

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

CSX TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 04-0611 (RWR)
NATIONAL MEDIATION BOARD,	)	Hon. Richard W. Roberts
	)	
	)	
Defendant.	)	
	)	

**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF’S  
MOTION FOR A PRELIMINARY INJUNCTION**

**Preliminary Statement**

CSX Transportation, Inc. (“Plaintiff”) has brought an action challenging the legality of an order of the National Mediation Board (“NMB”). The NMB’s order consolidated over thirty existing arbitral panels, called Public Law Boards (“PLBs”), all dealing with similar issues of law and fact into one consolidated PLB. In addition, the order lays out a 90-day process for the consolidated PLB to arbitrate the underlying dispute between Plaintiff and the Brotherhood of Maintenance Of Way Employees (“BMWE”) and produce an award if the parties opt not to settle. Although the NMB has agreed that Plaintiff may participate in the consolidated PLB without waiving its legal challenge, Plaintiff has also sought a preliminary injunction to prevent the NMB from beginning this arbitration process.

For the reasons discussed below, the Court should deny Plaintiff’s motion. First, Plaintiff is unlikely to succeed on the merits, particularly given the extremely narrow scope of judicial

review over the NMB's actions and the NMB's discretionary control over the arbitration process through expressly delegated funding authority.

Second, Plaintiff cannot establish irreparable harm. Plaintiff's alleged harm is largely speculative and contingent on numerous uncertain events. Further, requiring Plaintiff to engage in arbitration is not irreparable harm, particularly here because Plaintiff was already engaged in the arbitration of these disputes with BMW. Indeed, if Plaintiff is correct that the NMB's order was an ultra vires action under the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. §§ 151 et seq., then the order was void ab initio, meaning that Plaintiff will not be harmed at all by participating in the process, except through the expenditure of resources in the process; those costs are not irreparable harm. Conversely, if the Court decides that the NMB acted within its authority, then injunctive relief is not warranted. Clearly, Plaintiff objects to the process the NMB ordered, but that is not enough. Given the lack of irreparable harm and Plaintiff's ability to challenge the legality of an award, Plaintiff should challenge the NMB's order through seeking declaratory and/or final injunctive relief. Preliminary injunctive relief, however, is inappropriate.

Third, the NMB (and the BMW) would be harmed if the Court enjoined the NMB's order. The dispute between Plaintiff and BMW has been pending for over four years. The NMB and the parties have expended substantial resources without any significant resolution of the underlying cases. By consolidating these PLBs, which share common issues of law and fact, an expedited resolution can be achieved. The BMW would, therefore, be harmed by enjoining further arbitration. Furthermore, if injunctive relief was granted, the NMB faces the substantial cost of funding these non-consolidated PLBs and would thereby be significantly harmed.

Fourth, the public interest in this case strongly counsels against granting injunctive relief.

As the steward of federal taxpayer funds, which pay for the PLBs in question, the NMB is a guardian of the public interest and its action to consolidate these PLBs furthers the public's interest in the efficient and economic use of limited public resources. Indeed, the Court's decision to grant an injunction would result in the imposition of a less efficient arbitration system to govern these disputes. Moreover, the NMB's order furthers Congress' stated public policy in the RLA of the "prompt and orderly settlement" of labor-management disputes in the railroad industry. Enjoining the NMB's order, thereby preventing the NMB from implementing a more efficient and economic arbitration process, would frustrate Congress' purpose and the public interest.

Plaintiff has a perfectly adequate remedy in this Court to challenge the NMB's order. Under the circumstances, the extraordinary remedy of injunctive relief should not be granted. Plaintiff's attempt to invoke Rule 65 for an expedited decision on the merits should be rejected.

#### **STATUTORY AND REGULATORY BACKGROUND**

Congress enacted the RLA in 1926 to provide for the "prompt and orderly settlement" of labor-management disputes, in order to protect commerce and carrier operations from the economic and social disruptions that such disputes could cause. See 45 U.S.C. § 151a. In 1934, Congress amended the RLA and created the National Mediation Board ("NMB") to administer the Act. 45 U.S.C. § 154; 48 Stat. 186 (1934). Congress' principal aim in creating the RLA was to establish a framework to facilitate settlement disputes between carriers and their employees so that both major and minor disputes could be resolved with a minimum impact on interstate commerce. The RLA, therefore, requires the parties "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all

disputes . . . in order to avoid any interruption of commerce.” 45 U.S.C. § 152, First.

Aside from the NMB’s funding duties, which are discussed at greater length below, the NMB has two primary duties under the RLA. First, the NMB mediates “major” disputes between carriers and labor organizations arising from the formation or change of collective bargaining agreements. See 45 U.S.C. §§ 155, 183. Under the RLA, major disputes “are left to the machinery of non-compulsory adjustment under the general supervision of the [NMB].” Local 808 v. Nat’l Mediation Bd., 888 F.2d 1428, 1431 n.3 (D.C. Cir. 1989). On the other hand, minor disputes – those disputes that arise from the interpretation or application of an existing agreement – are subject to compulsory and binding arbitration before the National Railroad Adjustment Board (“NRAB”) or other arbitral boards, which are discussed below. 45 U.S.C. § 153; see generally Consolidated Rail Corp. v. Ry. Labor Exec. Ass’n, 491 U.S. 299, 303-04 (1989). The NMB’s second primary duty is to determine and certify the choice of a bargaining representative for each “craft or class” of employees. 45 U.S.C. § 152, Ninth.

