

The NMB's actions are an unlawful arrogation of power to it and represent an unprecedented and groundless invasion by the NMB into the exclusive statutory rights and the contractual freedom of carriers and unions to determine which PLBs they wish to establish and which cases they wish to assign to each PLB.

As explained in detail in CSXT's Memorandum of Points and Authorities in Support of Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction ("CSXT's Memorandum"), CSXT satisfies this Circuit's standard for emergency injunctive relief.

CSXT is likely to succeed on the merits of its claim that the NMB exceeded its authority as limited and defined by the RLA by issuing its April 7th Order and violated the express provisions of RLA Section 3, Second, 45 U.S.C. § 153, Second. The NMB can point to no statutory language stating or even remotely suggesting that Congress delegated to it the authority to cancel PLBs established by agreements between a carrier and a union or to consolidate and transfer cases in a manner contrary to the parties' agreements establishing PLBs. To the contrary, the April 7th Order is in direct conflict with clear statutory language in Section 3, Second of the RLA, which states that carriers and unions have the sole power to establish PLBs and to determine which cases PLBs will hear.

CSXT will be irreparably harmed if the NMB's consolidation order is enforced, as it will be forced to either participate in the NMB's unlawful arbitration procedure, which is in direct violation of Section 3, Second of the Act and the parties' PLB agreements, or refuse to participate in the procedure and face immediate prejudice in the cases that NMB purports to consolidate. For these and other reasons addressed at length in CSXT's Memorandum, CSXT has no adequate remedy at law.

In contrast, if enjoined, Defendant will suffer no injury. Injunctive relief merely will require Defendant to comply with its statutory obligations under the RLA.

Finally, injunctive relief is in the public interest, because enforcement of the NMB's Order would severely disrupt the minor dispute resolution procedures required by the RLA and result in an increased risk of interruptions to commerce, the primary interest protected by the RLA.

For the foregoing reasons, CSXT requests that the Court enter an order enjoining the enforcement of the NMB's April 7th Order, which is in direct violation of the RLA.

Respectfully submitted,

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CSX TRANSPORTATION, INC.

Dated: April 23, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC.,)	
)	
)	
Plaintiff,)	
)	
v.)	Case No.: 04-611 (RWR)
)	
NATIONAL MEDIATION BOARD,)	
)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
APPLICATION FOR A PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiff CSX Transportation, Inc. ("CSXT") seeks a preliminary and permanent injunction pursuant to Federal Rule of Civil Procedure 65 and Rule 65.1 of the Local Rules of this Court to prevent the enforcement of an Order issued by the National Mediation Board ("NMB"), in which the NMB exceeded its delegated authority under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88, and violated the language of the statute. The NMB issued the Order being challenged on April 7, 2004. CSXT asked the NMB to stay its Order pending CSXT's court challenge. The NMB refused, but agreed not to certify an arbitrator, which would commence the NMB-ordered procedures being challenged, until after the close of business on May 7. CSXT respectfully requests a hearing and a decision on its application by May 7, 2004, or before such other date that the NMB takes further action to implement its April 7th Order.¹

¹The NMB subsequently represented to CSXT that, if the Court is unable to schedule a hearing on CSXT's Application for a Preliminary Injunction in the May 5-7 timeframe, but is able to schedule a hearing during the week of May 10, 2004, the NMB will delay certifying an arbitrator, which is the next step implementing its Order until after such hearing.

On April 7, 2004, the NMB issued an Order that purported to cancel thirty of the thirty-one different arbitration boards called “public law boards” (“PLBs”).² These arbitration panels were established by arbitration agreements between CSXT and the Brotherhood of Maintenance of Way Employees (“BMWE”), pursuant to the second unnumbered paragraph of Section 3, Second of the RLA, 45 U.S.C. § 153, Second, to resolve various disputes arising under their collective bargaining agreement.³ In so doing, the NMB purported to transfer the 301 cases scheduled to be heard by these thirty canceled PLBs to one remaining PLB and to create entirely new procedures for that PLB to follow. In effect, the NMB is attempting to create an entirely new PLB. The NMB’s actions are an unlawful arrogation of power to it and represent an unprecedented and groundless invasion by the NMB into the exclusive statutory rights of carriers and unions to establish arbitration boards and determine how many and which cases they wish to assign to each PLB.

