International Association of Machinists and Aerospace Workers

9000 Machinists Place
Upper Marlboro, Maryland 20772-2687

Area Code 301
967-4500

OFFICE OF THE GENERAL VICE PRESIDENT

GL 2 Legal

January 4, 2010

Subj: IAM Comments in Support of National Mediation Board's 11/03/09 Notice of Proposed Rulemaking
Docket #C-6964

Mary L. Johnson, General Counsel
National Mediation Board
1301 K Street, NW, Suite 250 East
Washington, DC 20005

Dear Ms. Johnson:

On November 3, 2009, the National Mediation Board ("NMB" or "Board") issued a Notice of Proposed Rulemaking to change the procedures for determining representation disputes from requiring a majority of eligible employees to vote before certifying a union to certifying a union based on a majority of those who cast ballots. 74 Fed. Reg. 56750 (Nov. 3, 2009). In addition to the November 20, 2009 written comments and December 7, 2009 oral comments of General Vice President Robert Roach, Jr., this will serve as the comments of the International Association of Machinists and Aerospace Workers ("IAM").

The IAM was formed as a rail union in 1888. For the past 122 years, the IAM has consistently been a leading representative of employees in the rail and air industries. Today, we represent over 115,000 air and rail workers, in virtually every craft or class of airline workers and the shop crafts of railroad workers. On behalf of those 115,000 workers, as well as

unorganized rail and airline workers who want a union, the IAM whole-heartedly supports the proposed change.

I. Introduction

The Railway Labor Act ("RLA") guarantees to employees the *right* to select a representative of their own choice without interference by carriers. That selection is accomplished by "[t]he majority of any craft or class of employees." 45 U.S.C. §152, Fourth ("§2, Fourth"). This is the *only* statutory language placing any limitation on the selection of a representative. The statute itself does not set any quotas or threshold percent that must *participate* in an election. In fact, the statute itself does not even *require* an election. Instead, Congress chose to leave the method by which the majority choice would be determined to the Board. 45 U.S.C. §152, Ninth. ("it shall be the duty of the Mediation Board...to investigate such dispute...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...") (emphasis added)

II. As Currently Written, the RLA Allows Certification Based on a Majority of Those Who Cast Ballots

Some argue that the Board cannot implement the proposed change absent an act of Congress. They contend that the words "majority of the craft or class" mean that a majority of the craft or class must actually *participate* in an election in order for the certification to be valid. Their argument does not hold water. Whenever legislation refers to the majority of a particular electorate, the courts consistently interpret it to mean the majority of those *voting*. Indeed, such interpretations had been handed down for at least 50 years by the time the RLA was written. Therefore, Congress understood that the phrase "a majority of the craft or class" would be interpreted by the courts as a majority of those in the craft or class who bother to vote. In fact,

the language that §2, Fourth came from was interpreted to mean that the majority of those *voting* determine representation. And, of course, the Board itself, at times, has certified unions based on a majority of those voting since it was first given representation duties. The language of §2, Fourth as currently written permits the interpretation the Board proposes giving it and no act of Congress is necessary.[1]

A. The Courts Have Steadfastly Interpreted "Majority" Voting Rules to Mean the Majority of Those Who Bother to Cast Ballots

For more than 135 years, the Supreme Court has consistently interpreted the phrase "a majority of legal or eligible voters" to mean the majority of all persons entitled to vote **and** who actually cast a ballot. See, St. Joseph Township v. Rogers, 83 U.S. 644, 664 (1873) (upholding a bond issued by a majority of the 75 actual voters even though a majority of eligible voters, 225 people, failed to vote). As the Country was just getting under way and states were adopting their own Constitutions, many questions arose as to the effect of the various legislation authorizing elections. The Supreme Court had occasion to interpret a Missouri state Constitution which required "two-thirds of the qualified voters" assent to a bond. The question arose whether that meant two-thirds of all registered voters or two-thirds of those who actually cast a ballot. In adopting the later interpretation the Court explained:

> "[t]his [is] the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. **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.**"

County of Cass v. Johnston, 95 U.S. 360, 369 (1877) (citations omitted) (emphasis added).

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[1] It is noteworthy that more than 225 democratic and republican members of Congress have written the Board in support of its proposal and noting that it has full authority to act as the law is currently written.

The Court reiterated the point just a few years later in Carroll County v. Smith, 111 U.S. 556 (1884). The Court elaborated that votes not cast cannot be counted as votes cast against the proposition unless the law clearly requires. Id. at 543-44. The phrase "qualified voters," the high Court explained "must be taken to mean not those qualified and entitled to vote, but those qualified and *actually* voting." Id. at 544(emphasis added).

Finally, by 1937, the Supreme Court had occasion to examine these concepts directly in the context of the Railway Labor Act. It did not waiver. "Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election." Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 560 (1937) (citations omitted). It continued "[w]e see no reason for supposing that section 2, Fourth (45 U.S.C.A. §152, subd.4), was intended to adopt a different rule." Id.

Despite the facts in Virginian Ry., in which a majority of all employees participated in the election, the case law interpreting Virginian Ry. uniformly interpreted the decision as applying even when a majority of all voters do not participate. The high Court later explained that the National Labor Relations Board has adopted the presumption spelled out in Virginian Ry. that if an employee does not vote, he will be presumed to acquiesce to the will of the majority. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 670 (1965) ("ABNE"). And of course, the NLRB does not require any specified number of employees to participate. The U.S. Attorney General himself explained that the decision in the Virginian Ry. case was "predicated on the principle applied to political elections, namely, that an election is determined on the majority vote of those participating." 40 U.S. Op. Atty. Gen. 541, 544 (1947).

Lower courts have also relied upon the Virginian Ry. principle that the generalized political process of counting the majority of votes cast (even if a majority does not participate) determines the outcome. See, Alaska Native Association of Oregon v. Morton, 417 F. Supp. 459, 467 (D.D.C. 1974)(the district court followed Virginian Ry. to find that the words "a majority of all eligible Natives" means a majority of all Natives who voted.)

Significantly, in interpreting Virginian Ry. specifically in the union context, the Fourth Circuit Court of Appeals declared "the political principle of majority rule with the presumption that those not voting assent to the expressed will of the majority voting, supports the choice made in an election, whether the majority of employees has participated or not." NLRB v. Standard Lime & Stone Co., 149 F.2d 435, n. 1 (4th Cir. 1945). In reaching this conclusion, the Fourth Circuit was also swayed by the fact that there was nothing in the NLRA or in reason to assert that a majority must participate in the election. Of course, there is also nothing in the RLA mandating that a majority must participate in the election.

The courts have not waivered from this steadfast interpretation over the past 100+ years. The Supreme Court of Pennsylvania recently found that a Pennsylvania statute which permits Police to be represented when so designated "by fifty percent or more" of the employees, was satisfied when the union received a majority of the votes cast, even though a majority of all eligible employees did not vote. Whitaker Borough v Pennsylvania Labor Relations Board, 556 Pa 559, 729 A.2d 1109 (S.Ct. Pa 1999) Thus, the Court upheld the selection of the union by 4 police officers even though there were 12 police officers eligible to vote. It stated "[t]he eight . . . policemen who did not vote are therefore presumed to accept the expressed will of the majority of those who did vote." 556 PA. at 566, 729 A.2d at 1113.

Throughout American jurisprudence, when courts are asked to interpret language like "a majority of the craft or class," the Courts uniformly declare that such language means the majority of those actually voting and not the majority of the entire potential universe of voters.

B. The Origins of Section 2, Fourth's "Majority" Requirement Demonstrates a Majority of Those Who *Cast Ballots* Is Clearly Consistent with the Language

Prior to the enactment of the 1934 amendments to the RLA, representation disputes were resolved between the unions vying for representation and the carrier. Under the Transportation Act of 1920, if the parties were not able to resolve the dispute, it could go to hearing before the United States Railroad Labor Board. ("RRLB")

After a particularly contentious representation dispute, the RRLB issued decision no. 119 in which it instructed the parties on a number of Principles that were to be met going forward. Among them, was Principle No. 15 which stated:

> "**The majority of any craft or class of employees** shall have the right to determine what organization shall represent members of such craft or class." 2 Decisions of the USRRLB 119 (1921) (see attachment 1) (emphasis added).

However, because there was no formal procedure in place for enforcing representation on this basis, disputes and labor strife remained. Shortly thereafter the RRLB was called upon to interpret Principle No. 15. Specifically, in decision No. 218 the RRLB set forth what the ballot would look like. It was to have a place for the Union, a place for the Company Union and a place for someone to write in the name of any other individual or organization who they wished to be represented by. Most significantly, the RRLB then instructed that "[i]f in any craft no organization or individual receives a **majority of the legal votes cast**, a second vote shall be taken..." 2 Decisions of the USRRLB 218 (1921)(emphasis added)(see attachment 2).

Finally, the exact meaning of "a majority of the craft or class" was elucidated by the RRLB in a later decision. Relying on Principle No. 15 of Decision 119 and the interpretation

given it in decision No. 218, the Board explained that in using the language the "majority of any craft or class" "[i]t was obviously the meaning and the purpose of the board that a **majority of the votes properly cast** and counted in an election properly held should determine the will and choice of the class." 4 Decisions of the USRRLB 1971 at p. 629 (1923)(see attachment 3) (emphasis added). This was so because Principle No. 15 was intended "to give all the employees to be affected the privilege of expressing their choice." Id. Yet at the same time, "[t]he board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity." Id. Accordingly, the RRLB definitively explained that this language meant "that a majority of the legal votes cast in this election will determine who shall be the representatives of the employees." Id.

It is significant that the language "majority of any craft or class" was understood at its inception to mean "a majority of the legal votes cast" because it is widely accepted by legal scholars that Principle No. 15 from Decision 119 is the direct predecessor to §2, Fourth. The Railway Labor Act at Fifty, ed. Charles Rehmus, p. 27 (1976) (the guiding principles of majority rule "were adopted in Section 2 Fourth of the Act almost verbatim from Decision 119 of the old Railroad Labor Board."); See also, 40 U.S. Op. Atty. Gen 541, n. 1 (1947) (noting the language of 2, Fourth was taken from the RRLB decision and that the RRLB later interpreted it to mean a majority of votes cast). The Supreme Court found it "significant of the congressional intent that the language of section 2, Fourth, was taken from a rule announced by the United States Railroad Labor Board, acting under the labor provisions of the Transportation Act of 1920, Decision No. 119. . ." Virginian Ry., 300 U.S. at 561.

Legislative history itself shows that the chief sponsor of the RLA Amendments, Commissioner Joseph Eastman clearly intended that the same majority of votes cast that applies

to U.S. political elections would apply to NMB elections. Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 34-35. Indeed, he reiterated the same sentiment repeated over and over by the Supreme Court that if an individual does not choose to exercise the right to vote "that is their own fault." He stated that it was his intent that the language in § 2, Fourth would mean that "the vote would have to be majority of those that have the right to vote **and participate in the elections.**" Id. (emphasis added).

Even interpretations of the RLA, once passed, clearly envision that the language as written could legally mean the majority of those who cast ballots. When called for his opinion, the Attorney General determined the NMB "has the power to certify a representative which receives a majority of the votes cast at an election despite the fact that less than a majority of those eligible to vote participated in the election." 40 U.S. Op. Atty. Gen. 541 (1947). This conclusion is necessary, in part, because the Act itself does not provide for "a quorum nor for the participation of any definite proportion of the employees in the election." Id. (citing, NLRB v. Standard Lime & Stone Company, 149 F.2d 435, 438 (4th Cir. 1945).) Therefore, nothing in the Act can be construed to mandate a certain number of employees vote.