When Congress amended the RLA in 1934, it provided that the NRAB would resolve disputes “growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.” See R.R. Trainmen v. Chicago River & I.R.R., 353 U.S. 30, 36-37 (1957). Thus, Section 3, First of the RLA establishes the NRAB, which is composed of representatives of labor and management, and governs the NRAB’s jurisdiction and handling of disputes among other things. 45 U.S.C. § 153, First. The organizations that appoint these “partisan” members pay for their services. Id. at (a) & (g). Disputes brought to the NRAB are initially heard by two members, one labor and one management. If the two cannot agree, they attempt to select a “neutral referee” to decide the

case. Id. at (k) & (l). In the event that the partisan members are unable to agree upon a neutral referee, then the NMB chooses the neutral. Id. For neutrals selected under 45 U.S.C. § 153, First, the RLA directs that the NMB shall “fix and pay the compensation of such referees” for neutrals who operate to settle disputes that are assigned to the NRAB. Id. at (g) & (l).

In addition to establishing the NRAB, the RLA authorized the creation of two other types of arbitral boards, which are distinct from the NRAB, to resolve minor disputes: (1) consensual arbitral boards, commonly referred to as “Special Boards of Adjustment” (“SBAs”) and (2) non-consensual arbitral boards, know as “Public Law Boards” (“PLBs”). See 45 U.S.C. § 153, Second. Both the SBAs and PLBs generally consist of one member designated by the carrier, one member designated by the employee representative, and a neutral member appointed by the NMB, if requested by either party. Id. It is the PLBs that are relevant to the case at bar. Congress amended the RLA in 1966 to authorize the creation of PLBs. See Pub. L. 89-456 (1966). Congress did so to reduce the backlog of cases before the NRAB. Like the case of neutrals appointed to in the NRAB disputes, the RLA directs the NMB to pay the compensation and expenses of neutrals. Id.

Although the RLA requires that the NMB make certain expenditures, the RLA simultaneously grants the NMB discretion in making those expenditures. In particular, the RLA gives the NMB discretion in paying for the arbitration services, such as PLBs, offered to carriers and unions under the RLA. To that end, the RLA provides that:

The Mediation Board may . . . (3) make such expenditures . . . including expenditures for salaries and compensation . . . and other necessary expenses of the . . . boards of arbitration, in accordance with the provisions of this section and sections 153 and 157 of this title, respectively [] as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the

boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.  
45 U.S.C. § 154, Third (emphasis added).

This express grant of authority to the NMB provides the basis of the NMB's budgetary power over the arbitration process and its power to attach conditions, such as consolidation, to funding.

### **FACTUAL BACKGROUND**

#### **A. NMB's Operation Under The RLA & Funding Of Public Law Boards**

The NMB is headquartered in Washington, D.C. and is composed of three Members selected by the President and confirmed by the U.S. Senate. See Declaration of Roland Watkins,<sup>1</sup> Director of Arbitration Services, National Mediation Board, dated April 30, 2004 ("Watkins Decl.") at ¶ 6, attached at Exhibit A. Under the RLA, the NMB is responsible for the mediation of collective bargaining disputes, the resolution of employee representation cases, and certain support services for arbitration in the airline and railroad industries. Id. at ¶ 5. It is NMB's role in arbitration in the railroad industry that is at issue in the case at bar.

The NMB's Director of Arbitration Services, Roland Watkins, is involved in the NMB's arbitration support functions and has broad authority with respect to the selection and appointment of arbitrators under the RLA. Id. at ¶ 2. The Director of Arbitration Services is responsible for providing panels of arbitrators for the resolution of disputes in the railroad industry and all administrative procedures related to these functions. Id. Finally, the Director of Arbitration Services is the authorized certifying officer for all NMB expenditures associated with

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<sup>1</sup> The NMB offers Mr. Watkins' declaration in support of its opposition to plaintiff's motion for a preliminary injunction and to set forth the facts before the NMB in making its decision to consolidate the PLBs. The documents attached to Mr. Watkin's Declaration are authentic copies of records maintained in the NMB's official files. Watkins Decl., at ¶ 4.

PLBs, SBAs, and the NRAB. Id. at ¶ 3. These expenditures include payments to arbitrators for compensation and travel expenses, as well as payments to various suppliers.

In the railroad industry, the NMB appoints and sets the rates of pay for those arbitrators who are compensated by the Government. Id. at ¶ 7. When carriers or unions bring disputes to be arbitrated before the SBAs, the PLBs or the NRAB, the NMB is responsible for financial administration. Id. at ¶ 8. The NMB creates the PLBs and SBAs on an ad hoc basis when the parties request arbitral services and request the formation of PLBs and SBAs. Id. Thus, at the conclusion of an arbitration, the NMB compensates those arbitrators from the NMB budget. See id. at ¶¶ 7-8. The NMB's grievance arbitration funds are in a pool of the NMB's total budget and are not designated as separate PLB, SBA or NRAB funds. See id. at ¶ 8. Thus, the cost of PLBs are to the detriment of NMB's other arbitral functions. See id.

