

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,**

Plaintiff,

v.

**NATIONAL MEDIATION BOARD, et al.,
Defendants.**

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**CIVIL ACTION NO.
Judge**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF’S MOTION FOR PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF**

INTRODUCTION

Plaintiff International Association of Machinists and Aerospace Workers (“IAM”) is a labor organization that is the exclusive collective bargaining representative of machinist employees of the nation’s major rail carriers. Since January 2000, the IAM has been involved in private bargaining and government-supervised mediation with those carriers in an attempt to arrive at new collective bargaining agreements, all in accordance with the procedures of the Railway Labor Act, 45 U.S.C. § 151 et seq. The Act requires the parties to submit their disputes to the mediatory efforts of the National Mediation Board (“NMB”). Once under the NMB’s jurisdiction, the parties cannot advance to the next steps in the statutory process until after the NMB has made a proffer of arbitration. Once the statutory procedures are exhausted, the parties may resort to self-help to try to achieve their respective bargaining objectives.

As more fully explained below, the Mediation Board has had jurisdiction over this dispute since February 2001. The Board has conducted many mediation sessions over the course of more

than four years but it has been unsuccessful in bringing the parties to an agreement. While the statute requires that the Board proffer arbitration to the parties “at once” if its efforts to mediate an agreement prove unsuccessful, the Board has continually and repeatedly ignored or rejected requests that it do so. In the circumstances of this case, those actions or inaction amount to patent official bad faith by the Board and a repudiation of its statutory obligation. This Court should so find and enjoin the Board to honor the requirements of the Act.

THE RELEVANT FACTS

The facts that support the IAM’s motion are set forth in detail in the Declaration of Robert Reynolds. In summary, the IAM and the carriers have been trying since early 2000 to negotiate the resolution of a dispute over changes to their existing agreements covering about 8,000 railroad machinists. The bargaining began with the serving of opening proposals in November 1999. Reynolds Decl. ¶ 8. After about a year of direct bargaining that did not lead to an agreement, mediation was invoked in February 2001. Id. ¶ 9. Bargaining then continued under the mediation auspices of the National Mediation Board. Two years later, in April 2003, the carriers made a “last and final offer.” Id. ¶ 10.

At that point, the IAM had been in bargaining with the carriers for three and one-half years, over two years of which were conducted in mediation. There had been at least 12 sessions of direct negotiation between the IAM and the carriers and an additional 10 separate sessions under NMB mediation. The main areas of disagreement between the parties were wages and the size of the employee contribution to health and welfare. The IAM considered, but did not accept the carriers’ last and final offer. Instead, on July 7, 2003, the IAM presented a comprehensive counteroffer to the carriers. The carriers rejected that counteroffer. Id.

Before proceeding farther, the IAM decided to submit the carriers' last and final offer to its members who work for the carriers to see whether they found it acceptable. It did so in September 2003. The union membership rejected the carriers' last and final offer by more than 97% and the union so informed the carriers and the NMB. Id. ¶ 11.

After that, the NMB conducted three more mediation sessions – on September 29, 2003, February 24, 2004 and January 27, 2005. No progress was made at any of those sessions toward resolving the issues separating the parties. The IAM and the carriers are no closer today on the issues that divide them than they were in 2003. Wages and the size of the employee contribution to health and welfare still remain to be resolved. Id. ¶ 12.

The IAM has asked the NMB to proffer arbitration and release the parties from mediation many times during the last few years, to no avail. Id. ¶s 14-22. In each instance, the NMB has either rejected, ignored, or refused to consider the union's request. Meanwhile, there has been no change in the positions of the parties to the dispute. Id.

The arbitrariness and bad faith of the NMB's actions/inaction is best exemplified by three events:

1. A year ago, two Members of the Board have voted on the IAM's request, one of whom voted to grant it. The third Member of the Board either refuses or neglects to vote, thereby preventing the Board from acting. Id. ¶ 28.
2. The Board wrote to a member of the union who inquired about the status of mediation that mediation had not even been invoked and that, if dissatisfied with that, the member should consider suing the union. The letter was authored by the Board's Deputy Chief of Staff, the same person who five months earlier wrote to

the union that its “request for a proffer of arbitration has not been formally considered or deliberated upon by the Board.” Id. ¶s 19, 23-25.