Since its inception in the 1920's, every time a court, another administrative agency or the Attorney General has been asked to interpret the words "majority of the craft or class", the result is the same – this language allows certification of a union based on the majority of those voting. To be sure, there are cases that upheld the Board's current practice of requiring a majority of eligible voters to participate. However, they do so not on the basis that such an interpretation is mandated by the statute, but on the basis that representation disputes must be investigated by the Board, "and in the matter of investigation the Board's actions are purely discretionary." Radio Officers' Union v. NMB, 181 F.2d 801, 802 (D.C. Cir. 1950). There is not a single viable

interpretation of §2, Fourth that mandates the current practice of requiring a majority of eligibles to participate.[2]

C. The Board Itself, Throughout History, Has Interpreted §2, Fourth to Permit the Certification of a Union Based on a Majority of Those Casting a Ballot

Significantly, while the Board is proposing a change in its balloting procedures, this is nothing new. Since the inception of the language, the Board has understood §2, Fourth to allow certification based on a majority of voters. In the first year of the amended RLA alone, the Board issued 107 certifications on the basis of a majority of those voting. See, First Annual Report of the National Mediation Board p. 19 (1935). In that year, the Board examined a total of 291 representation disputes. Id. at p.15. Thus, more than 1/3 of all representation disputes decided in the first year were decided based on a majority of all votes cast and not a majority of all eligible voters participating.

Since that time, the Board has continued to certify unions based on a majority of all voters, or even other methods. See, Laker Airways, 8 NMB 236 (1981) (certification based on a majority of votes cast); Continental Airlines, Inc. v. NMB, 793 F. Supp 330 (D.C. Cir. 1991)(transfer of certification based on union merger vote); Ross Aviation Inc., 22 NMB 89 (1994)(accretion of employees into existing certification without election); US Airways/America West, 33 NMB 151, 168 (2006)(transfer of certification based on a majority of those voting in Unions' secret ballot elections of its members); NMB Representation Manual § 7.0 (authorizing certification based on card check).

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[2] The only case to rule that the Board could not certify a union based on a majority of those who participated, was the district court in the Virginian Ry. case. That portion of the case was not appealed. Never-the-less, as discussed above, the thrust of the Virginian Ry. case was that those who chose not to participate bow to the will of those who do vote, just as in political elections. This has been the interpretation of that case ever since. Therefore, as a practical matter, if not technically, the district court was overruled.

Indeed, in Key Airlines, Inc. v. NMB, 743 F. Supp 34, (D.D.C. 1990) the Court upheld the Board's use of a balloting method where a majority of eligibles had to vote **against** union representation or else the Union would be automatically certified. Using this method, even when the result was a tie, 7 voting for the union and 7 voting against the union, the courts found the NMB was within its authority to certify the union because a majority of all eligibles did not vote against the union. Washington Central RR Company, Inc. v. NMB, 830 F. Supp 1343, 1359-60 (E.D.Wa 1993) (noting that the statutory language of the Act does not even require that a majority must favor representation before the Board can certify a union). If the courts read §2, Fourth and §2, Ninth to permit the Board to certify a union based on a presumption that an employee wants a union unless s/he exercises the right to vote against the union, then certainly the current statutory language permits the Board to certify a union based on a majority of voting employees who affirmatively express they want a union.

D. Congress Allows the Board to Make this Change as the RLA is Currently Written Without Any Further Legislation

Section 2, Ninth gives the Board the power to resolve all conflicts concerning the employees' right as expressed in §2, Fourth to have the majority determine representation. ABNE, 380 U.S. at 659. Congress chose not to legislate the process to be followed in selecting a representative. Instead, "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." Id. at 662. In the event that any question were to remain, the Supreme Court pointed out "[t]hat the details of selecting representatives were to be left for the final determination of the Board is buttressed by legislative history clearly indicating as much." ABNE, 380 U.S. at 669 (citing, Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 34-35.)

In fact, Congress decided to give the NMB such wide latitude in deciding how to resolve representation disputes that Congress elected to not even require selection by a ballot at all. Instead it instructed the Board to investigate using "a secret ballot **or any other method**...." Thus, whether to use a ballot in the first place and the form of any ballot is a matter in the sole discretion of the Board. See also, Saturn Airways, Inc., 4 NMB 87, 88 (1965) (acknowledging "the broad discretion of the Board" in determining the proper ballot). The only "*caveat* [is] that it 'insure' freedom from carrier interference." ABNE, 380 U.S. at 668-69.

The Board also has the ability to change the methods used over time. This is not the first time the Board has decided to change the procedures of balloting. Early in Board law, the NMB required a union to receive the absolute majority of all eligible employees to win an election. Soon thereafter, the Board changed that practice so that a Union could win with less than the absolute majority of all eligibles, provided a majority of all eligible employees voted for some representation. This change met with resistance. The Courts easily rebuffed the resistance deferring to the Board's ability to interpret how to determine a representative. "The Board, though having construed it in a prior instance, is not bound to the same construction if thereafter it becomes satisfied that a different construction should be given. In a case such as this we think the general rule applies that those not voting at an election should be considered as assenting to the will of the majority there expressed." Association of Clerical Employees of Atchison, T&S.F. Ry System v. Brotherhood of Railway and Steamship Clerks, 85 F.2d 152, 156 (7th Cir. 1936).

There can be no doubt that the Board has authority to make this change, on its own, and without an Act of Congress. Indeed, the courts themselves have indicated that the Board's decisions in these matters are virtually unreviewable. Thus in ABNE, the Court noted that it

would not furnish a right of review when Congress had refused to authorize one. "[T]he dispute was to reach its last terminal point when the administrative finding [of the NMB] was made. There was to be no dragging out of the controversy into other tribunals of law." ABNE, 380 U.S. 650, 659 (1965) (citing, Switchmen's Union v. NMB, 320 U.S. 297, 301-05 (1943)). The court's only role is to determine if the Board performed its statutory duty to investigate the dispute. However, it is clear "[a]n investigation is 'essentially informal, not adversary'; it is 'not required to take any particular form.'" ABNE, 380 U.S. at 662 (citations omitted.)

Recognizing the broad discretion of the Board, the D.C. Circuit refused to review the Board's actions explaining:

> "The right of representation for the majority was created by Congress under this Act. Congress, however, also decided as it had the power to do, upon the method for the protection of this right which it had created. The method provided was the administrative determination by the Board, and when the administrative finding is made the dispute has reached its last terminal point. Congress chose not to confer any judicial remedies in a case such as this. . . . [representation matters] must be based on investigation, and in the matter of investigation the Board's actions are purely discretionary."

Radio Officers' Union v. NMB, 181 F.2d 801, 802 (D.C. Cir. 1950)(citations omitted); *See also*, Zantop International Airlines, Inc. v. NMB, 732 F.2d 517, 522 (6th Cir. 1984)("neither the method by which the Board determined that a majority favored representation. . . nor the form of the ballot is subject to judicial review."); Continental Airlines, Inc. v. NMB, 793 F. Supp 330, 334 (D.D.C. 1991), *aff'd*, 957 F.2d 911 (D.C. Cir.), *cert. denied* 506 U.S. 827 (1992)("The method used by NMB to determine that the employees supported the union merger and the form of the ballot used by IAM in this case are not subject to judicial review.")[3]

[3] The Board itself acknowledged its authority to make such a change in Chamber of Commerce, 14 NMB 347, 362 (1987). This assertion of authority in 1987 undermines any reliance on the unsupported and self-serving Board declaration in 1978 that the Board lacked such authority. The 1978 pronouncement also flies in the face of decades of court decisions finding broad Board discretion.

In her dissent, Chairwoman Dougherty implies the Board has failed to meet the prerequisites of the Administrative Procedures Act ("APA") to make this change. Given that Congress has given to this Board the widest discretion to adopt any means to resolve representation disputes and that the Courts have found judicial review of such action to be the narrowest known in law, the APA is not applicable to this proposed change.

Nevertheless, this Board clearly has met the APA's requirements. Less than 9 months ago, the Supreme Court examined the APA's requirements of an agency before it changes its policies. F.C.C. v. Fox Television Stations, Inc., ___ U.S. ___, 129 S. Ct. 1800 (2009). The Court made clear that an agency is not subject to a heightened review when it changes policy. An agency need not articulate "'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive.'" Fox Television, 129 S.Ct. at 1810 (brackets in original). Nor must the agency explain why the new rule "effectuates the statute as well as or better than the old rule." Id. Instead, an agency simply must provide a reasoned explanation acknowledging the change in position, showing there are good reasons for the new policy, that it is permitted by the statute and the agency "*believes* it to be better." Id. at 1811 (emphasis in original).

To date, the Board has already met the APA's standards. In its Notice of Proposed Rulemaking, the Board acknowledged that it was changing its election balloting procedures. It justified the reasons for the new policy, including that the prior rationale of maintaining labor stability was no longer served by the existing rule, rather the Board's mediation function more properly accounts for the low incidence of strikes. It explained that the current practice resulted in a form of "compulsory voting;" that the current practice resulted in those who lack interest to vote supersede the wishes of those who bother to vote; and that the effect of the current policy was that the Board substituted its opinion for that of the employee, all of which is abhorrent to a

democracy. The NPRM explained that the new policy is permitted by the current statute supported by opinions of the Courts and the Attorney General. And it gave its rationale for why it *believed* this to be a better policy as it better allows the Board to determine the clear, uncoerced choice of the employees, and is more in line with American notions of democratic voting and participatory workplace philosophies.

No real doubt can exist that the Board has the full authority to make the proposed change without any further act of Congress.

III. The Board Has a Duty to Investigate Representation Disputes and a System Which Determines Each Person's True Intent Is Essential to the Board's Administration of Representation Matters.

A. The Board's Duty To Investigate Is Best Met By Determining the True Desire of Each Employee.

The Board's current practice of counting all non-participating employees as voting "no union" is fundamentally flawed in a democracy. There are literally countless reasons why a person may not vote. It is impossible to assign to each one of them an affirmative desire not to have a union. For example, many people want the union, but they simply forget to vote. Others want the union but are unable to vote because they are hospitalized, out of the country, on vacation, serving our country in the armed forces, caring for an ill parent or any number of other reasons. The NMB has never investigated the reasons why these people did not vote. Rather, our government presumed, **without investigation**, that each person would have voted "no union" and treated them as such.

At the same time, there are people who affirmatively do not want to participate in a government run election. Their religion may forbid them from voting in a government sponsored union representation election. They may have ideological reasons for not want to participate in a government sponsored event. When these people do not participate, abstention is

their statement. Yet, the government does not allow them to express their will to abstain. The NMB counts their lack of participation as voting against the Union. As the Board itself noted, this practice serves as a form of "compulsory voting."

A third category of employee is the apathetic employee. These employees rather not read all the literature and make an informed decision. These employees rather trust their colleagues to make the right decision. Therefore, they simply don't vote and leave it to everyone else to decide. However, again, the government does not allow them to be apathetic. By not voting, the government assigns to these employees a "no union" position. Thus, apathy becomes an affirmative vote against the union and rather than being allowed to defer to the will of his/her colleagues, the apathetic employee becomes an unwilling voter.

Significantly, the result of all of these unwitting "no" votes is that those who want a union and bother to vote for a union have their will vetoed by the silence of their colleagues. For example, at times employees who vote for the union are denied representation because as few as one (1) person did not vote. See, Center for Emergency Medicine, 36 NMB 121 (2009). Because one person had a religious or moral basis for not voting, or one person forgot to vote, or one person was hospitalized and could not vote, or one person deferred to the will of his/her colleagues, everyone was deprived of representation. This is particularly more egregious given that "the absence of eligible voters may be due less to their indifference than to coercion by the employer." Virginian Ry., 300 U.S. at 560. Veto by silence is inherently undemocratic and unfair.

Finally, there are those employees who do not want the union. Ironically, when these voters attempt to express their will and vote "no union" their ballot is voided. Rather than encourage the employees to vote, the government (and often the carriers) encourage these

employees to ignore the process. The less involved they are, the more their voice is heard. This is not fair to these employees. Worse yet, it encourages carriers to suppress voting.

