

ORAL COMMENTS OF WILLIAM R. MILLER
BEFORE THE
NATIONAL MEDIATION BOARD PUBLIC HEARING

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Good day, my name is William R. Miller. I'm the Senior Executive Director of the Industry Relations Department of the Transportation Communications International Union and presently hold the positions of Vice Chairman of the National Railroad Adjustment Board and the Third Division of the NRAB. I would like to thank the National Mediation Board for the opportunity to address this forum regarding the administration of the Section 3 grievance process as published by the NMB in the Federal Registry on December 21, 2004.

I have been employed full time by the Transportation Communications International Union (TCU) since April 1, 1976, and part time since 1970. Since June 1984, I have been the Labor Representative for TCU at the National Railroad Adjustment Board (NRAB) and have been Chairman or Vice Chairman of the Third Division and the full Board since 1987.

As TCU's Senior Executive Director of the Industry Relations Department I review and approve, on behalf of TCU's International President, all submissions to Public Law Boards, and Special Boards of Adjustment.

My comments will briefly summarize my written Declaration of September 16, 2004, regarding NMB Docket No. 2003-01N in reference to the NMB's Notice of Proposed Rule Making. I have been involved in the Section 3 process for 35 years as an advocate and I have been an active participant of the Section 3 Committee and Chairman of Subcommittee since its inception.

Before I discuss the work of the Section 3 Disputes Committee, let me reiterate the position of rail labor wherein we believe that the good-faith compacts made with both the government and the carriers is being placed in jeopardy because of the National Mediation Board's (NMB) Proposed Rulemaking. The original social compact, perhaps better described as a covenant between the government, carriers and unions, was forged in 1934 when the unions agreed to limit their right to strike as a quid pro quo for federally financed arbitration of grievances through the National Railroad Adjustment Board (NRAB). The compromise was clearly understood by the principals and explicitly placed before Congress that labor was giving up the right to strike over minor disputes in return for all of the rights set forth in the 1934 amendments to the RLA. That governmental responsibility and obligation has been honored by every administration regardless of which party was in control for over 70 years. In 1966, Congress passed an amendment to the RLA dealing with the problems of backlogged cases at the NRAB, the same problem allegedly being addressed by the NMB in its current proposal. The 1966 amendments created public law boards as an option to the NRAB. Congress was well aware, at that time, that the 1934 amendments required the NMB to pay all expenses of the NRAB, except the partisan members' salaries and expenses. The Chairman of the National Railway Labor Conference, Mr. Wolfe testified before Congress that the solution to the problems of backlogs was to require the parties to pay for the referee. Wolfe's proposal was rejected by Congress in 1966 because Congress recognized the promise it made in 1934 to rail labor had not changed nor had the promise that the unions made changed. Seventy-one years later the promise is still the same and it should continue to be honored. Congress recognized that public financing of Section 3 arbitration is fully justified because it provides labor peace and prevents interruptions to commerce at a relatively insignificant cost. Another commitment was made to strengthen the 1934 social compact when the unions and carriers formed the Section 3 Committee in 1985 for the express purpose of working together to streamline the grievance machinery and reduce the case backlog. By agreement between the parties, reduced arbitration was never on the Section 3 Committee's agenda. From all of rail unions' perspective, the imposition of user fees

would violate the original social compact and seventy-one years of understanding that has followed.

It should be noted that in a series of three articles from the September 1983 Arbitration Journal that examined the history and debated the rationale of taxpayer funded arbitration in the railroad industry one of the authors, Chuck Hopkins, former Chairman of the National Carriers Conference Committee (NCCC), stated:

It is my hope that rail labor and management will explore the possibilities in a collaborative and open-minded way and not continue to frustrate the effort by limiting their consideration to the financing question. A prompt and orderly system for settling disputes is intrinsic to a healthy labor relations environment in our industry. Rail labor and management owe it to themselves, to their constituents, and to the public as well to find a better way. I think we can do it together.

Mr. Hopkins was prophetic. Just two years, later the Section 3 Committee was established by rail labor and management for the precise purpose of working together to improve the Section 3 grievance handling process and reduce the backlog.