Due to the NMB's limited budget, which is a specific, fixed appropriation from Congress, id. at ¶ 9, and given that the funds necessary to resolve all the cases on the NMB caseload far exceeds the NMB arbitration budget, the NMB must closely monitor arbitration expenses before PLBs, SBAs, or the NRAB. Id. The NMB cannot commingle arbitration funds with its general operating funds. Id. To that end, the NMB ensures that the funds expended for the PLBs (and other arbitral boards) are authorized and in accord with Government rules and regulations and are consistent with the NMB's policies. Id. The NMB routinely makes funding related decisions concerning the operations of PLBs, SBAs and the NRAB. Id. For example, if the NMB is operating under a continuing resolution, only a portion of the Section 3 activity is allowed to operate. See id. & Attachment ("Att.") 1, attached thereto. Likewise, budgetary limitations cause the NMB, using its discretion over the funds, to limit arbitral operations under 45 U.S.C. §

153. Id. For instance, during the last two months of Fiscal Year 2003, the NMB limited arbitration activities under 45 U.S.C. § 153 due to the unavailability of funds and only funded portions of those activities. See id. & Att. 2, attached thereto. PLBs and SBAs are closely monitored for funding purposes and if, in the judgment of the Director of Arbitration Services, there is no activity, that board is closed. Id. For example, in fiscal year 2002, the NMB closed 272 PLBs and 50 SBAs and in fiscal year 2003, the NMB closed 38 PLBs and 4 SBAs for a total of 364 arbitration boards closed. Id.

### **B. The Dispute Underlying the Public Law Boards At Issue**

The PLBs at issue in this case are arbitrating a long-running subcontracting dispute between Plaintiff and BMW. Id. at ¶ 10. In March 2000, BMW was enjoined from engaging in a work stoppage when the District Court in the Middle District of Florida ruled the dispute was “minor” under the RLA and that the parties were required to engage in a mandatory arbitration process. Id. & Att. 3, attached thereto. On February 7, 2002, the BMW requested that the NMB appoint neutrals to decide 57 contracting-out cases pending at the NRAB. See id. ¶ 11 & Att. 4, attached thereto. BMW organized the 57 cases into seven lists with each list requiring a separate neutral. BMW’s action was based on Section 3, First (1) of the Railway Labor Act, 45 U.S.C. § 153, First (1). Approximately one month later, on March 5, 2002, Plaintiff requested that the NMB “appoint a neutral to establish an agreement creating a public law board for certain contracting out disputes between CSXT and the [BMW].” See id. at ¶12 & Att. 5, attached thereto. Plaintiff requested that the “NMB expeditiously . . . provide a strike list of seven referees from which the parties can select a procedural neutral to fashion a PLB agreement.” Id. Plaintiff asserted that this request was pursuant to 29 C.F.R. § 1207.1(b). To

resolve the dispute regarding contracting-out, the NMB met with the parties on March 21, 2002, in an attempt to mediate the dispute. Id. at ¶13. The NMB proposed that the parties establish several public law boards to resolve these cases, which both Plaintiff and BMW agreed to in principle. Id. The NMB then proceeded to work on principles for the operation of these boards, which resulted in an agreement between Plaintiff and BMW. See id. & Att. 6, attached thereto. The initial agreement on the PLBs over this issue was reached April 30, 2002, and the first sets of cases were docketed into the first PLBs on May 2, 2002. Id. at ¶14 & Att. 7, attached thereto. A total of 32 PLBs have been established to handle cases relating to the contracting-out issue and 2 more PLBs have been proposed. See id. at ¶¶ 14-45.<sup>2</sup> At the time of the consolidation, only in the case of the first three PLBs (Nos. 6508, 6509, & 6510), which are discussed below, had an arbitrator been selected. Only PLBs No. 6508 & 6509 have been resolved; many other subcontracting grievances between the parties, requiring many new PLBs, continue to arise. Id. at ¶¶14-15.

PLB No. 6508 was the first PLB to consider the dispute between Plaintiff and BMW and was docketed May 2, 2002. Id. at ¶14 & Att. 9, attached thereto. After the NMB provided a list of arbitrators to the parties, they selected Robert Douglas and notified the NMB. The NMB

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<sup>2</sup> As described in the attached declaration, on the issue of contracting-out between Plaintiff and BMW: (i) Public Law Board Nos. 6508, 6509, 6510, 6511, 6512, 6513, 6514, and 6515 were docketed on May 2, 2002; (ii) PLB Nos. 6575 and 6576 were docketed on November 7, 2002; (iii) PLB Nos. 6591, 6592, and 6593 were docketed on December 10, 2002; (iv) PLB Nos. 6613 and 6614 were docketed February 3, 2003; (v) PLB No. 6628 was docketed April 2, 2003; (vi) PLB Nos. 6654, 6656, and 6668 were docketed June 30, 2003; (vii) PLB No. 6677 was docketed September 12, 2003; (viii) PLB Nos. 6678 and 6679 were docketed September 17, 2003; (ix) PLB No. 6690 was docketed October 15, 2003; (x) PLB Nos. 6704, 6705, 6707, 6708, and 6709 were docketed December 8, 2003; (xi) PLB Nos. 6724 and 6725 were docketed February 17, 2004; and (xii) PLB Nos. 6733 and 6734 were docketed March 9, 2004.