3. The NMB operates in accordance with a Strategic Plan that says the agency’s goal is to “assist the parties in reaching an agreement within twelve months (365 days) of application.” The dispute between the IAM and the carriers has languished in mediation for over 1500 days, more than four times longer than that.

Id. ¶ 13. See <http://www.nmb.gov/documents/2004perf-rept.pdf> ; Attachment A to this Memorandum.

During the last 20 months in which the NMB has continued mediation, there has been no progress or movement whatsoever toward an agreement. The parties remain divided on the same issues such that the Board cannot genuinely hope or expect that further mediation will lead to an agreement. Id. ¶ 29. In fact, one Board Member already concluded that there is no such hope. The NMB’s failure to let the statutory process go on to the next step has prevented the IAM and the carriers from addressing other issues that cannot be resolved until the ongoing dispute is settled. Id. ¶ 30.

The NMB’s conduct has caused irreparable harm to the machinists the IAM represents. They are entitled to see the major dispute process progress to the next step contemplated by the statute so that a new agreement can be achieved. Id. ¶ 31. As for machinists at or near retirement, their federal Railroad Retirement Act pensions will be irreparably reduced because of the delay in concluding the process if they retire or they will be forced to work longer in order to avoid such harm. Id. ¶ 32-33. Finally, the general public has been deprived of the benefits that proper progression of disputes under the statute is intended to convey while confidence in the

integrity of the government in general and the NMB in particular has been undermined. Id. ¶ 31.

ARGUMENT

THE MEDIATION BOARD HAS VIOLATED A STATUTORY COMMAND BY REFUSING TO TERMINATE MEDIATION

A. The Applicable Principles

1. The Major Dispute Process

The Railway Labor Act sets forth specific procedures which must be followed if a party desires to alter existing employment conditions or the terms of its labor contract. The Act provides a detailed framework to facilitate the voluntary settlement of disputes that arise when labor and management try to create or change collective bargaining agreements. Those disputes are called “major disputes” because that is how labor and management referred to them when the Act was created. Elgin, J. & E.Ry. Co. v. Burley, 325 U.S. 711, 723 (1945); Consolidated Rail Corp. v. Railway Labor Executives’ Assoc., 491 U.S. 299, 302 (1989)(“[M]ajor disputes seek to create contractual rights, minor disputes to enforce them.”). Major disputes are governed by a process of noncompulsory adjustment, one step of which is mediation under the auspices of the National Mediation Board.

Major disputes begin when a union or employer serves a notice requesting bargaining under Section 6 of the RLA; such a notice is commonly called a “Section 6 Notice.” 45 U.S.C. §§152, 156. The parties then engage in direct conferences or negotiations. If these efforts fail to produce a resolution, either party may invoke the services of the NMB. 45 U.S.C. §155, First. If mediation fails, the NMB must endeavor to persuade the parties to submit the controversy to binding arbitration, which can only take place if both parties consent. 45 U.S.C. §155, First,

§157. In the words of the statute, “[i]f such efforts to bring an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.” 45 U.S.C. §155, First. If either party declines the proffer of arbitration, a 30-day period begins during which neither management nor labor may make any change in the status quo. Thereafter, both parties may resort to economic self-help to pressure the other to arrive at an agreement.

There are two exceptions to this sequence. First, both parties may agree to arbitrate their differences, in which event an arbitration board will write the new agreement between the parties. Second, the Mediation Board may determine that the major dispute “threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service.” 45 U.S.C. § 160. In that event, the Board is required “to notify the President [of the United States], who may thereupon, in his discretion create a board to investigate and report [to him] respecting such dispute.” Id. If the President creates such a board (commonly known as a “Presidential Emergency Board”), the parties are constrained not to change the status quo (i.e., resort to self-help) until thirty days after the Emergency Board has made its report to the President.