Allowing employees to voice their true position gives more credibility to the election process. Employees can trust that the outcome represents the will of the majority. With greater employee buy-in to the results, there will be greater labor peace and stability, thus serving some of the primary purposes of the Act.

The Board can best fulfill its statutory duty to investigate representation disputes when the employees are permitted to voice their true desires. When employees have the opportunity to vote for the union or vote against the union or to abstain, the Board can best trust the outcome is actually desired by the employees. In fact, a significant feature of the 1934 Amendments was to give the Board authority to investigate representation disputes, including the right to hold elections because "when doubt exists, the employees may record their actual preference." Hearings on S. 3266 Before Committee on Interstate Commerce, 73rd Cong 2d Sess. p. 15 (April 10, 1934) (emphasis added). Guessing why employees failed to vote and imposing a viewpoint on them is an anathema to the democratic principles of voting. Thus, this change is essential to the proper administration of the Board's representation duties.

B. After 75 Years, The Time Has Finally Come for the Government to Change The Rules So Every Employee's Voice Can Be Heard.

There are many that say that despite these anomalies in American voting jurisprudence, this system has been in place for 75 years so it should not be changed. However, a system which encourages those who do not want a union to not vote and forces those who do not wish to participate to take a position is anti-democratic and fundamentally flawed.

The government is often slow to act and to correct the wrongs of our past. It took our government 131 years to finally allow women's suffrage – and that only happened after much

dissention and occurred over significant resistance to the change. It took our government 176 years to finally allow African-Americans full voting rights. The protests were fierce and past practice had been long, but the government finally righted the wrong. Our country is better for these changes.

It has been 75 years since the Board adopted the majority of all eligibles requirement. Many carriers are taking out all of the stops to fight against changing it. It is now time for the government to see the error of its ways. It is time for the government to listen to the true opinions expressed by employees and allow it to have the meaning intended. The NMB should finally right the wrong. Our country will be better for the change.

C. The Practice of Requiring a Majority to Participate Deprives Workers of their Statutory Right to Select a Representative In Ways It Did Not 75 Years Ago

In 1935, of 291 representation disputes, the Board certified unions in 273 instances (or 94%). In 1948, the Board noted that in the first 14 years of the Act, the Board certified unions in 84% of all cases. In 2009, by contrast, of 40 representation disputes, the Board certified unions in 25 (or 62.5%). This number is even more dramatic in the airline sector, where the Board only certified 50% of all airline representation cases brought to it in 2009 (11 of 22). Compare First and Fourteenth Annual Reports with the Annual Performance and Accountability Report FY 2009, p. 80.

The numbers tell a dramatic story. A system which once worked to give employees the right to organize is now woefully inadequate. Recall, one of the purposes of the RLA is "to forbid any limitation...of the right of employees to join a labor organization" and "to provide for the complete independence...of employees in the matter of self-organization." 45 USC §151a..." The current system is failing the employees. As recognized by the Supreme Court,

the Board's practice of requiring a majority of all eligible employees to vote for representation is skewed against representation. ABNE, 380 U.S. at n.5 and at 670 ("the practicalities of voting – the fact that many who favor some representation will not vote – are in favor of the employee who wants 'no union.'")[4]

The Board itself has recognized that the current system is not a level playing field and weighs against unions. For that reason, when it finds sufficient interference it levels the playing field by using a Key or Laker ballot. The problem is that the field has tipped so far against unionization that the Board needs to adopt this change to level the playing field globally and allow each employee a fair chance to voice his/her position.

At one time, the uneven playing field did not have a practical effect because it was still true that virtually all employees who wanted a union could get one. For example, 91% of all employees received representation as a result of all of the elections run in 1950. See, Sixteenth Annual Report of the NMB at p.23. In 2009, the story is much different. Only 51.5% of employees were able to achieve union representation (3,046 employees attained representation out of 5,909 total employees involved in all representation disputes in 2009). See Annual Performance and Accountability Report FY 2009, p. 80. Clearly then, to the extent the Board previously rejected such changes because of the high degree of organization among employees covered by the RLA[5], that rationale has eroded.

One reason that may account for this change is the advent of technology. In 1934, the only means employers had for intimidating employees from voting was through in-person

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[4] There is a real question about whether skewing elections against unions is consistent with the purposes of the Act, since the 1934 Amendments giving the NMB unbridled discretion in conducting representation elections "was designed to foster the growth and influence of the independent unions in the railroad industry." The National Mediation Board at 50, Its Impact on Railroad and Airline Labor Disputes, NMB and Charles M. Rehmus, p.7 (1984).

[5] Chamber of Commerce, 14 NMB 347, 363 (1987).

meetings and written communication. Although those are clearly effective means of coercion, employers now have many more weapons in their arsenal. Now, employers can send daily, or more frequent, emails to their employees telling them to ignore the government issued balloting instructions. Employers have intra-nets which employees are obligated to log into every day for their work. Carriers post hostile, anti-union propaganda on these intra-nets. Carriers have blogs, electronic chat lines, twitter accounts, and social networking accounts all aimed at coercing employees not to participate in the election. Added to this deluge of anti-union propaganda, employers also have free phone lines employees can call into to hear the president of the company bash the union personally and even use robo-calling devices and DVDs mailed to employees' homes. After receiving this daily barrage of anti-voting and anti-union propaganda, it is no wonder more and more employees are confused and scared to exercise their rights to vote.

While in the past the Board refused to change its balloting method because it appeared the tipping of the scales in favor of those who want no union did not handicap unionization, that has changed. In the realities of today's environment, the practice of requiring a majority of all eligibles to participate frustrates the purposes of the Act. The clear impact of this continued practice is that significantly larger percentages of employees cannot achieve unionization even when they want it. The current system no longer serves one of the main purposes of the Act and therefore it must be fixed.

D. The Parties Are In Unanimous Agreement that the Time Has Come to Change to a System Where a Majority of Votes Cast Prevails

All of the Unions, whether under the TTD/AFL-CIO umbrella or not, have voiced unanimous agreement that the Board should change its election procedures so that there is a

yes/no ballot and the majority of votes cast determines the outcome. Those who are voicing the loudest objections to such a change are carriers and carrier representatives.

Yet, carriers are not a party to whatever procedure the Board uses to investigate a representation dispute under §2, Ninth. Historically, the Board established election rules "'only when the parties to a representation dispute (contesting employees or labor organizations **but not carriers**) fail to agree among themselves as to who may participate in elections.'" The Railway Labor Act at Fifty, Rehmus, p. 31 (citing, Lehigh Valley RR Co., 1 NMB 141, 142 (1940)). The RLA itself mandates that one of the purposes of the Act is "to provide for the **complete independence... of employees in the matter of self organization.**" 45 U.S.C. §151a (emphasis added). The status of "parties" to a dispute "is accorded only to those organizations and individuals who seek to represent the employees for it is the employees' representative that is to be chosen, not the carriers." ABNE, 380 U.S. at 666.

Chairwoman Dougherty, in her dissent, voiced concern over the proposed change because, she states, the Board's precedent is only to make rule changes with consensus. The good news is that the consensus exists, for the first time. Never before in history have you had all of the *parties* agree that a change to a majority of votes cast is needed. The last time the Board seriously considered this change, it even commented that the Unions were not unanimously behind the Teamsters' request. Chamber of Commerce, 14 NMB 347, 361 (1987)("The Board considers it noteworthy that not one organization which represents employees in the airline or railroad industry filed a brief in support of the IBT's proposed rule changes.")

Chairwoman Dougherty seems offended that the change would come at the request of the unions, and she implies that it is politically motivated. But, in fact, the Board's own procedures

contemplate parties making such requests. What has changed has nothing to do with the political party in office and everything to do with consensus among the only parties relevant to a representation dispute. Consistent with the long history under the RLA, the Board should adopt the election method unanimously agreed to by the *parties*.

IV. Following a Rule Where a Majority of Those Who Cast Votes Prevails Furthers the Purposes of the Act.

A. A Majority of Eligibles is No Longer Necessary (If It Ever Was) To Maintain Labor Peace

The only rationale ever given by the Board for using a majority of eligibles system was that the Board supposedly believed it would promote the RLA's purpose of maintaining stable labor relations. Chamber of Commerce, 14 NMB 347, 362 (citing Sixteenth Annual Report of the Board, p. 20 (1950)). It has never explained this rationale or provided any support for reaching such a conclusion.[6]

The Board never suggested that a majority of eligibles is required by legal analysis or judicial precedent. Rather, the Board explained it is a *practice* the Board itself adopted for its own *administrative* convenience. See, First Annual Report at p. 19 (1935). It may very well be that the Board initially adopted this "administrative convenience..." to assist the National Unions, and out of a concern over the labor unrest caused by company unions. At the time, there was infrequently a question of whether a union would be on the property, rather employers routinely used "company unions" to challenge independent unions.

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[6] It is noteworthy that the 1934 Amendments (including the powers given the Board under §2, Ninth) were added to further three main purposes of the Act: to prohibit any interference with the freedom of association among employees; to provide for the complete independence of employees with regard to self-organization; and to provide for the prompt and orderly settlement of grievances. Statement of Hon. Robert Crosser, Representative from Ohio hearing of the Committee on Rules of the House of Representatives, 73rd Cong. 2d Sess. H.R. 9861, p.10 (June 12, 1934). So, contrary to the Board's self-serving proclamations, there was no mention of limiting strikes or maintaining labor peace as a goal for this section of the RLA.

One particularly contentious election under the Transportation Act of 1920 demonstrated the then-modern day dilemma. See Pennsylvania Railroad System and Allied Lines Federation No. 90 v. Pennsylvania Railroad Company, 267 U.S. 203 (1925). In that election, the carrier refused to recognize the independent union who claimed majority support after the union conducted an election. Instead, the carrier held its own election and found that the company union won (although only a small minority of employees participated). The RRLB found that neither election was valid and ordered a new election setting forth the terms of the new election (including that the winner would be whoever received a majority of the legal votes cast). The carrier refused to participate or honor the results.

That brought significant strife to the industry and resulted in a strike because the members of the union who had majority support obviously wanted recognition. When it was ultimately litigated, the Supreme Court decided that under the Transportation Act of 1920 it could not enforce the decision of the RRLB. In the wake of this decision, the RLA was born. Sixteenth Annual Report of the NMB at p. 15 (1950). It was in this context that the NMB, when given the authority to resolve representation disputes, first required a majority of all eligibles to participate before certifying a representative.

Although this may have made sense with that background, such prophylactic measures are no longer necessary. What ensures this type of strife will not occur again is not mandating that a majority of the eligibles participate in an election before certifying a union, it is the mechanism for determining representatives adopted in the RLA and the enforcement of the law by the courts.

"Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of

the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided." Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 545 (1937). Therefore, the RLA was designed to give an enforceable means of resolving representation disputes. Section 2, Ninth was specifically aimed at the practice of stopping the use of company unions to deny employees the representative of their choice. Id. The sooner the representative was authoritatively determined, the sooner the representatives could get to the business of entering into a collective bargaining agreement. The absence of strikes is attributed to the existence of collective bargaining agreements as a means for providing orderly legal process of settling disputes as a substitute for strikes and industrial warfare. Id. at n. 7.

Thus, there is no risk that a change in the balloting method will increase labor unrest. Rather, the fact that the statute provides for an enforceable definitive method for selecting a representative promotes labor peace by getting authoritative representatives to the bargaining table. Further, the prevention of strikes comes more from the Board's powers to hold the parties in mediation. "Under the Railway Labor Act, industrial peace was to be sought and achieved, not by forbidding strikes, but by requiring the parties to remain in mediated negotiations for unusual lengths of time in an extraordinary effort to reach voluntary agreement." The National Mediation Board at 50, Its Impact on Railroad and Airline Labor Disputes, NMB and Charles M. Rehmus, pp. 53-54 (1984).