CSXT is likely to succeed on the merits of its claim that the NMB’s April 7th Order exceeded its authority and violated the RLA. Never in the history of the RLA has the NMB attempted to invade the province of adjustment boards, which have exclusive jurisdiction to resolve contract interpretation disputes. The NMB can point to no statutory language stating or

² PLBs take their name from the fact that the RLA was amended in 1996 by Public Law No. 89-456 to allow the creation of such boards as an alternative to arbitration before the National Railroad Adjustment Board. See, e.g., Jones v. St. Louis-San Francisco Ry. Co., 728 F.2d 257, 263 & n.4 (6th Cir. 1984). “The term ‘Public Law Board’ is not used in the statute but refers generally to those special boards of adjustment authorized by 45 U.S.C. § 153, Second. These boards which generally come into existence by mutual agreement of the parties to decide system, group or regional issues, perform the same function as the Adjustment Board, but are composed of three members and generally operate as a subordinate version of the National Railroad Adjustment Board.” Int’l Bhd. Of Elec. Workers v. Washington Terminal Co., 473 F.2d 1156, 1165 n.24 (D.C. Cir. 1972).

even remotely suggesting that Congress delegated to it the authority to cancel PLBs and consolidate cases before those PLBs with another PLB in a manner contrary to the RLA and to the carrier's and union's arbitration agreements. To the contrary, the April 7th Order is in direct conflict with clear statutory language in Section 3, Second of the RLA, which gives carriers and unions the exclusive right to establish such PLBs and their jurisdiction, and determine which cases each PLB will hear. The NMB has no jurisdiction or authority to establish PLBs. Once established pursuant to the terms of Section 3, Second and the parties' arbitration agreements, by law a PLB continues in existence until it has decided all of the cases listed with it by the parties or they agree to its early termination.

As demonstrated below, an injunction against the NMB's unlawful April 7th Order is necessary to enforce the RLA's mandatory arbitration procedures and CSXT meets the standards for preliminary injunctive relief in this jurisdiction.

II. STATEMENT OF FACTS

A. Background

The following facts are set forth in the Verified Complaint and the Declaration of James T. Klimtzak ("Klimtzak Dec.") (attached as Exhibit No. 1). CSXT believes these facts are not in dispute.

CSXT operates an interstate railroad system of approximately 23,400 miles in this judicial district, 23 states, and the Canadian provinces of Ontario and Quebec. CSXT is a "carrier" within the definition of the RLA, 45 U.S.C. § 151, First. BMW is an unincorporated

³ The relevant portion of RLA Section 3, Second is the second unnumbered paragraph of that section. The first unnumbered paragraph of Section 3, Second addresses a different type of adjustment board (a "system board of adjustment"), not at issue here.

association and a labor union. BMW is a representative within the meaning of the RLA, 45 U.S.C. § 151, Sixth, and represents CSXT's maintenance of way employees.

CSXT is party to collective bargaining agreements with the BMW, including the June 1, 1999 System Agreement ("System Agreement"). The System Agreement replaced thirteen prior agreements that applied to various parts of CSXT's system. Since shortly after the System Agreement went into effect, CSXT and BMW have been involved in multiple disputes over CSXT's right to contract out work covered by the scope rule of that Agreement. CSXT interprets the scope rule to allow it to continue to contract out work covered by that rule to outside contractors in certain circumstances. BMW disagrees, taking the position that the scope rule prohibits contracting out of any such work unless the union consents. See Klimtzak Dec. at ¶ 5.

B. Procedure for Resolution of Contract Interpretation Disputes

Under the RLA, disputes between carriers and unions over the interpretation or application of collective bargaining agreements, i.e., "minor disputes," are resolved through a mandatory and exclusive dispute resolution procedure set forth in Section 3 of the RLA. 45 U.S.C. § 153; Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 303 (1989) ("Conrail"). Section 3, First (i) requires that disputes over the interpretation or application of collective bargaining agreements "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" 45 U.S.C. § 153, First (i). In the railroad industry, the "usual manner" of handling claims that a carrier has violated a term in a collective bargaining agreement is that the union or employee files a grievance under the grievance procedures in the parties' collective bargaining agreement.

In the present case, the "usual manner" for resolving claims that CSXT violated the System Agreement is found in the grievance procedure in Rule 24 of that Agreement. If, at the

end of this multi-step procedure, the carrier still denies the grievance, the union or employee can submit the dispute to “final and binding” arbitration by the National Railroad Adjustment Board (“NRAB”), a specialized arbitration board established by Section 3, First of the RLA 45 U.S.C. § 153, First. As an alternative to the NRAB, the parties can agree to establish one or more PLBs to arbitrate dispute(s) the parties agree to submit to that PLB. 45 U.S.C. § 153, Second. As described in more detail below, Section 3, Second specifies how the PLBs are to be established, including detailed instructions as to the roles of the carrier, the union, and the NMB.

