NMB to demonstrate to employers that their employees overwhelmingly preferred an independent labor union to a company union controlled and financed by management.

* An effort to guard against racial discrimination in an election and better assure access to ballots by African-American workers.

* An effort to resolve conflict among some 21 separate independent labor unions seeking to represent some 291 separate crafts or classes at the time – to "get it right" by determining the desires of a majority of those eligible to vote.

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[49] "Railroad Workers Forward!" *Railway Age* magazine, April 2, 1938, p. 623.

[50] *Id.*

* An effort to combat substantially lower levels of education and reading comprehension among workers. By requiring a positive vote among a majority of those eligible, better assured that efforts would be made by those asking for the election to reach and explain voting procedures to those eligible.

* An effort to combat technological difficulties in communicating with potential voters. Again, requiring a positive vote among a majority of those eligible, better assured that efforts would be made to reach out and communicate with those eligible.

* An effort to combat Communist agitators, who were using intimidation and other tactics to encourage worker militancy and workplace discord.

Today,

* There no longer are company unions or the threat of company unions.

* Racial discrimination has been outlawed, and procedures are in place to root out and prosecute racial discrimination in the workplace.

* Conflicts among RLA-covered labor unions are largely non-existent today, and the number of crafts and classes of workers has been reduced substantially. Moreover, by including a "no union" choice on the ballot provides eligible employees opportunity to cast a "no vote."

* Levels of education, especially among railroad and airline workers, have been dramatically improved, with most using computers in their daily work routines.

* Barriers to communication among workers, as well as between workers and their employers and union organizers have been almost entirely eliminated with near universal access to telephone and e-mail. Also, today's railroad and airline workers have substantially higher levels of education than they did during the 1930s.

Because of changes in circumstance, 75-year-old NMB voting procedures are ripe for change to bring them in sync with the universal rule as to elections of officers and representatives, which is a majority of those casting ballots.

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