As indicated above, over the decades the Board has used any number of different ways of determining who the representative will be, including using a majority of those who vote. None of those methods has been more likely to lead to labor unrest.

B. Allowing a Majority of Voters Who Cast Ballots to Determine Representation Does Not Create "Minority Unions."

In mounting their aggressive opposition to this more fair system, the carriers have adopted the catch phrase "minority union," implying that using a majority of those who cast ballots to determine the outcome would result in a union with minority support. While this makes for a nice sound bite, saying the proposed change will result in a "minority union" makes no more sense than calling one's Congressperson a minority representative.

There is no support for the preposterous suggestion that allowing a union to be determined by those who actually vote will result in fewer than 50% of the people voting. In fact, the evidence is that we will have much greater participation with a yes-no ballot because people will have the opportunity to voice their opinion about a union. As shown by the statistics submitted by Professor Kate Bronfenbrenner, NLRA elections (which operate on a majority of those who cast ballots wins) have significantly greater voter turnout than typically turn out for RLA elections. See, "Prepared Statement for the National Mediation Board Open Meeting", by Kate Bronfenbrenner at p. 2 (Dec. 7, 2009). She hypothesizes that the reason for this is that the employer campaigns to defeat the union encourage employees to vote no. Therefore, typically NLRA elections result in as much as 88% of the electorate voting.

Given this result, it is quite likely that this is much ado about nothing. If the RLA elections follow the statistical pattern of the NLRA elections, more than 50% of the electorate will participate in the election.

Further, given the unwavering precedent in this country of assuming that those who do not vote have acquiesced to the will of those who do vote, it is not accurate to claim that the union would only have a "minority" of support if fewer than 50% plus 1 voted. All of the remaining employees are treated as having consented to the will of those who voted. If the

majority of the voters choose a union, then that is o.k. with those who did not vote. Therefore, the union would have the support of a majority of the employees. By the same token, if a majority of voters choose not to have a union, then the non-voters have acquiesced to no representation. Undoubtedly union complaints that less than a majority of eligibles voted against the union will fall on deaf ears.

While the Board, in 1987, refused to change to a majority of those who cast votes in part because it was concerned that a union without majority support would not be as effective in negotiations and might not promote harmonious labor relations[7], the unsupported assertion has not born true over the years. Over the decades, the NMB routinely certifies unions who win with less than a majority of all votes. In other words, as long as a majority of all eligible employees vote for representation, the Board has followed the practice of certifying the union with the most votes, even if it wasn't a majority. The Courts routinely approve of the Board certifying the union who receives a plurality. IAM v. TWA, 839 F.2d 809 (D.C. Cir. 1988); Aeronautical Radio v. NMB, 380 F.2d 624 (D.C. Cir. 1967); Zantop Int'l Airlines, Inc. v. NMB, 732 F.2d 517 (6th Cir. 984); USAir, Inc. v. NMB, 711 F.Supp 285, *aff'd* 894 F.2d 403 (4th Cir. 1989). Moreover, as noted above, the Board has certified hundreds of unions using a majority of votes cast whether by agreement of the parties or after an interference finding. Therefore, countless number of unions currently certified were certified with so-called "minority support." This practice has not unraveled the RLA, has not lead to industrial warfare, and has not destroyed the ability to reach collective bargaining agreements.

Finally, the rationale itself is inherently flawed. If it were true that a union did not have strong support from its members, it is **less** likely, not more likely, that the union would strike. The IAM, like most unions, has a requirement that 2/3rds of the voting membership authorize a

[7] Chamber of Commerce, 14 NMB 347, 362 (1987).

strike before it is taken. When the vote comes in the context of a ratification vote, the IAM's policy is that the contract will ratify if the membership fails to support a strike. Thus, internal union policies (and common sense) dictate that the union only strike when it has strong support from its members. A weak union is less likely to strike and therefore the existence of so-called "minority unions" does not rationally lead to the conclusion that there will be more industrial strife.

V. Changing the Balloting Method Does Not Necessitate Changing "Decertification" Procedures

The carriers, who have no formal role in the representation process, contend that if the Board changes its method of balloting, it also needs to adopt a process to make it easier to "decertify" unions. This is apples and oranges. Nothing about changing the balloting method means that the Board has to adopt formal decertification procedures when it never before has had them. Revealingly, in 1947 Congress took action to add a decertification process to the National Labor Relations Act. "No similar provisions were included in the original Railway Labor Act of 1926 or any of its various amendments." The National Mediation Board at 50, Its Impact on Railroad and Airline Labor disputes, NMB and Charles M. Rehmus, p. 24 (1984). [8]

At the same time, it is not true that there is no way for employees to change unions or to get rid of a union after one is certified. The Board allows employees to change unions or to get rid of unions. If employees no longer want the union currently representing them, they are free to find another union willing to represent them. If that union makes a sufficient showing of interest, the Board will conduct an election and, depending on the result of the election, the first

[8] Nor is it clear that the Board even has the authority to make a change to add formalized decertification procedures absent Congressional action. As the Board noted the last time it considered such a change, there is a question of the Board's statutory authority to amend its rules to include decertification procedures. Chamber of Commerce, 14 NMB 347, 357 (1987).

union can be replaced, or the employees can choose to have no union at all. This is true under the current procedures and under the proposed procedures.

Moreover, nothing about changing the balloting procedure would change the ability of individuals to seek to be a representative with the purpose of disavowing representation – essentially decertifying the union. Again, if the individual received a sufficient showing of interest, the Board would conduct an election. This is true under the current procedures and would be true under the proposed procedures.

So what are the carriers really complaining about? The 50% showing of interest needed to call for an election in a represented unit. However, nothing about changing the balloting method means that the Board should change the showing of interest needed to call for an election for a represented craft or class. It is ironic that those who fret that changing the balloting method could lead to industrial strife promote a reduction in the showing of interest.

The NMB has noted that one of the largest contributors to industrial strife was the disputes between unions. Prior to 1948, for example disputes between the AFL and the CIO unions were common. Additionally on the railroads disputes arose from the rivalry between the standard train and engine service unions. Fourteenth Annual Report of the NMB, p. 9 (1948). The Board noted a turning point in 1948. It "commended the organizations on their improved relationships as a great contribution to stability in labor relations." Id. Thus, it was not the method of balloting that contributed to labor peace, rather it was the cooperation among unions. In 1950, after a brief period of relative calm, industrial strife was again on the rise. The NMB commented that its belief was that "the former cooperative spirit by and between the operating brotherhoods contributed materially to the minimizing of such disputes which have been so prevalent in recent years." Sixteenth Annual Report of the NMB at p. 7. Minimizing

representation disputes among represented employees was a direct link to minimizing labor unrest.

"Obviously, this basic purpose of the law [the duty to exert every reasonable effort to make and maintain agreements] cannot be realized if the representation issue is raised too frequently. In addition, representation elections and the organizing campaigns which necessarily precede them cause unsettled labor conditions and, in many cases, disturb employees substantially in the discharge of their duties." Sixteenth Annual Report of the NMB at p. 21 (1950). Continuity in representational status "foster[s] stability in collective bargaining relationships and minimize[s] employee unrest." The National Mediation Board at 50, Its Impact on Railroad and Airline Labor disputes, NMB and Charles M. Rehmus, p. 28 (1984).

Reducing the showing of interest will have the exact result the detractors are seeking to avoid – increased labor unrest. By making it easier to switch unions or decertify unions, the employees will be in a constant state of flux. Employers will be able to easily pit one group against the other in a "divide and conquer" mentality. Rather than focusing on making and maintaining effective agreements, Unions will have to look over their shoulders to see who is vying for the membership.

For decades this Board has recognized that the key to strong labor peace was not the method of balloting, it was not forcing employees to take a position in the election, it was not voiding ballots when employees expressed their will not to have a union. The key to strong labor peace was ensuring strong effective collective bargaining relationships. It is for this reason that the Board imposed a two year bar on elections for a newly certified union. Minimizing the opportunity for unions to fight over representation enhances the purposes of the Act.

To those who complain that a decertification process is necessary because the Board needs to have an equal right for employees to exercise the right not to have a Union, that is precisely what the Board is doing by proposing this change. By allowing people to vote no, for the first time, people will have an equal opportunity to declare they do not want to have a union. And, if the no's are the majority of all voters, there won't be a union. There is not a more equal opportunity to decide if there should be a union or not than allowing everyone to voice their opinion.

Conclusion:

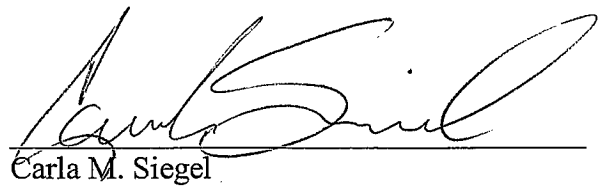
Courts uniformly hold that statutory language authorizing the majority of a group to make a decision means the majority of the group that cast ballots in the election. Since its inception in the 1920's, the RRLB, the Courts and the Attorney General all interpret "a majority of the craft or class" to permit a majority of the craft or class *voting* in the election to decide the representative. The Board itself has often certified unions based on a majority of those voting in an election. No real doubt exists, therefore, that the RLA as currently written authorizes the Board to make the proposed rule change.

The proposed change will allow the Board to best perform its administrative duties to investigate representation disputes. It will mean that the Board no longer presumes that all those who do not vote, do not want representation. Instead, the Board will determine the true intent of each voter, whether the intent is to vote for the union, against the union or to abstain. The Board will level the playing field so that all employees will have equal footing to declare whether or not they want representation. The proposed change brings the NMB's voting process squarely in line with American ideals of democracy.

For all of these reasons, the IAM fully supports the NMB's proposed change.

Sincerely,

IAM LEGAL DEPARTMENT

By: 

Carla M. Siegel
DEPUTY GENERAL COUNSEL

CMS/rc

Attachment 1

watchmen that their salary would be increased $17.34 per month. The men working 8 hours got the same increase as the men working 12 hours per day.

Employees' position.—We contend that street crossing watchmen who were paid on a monthly basis for an eight-hour day prior to July 20, 1920, are entitled to an increase of $17.34 per month, to be added to their salary for an eight-hour day, and where these men work over eight hours per day their salary should be adjusted accordingly, pro rata rate for the ninth and tenth hours and time and one-half time for the eleventh and twelfth hours.

Carrier's position.—Street crossing watchmen are carried on the pay roll as monthly men, and in applying Article XIII of Decision No. 2 they were allowed 204 times the hourly rate specified; viz, 8½ cents, making $17.34, which we added to the monthly rate. The differentials maintained prior to January 1, 1918, due to hours of service and working conditions, are still maintained plus the increases authorized under General Order No. 27 and supplements thereto.

Decision.—Interpretation No. 1 to Decision No. 2 clearly outlines the intent of section 7, Article III of Decision No. 2 with reference to the increases to monthly rated employees, and should govern in this dispute.

DECISION NO. 119.—DOCKETS 1, 2, AND 3.

Chicago, Ill., April 14, 1921.

International Association of Machinists; Amalgamated Sheet Metal Workers' International Alliance; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Trainmen; Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees; Switchmen's Union of North America; International Brotherhood of Firemen and Oilers; Brotherhood Railroad Signalmen of America; Railway Employees' Department, A. F. of L.; United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers; Order of Railroad Telegraphers; Brotherhood Railway Carmen of America; International Brotherhood of Electrical Workers; Brotherhood of Locomotive Firemen and Enginemen; Order of Railway Conductors; International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America; International Brotherhood of Blacksmiths, Drop Forgers and Helpers; National Organization Masters, Mates and Pilots of America; American Train Dispatchers Association; International Association of Railroad Supervisors of Mechanics v. The Atchison, Topeka & Santa Fe Railway et al.

