

of arbitration, yet another Board Member refused to vote, further stalling the process.

Plaintiff seeks such an Order because the NMB has continued mediation on a basis that is completely and patently arbitrary and for a period of time that is completely and patently unreasonable, notwithstanding the lack of any genuine hope or expectation that the parties will reach agreement, in violation of the NMB's statutory obligation under Section 5, First of the Railway Labor Act, 45 U.S.C. §155, First. By these acts of patent official bad faith, the NMB suppresses rather than promotes the purposes of the Railway Labor Act. Plaintiff also seeks to compel the defendants under the Freedom of Information Act, 5 U.S.C. § 552, to produce documents that they have unlawfully withheld from the plaintiff.

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §1331, which provides for original jurisdiction in this Court for all civil cases arising under the Constitution or laws of the United States, 28 U.S.C. §1337, which provides for original jurisdiction in this Court for any civil action arising under any Act of Congress regulating commerce, and 28 U.S.C. §1361, which establishes original jurisdiction in this Court for any action in the nature of mandamus against a federal agency, and 5 U.S.C. § 552(a)(4)(B), which provides for original jurisdiction in the Court for Freedom of Information Act claims. Venue is proper because the defendant NMB resides in this judicial district and the individual defendants maintain their principal places of business at that same address.

RELIEF

2. Plaintiff's request for declaratory, injunctive and other relief is authorized by 28 U.S.C. §2201-2202.

FACTUAL ALLEGATIONS

3. Plaintiff IAM is an unincorporated labor organization which is the exclusive collective bargaining representative for nearly 8,000 employees of U.S. rail carriers. It is a "representative" within the meaning of Section 1, Sixth of the Railway Labor Act ("RLA"), 45 U.S.C. §151, Sixth.

The IAM has represented railroad employees for more than 100 years.

4. Defendant NMB is a federal agency created by Congress to administer certain provisions of the Railway Labor Act. 45 U.S.C. §151, et seq. Its headquarters is located at 1301 K Street, NW, Suite 25 E, Washington, DC 20572. Defendant Harry R. Hoglander is Chairman of the NMB, and defendants Edward J. Fitzmaurice, Jr., and Reed Van de Water are Members of the NMB. They all maintain their offices at the headquarters of the NMB.

Requirements of the Railway Labor Act

5. The IAM and the railroads represented by the NCCC are parties to collective bargaining agreements negotiated pursuant to the RLA. Under the RLA, collective bargaining agreements do not expire; instead they become “amendable” on a certain date. Pursuant to Section 6 of the RLA, 45 U.S.C. 156, a carrier or a union wanting to change the rates of pay, rules, or working conditions in an existing agreement must provide at least 60 days notice of that desire to the other party. This is known as a “Section 6 notice.” Once a Section 6 notice has been served, the carrier and the union are required to negotiate regarding the subjects covered by the notice. 45 U.S.C. § 152 First.

6. Once either party believes that efforts at resolving a Section 6 notice via direct negotiations has been unsuccessful, the party may invoke the service of the NMB. In that event, the NMB is required by law to “use its best efforts, by mediation, to bring them to agreement.” If the NMB’s efforts “shall be unsuccessful, the said Board shall at once endeavor as it final required action ... to induce the parties to submit their controversy to arbitration...” 45 U.S.C. §155, First. This is known as “making a proffer of arbitration.”

7. Neither party is required to submit the controversy to arbitration. If either party declines to do so, the RLA requires the Board to “at once notify both parties that its mediatory efforts have failed.” 45 U.S.C. § 155, First. This is commonly known as “a release from mediation” or simply “a release.” For thirty days after the NMB issues a release, “unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under

section 10 of [the RLA], no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.” 45 U.S.C. § 155, First. Following that thirty day period, the parties are free to resort to economic self-help to achieve their respective bargaining demands.

8. On or about November 1, 1999, the NCCC, on behalf of the carriers that designated it to serve as their bargaining representative, served on the IAM Section 6 notices requesting changes in agreements that became amendable January 1, 2000. On or about December 19, 1999, the IAM served Section 6 notices on those same carriers, requesting change in those same agreements. The IAM and NCCC each raised approximately 30 issues to be negotiated. Negotiations over these Section 6 notices were conducted on a national multiemployer basis between NCCC and a number of railroad unions, including the IAM..

9. IAM and the carriers bargained directly from January 2000 to February 2001.

10. In February 2001, the services of the NMB were invoked pursuant to Section 5, First of the RLA, 45 U.S.C. § 155, First, to assist in resolving the dispute that had arisen from the parties’ Section 6 notices. The NMB thereupon took jurisdiction of the dispute.