certified Mr. Douglas as the arbitrator on May 28, 2002.<sup>3</sup> Id. On July 18, 2002, Arbitrator Douglas began work on PLB 6508 and conducted hearings on August 19th, October 16th and November 3, 2002. Id. On June 4, 2003, nearly a year after certification, the NMB requested that Arbitrator Douglas render decisions on these cases by the end of June 2003.<sup>4</sup> Id. & Att. 14, attached thereto. In August and September of 2003, NMB officials directed Arbitrator Douglas to produce decisions for the cases in PLB 6508. Id. at ¶14. Arbitrator Douglas provided Plaintiff and BMW with a draft decision in early September 2003. Id. Arbitrator Douglas performed work on the awards in October 2003 and submitted them to the parties,<sup>5</sup> which the parties did not sign until October 14, 2003 – approximately eighteen months after the NMB certified him as an arbitrator. Id. & Att. 15, attached thereto. For Arbitrator Douglas’ work the NMB paid for 62 days of work, amounting to \$18,600.00, for a final award that resolved one PLB and eight subcontracting grievances. Id. & Att. 16, attached thereto.

PLB No. 6509 was the second PLB to consider the dispute and was docketed on May 2, 2002. Id. at ¶15 & Att. 17, attached thereto. On July 23, 2002, the NMB certified Arbitrator Ann Kenis as the arbitrator for PLB 6509. Id. The parties had originally scheduled a hearing

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<sup>3</sup> It is this NMB certification of an arbitrator that is the first step of the process outlined in the NMB’s order that Plaintiff wants enjoined.

<sup>4</sup> The NMB sent this letter because as of February 2003 six months had elapsed between the scheduled hearings. It is NMB policy that the arbitrator must render the awards within 6 months of the date of the hearing of the cases. Watkins Decl., at ¶ 14. Arbitrator Douglas missed the deadline.

<sup>5</sup> After the submission of the award to the parties, the Arbitrator met with the parties in an executive session. The executive session allows the parties to give the arbitrator notice to facts in the award that are incorrect. Watkins Decl., at ¶ 14. This is generally the final step before an award is issued.

before Arbitrator Kenis for November 21, 2002, but on August 23, 2002, the parties agreed to suspend the arbitration proceedings. BMW contacted Arbitrator Kenis on November 24, 2003, to schedule a new hearing date and the parties agreed to a date of February 18, 2004. Id. & Atts. 23 & 24, attached thereto. Prior to February 18, 2004, the parties settled the 8 cases on PLB 6509. Id. PLB 6510 was the third and, to date, final docketed PLB to consider the dispute over subcontracting. PLB was docketed on May 2, 2002. Id. at ¶16. On July 9, 2002, the BMW requested that the NMB furnish a list of 11 arbitrators and the NMB was notified on March 2, 2004, that the parties had selected Arbitrator Elliot Goldstein. Id. The NMB certified Arbitrator Goldstein on March 23, 2004 and a hearing was held on April 21, 2004. Id. & Atts. 28 & 29, attached thereto. No decision or award has issued.

Thus, in the more than four years that this dispute between Plaintiff and BMW has been pending, three of the thirty-two existing PLBs have heard the dispute – one has resolved the decision and issued an award, one has simply been settled, and one has had only a hearing.

**C. The NMB's Order To Show Cause And Order To Consolidate And Effects Thereof**

Faced with the exceedingly slow pace at which the parties had been resolving these disputes, on March 1, 2004, the NMB issued an order to show cause as to why the remaining PLBs on the subcontracting issue should not be consolidated in the interest of economy and efficiency. Id. at ¶46 & Att. 31, attached thereto. The delay in resolution of these PLBs and the large number of grievances was the significant factor in issuing this order. See id. Additionally, at the time the NMB issued the order, the parties had filed agreements requesting the docketing of the 33rd and 34th PLBs on this issue. Id. Furthermore, numerous future PLBs on the same

issue appeared necessary because of additional grievances between Plaintiff and BMW. For instance, the BMW informed the NMB that the organization had 95 more grievances waiting to be docketed on additional PLBs and possibly 300 additional grievances on Plaintiff's property.

Id. Because the PLBs average about 8 cases per PLB approximately 11 more PLBs were needed for the 95 grievances and approximately 37 more PLBs, or a total of 48 PLBs to cover the potential grievances. Id. With the existing PLBs, the total would be over 80 PLBs all dealing with the same issue. The drain on the NMB's funds and limited resources necessitated that the NMB consider consolidation of the PLBs for the prompt resolution of these disputes. Id. Further, the NMB, as a steward of public funds, must ensure that there is an efficient use of the taxpayers' monies. Id.