The Supreme Court has explained that “[w]hile the dispute is working its way through these stages, neither party may unilaterally alter the status quo. §§2 Seventh, 5 First, 6, 10 [45 U.S.C. §152, Seventh, §155, First, §156, §160].” Brotherhood of Railroad Trainmen, et al. v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969). Accord: Detroit and Toledo Shore Line R. Co. v. UTU, 396 U.S. 142, 149, n. 14, 150-52 (1969); Int'l Brotherhood of Electrical Workers

v. Washington Terminal Co., 473 F.2d 1156, 1160, n. 6 (D.C. Cir. 1972), cert. denied, 411 U.S. 906 (1973). This process is universally recognized as long and drawn out, but the process is not endless. See, Detroit and Toledo Shore Line R.Co. v. UTU, 396 U.S. 142, 150 (1969) (“[T]he exhaustion of the Act's remedies [is] an almost interminable process.” (Emphasis added)); Delaware and Hudson Railway Co. v. UTU, 450 F.2d 603, 608 (D.C. Cir. 1971) (“[T]he process is not completely 'interminable'. It does some time come to an end.”).

2. The Role of the Mediation Board

The RLA provides that the Mediation Board plays an important, but not dictatorial, role in the major dispute process. The Board’s authority is to assist the parties in resolving their dispute, but it has no authority to compel them to do so. When a party to a major dispute invokes the services of the Board, the statute requires the Board to “promptly put itself in communication with the parties to such controversy, and [to] use its best efforts, by mediation, to bring them to agreement.” 45 U.S.C. §155, First. If the Board's mediatory efforts fail to resolve the dispute (i.e., “to bring about an amicable settlement”), the statute directs the Board to “at once endeavor . . . to induce the parties to submit their controversy to arbitration, in accordance with the provisions of the Act.” Id. (emphasis added). If one or both parties refuse to submit the dispute to arbitration, the Act requires that the Board “at once notify both parties in writing that its mediatory efforts have failed.” Id. (emphasis added). The Board is not authorized to require the parties to concede to any offer by its adversary or to tender any particular contract proposal.

The Court of Appeals for this Circuit has addressed the Board’s role in mediation and the obligations it bears under the Act on several occasions. International Association of Machinists and Aerospace Workers v. National Mediation Board, 425 F.2d 527 (D.C. Cir. 1970)(“NMB-1”),

arose out of a major dispute between the IAM and National Airlines. Both parties had served Section 6 notices and the dispute went into mediation after five private sessions between the parties did not result in an agreement. After only two mediation sessions, the union asked the Board to proffer arbitration. Eight more mediation sessions occurred over a six-week period, at which point the union sought a court order directing the Board to proffer arbitration. Mediation continued during the litigation until the District Court granted the union's motion. The Mediation Board appealed and the order was stayed. The Board continued to mediate during the appeal.

The Court of Appeals reversed the District Court. It held that due to the "subtle and delicate" nature of the mediation process, the Mediation Board was not "subject to the same kind of judicial scrutiny as is provided in the case of other officials and agencies." 425 F.2d at 534. But the Court rejected the NMB's argument that the agency was absolutely immune from scrutiny in its decision to refuse to proffer arbitration. The Court held that its ruling "does not necessarily mean that the courts are completely deprived of any scrutiny whatever of the Mediation Board." Id. It explained that "[a]n exception to the rule of immunity has been carved out and jurisdiction of the courts established, where the papers establish on their face a plain violation by the Board of a statutory command which warrants immediate intervention of an equity court." Id. at 536. As the Court stated:

The Railway Labor Act taken as a whole does not fairly require the conclusion that the courts are without jurisdiction to provide a remedy if the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable, notwithstanding the lack of any genuine hope or expectation that the parties will arrive at an agreement. Any such view of the act as removing judicial jurisdiction would raise serious constitutional questions. The legislature has latitude to impose a solution, by specifying a reasonable procedure and public tribunal that is binding upon parties unable to reach an agreement. [fn. omitted]. But a rule of absolute immunity from judicial

inquiry for the National Mediation Board would be tantamount to requiring the parties to stay frozen for an indefinite period even though no relevant public process was underway.

Id. at 537.

In so holding, the Court of Appeals expressly rejected “the conclusion that the process is indefinitely interminable, on the say-so of the agency alone.” Id. at 537. Rather, the Court set an objective standard to be followed in evaluating the propriety of the agency’s conduct. Inquiry into “the reasoning process of the Mediation Board” is not allowed; inquiry into the “objective facts concerning the conduct of the mediation process” is. Id. at 540. The ultimate question posed by the Court of Appeals is this: after “examination of the objective facts and determination thereon[, is] there . . . a reasonable possibility of conditions and circumstances (including attitudes and developments), available to the Board, consistent with the objective facts, sufficient to justify the Board’s judgment that the possibility of settlement is strong enough to warrant continuation of the mediation process[?]” Id. at 541. If there is not, the Court may direct the Board to terminate mediation and proffer arbitration.

