

TESTIMONY OF MITCHELL KRAUS  
BEFORE  
NATIONAL MEDIATION BOARD

January 11, 2005

Chairman Hoglander, Members Fitzmaurice and Vanderwater. Good morning, my name is Mitchell Kraus and I am the General Counsel of the Transportation Communications Union. I appear before you this day on behalf of the Railway Labor Division of the Transportation Trades Department of the AFL-CIO and its affiliated organizations. The Railway Labor Division is composed of all but one of the rail labor organizations and it has filed timely comments about the proposed rules.

My testimony today will focus on the Board's claimed legal authority to issue the proposed rules on fees. Other union witnesses will testify about the policy concerns and practical problems raised by this proposed rule.

As the D.C. Circuit Court of Appeals noted in rejecting the NMB's merger rules, "an agency's power is no greater than that delegated to it by Congress." The NMB has claimed that it has authority to issue the proposed rules under Section 4, Third of the Act. That provision gives the NMB authority to expend funds for a variety of purposes including salaries and compensation necessary for the execution of the functions vested in the NRAB.

The NMB's responsibility to pay for the compensation of referees is not, however, discretionary, it is mandatory. Section 3, First (p) of the Act states that the NMB "shall" pay such compensation. This mandatory language leaves no room for the NMB to condition its payment of referee compensation on the payment of fees.

Significantly, nothing in Section 3, Fourth either explicitly or implicitly authorized the NMB to charge parties fees for using the service of the NRAB or Public Law Boards. The plain meaning of the provision authorizing the NMB to expend funds, cannot be stretched to authorize it to charge others fees. The authority to expend does not encompass the authority to charge. They are two different functions.

The legislative history of the Act is consistent with the unambiguous language of the statute itself. It should be noted that the Supreme Court has found the congressional testimony of those involved in the drafting of the 1934 Amendments to be of particular importance in interpreting the meaning of the Act.

The Railway Labor Act was originally passed in 1926. That Act created the US Board of Mediation, which was responsible for the mediation of major and minor disputes. Under the 1926 Act arbitration was not compulsory, and the US Board of Mediation had no means of compelling arbitrations. Thousands of grievances were deadlocked and left on the Board's docket, with no means of resolution.

Under the 1926 Act, unions were not restricted from striking over minor disputes. They regularly threatened and in some instances did strike over such disputes.

The “most important part” of the 1934 Amendments to the RLA, according to the testimony of Federal Transportation Coordinator Joseph Eastman, was the establishment of compulsory arbitration of minor disputes. Mr. Eastman, the principal draftsman of the 1934 Amendments characterized rail labor’s agreement to compulsory arbitration a “a very important concession.” George Harrison, then the President of the Brotherhood of Railway Clerks and Chairman of the Railway Labor Executives Association testified on behalf of rail labor that the unions were prepared to concede that grievances must proceed to arbitration provide that the proposed amendment was passed in its entirety. Mr. Harrison stated:

“...if we are going to get a hodgepodge arrangement by law, rather than what is suggested by this bill, then we don’t want to give up the right, because we feel that we will get a measure of justice by the machinery that we suggest here.”

Congress enacted the bill in its entirety as requested by Mr. Harrison. Although the language of the Railway Labor Act as amended in 1934, does not explicitly prohibit strikes, the U.S. Supreme Court in its Chicago River decision found that it did so, relying principally on the testimony of Messrs. Eastman and Harrison.

The testimony of Mr. Eastman and the testimony of then Chairman of the U.S. Mediation Board Samuel Winslow, quoted on p. 5 and 8 respectively of RLD’s written comments, made clear that under the 1934 amendments, all expenses of the Adjustment board, other than those of its partisan members, were to be paid by the NMB. This testimony regarding the most important part of the bill leaves no wiggle room for the NMB to now claim that the 1934 amendments contemplated that it could charge labor a fee for providing the services required by the Act. The legislative history makes clear that the NMB was not only responsible for the payment of referee compensation, but that it was responsible for any administrative costs incurred in the processing of such payment as well as any costs incurred in the appointment of referees. It is disingenuous to urge that a bill designed to encourage the use of arbitration procedures in lieu of strikes, implicitly authorizes the NMB to impose fees in order to discourage the use of those very procedures.

The deal embodied in the 1934 Amendments as described in testimony to Congress and recognized by the U.S. Supreme Court was simple and straight forward – labor gave up its right to strike over minor disputes and in return all minor disputes were subject to arbitration, and the government was to pay for all costs except those of the partisan members of the NRAB. The deal was not that government would pay all costs except to the extent the NMB could figure out a way to charge fees to labor. Until now, for seventy years, the NMB’s actions demonstrate that it fully understood this arrangement.

In 1966 the Act was amended to provide for the creation of public law boards. During the hearings on the 1966 amendments, the then Chairman of the National Railway Labor Conference, J.E. Wolfe, urged that Congress replace the existing system with party pay

arbitration, a proposal rejected by Congress. In a colloquy with Congressman Staggers, the principal sponsor of the bill, quoted on page 12 of RLD's comments, NRLC Chairman Wolfe agreed with Mr. Staggers that under the 1934 Amendments all fees and expenses associated with the NRAB, except for the expenses of the partisan members, were to be borne by the NMB. The carriers' proposal was rejected by Congress and the 1966 Amendment made no change in this system.

The NRLC's written comments herein are consistent with its Chairman's testimony in 1966. It is noteworthy that while urging that the imposition of fees are warranted for policy reasons, the NRLC agrees with labor that this Board has no authority under the Railway Labor Act to impose such fees, I will leave it to others to deal with the NRLC's policy argument as to why fees are now necessary when the backlog of cases is far less than in 1966 when Congress rejected the same policy argument. The significant point here is that the carriers and rail labor are in agreement that Railway Labor Act does not give the Board the authority it claims.

It strains credibility to assume that all involved parties, the Carriers, the Unions, Coordinator Eastman, who drafted the 1934 Amendments, the then Chairman of the US Mediation Board, and key legislators understood that the NMB is responsible for all non-partisan costs of the NMB, but that sub-silentio the Act authorizes this board to charge unions fees for these services.

As set forth in detail in the RLD comments, and as I have explained today, the NMB's claim that it has such authority under Section 4, Third of the RLA is unsupported by and contrary to the plain meaning of the Act, its legislative history, and the practices of the past seventy years.

In 1984, under similar circumstances, the Board issued merger rules which the DC Circuit Court of Appeals rejected in an en banc decision stating:

“Unable to link its assertions of authority to any statutory provision the Board's position amounts to the bare assertion that it possesses plenary authority to act within a given area because Congress has endowed it with some authority to act in that area. We categorically reject that.”

Stripped to its basics the NMB's claim of authority in the instant matter rests on the same discredited argument that it enjoys plenary authority to regulate because it has some authority in an area. That argument did not pass muster with the DC Circuit in 1994, and I respectfully suggest that it will not pass muster now.

Regardless of the NMB's authority, issuance of the proposed rules will inevitably detract from the Board's ability to meet its basic function – namely the mediation of major disputes. As a practical matter, adopting rules opposed by both the rail unions and rail carriers and then engaging in litigation with the parties responsible for that consensual Act, inevitably, will hamper the Board in its mediation function.

As other witnesses will testify there are other means to address the issues the NMB has raised in this rule making procedure than the imposition of rules opposed by rail carriers and rail labor.

For these reasons, the Rail Labor Division of the Transportation Trades Department of the AFL-CIO urges this Board not to implement the proposed rule on fees.