The deadline for a written response was March 22, 2004. Plaintiff and BMW both responded and argued that the NMB lacked the authority under the RLA to consolidate these PLBs. Id. & Att. 32, attached thereto. Plaintiff also took issue with the financial drain that these PLBs cause for the NMB. Id. & Att. 32, attached thereto.

After considering the responses, and concluding that the NMB does have the discretion to order consolidation because of its budgetary power over the arbitration process and PLBs, the NMB ordered consolidation. See id. at ¶47. On April 7, 2004, the NMB ordered the remaining thirty PLBs consolidated into the existing PLB No. 6511<sup>6</sup>— the fourth PLB originally established and docketed May 2, 2002. Id. & Att. 33, attached thereto. In addition to consolidation of the PLBs, the NMB's order set out a lengthy process for the resolution, via continued arbitration, of

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<sup>6</sup> The NMB order erroneously refers to the consolidated PLB as No. 6711. This is a graphical error.

the dispute between Plaintiff and BMW in PLB 6511. Id. This is the order that Plaintiff seeks to enjoin through the pending motion for injunctive relief.

The NMB's order first directed Plaintiff and BMW to select an arbitrator and provided a process to do so in the event that Plaintiff and BMW could not agree. Id. The order then stated that upon the NMB's certification of the arbitrator, the arbitrator would have 30 days to conduct a hearing and issue guidelines governing this dispute. Id. The order then provided that the parties would have 30 additional days to resolve the disputes themselves using these guidelines. Id. Further, the order provides that cases that the parties cannot resolve will be given to the arbitrator who will have another 30 days to issue awards in unresolved cases. Id. Thus, the consolidation order sets out a 90-day process prior to the issuance of any award by an arbitrator. It is this lengthy process that Plaintiff objects to and seeks injunctive relief to block. This consolidation will save the NMB substantial arbitration funds, just as the prior system would have been a great financial drain on the NMB. Id. (describing the costs of the arbitration system employed at pp. 20-21). This savings would allow the NMB to further the vital interest under the RLA of "offering the largest possible set of possible services to the labor organizations and carriers." Id. Furthermore, nothing in this order prohibits the Plaintiff and BMW from establishing as many arbitration panels as they see fit, provided that the parties pay for the costs of arbitration. Id. This is common in the airline industry. Id.

#### **D. Events Subsequent To The Order To Consolidate**

On April 14, 2004, the BMW informed the NMB that the parties were unable to select an arbitrator. Id. at ¶48 & Att. 34, attached thereto. In response, on April 15, 2004, the NMB provided the parties with a list of 11 arbitrators, as the NMB had done in the other cases. Id. &

Att. 35, attached thereto. Additionally, the parties were reminded that at any time they could confer for the purpose of settling these disputes and that such mutual agreement would eliminate the need for the NMB's action. This letter also stated that the NMB would facilitate settlement discussions if possible. Id. & Att. 35, attached thereto.

On April 21, 2004, NMB Board Member Hoglander and Director Watkins met with representatives of Plaintiff and BMW. Id. at ¶49. In these meetings, the NMB offered the agency's mediation services to assist the parties in the resolution of these disputes and that Deputy Chief of Staff Lawrence Gibbons would be available to assist the parties the entire week of May 3, 2004 in mediation. Id. At that time, Plaintiff gave no indication whether it intends to accept the NMB's offer of mediation. Id. BMW agreed to participate if Plaintiff agreed to mediation. Id.

Additionally, Plaintiff and BMW have selected Arbitrator Gerald Wallin to arbitrate the dispute in consolidated PLB 6511. Id. at ¶50 & Att. 36, attached thereto. Given the lengthy process set out in the NMB order and the preexisting requirements on the parties to arbitrate this dispute, the NMB does not view the certification of Arbitrator Wallin as creating any emergency requiring the Court to enjoin the dispute. Nevertheless, the NMB has decided not to proceed with the certification until the close of business on May 7, 2004 and will delay certification until after a hearing if the Court orders a hearing during the week of May 10, 2004. Id. at ¶51 & Att. 37, attached thereto

### **ARGUMENT**

A request for a preliminary injunction or other emergency injunctive relief is an extraordinary remedy and a drastic and unusual measure that "should be sparingly exercised."

Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (internal marks omitted); Marine Transport Lines, Inc. v. Lehman, 623 F. Supp. 330, 334 (D.D.C. 1985). Preliminary injunctive relief should be limited to those situations where a party must act to maintain the status quo in order to prevent immediate and irreparable injury until the lawsuit can be determined on the merits. Sullivan v. Murphy, 478 F.2d 938, 964 (D.C. Cir. 1973). In other words, injunctive relief should not be granted where a party can obtain relief on the merits through the ordinary procedures of the Federal Rules of Civil Procedure without being irreparably harmed. Thus, in the absence of irreparable injury alone, a preliminary injunction may, and should, be denied. CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (holding that where plaintiff “has made no showing of irreparable injury here . . . alone is sufficient for us to conclude that the district court did not abuse its discretion by rejecting” a request for injunctive relief).