Pursuant to a March 21, 2002 agreement and RLA Section 3, Second, CSXT and BMWWE agreed to establish eight PLBs and transfer the arbitration cases initiated by BMWWE at the NRAB regarding the contracting out issue to those PLBs. CSXT and BMWWE then entered into eight PLB agreements pursuant to Section 3, Second, establishing those PLBs. Those arbitration agreements listed the cases to be heard by each PLB. The parties subsequently agreed to create additional PLBs as additional contracting out grievances were progressed to arbitration by the BMWWE. CSXT and BMWWE currently have established more than thirty-one PLBs to resolve the pending contracting out cases.⁴ See Verified Complaint at ¶ 12; Klimtzak Dec. at ¶ 7.

3. NMB Cancels Arbitrations

On March 1, 2004, the NMB sent a letter to CSXT and BMWWE requesting that the parties show cause as to why the NMB should not order the cancellation of thirty of the parties’ PLBs and the consolidation of all of the cases pending before thirty-one PLBs into a single PLB. A copy of the March 1, 2004 NMB show cause letter is Verified Complaint Exhibit No. 10; copies

⁴ To date, the first PLB (PLB No. 6508) has already heard eight (8) of the contracting out cases and issued its final award on October 7, 2003. CSXT and BMWWE settled the cases scheduled to be heard by the second PLB (PLB No. 6509). The third PLB held its hearing on April 21, 2004 (PLB No. 6510). See Klimtzak Dec. at ¶¶ 12, 13, 20.

of the initial eight arbitration agreements between CSXT and BMW are Verified Complaint Exhibit Nos. 2-9. The NMB's letter explained that it was concerned that payment of the neutrals for these PLBs would impose too large a burden upon the NMB's budget for arbitrators. The RLA mandates the government to pay the fees and expenses of the arbitrator who sits as the neutral member of the NRAB or PLBs to decide cases. The other members of such arbitration boards are an equal number of partisan members from the carrier and the union.

CSXT and BMW each responded to the NMB's show cause letter. Both explained that the NMB lacked any statutory authority to cancel PLBs established by agreements between CSXT and BMW or order the transfer and consolidation of cases from one established PLB to another. They also explained that any such consolidation would be prejudicial to the parties. Copies of the responses of CSXT and BMW are attached to the Verified Complaint as Exhibit Nos. 11 and 12, respectively.⁵ Notwithstanding the parties' objections, on April 7, 2004 the NMB issued an Order purporting to cancel thirty of the parties' PLBs and consolidate the remaining 301 cases listed with the thirty-one PLBs into one PLB, PLB No. 6511.⁶ A copy of

⁵ The NMB in August 2003 issued an advanced notice of proposed rulemaking, inviting comments from the railroad industry and rail unions on several steps the NMB was considering with respect to improving the processing of arbitration cases by the NRAB. Administration of National Railroad Adjustment Board Functions and Activities, NMB Docket No. 2003-01, 68 FR 46983, 2003 WL 21803144 (F.R.). One action under consideration was "should the NMB, in agreeing to pay for the appointment of an arbitrator ('referee') require consolidation of similar cases dealing with similar issues?" *Id.* at p. 3. This is the same action that the NMB has taken with respect to the CSXT-BMW PLBs. As in this case, a fallacy in the NMB's premise is that the NMB must "agree" to pay for the arbitrator. As with PLBs, the NMB is required to pay the neutrals who are appointed to sit with the NRAB to decide cases. It has no discretion in this regard. *See* 45 U.S.C. § 153, First (l). Both the major railroads, through the National Railway Labor Conference, and rail unions, including BMW, filed comments with the NMB that it had no statutory authority to order the consolidation of arbitration cases. Copies of the industry comments are attached to this memorandum as Exhibit 2.

⁶ The NMB's April 7th Order references PLB No. 6711, but this is apparently a typographical error in the Order.

the April 7th Order, which includes a copy of the outstanding cases, is Verified Complaint Exhibit No. 13. The NMB's Order also specified special procedures for this new PLB.

In an attempt to justify its April 7th Order, the NMB postulates that, because it paid the arbitrator in the first of the CSXT-BMWE public law boards (PLB No. 6508) approximately \$18,600, the remaining thirty-one PLBs will cost the NMB \$576,000 in arbitrators' salaries – too much for the agency to pay in one year. The NMB's analysis is no more complicated than multiplying 31 times \$18,600 to get \$576,000. See Verified Complaint Exhibit No. 13. However, for many reasons described below, the NMB's concerns are drastically overstated and without any basis. Typical fees for a neutral in a railroad arbitration under Section 3 of the RLA are more in the range of \$3,000-\$5,000. See Klimztak Dec. at ¶ 11.