Mediation Under the Auspices of the NMB

11. Since February 2001, the IAM and the carriers have been in the mediation process under the auspices of the NMB.

12. Three and one-half years after bargaining began; after over two years of mediation; and after at least 12 sessions of direct negotiation between the parties and 10 separate sessions under NMB mediation; the carriers made their last and final offer in April 2003.

13. The IAM considered that offer and presented a comprehensive counteroffer to the carriers on July 7, 2003. The carriers rejected that July 7, 2003 counteroffer. The main areas of disagreement between the parties were wages and the size of the employee contribution to health and welfare.

14. Thereafter, in September 2003, the IAM submitted the carriers’ last and final offer to

its members for a vote. The IAM's members rejected the carriers' last and final offer by more than 97%.

15. Since that time, the NMB has required the IAM and the carriers to participate in three more mediation session – on September 29, 2003, February 24, 2004 and January 27, 2005. No further progress toward resolving the outstanding Section 6 notices was made in any of those sessions.

16. The IAM and the carriers are no closer today on the issues that divide them than they were in two years ago, in April 2003, when the carriers first made their last and final offer.

17. The NMB operates under an annual Performance Plan that is driven by a five-year Strategic Plan. The Strategic Plan contains outcome goals for the Agency's three missions: mediation, representation and arbitration. As for mediation, the NMB's stated goal is to "assist the parties in reaching an agreement within twelve months (365 days) of application."

18. This case, by comparison, has languished in mediation under the NMB's jurisdiction for more than 1500 days.

The IAM's Numerous Requests For A Release From the NMB

19. On numerous occasions since early 2003, the IAM has requested that the NMB proffer arbitration so that the law can work as it is intended and the dispute can proceed to the next step in the RLA major dispute process. The first such request occurred on March 14, 2003, after the IAM had spent more than thirty-eight (38) months in negotiations with the carriers but was unable to achieve an agreement. A true and correct copy of that request is Exhibit A to this Complaint. The IAM reiterated its request on March 25, 2003. A true and correct copy of the correspondence to that effect is Exhibit B to this Complaint. On or about March 31, 2003, the NMB denied the IAM's request.

20. The IAM made another request for a proffer of arbitration on April 25, 2003. A true and correct copy of that request is Exhibit C to this Complaint. The NMB never took any action on this request.

21. In October 2003, after the IAM's members overwhelmingly rejected the carrier's last and final offer and further mediated negotiations revealed that the parties remained hopelessly deadlocked, the IAM again requested that the NMB proffer arbitration. A true and correct copy of that request is Exhibit D to this Complaint. Once again, the NMB did not take any action on the IAM's request.

22. On or about February 27, 2004, after nearly fifty months had passed in which the IAM and the carriers were unable to reach an agreement, during 36 months of which the NMB was conducting mediation, an objective observer could reach no other conclusion but that no progress had been made in over a year and that no further progress could be achieved by continued mediation. The IAM therefore made its fifth request for a proffer of arbitration. A true and correct copy of that request is Exhibit E to this Complaint.

23. Two weeks later, on March 10, 2004, the carriers re-submitted to the union the exact same proposal that they had made in April 2003, further demonstrating the completely deadlocked nature of the negotiations.

24. Yet the NMB again refused to even consider the IAM's request for a proffer. By letter dated April 7, 2004, the NMB informed the IAM that "the IAM's request for a proffer of arbitration has not been formally considered or deliberated upon by the Board." A true and correct copy of that letter is Exhibit F to this Complaint.

25. The IAM submitted additional requests for a proffer of arbitration on or about July 22, 2004, and November 29, 2004. True and correct copies of these requests are Exhibits G and H to this Complaint. The NMB made no response to the July 22, 2004 request. The NMB denied the November 29, 2004 request on December 3, 2004, asserting that an additional meeting to be held between the IAM and the carriers in January was "evidence" that all efforts had not yet been exhausted. A true and correct copy of that letter is Exhibit I to this Complaint.

26. The IAM and the carriers did meet on January 27, 2005, but no progress toward an agreement was made. At that meeting, the carriers and the IAM confirmed to the NMB mediator

that there had been no direct negotiations and no NMB-assisted mediation in the past eleven months, that there had been no progress toward an agreement since 2003, and that there was no genuine hope or expectation that they would arrive at an agreement via mediation.

27. The IAM made an eighth request for a proffer of arbitration on or about February 1, 2005. A true and correct copy of that request is Exhibit J to this Complaint. Other than ask the carriers their opinion as to IAM's request, the NMB has taken no action on the request.