It is well established in the District of Columbia Circuit that for Plaintiff to prevail and obtain preliminary injunctive relief that Plaintiff must demonstrate (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir. 1989). “In deciding whether to grant an injunction, the district court must balance the strengths of the requesting party's arguments in each of the four required areas.” CityFed Financial Corp., 58 F.3d at 747. In this case, Plaintiff fails to meet any of these requirements as all the factors tilt in favor of the NMB.

This case is particularly ill-suited for resolution through a preliminary injunction because

Plaintiff can achieve resolution of its complaint through the ordinary procedural route established in the Federal Rules of Civil Procedure without incurring any irreparable harm.

**I. PLAINTIFF HAS NOT DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS**

**A. The NMB's Decision To Consolidate Public Law Boards Due To Funding Considerations Is Not A "Gross Violation" of the RLA, Which Is The Standard Of Review Applicable In This Case**

Plaintiff challenges the NMB's order to consolidate PLBs, which the NMB consolidated based on its financial control over the arbitration process. The NMB relied on, and acted within the scope of, its expressly delegated discretionary budget power over the arbitration process under 45 U.S.C. § 154, Third. The NMB did so in the interests of economy and efficiency.

1. Standard of Review

The NMB is a unique agency and judicial review of any order or decision of the NMB is exceedingly narrow. Thus, in seeking injunctive relief against the NMB in the case at bar, Plaintiff asks this Court to ignore long-standing precedent in the Supreme Court and District of Columbia Circuit. It is well-established in the D.C. Circuit that a court has very limited authority to review the NMB's actions. Since the Supreme Court's decision over sixty years ago in Switchmen's Union v. Nat'l Mediation Bd., 320 U.S. 297 (1943), judicial review of NMB decisions under the RLA has been "one of the narrowest known to the law." Int'l Ass'n of Machinists & Aerospace Workers v. Trans World Airlines, Inc., 839 F.2d 809, 911 (D.C. Cir. 1988). Indeed, the District Court's jurisdiction to review NMB orders is "simply to assure that the Board is acting within its delegated powers and not contrary to a specific prohibition of the enabling statutes." Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 785 F. Supp. 167, 168

(D.D.C. 1991). The Supreme Court reconfirmed this view of review of the NMB's decisions in Ry. Clerks v. Employee's Ass'n. See 380 U.S. 650 (1965). In Railway Clerks, the Court made clear that its rule of non-reviewability applied to the NMB's procedures and all other rules governing representation elections, which the NMB oversees. Id. at 668.

Thus, the D.C. Circuit has held that the applicable standard of review to challenge a determination of the NMB is ordinarily for the Court to take only a "peek at the merits" in order to determine whether the NMB has committed a "gross violation of the [RLA]." See Prof'l Cabin Crew Ass'n v. Nat'l Mediation Bd., 872 F.2d 456, 459 (D.C. Cir. 1989).<sup>7</sup> The reviewing court may not proceed to review the action unless the "peek" reveals an error that is "obvious on the face of the papers as to what the Railway Labor Act should provide." Id. (quoting Ry. Clerks, 380 U.S. at 671.). This general rule of review over the NMB's actions recognizes that courts may invalidate only those NMB actions taken "in excess of its delegated powers and contrary to a specific prohibition of the Act." Ry. Clerks, 380 U.S. at 659-60 (quoting Leedom v. Kyne, 358 U.S. 184, 188 (1958)) (emphasis in original).

As discussed below, the RLA expressly grants the NMB substantial discretion over the funding of the arbitration services it provides. Furthermore, Plaintiff fails to demonstrate that the provisions of the RLA specifically prohibit the NMB from attaching conditions, such as the consolidation of PLBs that share common issues of law and fact, to the funding of the RLA's arbitration services. Because the sections of the RLA that Plaintiff cites say nothing about the NMB's authority to attach conditions to the expenditure of discretionary funds and do not cabin

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<sup>7</sup> For alleged constitutional violations, the D.C. Circuit has held that the "peek at the merits" review does not apply. See US Airways, Inc. v. Nat'l Mediation Bd., 177 F.3d 985, 990 (D.C. Cir. 1999).

the NMB's funding authority, there is no gross violation of the RLA. Indeed, the RLA's silence on the issue means that Plaintiff cannot prevail under this strict standard of review. The NMB's consolidation order must be upheld because it does not constitute a "gross violation of the RLA . . . obvious from the face of the papers." Prof'l Cabin Crew Ass'n, 872 F.2d at 459.

2. The NMB Derives Broad, Discretionary Authority Over The Arbitration Process From Its Expressly Delegated Authority To Fund Arbitration

Whether the NMB's actions constituted a gross violation of the RLA is essentially a matter of statutory interpretation. Where, as here, there is an express delegation of authority that gives the NMB broad powers to fund arbitration functions in its discretion, and there is no converse express and specific prohibition on the NMB's decision to make funding choices, there can be no gross violation of the RLA.

The RLA expressly grants authority to the NMB to fund the arbitration procedures set out in 45 U.S.C. § 153, Second, including the PLBs at issue here. See 45 U.S.C. § 154, Third. In providing this authority to the NMB, Congress chose its words carefully and stated that "[t]he Mediation Board may . . . make such expenditures . . . including expenditures for salaries and compensation . . . as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration . . ." Id. (emphasis added). Further, Congress provided that "[a]ll expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman." Id. (emphasis added). This grant of authority is noteworthy because it delegates substantial discretion to the NMB to make funding decisions.