This decision determines the undecided portion of the dispute between the carriers and organizations of their employees referred to the Labor Board, April 16, 1920. That dispute was what should constitute reasonable wages and working conditions on the carriers parties thereto. On July 20, 1920, this Board decided the wage portion. It now decides upon a method of arriving at rules regulating working conditions.

The parties are set forth in Exhibit A.

From December 28, 1917, to March 1, 1920, the President took over and operated through the Director General of Railroads the carriers parties to this dispute. On March 1, pursuant to the Transportation Act, 1920, these carriers reverted to their owners.

During Federal control the Director General of Railroads entered into contracts with organizations of employees of these carriers. These contracts, called national agreements, set out the classes of employees affected, define with particularity the grades in each class, specify work to be done by each grade, hours of service, when payments shall be made, how forces shall be reduced, seniority deter-

mined, work assigned, grievances adjusted, apprentices trained, and otherwise fix the rights and obligations of the parties as to working conditions. These agreeents by their terms expired with Federal control. In the same period certain orders, supplements thereto and interpretations thereof, relating to wages and working conditions of railroad employees, were issued by the authority of the Director General. These orders, etc., among other things, classified positions, determined the duties and rights of the incumbents, and fixed the wages to be paid such incumbents. These orders and supplements provided that they should be incorporated into existing agreements between railroads and their employees.

In February, 1920, the said organizations pressed long-standing requests for wage increases on the Director General of Railroads, who declined to act, as Federal control was almost at an end. On February 28, the Transportation Act became law. Section 301 provides that all disputes between carriers and their employees shall be considered and, if possible, decided in conference between representatives of the parties, and if there undecided, shall be referred for decision to the Railroad Labor Board created by the act. Accordingly, the Association of Railway Executives appointed representatives of the carriers released from Federal control to confer with representatives of the organizations on the pending requests for wage increases.

The representatives met in Washington on March 10, 1920. On March 24, the employees requested that the carriers' representatives secure authority to enter into an agreement preserving after September 1, 1920, the provisions of the general orders, supplements, and addenda issued by the United States Railroad Administration as well as the national agreements and interpretations thereof. On March 30, the representatives of the carriers declined to request such authority.

No agreement was reached by the conference on any matter in dispute, and on April 16 the entire dispute was referred to the Labor Board.

On May 3, 1920, the organizations were informed by the chairman of the Association of Railway Executives that the association had taken the following action on the request for continuance of the national agreements, orders, etc., of the Railroad Administration:

> That the matter of continuing national agreements, interpretations thereof and general orders and all other arrangements negotiated between the United States Railroad Administration and the so-called standard recognized labor organizations shall be handled by negotiation between the management and employees of each individual railway.

It was further stated that "this recommendation" had been conveyed to all the member roads of the association.

Accordingly, the organizations arranged for the presentation about May 1, 1920, to each carrier of a request for the continuance of the national agreements, etc. Such requests were thereafter made on each carrier. Conferences on the requests were denied by the officers of the carriers in general on the ground that the matter had been referred to the Labor Board for decision.

In formulating Decision No. 2, the Labor Board perceived that to inquire into the justness and reasonableness of the national agree-

ments, etc., as well as to decide what shall constitute just and reasonable wages, was impracticable. Time for such inquiry was lacking. Accordingly, at that time the matter of the national agreements and of the orders, etc., of the United States Railroad Administration was thus disposed of:

> There are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with and materially affect earnings and wages. Adequate investigation and consideration of these questions would demand time. Existing conditions required that the Board should make as early decision of the wage question as practicable. For that reason, it has been necessary—and both parties to the controversy have indicated it to be their judgment and wish—that the Board should separate the questions involving rules and working conditions from the wage question. Accordingly, the Board has not undertaken herein to consider or change the rules and agreements now existing or in force by the authority of the United States Railroad Administration or otherwise and this decision will be so understood and applied.
>
> The Board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions, and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration, and determination of the questions pertaining to the continuation or modification of such rules, conditions, and agreements no changes therein shall be made except by agreement between the carrier and employees concerned. As to all the questions with reference to the continuation or modification of such rules, working conditions, and agreements, further hearings will be had at the earliest practicable date and decision thereon will be rendered as soon as adequate consideration can be given.

On December 18, 1920, the parties were notified to present, beginning January 10, 1921, evidence and argument on this dispute.

The evidence and arguments submitted support the following conclusions:

The duty imposed by section 301 on all carriers and their officers, employees, and agents to consider and if possible to decide in conference all disputes between carriers and their employees has not been performed by the parties hereto either with regard to the wage or the working conditions portion of this dispute. The record shows that the representatives of the carriers were unwilling to assume the responsibility of agreeing to substantial wage increases. Hence, the conference of March 10 to April 1, 1920, on the side of the carriers was merely a perfunctory performance of the statute. Nor was the action of the organizations with regard to the individual carriers more than perfunctory. Naked presentation as irreducible demands of elaborate wage scales carrying substantial increases, or of voluminous forms of contract regulating working conditions, with instructions to sign on the dotted line, is not a performance of the obligation to decide disputes in conference if possible. The statute requires an honest effort by the parties to decide in conference. If they can not decide all matters in dispute in conference, it is their duty to there decide all that is possible and refer only the portion impossible of decision to this Board.

Although section 301 has not been complied with by the parties, the Board has jurisdiction of this dispute, as it is and has been one likely substantially to interrupt commerce.

The carriers parties hereto maintain that the direction of this Board in Decision No. 2, extending the national agreements, orders, etc., of the Railroad Administration as a *modus vivendi* should be

terminated at once; and that the matter should be remanded to the individual carriers and their employees for negotiation and individual agreement.

The organizations maintain that the national agreements, orders, etc., with certain modifications desired by the employees should be held by this Board to constitute just and reasonable rules; and should be applied to all carriers parties to the dispute, except to the extent that any carrier may have entered into other agreements with its employees. They maintain that local conferences requiring necessarily the participation of thousands of railroad employees for several weeks would constitute an economic waste and would produce a multiplicity of controversies as well as irritation and disturbance. They also urge that to require local conferences would be to expose the local organizations on the several carriers to the entire power and weight of all the carriers acting through the Association of Railway Executives on the conferring carrier; that such a disparity of force would produce an inequitable result highly provocative of discontent and likely to result in traffic interruptions. They, accordingly, insist that the conference should be national.

The carriers maintain that rules negotiated by the employees and officers who must live under them are most satisfactory; that the participants in such negotiations know the intent of the rules agreed to and advise their fellow workmen and officers accordingly, thereby avoiding a litigious attitude on both sides: that substantial differences exist as between the several carriers with relation to the demands of the service, necessary division of labor, and other factors, which differences should be reflected in the rules: that these local differences can be given proper consideration only by local conferences. The carriers refuse to confer nationally.

The Labor Board is of the opinion that there is merit in the contentions of each party, and has endeavored to take action which will secure some of the advantages of both courses.

This Board is unable to find that all rules embodied in the national agreements, orders, etc., of the Railroad Administration constitute just and reasonable rules for all carriers parties to the dispute. It must therefore, refuse the indefinite extension of the national agreements, orders, etc., on all such carriers as urged by the employees.

This Board also deems it inadvisable to terminate at once its direction of Decision No. 2 and to remand the dispute to the individual carriers and their employees. Such a course would leave many carriers and their employees without any rules regulating working conditions.

If the Labor Board should remand the dispute to the individual carriers and their employees and should keep the direction of Decision No. 2 in effect until agreements should be arrived at, it is possible that agreements might not be arrived at.

The Labor Board believes, nevertheless, that certain subject matters now regulated by rules of the national agreements, orders, etc., are local in nature and require consideration of local conditions. It also believes that other subject matters now so regulated are general in character and that substantial uniformity in rules regulating such subject matters is desirable.

The Board also believes that certain rules are unduly burdensome to the carriers and should in justice be modified. It may well be that other rules should be modified in the interest of employees.

To secure the performance of the obligation to confer on this dispute, imposed by law on officers and employees of carriers, to bring about the recognition in rules of differences between carriers where substantial, to preserve a degree of uniformity in rules regulating subject matters of a general nature, to prevent to some extent the operation in negotiations of a possible disparity of power as between the carriers and their employees, and to enable the representatives of employees of each carrier and the officers of that carrier to participate in the formulation of rules under which they must live, the Labor Board has determined upon the following action:

Decision.—1. The direction of the Labor Board in Decision No. 2, extending the rules, working conditions, and agreements in force under the authority of the United States Railroad Administration, will cease and terminate July 1, 1921.

2. The Labor Board calls upon the officers and system organizations of employees of each carrier, parties hereto, to designate and authorize representatives to confer and to decide so much of this dispute relating to rules and working conditions as it may be possible for them to decide. Such conferences shall begin at the earliest possible date. Such conferences will keep the Labor Board informed of final agreements and disagreements to the end that this Board may know prior to July 1, 1921, what portion of the dispute has been decided. The Labor Board reserves the right to terminate its direction of Decision No. 2 at an earlier date than July 1 with regard to any class of employees of any carrier if it shall have reason to believe that such class of employees is unduly delaying the progress of the negotiations. The Board also reserves the right to stay the termination of the said direction to a date beyond July 1, 1921, if it shall have reason to believe that any carrier is unduly delaying the progress of the negotiations. Rules agreed to by such conferences should be consistent with the principles set forth in Exhibit B, hereto attached.

3. The Labor Board will promulgate such rules as it determines just and reasonable as soon after July 1, 1921, as is reasonably possible and will make them effective as of July 1, 1921, and applicable to those classes of employees of carriers parties hereto for whom rules have not been arrived at by agreement.

4. The hearings in this dispute will necessarily proceed in order that the Labor Board may be in position to decide with reasonable promptness rules which it may be necessary to promulgate under section 3 above.

5. Agreements entered into since March 1, 1920, by any carrier and representatives of its employees shall not be affected by this decision.

Attachments: Exhibit A; Exhibit B.

Southern Railway System—Continued
Harriman & Northeastern Railroad.
Cincinnati, Burnside & Cumberland River Railway.
Northern Alabama Railway.
Georgia, Southern & Florida Railway.
Mobile & Ohio Railroad Co.
Southern Pacific Co.
Arizona Eastern Railroad.
Galveston, Harrisburg & San Antonio Railway.
Houston & Shreveport Railroad.
Houston & Texas Central Railroad.
Houston, East & West Texas Railway.
Iberia & Vermillion Railroad.
Lake Charles & Northern Railroad.
Louisiana & Western Railroad.
Morgan's Louisiana & Texas Railroad & Steamship Co.
Texas & New Orleans Railroad.
Spokane, Portland & Seattle Railroad.
Oregon Electric Railway.
Oregon Trunk Railway.
Tennessee Central Railroad.
Texarkana & Fort Smith Railway.
Texas Midland Railroad.
Texas & Pacific Railway.
Dennison & Pacific Suburban Railway.
Weatherford, Mineral Wells & Northwestern Railway.
Toledo, Peoria & Western Railway.
Toledo, St. Louis & Western Railroad.
Trans-Mississippi Terminal Railroad.
Trinity & Brazos Valley Railway.
Ulster & Delaware Railroad.
Union Pacific Railroad.
Oregon Short Line Railroad.
Oregon-Washington Railroad & Navigation Co.
Union Stock Yards of Omaha.
Vicksburg, Shreveport & Pacific Railway.
Virginian Railway.
Wabash Railway.
West Side Belt Railroad.
Western Maryland Railway.
Western Pacific Railroad.
Western Railway of Alabama.
Wheeling & Lake Erie Railway.
Winston-Salem Southbound Railway.
All union depot and terminal companies, a majority of whose stock is owned by railroads enumerated above.