28. On September 15, 2004, a member of the IAM sent an email to the NMB stating "I work for Union Pacific [sic] Railroad, machinists union LL180 in North Platte, NE, 5 years without a contract seems long enough, by law should'ent [sic] this be resolved, is this not why the NMB was formed?" A true and correct copy of that correspondence is Exhibit K to this Complaint. Union Pacific Railroad ("UP") is the largest carrier to which IAM addressed its Section 6 notice and on whose behalf the NCCC served a Section 6 notice on the IAM.

29. At the time that the NMB received the email inquiry from the IAM member, the IAM had been in mediation under the NMB's auspices for more than 3½ years. Yet on September 16, 2004, the NMB wrote back to the inquiring IAM member that "[a] review of case records of the National Mediation Board indicates that neither your union nor the carrier in the referenced negotiations have applied for NMB mediation. You should consult with your union representative regarding this matter. *To the extent that you believe your union is not representing your interests, you may want to refer to the union's constitution and bylaws for appropriate internal union procedures to follow, or you may want to consult a private attorney.*" (Emphasis added). A true and correct copy of the NMB's letter is Exhibit L to this Complaint.

30. The person who sent the letter to the IAM member was Daniel Rainey, NMB Deputy Chief of Staff. Rainey is the very same individual who authored the NMB's April 7, 2004, letter to the IAM stating that the IAM's request for a proffer had not been considered or deliberated upon because "negotiations are ongoing" and "it is the Board's judgment that all reasonable efforts to find a mutually acceptable resolution have not been expended." See paragraph 24 above

and Exhibit F.

The IAM's FOIA Request

31. On or about March 10, 2004, the IAM submitted to the NMB a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 and the Sunshine in Government Act, 5 U.S.C. § 552(b), for “copies of all transcripts, recordings, minutes and/or notes from any and all meetings at which the NMB discussed or deliberated regarding a proffer of arbitration in Case No. A-13159, NCCC & IAM ..., including, but not limited to deliberations regarding the IAM's requests for a proffer of arbitration in said cases.” A true and correct copy of that request is Exhibit M to this Complaint.

32. The NMB responded to the IAM's request on April 21, 2004 with a letter stating that “[t]here are no transcripts, recordings or minutes sought by your request.” A true and correct copy of that letter is Exhibit N to this Complaint. The NMB's letter further stated: “A search of our files located 24 pages of documents that contain information responsive to your request for copies of ‘notes from any all [sic] meetings.’” Id.

33. The NMB provided only 9 of the 24 pages referred to in its April 21, 2004, response to the IAM. On the pages it did produce, the NMB redacted the vast majority of information. The NMB asserted that the missing pages and redacted portions of the 9 pages it provided were covered FOIA's Exemption 5. Id.

34. By letter dated May 6, 2004, the IAM requested clarification on several aspects of the NMB's April 21, 2004 response. By that same letter, the IAM requested that the NMB identify the scribe of the notes the NMB had provided. A true and correct copy of that letter is Exhibit O to this Complaint.

35. By letter dated May 12, 2004, the NMB refused to identify the scribe, citing Exemption 6 of the FOIA and claiming the identity of the scribe is “a matter which would constitute an unwarranted invasion of personal privacy.” A true and correct copy of that letter is Exhibit P to this Complaint.

36. By letter dated May 20, 2004, the IAM timely appealed these determinations to the then-Chairman of the NMB. A true and correct copy of that letter is Exhibit Q to this Complaint. In response to the appeal, the NMB sent IAM a letter dated June 18, 2004. In that letter, the NMB no longer asserted nor relied upon Exemption 6. Nevertheless, it wholly ignored IAM's request for the identity of the scribe. It provided neither the requested identity nor a justification for withholding that information from IAM. A true and correct copy of that letter is Exhibit R to this Complaint.

37. In its June 18, 2004 response to the IAM's appeal, the NMB further asserted that "The Board did not hold any open or closed meetings at which the NMB discussed or deliberated regarding a proffer of arbitration in NMB Case No... A-13125. All Board actions on proffers are done by notation voting and not through meetings." However, the NMB did not provide copies of any notation voting that had occurred.

38. On September 10, 2004, the IAM filed a renewed FOIA request seeking all documents reflecting notation voting. A true and correct copy of that letter is Exhibit S to this Complaint.

39. The NMB responded on October 25, 2004. It provided IAM with two pieces of paper: an April 20, 2004 vote of then-Member Hoglander and a May 4, 2004 vote of Member Van de Water on some unidentified issue related to this case. A true and correct copy of that response is Exhibit T to this Complaint. Member Van de Water "disapproved" of whatever the question was. The NMB redacted all other substantive information on the two pieces of paper, asserting that the information was protected by FOIA Exemption 5. The NMB provided no document showing any vote by then-Chairman Fitzmaurice.