First, by using the permissive command "may" in defining the NMB's funding authority,

Congress expressly delegated discretion to the NMB that allows the NMB to use its expertise to make difficult funding choices. Second, Congress made it clear that in making these expenditures the NMB was to fund those operations “in accordance with the provisions of . . . section[] 153. . . as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration.” *Id.* (emphasis added). This clause grants the NMB the authority to determine which expenditures “may be necessary” to fulfill the functions of these arbitration services. Moreover, through this clause, Congress clarified that the NMB must consider, as a whole, the overall execution of the functions vested in the NMB itself, the NRAB, and other boards that offer arbitration services. Thus, Congress intended that the NMB should evaluate the costs of the arbitration procedures offered by the NRAB, the SBAs, and the PLBs as a whole in making resource allocation decisions. The NMB can accomplish this goal only if it has the discretion to fund some arbitration activities over others. Furthermore, if the NMB can fund some arbitration services over others, then the NMB must be able to attach conditions to funding, provided that the NMB determines, using its expertise, that the conditions are “necessary for the execution of the functions” of the arbitration entities. *Id.* Finally, Congress granted the NMB’s chairperson the authority to approve expenditures and stated that the NMB chairperson’s approval is necessary for the expenditure to be paid. *Id.* This further clarifies that the NMB is the ultimate authority when it comes to the discretionary funding of arbitration services.

Further, the few courts that have considered the NMB’s funding powers have all concurred that the NMB’s funding powers are quite broad. In Railway Labor Executives’ Ass’n v. National Mediation Board, an association of representative of labor unions challenged the

NMB's decision to discontinue funding for office space used by the association. 583 F. Supp. 279, 280 (D.D.C. 1984), aff'd 757 F.2d 1342 (D.C. Cir. 1985). Essentially, the labor association argued that the RLA required the NMB to fund office space for the association, but the Court disagreed. Citing 45 U.S.C. § 154, Third, and other RLA provisions, Judge Parker determined that there was no mandatory funding requirement because "Congress gave the NMB considerable latitude" to determine whether to provide office space. Id. at 281. As the Court recognized, "[i]f Congress had intended to prevent the NMB from exercising . . . discretion, it could have imposed such a requirement in clear and uncertain terms." Id. Likewise, in another funding dispute between the Railway Labor Executives Association and the NMB, Judge Gesell considered, and rejected, the RLEA's claim that the NMB was obligated to pay neutrals in a particular way. See Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 785 F. Supp. 167, 167-68 (D.D.C. 1991). The court reasoned that the RLA lacked a clear statutory directive on the matter and that the NMB's funding discretion controlled in the absence of such express limitations on that discretion. Id. at 169 (recognizing that a change in the NMB's funding policies was "rational and in the Board's discretion" because of "budgetary constraints" that change the NMB's allocation of resources); see also Am. Train Dispatchers Ass'n v. Nat'l Mediation Bd., 1992 WL 336734, at \*2 (D.D.C. 1992) (Lamberth, J.) (refusing to enjoin an NMB's refusal to fund staff positions because the NMB had "discretion" over funding the positions).

Indeed, Plaintiff's challenge is identical in many ways to the challenges to funding decisions that the District Courts have repeatedly rejected. Plaintiff's challenge to the NMB's discretion amounts to a claim that the PLBs must be funded in a way that Plaintiff and BMW decides and that the NMB's role is only a "ministerial" role. The problem for Plaintiff, however,

is that there is no express statutory language that requires one particular funding of the arbitration process. In the absence of an express statutory command that acts to cabin the discretion of the NMB, the NMB's broad discretion over funding controls. Because there is an express provision giving the NMB funding authority, the NMB has jurisdiction to act and use its discretion absent an express statutory bar in the RLA that prohibits the exercise of its funding discretion.

In the case at bar, the NMB's order merely exercised the considerable discretion that Congress gave to the NMB. The NMB cited the appropriate statutory provision in its order to consolidate and the NMB had sound reasons, such as economy, the efficient use of taxpayer funds, expedited resolution of a long-standing grievance, and the desire to use consolidation as a tool to free up resources that will pay for other arbitration services. See NMB's consolidation order at Att. 33 to Watkins Decl. & Watkins Decl., at ¶47. All of these reasons further Congress' purpose in enacting the RLA. Given the reasoning in the order, the NMB's reasonable interpretation of 45 U.S.C. § 154, Third, and the absence of an express and specific statutory limitation on the NMB's power to make funding decisions, it should be plain that there is no gross violation of the RLA and that the NMB's order should be upheld.

Due to the breadth of Congress' grant of authority to the NMB, no gross violation of the RLA can be shown when the NMB exercises the funding discretion that Congress authorized to consolidate PLBs in the interests of economy and efficiency.