2. ORGANIZATIONS.

International Association of Machinists.
Amalgamated Sheet Metal Workers' International Alliance.
Brotherhood of Locomotive Engineers.
Brotherhood of Railroad Trainmen.
Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees.
Switchmen's Union of North America.
International Brotherhood of Firemen and Oilers.
Brotherhood Railroad Signalmen of America.
Railway Employees' Department, A. F. of L.
United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers.
Order of Railroad Telegraphers.
Brotherhood Railway Carmen of America.
International Brotherhood of Electrical Workers.
Brotherhood of Locomotive Firemen and Enginemen.
Order of Railway Conductors.
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.
International Brotherhood of Blacksmiths, Drop Forgers and Helpers.
National Organization of Masters, Mates and Pilots of America.
American Train Dispatchers Association.
International Association of Railroad Supervisors of Mechanics.

EXHIBIT B.

Exhibit Referred to in Decision No. 119 (Dockets 1, 2, and 3).

PRINCIPLES.

1. An obligation rests upon management, upon each organization of employees, and upon each employee to render honest, efficient, and economical service to the carrier serving the public.

2. The spirit of cooperation between management and employees being essential to efficient operation, both parties will so conduct themselves as to promote this spirit.

3. Management having the responsibility for safe, efficient, and economical operation, the rules will not be subversive of necessary discipline.

4. The right of railway employees to organize for lawful objects shall not be denied, interfered with, or obstructed.

5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

6. No discrimination shall be practiced by management as between members and nonmembers of organizations or as between members of different organizations, nor shall members of organizations discriminate against nonmembers or use other methods than lawful persuasion to secure their membership. Espionage by carriers on the legitimate activities of labor organizations or by labor organizations on the legitimate activities of carrers should not be practiced.

7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

8. No employee should be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this principle. At a reasonable time prior to the hearing he is entitled to be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by a counsel of his choosing. If the judgment shall be in his favor, he shall be compensated for the wage loss, if any, suffered by him.

9. Proper classification of employees and a reasonable definition of the work to be done by each class for which just and reasonable wages are to be paid is necessary, but shall not unduly impose uneconomical conditions upon the carriers.

10. Regularity of hours or days during which the employee is to serve or hold himself in readiness to serve is desirable.

11. The principle of seniority long applied to the railroad service is sound and should be adhered to. It should be so applied as not to cause undue impairment of the service.

12. The board approves the principle of the eight-hour day, but believes it should be limited to work requiring practically continuous application during eight hours. For eight hours' pay eight hours' work should be performed by all railroad employees except engine and train service employees, regulated by the Adamson Act, who are paid generally on a mileage basis as well as on an hourly basis.

13. The health and safety of employees should be reasonably protected.

14. The carriers and the several crafts and classes of railroad employees have a substantial interest in the competency of apprentices or persons under training. Opportunity to learn any craft or occupation shall not be unduly restricted.

15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.

16. Employees called or required to report for work, and reporting but not used, should be paid reasonable compensation therefor.

DECISION NO. 120.—DOCKET 330.

Chicago, Ill., April 14, 1921.

United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers v. St. Louis Southwestern Railway Co.

Nature of the proceeding.—This is a proceeding and determination under section 313 of the Transportation Act, 1920, whereby the

Attachment 2

ARTICLE II.—GENERAL APPLICATION.

The general regulations governing the application of this decision are as follows:

Section 1. Decreases in wages specified in this decision are to be deducted from the daily, weekly, or monthly rates, as the case may be, in the following manner:

(*a*) For employees paid by the day, deduct eight (8) times the hourly decrease established from the daily rate.

(*b*) For employees paid by the week, deduct forty-eight (48) times the hourly decrease established from the weekly rate.

(*c*) For employees paid by the month (except train-service employees), deduct two hundred and four (204) times the hourly decrease established from the monthly rate.

(*d*) For train-service employees paid by the month, deduct two hundred and forty (240) times the hourly decrease established from the monthly rate.

Section 2. The decreases in wages hereby established shall be incorporated in and become a part of existing agreements or schedules, and shall remain in effect until or unless changed in the manner provided by the Transportation Act, 1920.

Section 3. It is not intended in this decision to include or fix wages for any officials of the carrier except that class designated in the Transportation Act, 1920, as "subordinate officials," and who are included in the act as within the jurisdiction of this Board. The act provides that the term "subordinate officials" includes officials of carriers of such class or rank as the Interstate Commerce Commission shall designate by regulation duly formulated and issued. Hence, whenever in this decision words are used, such as "agents," "foremen," etc., which may apply to officials, such words are intended to apply to only such classes of subordinate officials as are now or may hereafter be defined and classified by the Interstate Commerce Commission as "subordinate officials" within the meaning of the Transportation Act, 1920.

ARTICLE III.—INTERPRETATION OF THIS DECISION.

Should a dispute arise between the management and the employees of the carrier as to the meaning or intent of this decision, which can not be decided in conference between the parties directly interested, such dispute shall be referred to the United States Railroad Labor Board in the manner provided by the Transportation Act, 1920.

Section 1. All such disputes shall be presented in a concrete and joint signed statement setting forth:

(*a*) The article of this decision involved.

(*b*) The facts in the case.

(*c*) The position of the employees.

(*d*) The position of the management thereon.

Where supporting documentary evidence is used it shall be attached to the application for decision in the form of exhibits.

Section 2. Such presentations shall be transmitted to the Secretary of the United States Railroad Labor Board, who shall place same before the Labor Board for final disposition.

DECISION NO. 218.—DOCKET 404.

Chicago, Ill., July 26, 1921.

Railway Employees' Department, A. F. of L. (Federated Shop Crafts), v. Pennsylvania System.

Nature of the proceeding.—The Federated Shop Crafts of the Pennsylvania System have made an ex-parte submission to the Rail-

road Labor Board of a dispute involving, in substance, the following questions:

1. Has a majority of the employees of any craft on the Pennsylvania System the right to designate an organization to represent said employees in negotiating an agreement with the carrier covering rules and working conditions?

2. Has a majority of the employees of such craft the right to be represented in such negotiations by any one other than an employee of said carrier?

3. Has the carrier complied with the law in the method pursued by it to ascertain who are the representatives of the shop employees with whom it shall negotiate rules?

To said submission of the Federated Shop Crafts, the carrier filed its answer and the dispute has been orally presented by both parties to the Labor Board.

Statement of facts.—Prior to the conference referred to below employees in the several shop crafts of the carrier, belonging to System Federation No. 90 affiliated with the Railway Employees' Department of the American Federation of Labor, duly elected their general chairmen who, under the rules of the organization, were authorized to negotiate on matters in dispute between the carrier and the employees.

These officers met representatives of the carrier in conference on May 24, 1921. At this conference the officers stated that they represented the majority of the employees in the shop crafts on the Pennsylvania System and were prepared to negotiate rules in accordance with Decision No. 119 of the Railroad Labor Board.

The representatives of the carrier refused to negotiate with these officers on the ground that there was not satisfactory proof that the system federation actually represented a majority of the employees in question. In order to procure evidence as to whom the majority actually wished to have represent them, the representatives of the carrier announced that they had already prepared and proposed to send out a ballot upon which all shop-craft employees should designate their representatives.

The representatives of the employees comprising System Federation No. 90 objected to this ballot on the ground: (1) That the system federation did represent a majority of the employees in the shop crafts, which the carrier did not deny and that therefore the proposal to take a ballot involved unnecessary delay; (2) that the proposed ballot was not in accordance with the law in that it not only failed to permit employees to vote for an organization, but required them to designate individuals; (3) because it provided that the individuals so designated must be employees of the carrier; and (4) because it provided that the employees be represented regionally rather than from the system as a whole.

The officers of System Federation No. 90 proposed to the representatives of the carrier that they so amend the ballot as to allow employees to vote for an organization if they so desired. This proposal being declined, the officers refused to approve the ballot.

Thereupon the officers of System Federation No. 90 issued a ballot of their own to all shop-craft employees, whom, in supplementary notices, they warned against voting the company's ballot on the ground that it was illegal, and calling upon them to vote for System

Federation No. 90 as their representative. This ballot gave the employees the opportunity to vote for the system federation and left a blank for any other organization which the employee might prefer, but it did not permit him to vote for an individual.

This controversy resulted in two separate elections. The carrier recognized the result of the election which it conducted and is negotiating rules with the representatives chosen in said election.

It is contended by the system federation, and not denied by the carrier, that the majority of the employees in the shop crafts did not vote for the representatives whom the company has recognized and with whom it is conducting negotiations. The company replies that it is immaterial whether a majority of all the employees expressed a preference for these representatives, since they all had an opportunity to vote in the election held by the carrier, and under such circumstances it is the majority of those voting which counts.

The carrier further contends that the Board had not acquired jurisdiction in a lawful manner over the dispute regarding rules and working conditions when Decisions No. 2 and No. 119 were rendered.

The Labor Board acquired such jurisdiction, but that question is not of prime importance in this case.

Opinion.—It matters not whether the carrier in its recent efforts to negotiate rules was proceeding under the order of the Labor Board in Decision No. 119 or whether it was proceeding under the Transportation Act itself, as it claims. The fact remains that both the carrier and its employees were taking steps to hold conferences for the negotiation of rules, that a dispute arose at the very outset in the conference between the carrier and the representatives of the employees who constitute System Federation No. 90, and that this dispute is now before the Board.

The question involved is one necessarily incident to the negotiation of rules and within the unquestioned jurisdiction of the Board. It is quite obvious that no conference could ever be held and no rules ever agreed upon if either party could block the proceedings by declining to deal with the other upon any ground or pretext.

For the purposes of this case the arguments of the parties pro and con as to the regularity and validity of Decision No. 119 are of secondary importance. The questions involved arise directly from the Transportation Act itself and are properly before this Board for disposition.

It is not questioned by either party that the Transportation Act contains the following provisions applicable to this dispute:

> 1. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof.
>
> 2. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute.
>
> 3. The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions * * * upon the application of the chief executives of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute.

4. The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this title. (Referring to Title III—Disputes between carriers and their employees and subordinate officials of the Transportation Act, 1920.)

In the case under consideration the matter in dispute was the adoption of a schedule of rules and working conditions for the shop crafts on the Pennsylvania System. Both the carrier and the employees were taking steps to hold the conference required by the Transportation Act, and directed by Decision No. 119. Naturally, the question arising at the very threshold of the negotiations was: Who are the accredited representatives of this class of employees for the purposes of the proposed conference? The carrier had the right to know this fact, just as the employees had the right to know that they were dealing with the properly authorized representatives of the carrier.

It is true that the Federated Shop Crafts claim that the carrier knew that their organization constituted a majority of that class of employees, and that the carrier was not in good faith in refusing to deal with their representatives. This Board can not enter into the motives of the parties. The carrier did not deny that said organization comprised a majority of that class of employees, but merely stated that no evidence of the fact had been furnished to the carrier.

It is evident that since the statute provides that the employees interested in the dispute be represented in such a conference by representatives "designated and authorized" by said employees, it necessarily follows, under our system of government, that a majority of such employees would have the right to designate their representatives.

The Transportation Act does not prescribe any method by which the employees shall elect their representatives for such conference. Both the carrier and the employees in this case correctly concluded that an election by ballot would be necessary. It was at the next step that both parties fell into error.

The carrier had no more right to undertake to assume control of the selection of the representatives of the employees than the employees would have had to supervise the naming of the representatives of the carrier, for the statute plainly provides that the employees shall "designate and authorize" their representatives. In this sophisticated land of popular elections no political party would submit to having its primary held and managed by the opposing party. It is entirely proper, however, that the carrier should keep in close touch with said election, and should be given every facility for first-hand knowledge of the manner in which it is conducted and the correctness of the result reached and announced.