On April 14, 2004, CSXT filed a Verified Complaint in this Court alleging that the NMB was clearly without authority to issue its April 7th Order. CSXT further claimed that multiple provisions of the NMB's Order are in direct conflict with unambiguous provisions of the RLA.

The April 7th Order directed the parties "to immediately confer for the purpose of the selection of an arbitrator" from a list of eleven arbitrators subsequently furnished by the NMB. Without prejudice to its position that the April 7th Order is unlawful, CSXT participated with BMWE on April 23 to select Gerald E. Wallin as the arbitrator.

III. ARGUMENT

A. CSXT Satisfies Standards For Emergency Injunctive Relief

In this Circuit, a party seeking a preliminary injunction must show: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that, if issued, the injunction would

not be adverse to the public interest. See Delaware & Hudson Ry. Co. v. United Transp. Union, 450 F.2d 603 (D.C. Cir. 1971); see also Howard Univ. v. Nat'l Collegiate Athletic Ass'n, 675 F. Supp. 652, (D.D.C. 1987) (standard for granting temporary restraining order in D.C. Circuit same as standard for granting preliminary injunction).

The courts have recognized that the “[p]laintiffs are not required to prevail on each of these factors. Rather . . . the factors must be viewed as a continuum, with more of one factor compensating for less of another.” Miami Bldg. & Construction Trades Council v. Sec’y of Def., 143 F.Supp.2d 19, 24 (D.D.C. 2001); see also CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (“If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.”). Thus, the Court may grant injunctive relief when the moving party shows “either a high probability of success and some injury, or vice versa.” Id. (quoting Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 974 (D.D.C. 1985)).

B. CSXT Is Likely To Succeed On The Merits That The NMB’s April 7th Order Exceeds Its Authority Under And Violates The Railway Labor Act

1. Standard Of Review

The courts apply different standards of review to different kinds of NMB action, depending on whether the NMB has acted within the authority delegated to it by the RLA. A case can be made that the NMB action challenged here is subject to traditional review under the Administrative Procedure Act. See Railway Labor Executives’ Ass’n v. NMB, 29 F.3d 655, 659 (D.C. Cir. 1994) (en banc) (“RLEA v. NMB”).⁷ However even if it must be shown that the NMB

⁷ Having found a “gross violation” of the RLA, the Court rejected the NMB’s contention that its decisions were unreviewable under Switchmen’s Union of North America v. NMB, 320

committed a “gross violation” of the RLA, the NMB has clearly done so here. See RLEA v. NMB, 29 F.3d at 659.

2. CSXT Is Likely To Prevail As The NMB’s Order Of April 7, 2004 Is A “Gross Violation” Of The RLA

To establish a gross violation of the RLA, a party must be able to establish that the NMB acted in excess of its delegated powers and contrary to a statutory provision which is clear and mandatory. RLEA v. NMB, 29 F.3d at 659 (“Judicial review is available because the challenged action constitutes a ‘gross violation’ of the Act.”). As the D.C. Circuit stated in RLEA v. NMB, “it is beyond cavil that ‘an agency’s power is no greater than that delegated to it by Congress.’” Id. (quoting Lyng v. Payne, 476 U.S. 926 (1986)); see also id. at 666, n.6 (“The Board [NMB] seems not to understand that ‘an agency’s power is no greater than that delegated to it by Congress.’”).

a. The NMB Acted Beyond Its Authority And Invaded The Exclusive Jurisdiction of Adjustment Boards Under the RLA

The NMB clearly acted in excess of its delegated powers and usurped the exclusive jurisdiction of adjustment boards established under Section 3, Second of the RLA. As the Supreme Court has repeatedly stated, adjustment boards, such as the PLBs established by CSXT and BMWWE pursuant to Section 3, Second of the RLA, have exclusive jurisdiction over minor disputes. See, e.g., Conrail, 491 U.S. at 304 (“The Board (as we should refer to any adjustment board under the RLA) has exclusive jurisdiction over minor disputes.”); Gunther v. San Diego & A.E.R. Co., 382 U.S. 257, 263 (1965) (“This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by

U.S. 297 (1943). See also International Longshoremen's Assoc. v. NMB, 785 F.2d 1098,1100-01 (1986).