The Court of Appeals addressed this subject again in Local 808, Building, Maintenance, Service and Railroad Workers v. National Mediation Board, 888 F.2d 1428 (D.C. Cir. 1989). After reviewing the legislative history of the Act and the prior precedent on the issue, the panel majority in that case concluded that “[w]hile it is clear that the Board does not have absolute immunity from judicial scrutiny, . . . it is equally clear that the court's authority is narrowly circumscribed to situations in which there has been a showing of patent official bad faith.” 888 F.2d at 1437.

The Court addressed the issue one more time in International Association of Machinists

and Aerospace Workers v. National Mediation Board, 930 F.2d 45 (D.C. Cir. 1990), cert. denied, 502 U.S. 858 (1991)(NMB-2). In that case, the Court declined to second-guess the Board’s “mediation device[s]” and explained that its “review in this area has focused not on whether mediation could work but on the amount of time the Board has held a union in mediation and that we have suggested that we will order the Board to end mediation only after a theoretical time limit (“a period that is completely and patently unreasonable”) has passed with no resolution.” 930 F.2d at 49, citing Local 808.

**B. The Mediation Board's Refusal To Proffer
Arbitration in this Case Is An Act Of
Patent Official Bad Faith**

The objective facts to which the NMB-1 doctrine is to be applied here reveal that this case presents the “extraordinary and exceptional situation” (425 F.2d at 543) in which this Court should not stay its hand. This is truly a situation where the Board’s conduct amounts to “patent official bad faith.” Local 808, at 1437.

Since NMB-1, the Circuit Court has consistently applied an objective test to determine whether the standard for mandating the Board to issue a proffer is met. That test is whether “the Board [has] continue[d] mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable, notwithstanding the lack of any genuine hope or expectation that the parties will arrive at an agreement.” NMB-1 at 537. Each of the components of that test are met here.

First, the period that the Board has continued to hold the parties in mediation since mid-2003 has been marked by a total lack of progress toward an agreement. Not an iota of change has happened. The NMB convened only three mediation sessions over the next 20 months and

not one generated progress toward an agreement. The parties confirmed to the mediator in January 2005 that they were at an unresolvable impasse. The dispute has been in mediation four years and two months, more than four times longer than the Board's publicly-expressed goal for successful mediation. Still, the NMB continues to prevent the dispute from moving to the next step in the statutory dispute resolution process.

Second, there is no objective basis on which the Board can genuinely hope or expect that the parties will arrive at an agreement if mediation continues. The Board's mediators have offered nothing in the way of suggestions that have led to a break in the deadlock. The parties remain at the same point they were in 2003. The Board may hold a hope that a settlement can be mediated, but this Court must weigh whether that hope is "genuine."¹ In these circumstances, there is no objective basis for holding that it is.

Finally, because of the obstinacy or neglect of NMB Member Fitzmaurice, the Board has not even completed a vote on whether to issue a proffer. Coupled with the Board's written misrepresentation to a member of the union that mediation has not even begun and the suggestion that the member consider taking legal action against the union if dissatisfied with the status of negotiations, the IAM has proven "indications unrelated to the period of time in mediation that evince patent official bad faith." Local 808 at 1440.

Where, as here, the Board has violated its statutory mandate, injunctive relief is warranted. "In the rare and unusual case where the complaint, as supported by objective facts, requires overturning the Mediation Board's judgment notwithstanding the vigorous presumption of validity, the court has jurisdiction to require termination of the mediation process." NMB-1 at

¹ Again, one Board Member plainly gave up hope a year ago.

542-543. Just as the parties should be enjoined when they fail to honor their obligations under the process, the Board should be enjoined when its conduct renders the process a sham. There can be no question that this is what has happened here. The process must be permitted to move to the next step.