The Special Section 3 Disputes Committee had its genesis in the October 1985 Arbitration Meeting held in Palm Springs, California. The original purpose of the Committee, which is composed of representatives from various unions and management, was to analyze grievance handling within the railroad industry and to make recommendations for improvement. In late 1986, the Committee held its first scheduled meeting and then met many times through 1987. Subsequently, a report from the Committee was presented to the Appropriations Committee of Congress.

The mission of the Section 3 Committee was to improve the Section 3 grievance process and that same task has continued. During the initial meetings, there was a free flow of constructive dialogue and ideas between the participants, including outside expert arbitrators who were retained for the purpose of assisting Committee members. It would be far too exhaustive to recapture all of the constructive comments and suggestions that became part of the finalized report to Congress. Suffice, it is to say that many of those ideas have been incorporated into the Section 3 process and have resulted in greater efficiencies.

The Section 3 Committee and its Subcommittee has taken its work seriously and has continued to meet regularly and has periodically made recommendations that have been adopted by the NRAB. Those procedural changes have also generally been adopted by Public Law Boards (PLBs) and Special Boards of Adjustment (SBAs).

Let me briefly discuss some of the changes instituted because of the Section 3 Committee's work and its recommendations which have resulted in greater efficiencies and lowered federal costs. Originally when cases were filed at the NRAB, one of the parties would file a Notice of Intent that is a declaration for the filing of a submission. The parties would then be given 90 days to file submissions after which the submissions would be exchanged and the parties would be given an additional 90 days to file rebuttals. The parties could then request the opportunity to file sur-rebuttals after which they would be given 60 days to file such. Early on, the Section 3 Committee recommended that rebuttals and sur-rebuttals be eliminated which took 150 days of handling off the process and reduced the size of briefs. That recommendation was adopted by the NRAB on January 1, 1988. Additionally, the Committee recommended that Uniform Rules of Procedure be adopted for all four Divisions of the NRAB for the first time at that period of time in its 53-year history.

In 1988, the Committee also recommended several other changes, one of which required arbitrators to keep their undecided caseload below 50. The intention was to have arbitrators use

their allocated workdays to decide cases rather than stockpile new ones. Subsequently, in a few years the parties determined that the 50 case number was too arbitrary as it did not take into consideration the fact that many Arbitrators handled their cases very expeditiously and that number limited their ability to provide greater services to the parties. Therefore, the Committee came up with a better approach and recommended that all proposed decisions be issued within six months from the hearing. It is interesting to note what the NMB stated in its Memorandum of September 3, 1996, addressed to Robert Stone, Director, National Performance Review on page nine wherein it discussed to work of the Section 3 Committee when it wrote the following:

The NMB has applied substantial NPR efficiency principles to this program area. For example, the Board has been working with the labor/management parties to expand the use of more efficient case resolution methods, such as precedential setting boards, expedited arbitration, grievance mediation and prioritizing cases by issues. A time limit has been imposed on arbitrators which requires that all proposed decisions be issued within six months from the hearing. This approach has resulted in an increase in the timeliness of arbitration decisions.

Clearly the NMB has consistently recognized that the parties have continued to institute greater efficiencies to the grievance process. The improvement to the system has always become more efficient each and every time changes have been made because it has involved the participation of labor, management and the NMB. The NMB has never dictated an agenda that was counter-productive to the parties' needs and the greater public good.

The work of the Section 3 Committee continues. The Committee, in conjunction with the NRAB members, revised the Uniform Rules of Procedure in June 2003 to permit the electronic filing of submissions. That action in of itself saved the NMB tremendous monies reducing office and storage space as files were reduced to discs.

In early 2004, the Section 3 Committee established a Consolidation Committee that was working with the NMB and had actively engaged in discussions on adopting rules for the consolidation of cases. As a member of the Consolidation Committee, it is my judgment, that we were very close to reaching an agreement on such rules when, in April 2004, the NMB consolidated certain cases involving CSX and the BMW, resulting in pending litigation and the termination of any further discussions of consolidation among the Committee. Again, it is my opinion, that if the NMB had not proceeded forward in that instance, one, there would be no litigation and, two, the parties would have formulated a case consolidation process. Why do I come to that conclusion? Its very simple: because the history of the Section 3 Committee confirms that every problem it has addressed has been resolved through the mutual co-operation of the parties.

