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September 20, 2004

**BY FACSIMILE**

Roland Watkins  
Director, Arbitration Services  
National Mediation Board  
1301 K Street, NW  
Suite 250 East  
Washington, D.C. 20572

Dear Mr. Watkins:

We are submitting these comments on behalf of the short line railroads owned by Genesee & Wyoming Inc. ("GWI")<sup>1</sup>, in response to the notice of proposed rulemaking published by the National Mediation Board ("NMB") on August 9, 2004. Although the GWI Railroads may not use the Railway Labor Act's ("RLA") Section 3 arbitration services with the frequency of the Class I railroads, the RLA applies with equal force to these smaller railroads. Because of that, the GWI Railroads have legitimate concerns about the proposed rules.

As a preliminary matter, GWI has reviewed the positions taken by the National Railway Labor Conference ("NRLC") on behalf of its Class I railroad members. GWI concurs with the legal positions raised by the NRLC and will not restate them in this letter. The RLA gives the NMB the responsibility to administer payment of certain expenses of the National Railroad Adjustment Board ("NRAB"). 45 U.S.C. § 153 Third. But NMB is not given the discretion to

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<sup>1</sup> GWI controls Buffalo & Pittsburgh Railroad, Inc., a class II carrier operating in New York and Pennsylvania ("BPRR"),<sup>1</sup> and the following class III rail carriers: (i) Arkansas, Louisiana & Mississippi Railroad Company, operating in Arkansas and Louisiana; (ii) Chattahoochee Industrial Railroad, operating in Georgia; (iii) Commonwealth Railway, Inc., operating in Virginia; (iv) Corpus Christi Terminal Railroad, Inc., operating in Texas; (v) Dansville and Mount Morris Railroad Company, operating in New York; (vi) Fordyce & Princeton Railroad Company, operating in Arkansas; (vii) Genesee & Wyoming Railroad Company, Inc., operating in New York; (viii) Golden Isles Terminal Railroad, Inc., operating in Georgia; (ix) Illinois & Midland Railroad, Inc. ("IMRR"), operating in Illinois; (x) Louisiana & Delta Railroad, Inc., operating in Louisiana; (xi) Portland & Western Railroad, Inc., operating in Oregon; (xii) Rochester & Southern Railroad, Inc., operating in New York; (xiii) Salt Lake City Southern Railroad Company operating in Utah; (xiv) Savannah Port Terminal Railroad Inc., operating in Georgia; (xv) South Buffalo Railway Company, operating in New York; (xvi) St. Lawrence & Atlantic Railroad Company, operating in Vermont, New Hampshire and Maine; (xvii) St. Lawrence & Atlantic Railroad (Quebec), Inc., operating in Vermont; (xviii) York Railway Company ("York"), operating in Pennsylvania;<sup>1</sup> (xix) Talleyrand Terminal Railroad, Inc., operating in Florida; (xx) Utah Railway Company, operating in Colorado and Utah; and (xxi) Willamette & Pacific Railroad, Inc., operating in Oregon (collectively, "GWI Railroads").

declare that it will pay for things only if they are done in accordance with NMB's rules, and in the more than 70 years of practice under the RLA, no one has previously asserted that it could. This ministerial role is being used to attempt to modify the substantive rights of the parties, for reasons that do not appear consistent with the proposals.

NMB states as its goal a desire to expedite the process of resolving disputes. That sounds fine, but other than satisfying some arbitrary performance goals for the agency, the speed of dispute resolution affects only the parties, not the NMB. The speed of processing cases has always been primarily a function of what is required by the collective bargaining agreements and what the partisan members of the NRAB, the unions and the carriers choose to do. The only time that fails is when the NMB slows the process down by either authorizing inadequate numbers of working days per month for the arbitrators or cutting off arbitration all together when funds are exhausted prior to the end of the fiscal year. Other delays have been due to the inability of neutrals to get travel authority in a timely fashion. The proposal is silent on how NMB delays will affect the one-year process.

It has become far more difficult in recent years to get experienced railroad arbitrators to hear Section 3 cases. The daily rate for railroad cases is below the market rate for what the arbitrators can earn in private arbitrations; they do not have enough days allocated in which to keep up with their caseloads; and other than issuing one-line bench decisions based on gut reaction, they are left with insufficient time to do the analysis and draft the decisions that will be used to train the labor relations professionals of the future. These factors have combined to reduce the number of well-reasoned arbitration decisions being issued, and forced parties to rely on decades old precedent that has increasingly less relevance in today's 21<sup>st</sup> Century railroad industry. If the arbitration decisions are insufficient to provide guidance for the future, then it is likely that the RLA will fail to serve one of its primary purposes – "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

The NMB justifies the proposed changes to the rules on its "existing responsibilities to provide for the efficient and economical expenditure of public funds." 69 Fed. Reg. 48179. Nothing in the proposal explains how the new rules will accomplish that. It is difficult to grasp the concept of "efficiency" in the expenditure of public funds. As for economical expenditure, it does not appear that the NMB will spend any more, or less for that matter, if a case is heard in less than a year. And if a case cannot be decided in less than a year, for whatever reason, the NMB proposes to spend no funds at all, contrary to the requirements of the RLA. The proposed rule changes simply do not accomplish the goals stated.

Finally, there is the concern over a third party deciding on what cases must be consolidated into a single proceeding. The very suggestion that this is something the NMB should undertake is an affront to the carriers and the unions. The proposal implies that the parties themselves are not equally concerned about their own expenditures and would needlessly prepare and argue cases simply to keep things in a constant state of disruption. The Class I's won't spend money that way, and GWI's short line railroads can't. When there are issues involving the interpretation and application of national agreements, then perhaps the individual unions and the signatory carriers could agree to resolve stated issues, with the understanding that

the decisions would be applied on a case by case basis on their properties. But, except for Utah Railway, GWI Railroads are not parties to the national agreements. GWI Railroads negotiate their labor agreements to reflect their specific operations, and they would not want to risk being subject to a consolidation of cases that could ultimately cause more problems than it solves.

GWJ Railroads urge the NMB not to adopt the proposed rules. Like the RLA itself, changes to the process under which disputes are resolved should be negotiated by the parties, with input from the NMB staff.

Very truly yours,



Jo A. DeRoche

Attorney for  
Genesee & Wyoming Inc.