That does not mean that the major dispute will never be resolved or that the granting of an injunction will automatically lead to a strike. A settlement will ultimately be achieved, it will just occur by other means: either via an agreement between the parties to arbitrate the terms of a new agreement under Section 7 of the Act, or via the appointment by the President of the United States of an emergency board whose recommendations might lead the parties to a settlement, or by the threat or actual use of economic self-help by one or both of the parties. The statute does not contemplate that mediation will succeed in every instance. Rather, it recognizes that sometimes the Board's mediation efforts will fail. That is exactly why there are provisions for arbitration, cooling-off periods, and emergency boards. And that is why the Act requires that the NMB proffer arbitration "*at once*" when "its efforts to bring about an amicable settlement through mediation [are] unsuccessful."²

² The rights of self-help owned by both union and management have been deliberately preserved by Congress, albeit held in temporary abeyance. They survive, available for use when the statutory procedures to promote agreement are exhausted.

They are indeed in a sense symbols of freedom, reminders that even though their occasional exercise and the disorder of industrial warfare may be vexing to the point of distress the underlying freedom is more productive of a healthy and vigorous economy and nation than a structure of economic regimentation and dictated order.

NMB-1 at 536-37. As this Court has explained, "self-help at the appropriate point in the statutory process is not an evil, in fact, the threat of damaging economic warfare is essential to encourage good faith mediation." IAM v. National Mediation Board, 725 F. Supp. 558, 562 (D.D.C. 1989).

C. The IAM Has Satisfied the Traditional Grounds for Preliminary Injunctive Relief.

To obtain a preliminary injunction in this Circuit,

an applicant must establish: (1) a substantial likelihood of success on the merits; (2) irreparable injury in the absence of an injunction; (3) less injury to the non-moving party than the moving party if an injunction is ordered; and (4) that a preliminary injunction is consistent with the public interest.

Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C.Cir.1998). The IAM has done satisfied all of these elements.

The evidence described above shows that under the standard created by the Court of Appeals for this Circuit, the NMB has acted in a manner that constitutes patent official bad faith. IAM has therefore shown a substantial likelihood of success on the merits.

The union has also shown that the harm its members already have suffered and continue to suffer is irreparable. Not only are they all being denied the benefits of the statutory process administered in a good faith, reasonable way, some older workers also are suffering irreparable reductions in their federal statutory pensions while others are being forced to work longer in order to attain the higher benefit levels they would be due had the NMB not improperly prolonged the period of mediation. An injunction is the only available method by which the harm being caused by the NMB's actions can be remedied.

There can be no question that the NMB will suffer no harm whatsoever if an injunction is ordered. What will result is the IAM and the carriers, both of whom presumably are desirous of settling their ongoing dispute but have been unable to do so via mediation, will move on to the next stage in the RLA's dispute resolution process.

Finally, there can be no question that it serves the public interest to enforce the

requirements of the statute, which is exactly what the injunction this Court would enter would do. The statute itself is the expression of the public interest. It requires management and labor alike to pass through many stages of bargaining before the likelihood of a disturbance to interstate commerce becomes imminent. Mediation conducted by the NMB is just one of those stages. The public interest is in seeing a settlement ultimately reached via a process that is not perverted by either labor, management, or the government along the way. As this Court has recognized, there is an appropriate point in the process for self-help, or the threat of self-help, to induce a settlement.

In this case, the NMB has acted to ensure that that appropriate point never be reached. But that is not the role the public has set for the agency. The NMB's role is first, to attempt to see a settlement achieved via mediation and, second, if it is unable to accomplish that, to move the process along so that a settlement can ultimately be reached through the other statutorily-acceptable means. Here the NMB has perverted that role.

CONCLUSION

In this case, “a period that is completely and patently unreasonable has passed with no resolution.” The NMB’s efforts to bring about an amicable settlement through mediation have not succeeded. Nevertheless, the NMB has failed or refused to “at once” proffer arbitration to the IAM and the carriers so that the major dispute process can move on to the next stage. Coupled with one Board Member’s inaction, whether resulting from intent or neglect, and the Board’s misrepresentation to an IAM member of the status of mediation and its suggestion that if he is not satisfied he consider taking legal action against the union, the Board’s conduct constitutes “patent official bad faith.” This Court should act to require the Board to honor its statutory obligation by enjoining the Board to proffer arbitration.

Respectfully submitted,

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