The carrier was not justified in refusing the request of the employees to place on the ticket the name of the organization. The granting of this one request would have avoided all trouble, and nobody would have suffered any injury, because the name of any other organization or the names of individuals could have appeared on the ticket, and all employees, union and nonunion, would have had the right to vote. If a majority of the employees had not wanted to be represented by the organization, they would have had the unobstructed right to say so.

Representation by the organization is only representation by individuals after all. There is nothing in the statute to deny the employees the privilege of belonging to an organization and being represented by that organization through its accredited officers. In fact this has been the established custom for many years and is recognized in the Transportation Act itself.

In excerpt No. 3 from the Transportation Act, above set out, the "chief executive of any organization of employees" is authorized to submit to the Labor Board any dispute where disagreements have occurred in the conference between the carrier and employees. The existence of the organization of employees is thus recognized as it is elsewhere in the statute.

The Labor Board also holds that the employees may vote for representatives who are not employees of the carrier, if they so desire, just as the carrier may select a representative who is neither a director nor a stockholder. It is out of line with the customary procedure in this country to contend that a party to any suit or controversy in any court or tribunal shall be denied counsel and compelled to represent himself. It seems, however, that the employees in this instance were not asking to have the name of any outsider placed on the ballot, but simply the name of their organization, which would have resulted, as the carrier well knew, in the employees being represented by the officers of the organization who are employees of the carrier.

The carrier had no legal authority to divide its system into regions and require the employees to elect regional representatives. The Transportation Act contemplates that the employees of the class directly interested on an entire system shall select representatives. It is easy to see how an arbitrary regional division of the employees by the carrier might be as unjust as it is unlawful.

After having failed to reach a satisfactory agreement with the carrier as to the ballot, the shop crafts put out a ballot of their own, with no provision for any representatives to be voted for except organizations. This was not authorized by law and ignored the rights of the nonunion men.

Neither election, as held, was fair and legal. As a consequence of the failure of the parties to agree upon a method of holding an election, the employees have so far been denied their legal right to select their representatives for this important conference on rules. As evidence of the fact that no real test of the choice of the employees has been had, the carrier in its own presentation to this Board admits that, exclusive of the Altoona shops, only 3,480 men voted, out of 33,104 entitled to vote, for the alleged representatives who are now negotiating rules. In other words, only 10.5 per cent of these employees are represented in these negotiations, and 89.5 per cent are virtually disfranchised. This is the big, outstanding, uncontroverted fact presented in this case, and undoubtedly the law provides a remedy for such a wrong.

It is the duty of the Labor Board to settle this dispute by providing a method that will protect the legal rights of every employee, union and nonunion, to the end that the carrier and this class of employees may proceed to the orderly negotiation of rules.

Neither of the parties to this dispute can serve the country, or justify themselves in the eyes of the public by any amount of propa-

ganda, if they permit a controversy over small technicalities to interrupt commerce and bring loss and suffering upon themselves and the public.

There is no question of the closed or open shop involved in this dispute and no other real matter of principle. The question involved is merely one of procedure.

At a time when the Nation is slowly and painfully progressing through the conditions of industrial depression, unemployment, and unrest consequent upon the war, it is almost treasonable for any employer or employee to stubbornly haggle over nonessentials at the risk of social chaos.

Decision.—Under the authority of the Transportation Act, as hereinbefore cited, the Labor Board hereby declares that both of said elections on the Pennsylvania System were illegal and that rules negotiated by the alleged representatives selected by either ballot will be void and of no effect, and orders that a new election be held.

For the purpose of determining the choice of a majority of each of the respective crafts coming under the provisions of this decision the following shall govern:

EMPLOYEES ELIGIBLE TO VOTE.

1–a. All machinists, apprentices, and helpers, as defined in and coming under the provisions of Decision No. 2 (Dockets 1, 2, and 3), issued by the United States Railroad Labor Board under date of July 20, 1920, in the service of the carrier, including Altoona Works, and including all employees coming under the provisions of this decision who have been laid off or furloughed and are entitled to return to the service, under the seniority rules, when the force is restored to what is generally recognized as constituting a normal force, if accessible, shall be furnished a ballot and be permitted to vote.

1–b. All boilermakers, apprentices, and helpers, same definition and conditions as set forth in preceding 1–a to apply.

1–c. All blacksmiths, apprentices, and helpers, same definition and conditions as set forth in preceding 1–a to apply.

1–d. All sheet-metal workers, apprentices, and helpers, same definition and conditions as set forth in preceding 1–a to apply.

1–e. All electrical workers, apprentices, and helpers, same definition and conditions as set forth in preceding 1–a to apply.

1–f. All carmen, apprentices, and helpers, same definition and conditions as set forth in preceding 1–a to apply.

CONFERENCE AND REPRESENTATION.

A conference shall be held on or before August 10, 1921, at such place as the carrier may designate (of which due notice shall be given to all parties interested), between the duly authorized representatives of the carrier and the duly authorized representatives of System Federation No. 90; the duly authorized representatives of any other organization (representing the classes of employees set out in preceding 1–a to 1–f, inclusive) whose by-laws or constitution establishes the fact that the organization was established for the purpose of performing the functions of a labor organization as contemplated in Title III of the Transportation Act, 1920; and the duly

authorized representatives of 100 or more unorganized employees, selected by the respective crafts set out in the preceding 1–a to 1–f, inclusive, for the purpose of arriving at a clear understanding as to the distribution, casting, counting and tabulating of the ballots and announcing the results thereof.

NOTE.—Representatives of unorganized employees authorized and desiring to attend this conference must have the individual and personal signature and authorization of not less than 100 employees of a single craft, such authorization shall likewise name the place of employment and craft to which each belongs.

BALLOTS.

The employees shall, at their own expense, have ballots and envelopes printed in sufficient numbers to provide each employee an opportunity to vote.

Six sets of ballots and envelopes shall be printed, a separate and distinct ballot for each craft as per the following, and only the craft named thereon shall be permitted to use the ballot:

PENNSYLVANIA SYSTEM MACHINISTS', APPRENTICES', AND HELPERS' OFFICIAL BALLOT.

A dispute exists between the carrier and System Federation No. 90 of the Railway Employees' Department of the A. F. of L. as to who the employees in the craft above named desire to be represented by in the conference to negotiate rules and working conditions.

The machinists, apprentices, and helpers, irrespective of membership or nonmembership in any organization, are therefore to be given an opportunity to designate, by a majority vote, the representation of their choice, as follows:

Those in favor of either of the following will designate their choice by marking an X in the square set out for that purpose.

Those who desire to be represented by System Federation No. 90, Railway Employees' Department of the A. F. of L., mark an X in this square_____ [ ]

Those who desire to be represented by the American Federation of Railroad Workers, mark an X in this square_____ [ ]

Those who desire to be represented by individuals or by any other organization, write the name of such individual or organization here _____ and mark an X in this square_____ [ ]

Place employed_____

Craft _____

Actually working_____

Laid off or furloughed_____

Name of voter_____

If in any craft no organization or individual receives a majority of the legal votes cast, a second vote shall be taken in the same manner, and on the same kind of ballot, but the second ballot will contain only the names of the two organizations or individuals receiving the highest number of votes cast in the first election.

VOTING.

The vote shall be taken by crafts, each craft to include mechanics, apprentices, and helpers. A majority of each of the respective

crafts shall have the right to determine by whom they desire to be represented. This right shall not be construed to mean that employees shall be denied the right to name an organization as their representative, neither shall it be construed to prevent the employees from naming an individual who is not an employee of the carrier.

DISTRIBUTION, VOTING, AND COUNTING.

A general committee, composed of duly authorized representatives of the carrier, duly authorized representatives of System Federation No. 90, and the duly authorized representatives of any other organization or 100 or more unorganized employees participating in accordance with the provisions of this decision, will be located at designated places for the purpose of distributing, receiving, counting, and tabulating the results of the ballot.

A local committee composed of the duly authorized representatives as above outlined will be established at each division point and at Altoona Works for the purpose of receiving, distributing, packing, and forwarding the ballots by express or registered mail to the general committee. Local committees will see that each employee is given every opportunity to vote and that his ballot is placed in envelope and sealed; the local committee shall also keep a record of the ballots received.

Only the general committee is authorized to open envelopes and count the ballots. Where the force is limited and the local committee can not be procured, arrangements shall be made to place ballots in the hands of such employees and they shall be properly instructed as to the manner of getting their ballot to the general committee.

The ballot should be completed at the earliest possible date. No one but the general committee is authorized to open, count, and tabulate the returns of the ballot, and all parties to the dispute are entitled to be present when any ballots are opened and counted.

When the ballots have been canvassed, the result shall be reported to the Labor Board and the representatives of the carrier and the employees will proceed with the negotiation of rules.

If either party to this dispute believes that the spirit and intent of this decision is not being complied with, the complaint should be filed with the Board with all supporting data.

DECISION NO. 219.—DOCKET 403.

Chicago, Ill., July 27, 1921.

Railway Employees' Department, A. F. of L. (Federated Shop Crafts), v. Long Island Railroad Co.

Question.—Shall the carrier negotiate rules and working conditions affecting shop employees with the officers of System Federation No. 90?

Statement of facts.—On May 3, 1921, a notice was posted by the superintendent of motive power in the carrier's shops, addressed to all shop crafts (machinists, sheet-metal workers, blacksmiths, boilermakers, carmen, electrical workers, and their apprentices and help-

Attachment 3

DECISIONS

OF THE

UNITED STATES RAILROAD LABOR BOARD

WITH

ADDENDA AND INTERPRETATIONS

1923

WITH AN APPENDIX

SHOWING

REGULATIONS AND ORDERS OF THE RAILROAD LABOR BOARD, ALSO COURT DECISIONS IN RESPECT TO TITLE III OF THE TRANSPORTATION ACT, 1920

VOL. IV

(DECISIONS Nos. 1486 TO 2068)

WASHINGTON
GOVERNMENT PRINTING OFFICE
1924

UNITED STATES RAILROAD LABOR BOARD,
CHICAGO, ILL.

MEMBERS 1923.

BEN W. HOOPER, *Chairman.*
G. W. W. HANGER, *Vice Chairman.*
HORACE BAKER.
R. M. BARTON.
J. H. ELLIOTT.
E. F. GRABLE.[1]
SAMUEL HIGGINS.
W. L. MCMENIMEN.
A. O. WHARTON.
L. M. PARKER, *Secretary.*

[1] Appointed May 12, 1923, to succeed Albert Phillips, term expired.

DECISION NO. 1971—DOCKET 3489.

Chicago, Ill., September 21, 1923.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, The Association of Clerical Employees of the Southern Pacific Lines in Texas and Louisiana v. Southern Pacific Lines in Texas and Louisiana.

Question.—Dispute concerning the manner of determining the result of an election conducted to select representatives of clerical employees other than those employed in the general offices.

Statement.—Subsequent to the issuance of Decision No. 119 of the Railroad Labor Board, the carrier and the Association of Clerical Employees of the Southern Pacific Lines in Texas and Louisiana, hereinafter referred to as the "association," negotiated an agreement to cover the clerical forces employed in the general offices. This action was protested by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, hereinafter referred to as the "brotherhood," and, no agreement being reached, was submitted to the board for decision. The board decided the dispute by Decision No. 476, but subsequent to the issuance of this decision the brotherhood relinquished its claim to the general office employees and negotiated an agreement with the carrier to cover clerical forces outside of the general offices.

On May 19, 1923, the association committee informed the carrier that it had been selected as the representative of the employees outside the general offices and that it held representation authorizations from the majority of such employees. On May 21, 1923, the carrier conferred with the association committee and informed it that the brotherhood committee would probably challenge the right of the association to represent these employees, and suggested that the proper course to follow to settle the issue to the satisfaction of all concerned would be to conduct an election in accordance with the rules promulgated by the board in various decisions on this question.