Last, but not least, to cite another example of how cooperation of this Committee has proven successful, let me reiterate my testimony at the NMB's December 19, 2003 hearing wherein I quoted from the NMB's Annual Reports of 1985 and 2004 that the cases pending arbitration have been markedly reduced. In 1985, there were 22,173 pending cases before all Section 3 tribunals and by 2004 that number had been reduced to 5,136 cases. And that reduction was not just because the workforce had decreased. The facts which have not been refuted indicate that in 1985, 23 grievances per 1000 employees were being filed on an annual basis whereas in 2004 that figure had been reduced to 4.5 grievances being filed per 1000 employees on an annual basis. Therefore, when anyone suggests that the parties need the proposed regulation so as to facilitate the timely resolution of disputes in the rail industry and eliminate the backlog of pending cases at the NRAB and other arbitral boards they are mistaken. Again, history verifies that the parties have shown the ability to make the system more user friendly and efficient and they do not have to have regulations that are counter-productive thrust upon them.

Let's next talk about some of the specific proposals. The first I would like to discuss is the

adoption of a plan that would require having all cases being completed within less than one year after receipt of the Notice of Intent at the NRAB or being added to a Public Law Board list. Rail Labor has repeatedly stated that this is a laudable goal, and in fact, the idea was first proposed by Labor. Unfortunately, that suggestion has gone awry with the current proposed regulations. The question is what is wrong with it now? The answer is the NMB has hastily proposed that to enforce the expeditious handling of the cases it will in the event any of the procedural steps are not completed in a timely manner deny payment to the arbitrator. Supposedly, this will be the inspiration to the parties to move cases along more quickly. Aside from the fact that the NMB is not empowered to adopt rules in behalf of the NRAB or PLBs the proposed rules have the significant possibility for creating just the opposite effect. First, it leaves unanswered how a case is to be resolved when the NMB refuses to pay the referee's compensation. Secondly, if referees might not be paid the claims will revert to the status of un-resolvable cases. Contrary to the NMB's laudable goal to move cases more quickly, what will happen instead is the Carriers will have no reason to care if the grievance remains permanently unresolved since it is the unions and employees that file grievances, not the carriers. The proposed rule does not give the carriers any incentive to meet the time limits and affords carriers the opportunity to put a grievance into an unresolvable status. The teeth the NMB was trying to put into this rule to make it work, does not work and in fact bites the employees. The proposed rule will ultimately undo much of the Section 3 Committee's work and will increase the backlog.

I would next address the proposal regarding the consolidation of cases. Labor has repeatedly stated that the consolidation of cases makes sense and should be encouraged. The parties already consolidate cases where the facts and issues are sufficiently similar to warrant such action. If the parties agree to consolidation, those cases should be assigned to a single arbitrator as that will keep down the cost level of resolution for the NMB and the parties as opposed to using multiple arbitrators to hear identical issues.

In the past, the NMB has worked with the parties to help them to do so in response to particular problems of back log. Adopting procedures, on an experimental basis, for the NMB to assist the parties in consolidating cases would be worthwhile. If such efforts prove useful, such procedures can be permanently adopted. If not, they can easily be abandoned. As I said earlier, the NMB and the parties established a Consolidation Committee which in my opinion was very close to putting together a workable plan until the NMB chose to unilaterally consolidate cases for the BMWE and CSXT.

The problem again with the proposed rule is it ignores the fact that the NMB is lacking in experience, expertise and substantive background in railroad arbitration. Looking at a Statement of Claim without knowing the facts of the case and lumping it together with other cases that might appear similar on their surface can lead to unfortunate results wherein employees' rights to have their cases treated separately and fairly are denied because they were improperly consolidated.

The answer is not to go forward with this proposal, but instead the NMB should sit down with the parties and re-establish the Consolidation Committee.

I would next briefly talk about user fees. User fees as proposed by the NMB should not be used as a tool to limit the number of grievances that are to be arbitrated. That is precisely the effect that the present proposal seeks to accomplish. Valid grievances require adjustment without regard to their dollar value. Grievance settlements shape working rules and contribute to the common law of the workplace and the institution of filing fees might cause valid grievances to be abandoned. This would result in those grievances that were not handled having a disproportionate influence on the administration of the working agreement. Failure to handle a single case because of the imposition of an inappropriate user fee would be a disservice to the parties to the agreement.