40. The IAM timely appealed the NMB's response by letter dated November 4, 2004. A true and correct copy of that letter is Exhibit U to this Complaint. The NMB responded to that appeal on December 3, 2004. A true and correct copy of the NMB's response is Exhibit V to this Complaint. The NMB confirmed that the Board members received a recommendation from a

staff member regarding the IAM's proffer request and that a vote on the question was called. It further confirmed that then-Member Hoglander voted to grant the IAM's request for a proffer of arbitration, that Member Van de Water voted against it, and that then-Chairman Fitzmaurice did not vote on the question.

**FIRST CAUSE OF ACTION
(Violation of the RLA)**

41. The allegations in each of the preceding paragraphs is incorporated as if restated herein.

42. The NMB has unlawfully withheld and unreasonably delayed making a proffer of arbitration and releasing the IAM and the carriers from mediation.

43. The IAM and the carriers have been in negotiations over their respective Section 6 notices for more than five years and in mediation for over four years. During the last 24 months in which they have been in mediation, there has been no progress or movement whatsoever toward an agreement. One Member of the NMB has voted that the NMB's mediatory efforts have proven unsuccessful such that the Board should proffer arbitration as the next step toward ending the dispute and another Board Member has refused to vote on the question. In these circumstances, the NMB has continued mediation on a basis that is completely and patently arbitrary and for a period of time that is completely and patently unreasonable, notwithstanding the lack of any genuine hope or expectation that further mediation will lead to an agreement.

44. Even while holding the IAM and the NCCC-represented carriers, including Union Pacific, in mediation, the NMB, through its Deputy Chief of Staff informed an IAM member who inquired about the NMB's actions that "[a] review of case records of the National Mediation Board indicates that neither your union nor the carrier in the referenced negotiations have applied for NMB mediation." The NMB Deputy Chief of Staff further advised the inquiring individual to consider bringing legal action against the IAM.

45. By all of the foregoing, the NMB has engaged in patent official bad faith and violated its obligations under Section 5 of the RLA.

46. The NMB's conduct, as described above, has unlawfully and wrongfully deprived the IAM of its ultimate right under the RLA to resort to self-help.

47. The NMB conduct, as described above, has prevented the IAM and the carriers from resolving the outstanding issues and thereby prevented them from being able to resolve any future issues that can, under the statute, only be addressed once the dispute raised by the Section 6 notices served by the IAM and the carriers in 1999 has been concluded and the resulting agreement becomes amendable.

**SECOND CAUSE OF ACTION
(Violation of the FOIA)**

48. The allegations in each of the preceding paragraphs is incorporated as if restated herein.

49. The NMB has unlawfully refused to identify the scribe of the notes. FOIA's Exemption 6 does not protect such information from disclosure and the NMB has abandoned its reliance on that exemption in any event.

50. The NMB has unlawfully withheld information concerning the notation voting and the notes of meetings that are encompassed by the IAM's FOIA request. FOIA's Exemption 5 does not protect such information from disclosure.

RELIEF REQUESTED

Wherefore, the IAM respectfully requests that the Court grant the following relief:

A. Declare that the NMB has violated the requirements of Section 5, First of the RLA by refusing to proffer arbitration to the IAM and the carriers in their ongoing major dispute despite the fact that the NMB's efforts to bring about an amicable settlement through mediation has been unsuccessful;

B. Order the NMB to proffer arbitration to the IAM and the carriers in this case;

C. Declare that neither Exemption 5 nor 6 of the FOIA protects from disclosure the information that the IAM has requested and declare that the NMB has violated the FOIA by refusing to produce such information;

D. Order that the NMB disclose to the IAM the information that has been unlawfully withheld from disclosure;

E. Order that reasonable attorneys fees and costs be paid to the plaintiff; and

F. Order such other relief as the Court deems just and warranted.

Respectfully submitted,

Michael S. Wolly - DC Bar No. 225482
Margo Pave - DC Bar No. 461219
ZWERDLING, PAUL, KAHN 7 WOLLY, P.C.
1025 Connecticut Ave. NW
Suite 712
Washington, D.C. 20036
(202) 857-5000
FAX: (202) 223-8417

OF COUNSEL :

David Neigus, Associate General Counsel - DC Bar No. 419309

Carla Siegel, Associate General Counsel - DC Bar No. 449953

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS

9000 Machinists Place

Upper Marlboro, MD 20772

(310) 967-4510