On May 22, 1923, the carrier took the matter up with the chairman of the brotherhood committee and it was finally agreed by the three parties to the dispute that an election would be conducted. The election was held, and there were 1,181 votes cast out of a total of 1,635 eligible voters; 98 were rejected account of not being in compliance with the rules of the election, leaving a total of 1,083 legal ballots. Prior to counting and tabulating the votes, the carrier announced that it would require 818 or more, or a majority of those eligible to vote, to elect a representative. The association committee agreed to this, but the brotherhood committee contended that the majority of the legal votes, 542 or more, should decide election. The parties to the dispute joined in a telegram to the Railroad Labor Board requesting a decision on the point at issue, and the board made the following telegraphic reply on July 5:

> Your wire July 3d. In view of joint request and without establishment of precedent, the board is of the opinion that where all employees eligible to vote have been given an opportunity to vote a majority of the total votes cast will decide the question of representation in this case. By order of board.

The carrier asked the Railroad Labor Board for further review of this question by telegram under date of July 6, 1923, and asked that a definite decision be rendered that would establish a rule to govern in cases of this kind, to which the board responded that it had definitely answered the interrogatories submitted and would not pass on disputes having no actual existence. Further conferences were had by the parties to the dispute and no agreement reached, whereupon the brotherhood, the carrier, and the association filed ex parte submissions to the board requesting a decision.

The contentions of the brotherhood are as follows:

That the election should be carried to completion by counting the 1,083 votes now in the hands of the agreed-upon custodian as agreed upon in Exhibit C.

That a majority (542 or more) of the 1,083 votes, now in the hands of the agreed-upon custodian, should determine the question of representation in this case.

That the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees should be recognized by the carrier as the representative of all clerical employees, other than general office employees, on the Southern Pacific Lines in Texas and Louisiana, if 542 or more of the 1,083 legal votes, now in the hands of the agreed-upon custodian, are in favor of representation by that organization.

We are making the following requests of the Railroad Labor Board:

First. That the board instruct that the 1,083 votes, now in the hands of the agreed-upon custodian, be opened, tabulated, counted, and the result reported as provided for in Exhibit C.

Second. That the board rule that a majority (542 or more) of the 1,083 legal votes cast shall determine the question of representation in this case.

Third. That the board instruct the carrier to recognize the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as representative of all clerical employees, other than general office employees, if 542 or more of the 1,083 legal votes, now in the hands of the agreed-upon custodian, are in favor of the representation by that organization.

Fourth. That employees be granted the right to present further testimony, both oral and documentary, at hearing of this dispute before the United States Railroad Labor Board.

The contentions of the carrier are as follows:

The carrier understands that principle 15 of Decision No. 119, reading in part as follows:

"The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class * * *"

requires the carrier to deal with the representatives selected by a majority of any craft or class, and that such representatives must have the authorization of a majority of the employees of the class involved.

At the conference which was held with the general committee of the Association of Clerical Employees, on May 21, 1923, authorities signed by a majority of the clerical employees involved authorizing said association to represent them were presented, but the carrier being aware of the decisions which had been rendered in other cases by the United States Railroad Labor Board, requiring that representation be determined by the majority of any craft or class through the medium of a secret ballot, suggested to the general committee of the association, and to the general committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that a secret ballot be spread in line with Decisions Nos. 218 and 220, in order to permit the employees involved to determine by a vote of the majority of their number who should represent them. From the outset, it has been the carrier's understanding and its position that representation should only be definitely determined by an expression from the majority of all of the employees involved, and this understanding is not only supported by the decisions already referred to, but is supported by the board's Decision No. 476, wherein the board decided that unless the matter of representation was mutually agreed upon by the

general office committee and the committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the carrier that a vote of the majority should then determine representation. The carrier's understanding in this connection is further supported by other decisions which are herewith quoted in part:

"DECISION No. 220.—The board orders that another election be held to determine the choice of a majority of each of the three classes of employees above set out, as to their representatives in the negotiation of rules and working conditions. (II, R. L. B., 216.)

"DECISION No. 419.—When the ballots have been canvassed the result shall be reported to the Labor Board, and the representatives of the carrier and the employees will proceed with the negotiation of rules if the majority vote in favor of such procedure. (II, R. L. B., 413.)

"DECISION No. 503.—The Labor Board decides that the Florida East Coast Railway Clerks' Association represented a majority of the clerical employees in the service of the carrier named and had the right to negotiate an agreement with the carrier in May, 1921, which shall apply to all classes of clerical employees included within the scope of said agreement. (II, R. L. B., 478.)

"DECISION No 504.—The Labor Board decides that the work of the six shop crafts and the conditions under which it is performed are so similar in their main characteristics as to make it practicable and economical to treat said crafts as constituting such an organization or class of employees as is contemplated in the transportation act, 1920, and in Decision No. 119 of the Labor Board, for the purpose in question, and that said six shops crafts may negotiate and enter into said agreement jointly through the Federated Shop Crafts, if they so elect, provided said system federation represents a majority of each craft or class. (II, R. L. B., 480.)

"DECISION No. 1838.—The Railroad Labor Board decides that a secret ballot shall be taken to definitely determine the wishes of a majority of the shop craft employees on the Gulf Coast Lines and the Houston Belt & Terminal Railway in conformity with the manner prescribed in Decision No. 218 under its addendum, and that conference be held at an early date for the purpose of arranging the details in connection with the distribution, casting, counting, and tabulation of the ballots for the respective crafts."

The following is abstracted from Docket 404:

"The transportation act, 1920, had plainly and expressly recognized these labor unions and organizations as representatives of the employees which were to be dealt with by the carriers and the board. The act made no distinction as between organizations; hence, the board could make none and does make none. But it had to recognize the rights of each separate class as the "parties directly interested," as under the act the employees directly interested had the right to select their own representatives. This could only be secured by the voice of the majority of that class.

"It must therefore be obvious that the principle adopted was in pursuance of the directions and spirit of the act, and was fair, just, reasonable, and necessary." (II, R. L. B., 755.)

In all of the foregoing decisions, the Railroad Labor Board has insisted upon representation being determined by a majority of the craft or class affected. The contention of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express, and Station Employees that this issue should be determined on the basis or 542 votes, or less than one-third of the 1,635 employees involved, is in fact a contention for minority representation and in violation of the spirit and intent of the transportation act and decisions of the Labor Board above referred to. If 542 employees were allowed to determine representation for 1,635 employees, then the principle of majority representation would be destroyed, and if the case was settled on this basis, what would prevent some other organization coming in and making claim to represent the other employees, constituting more than one-third of the total number and who had not voted in favor of either the Association of Clerical Employees or the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees? The carrier holds and contends that representation for employees, under the provisions of the transportation act, can be determined only by the vote of a majority of the employees directly involved, and that to determine a question of this kind on a plurality vote, where such plu-

rality vote was a less number than the majority of the employees involved, would be confirming minority representation.

In this connection, we abstract the following from Decision No. 1833 of the board:

"Notwithstanding the fact that the statute provides that a class of employees shall enjoy the right of selecting the representatives of such class, one of the carrier's counsel before the board made this statement:

"'We claimed the right to deal with our employees either through a majority or minority representation.'"

In other words, the carrier arrogates to itself the privilege of treating with contempt the principle of majority representation, which is fundamental not only in the transportation act, 1920, but throughout the constitution and the institutions and laws of our land.

The carrier's position may be summarized as follows:

It stands ready to canvass the vote now in the hands of the official custodian, and if a majority, or not less than 818 votes, have been cast in favor of either contending party, it will recognize the party so selected as the representative of the clerical employees involved.

If neither of the contending parties have received the vote of a majority, or 818 votes, the carrier stands ready to spread another ballot for the purpose of securing a full vote of all of the employees of the class involved and thereby secure a clear majority vote in favor of one or the other of the two contending parties, and will join with the contending parties in urging each and every employee entitled to vote to cast his ballot in favor of representation of his choice. Either of the contending parties receiving a majority vote will then be recognized by the carrier as the duly accredited representative of the class involved.

The contentions of the association are as follows:

We hold that the right to represent the clerical employees can only be conferred by the votes or signatures of a majority of the total number of such employees, and that such right of representation can not be granted to or claimed by either contending party as the result of the vote of a minority, regardless of whether such vote is received by means of written authorization or by a secret ballot.

The committee of the Association of Clerical Employees holds the personal signatures of a majority of the clerical employees (other than general office forces), authorizing said committee to represent them and this, under the provisions of the transportation act, clearly gives such committee the right to do so. That right can not be taken away from said committee by a minority vote, regardless of how such vote is obtained. The Association of Clerical Employees does not desire to represent the employees, unless it is authorized to represent a majority of them, and its committee was therefore willing to agree and did agree to a secret ballot and understood that the vote of a majority of the employees in favor of either party would decide this question; but we did not at any time agree to accept the vote of a minority as deciding the question and we do not now agree that this would be proper or in accordance with the provisions of the transportation act. Unless or until the committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees obtains the vote or authorization of a majority of the clerical employees entitled to a voice in this matter (or 818 votes), we claim that the authorizations given us entitle our committee to represent all of the employees of our class, outside of general office forces, whom we have no authority to represent. We, therefore, ask that the Railroad Labor Board issue a decision establishing majority representation and making a majority vote of all of the clerical employees involved necessary to decide this matter.

We are of the opinion that some votes cast were not accounted for owing to not being forwarded through United States mail, and we desire to point out that the number of voters not accounted for was more than one-third of the total number involved, or more than would be necessary to decide this question, if the minority rule sought by the committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was adopted. We have at all times stood ready and we now stand ready to spread another ballot and to appoint a committee, or representatives, to go over the entire system from one end to the other and see that the vote of every eligible employee is obtained or is solicited.

At the oral hearing before the Railroad Labor Board on September 18, 1923, the brotherhood requested that the board subpœna the ballots that were cast in the election, count them, and announce the result.

Opinion.—In prescribing a method for justly and fairly ascertaining and determining in cases of disputes the question as to who are "representatives, designated and authorized," as provided by the transportation act, 1920, to confer and settle disputes, the Railroad Labor Board adopted and prescribed a procedure for holding an election, and in Decisions Nos. 218 and 220 prescribed a method to be observed in conducting such elections by secret ballot so as to secure a fair and true expression of the choice of the employees.

The board had previously in principle 15 of Decision No. 119, ruled that "the majority of any craft or class of employees *shall have the right to determine* what organization shall represent members of such craft or class" in negotiating agreements.

The purpose of the Railroad Labor Board was to give all the employees to be affected the privilege of expressing their choice. The board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity.

It was obviously the meaning and the purpose of the board that a majority of the votes properly cast and counted in an election properly held should determine the will and choice of the class.

In Decision No. 218 it was provided "if in any craft no organization or individual receives a majority of the legal votes cast, a second vote shall be taken in the same manner, and on the same kind of a ballot, but the second ballot will contain only the names of the two organizations or individuals receiving the highest number of votes cast in the first election."

So the method and principle of ascertaining the will of the majority has been made plain.

Decision.—The Railroad Labor Board decides that a majority of the legal votes cast in this election will determine who shall be the representatives of the employees. The representatives of the parties to the dispute shall arrange a date for the counting of the ballots which shall be not later than October 4, 1923. In order that any charges of interference may be avoided as between the two clerical organizations, said ballots shall be delivered in Chicago on or before that date, where they shall be counted under the direct supervision of a representative of the board.

DECISION NO. 1972—DOCKET 3151.

Chicago, Ill., September 21, 1923.

Petition of Gulf Coast Lines and Houston Belt & Terminal Railway Co. for Rehearing on Docket 3151, Decision No. 1838.

Question.—Request of carrier for reconsideration of Decision No. 1838.

Statement.—On June 29, 1923, the Railroad Labor Board rendered Decision No. 1838 which was the result of a dispute between the Railway Employees' Department, A. F. of L. (Federated Shop Crafts)