Because of time constraints, I will not go through the particulars of why each and every fee should not be imposed as they have been explicitly set forth in TTD's Comments to the Board, but instead will summarize why they should be abandoned. They should not be imposed because:

1. The NMB has no statutory authority to impose such fees.
2. NMB has authority to pay expenses, not impose fees on the parties.
3. NMB has no authority to charge the parties for functions that track an arbitration case so that it can pay referees especially in view of the fact that at the end of the year the parties provide the NMB with audit of all of their cases.
4. The NMB has failed to establish a reasonable connection between the fees being charged and the cost of the service being provided.
5. The fees unfairly give carriers an advantage in declining claims involving small amounts of money.
6. The proposed fees unfairly place a disproportionate share of fees on unions and employees.

The imposition of filing fees would clearly favor carriers and be detrimental to unions. Carriers will remain unburdened in acting upon disagreements of the collective bargaining agreements. The imposition of filing fees for arbitration not only appear to be slanted in favor of the carriers, it runs the real risk of indicating that the Board does not intend to be impartial in its handling of grievance arbitration. Ultimately, I believe that the user fees proposed by the NMB may very well have the unintended consequence of increasing the backlog rather than reducing it because if the Carriers know that the Unions will have to pay user fees on each case submitted to arbitration there will be little incentive for claim settlement on the property. Instead of settling claims with the General Chairmen at conference as the Carriers presently often do, the Carriers will be encouraged to refuse to settle so as to force the Unions to expend their resources on various filing fees as contemplated by the NMB proposal. This will cause the backlog of cases to increase, rather than decrease as it has been doing over the past two decades under the cooperative efforts of the Section 3 Committee.

In closing let me state that Rail Labor is strongly opposed to the proposed regulations. Some of the concerns as expressed earlier with the proposed regulation are:

1. Under the current law, the NMB has no authority to issue procedural rules for the NRAB, PLBs and SBAs, nor does the NMB have the authority to condition referees' compensation on compliance with those rules.
2. The NMB has no authority to establish or collect user fees for arbitration services. The RLA states that the Federal Government, not the parties, is responsible for the payment of referees' compensation and other authorized expenses.
3. Imposition of user fees will discourage unions and individuals from pursuing grievances as some of the fees may exceed the value of the grievances.
4. The backlog of pending cases – the supposed reason for the proposed regulations – has already been significantly reduced by the parties. The proposed regulation will only result in unions and individuals being discouraged from pursuing legitimate grievances.

Also troubling as we sit here today is the fact that the NMB proposed regulations has united the unions, rail carriers and arbitrators in opposition to the plan. Simply put, those who know the system and use it on a daily basis understand that the proposed regulations are defective and counter-productive to the process. The primary purpose of the National Mediation Board is set forth in its title. Mediation is the agency's primary purpose wherein you help to settle differences

between the parties. The parties are not at odds with one another over these proposed regulations, but they are with you, and by being at odds with you as we now approach a time period when Section 6 notices have been filed for contract changes you increase the likelihood of greater difficulty in that area as well. When one or both of the parties believe that the NMB has lost its neutrality it is replaced with distrust. And I believe you will accomplish that task even if done inadvertently by the institution of any of your proposed regulations.

I must again state that the public interest necessitates that Congress and the NMB continue to provide full funding for the adjustment of railroad grievances. I do not agree with the proposal for the institution of user fees, by whatever term they may be called. I do not suggest that the present system for adjustment of railroad grievances is perfect and requires no change. Like any other institution created by mankind that has survived for 71 years, the system can be improved. Yet history tells us it has been improved many times by the parties through the work of the Section 3 Committee and Subcommittee. The grievance handling system of today is not the same as that of 1985 and if those Committees are allowed to continue their work the system will continue to improve. Improvement in the system should be instituted by the parties' co-operative efforts and not by governmental dictate.

I would respectfully request that the proposed regulations should not be adopted, and the NMB should continue working with the Section 3 Committee to assist in adopting appropriate procedures to improve the efficiency of grievance handling. All of Labor appreciates your concerns, our hope and suggestion is that we come away from this meeting working together to address those concerns. The tools and means for constructive change are already in place in the forms of the Section 3 Committee, Subcommittee and the NRAB.

With that said, thank you again for the right to appear before the Board and I would be glad to answer questions from the Board Members, if you have any.