### 3. Plaintiff Has Not Established A "Gross Violation" Of The RLA

Plaintiff makes several arguments that the NMB's order had the effect of violating some provision of the RLA. Pl.App. at 11-18. However, Plaintiff points to absolutely no provision in the RLA that specifically prohibits the NMB from exercising its discretion to attach conditions to

the funding of arbitration services. Indeed, no such provision exists. In the absence of such a specific prohibition that constrains the NMB's discretion, Plaintiff cannot meet its burden of showing that the NMB committed a gross violation of the RLA, particularly given Congress' broad grant of authority discussed above.

Plaintiff's reliance on the D.C. Circuit's holding in Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655 (D.C. Cir. 1994) (en banc), is misplaced. In Railway Labor Executives' Ass'n, the D.C. Circuit concluded that the NMB's promulgation of merger procedures constituted a "gross violation" of the RLA, because the NMB could "point to no other provision in the RLA giving it the authority to promulgate the Merger Procedures" in question and the RLA's plain text "compel[led]" the a conclusion that the NMB's interpretation of the particular statutory provision was wrong. See 29 F.3d at 659-60. However, the situation presented in this case is distinguishable. Here, the NMB bases its order on a provision of the RLA – 45 U.S.C. § 154, Third, – that gives the NMB authority over the matter in question.<sup>8</sup>

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<sup>8</sup> The NMB also has the implied authority to consolidate PLBs in the interests of economy and efficiency, because it furthers Congress' purpose in drafting the RLA. Administrative agencies, such as the NMB, have implied power that is reasonably necessary in order to carry out the powers Congress has expressly granted. Am. Trucking Ass'n v. United States, 344 U.S. 298, 309-10 (1953) (recognizing that an agency may issue decisions or rules based on a grant of implied power from Congress). Indeed, when relying on an express delegation of authority, an agency may also act on implied authority. See Ry. Labor Executives' Ass'n, 29 F.3d at 670-71 (holding that an agency may only act based on "the delegation of authority, either express or implied, from the legislature." (emphasis added). But the NMB must be able to link an assertion of authority to a statutory provision Id.

Here, the NMB links its assertion of authority to consolidate cases to a express statutory provision – 45 U.S.C. § 154, Third – that provides the NMB with discretionary budgetary power over the arbitration process. With a delegation of discretion comes some implied authority to allow the NMB to fulfill its statutory purpose under the RLA and further the purposes that Congress has set forth in the statute. Consolidating PLBs furthers the purpose of the RLA, because the parties may resolve all grievance with respect to an issue without repeated

Plainly, the reasoning of the D.C. Circuit in Railway Labor Executives' Ass'n does not apply.

Moreover, the NMB's order did not amount to a gross violation of the provisions of the RLA that Plaintiff cites. First, Plaintiff seems to argue that the NMB violated the RLA by establishing a PLB. Pl.App. at 11. However, PLB 6511 was a PLB established and docketed May 2, 2002 and the NMB did not create it, so there cannot be a gross violation with respect to this claim. Second, Plaintiff asserts that the NMB has no authority to cancel PLBs, but as the Watkins Declaration shows, cancellation of PLBs is commonplace and is a frequent practice with over 300 PLBs cancelled in the last two fiscal years alone. Watkins Decl., at ¶9. Plaintiff also argues that the NMB's order "effectively abrogates the requirement that each PLB issue a written decision," but that is not the case. Pl.App. at 15. But the NMB order does require one-page awards that the NMB expects will incorporate a decision of some sort. See id. at ¶47 & Att. 33, attached thereto. That Plaintiff is dissatisfied with the form of the award does not mean that the award will not be written. Plaintiff's other asserted violations of the RLA address who has the authority to take various actions. However, none of these statutory sections place a specific and express restriction on the NMB's discretionary funding power. In the absence of such a specific restriction on the NMB's funding power, there is no gross violation of the RLA. Ry. Clerks, 380 U.S. at 659-60; see also Prof'l Cabin Crew Ass'n, 872 F.2d at 459.

In sum, Plaintiff's assertions that the NMB grossly violated the RLA is without merit. At most, the RLA is silent on whether the NMB may act using its funding discretion to attach

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arbitrations dealing with the similar issues. See 45 U.S.C. § 151(a). Additionally, by consolidating the PLBs, the NMB may use those saved resources to offer more arbitration services in a given fiscal year than it could otherwise, see Watkins Decl., at ¶47, which is plainly consistent with the statute. See 45 U.S.C. § 151a.

conditions, such as consolidation, to the funding of arbitration services. The silence of the RLA on the subject proves that Plaintiff cannot establish a gross violation of the RLA. In this case, the NMB acted through the express authority that Congress delegated to it to use its discretion to manage the arbitration services offered in the railroad industry. Because the NMB draws its authority from an express delegation of authority and there is no clear contrary provision prohibiting the NMB's consolidation, Plaintiff cannot establish a gross violation of the RLA.

4. The NMB's Statutory Interpretation Is Entitled To Deference

Because of the NMB's role in administering the RLA and because 45 U.S.C. § 154, Third, is in the NMB's enabling statute, the Court should accord deference to the NMB's interpretation of the RLA. United States v. Mead Corp., 533 U.S. 218, 235 (2001) (“[A]n agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.”). Whatever the form of deference accorded, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer,” taking into account such factors as the agency’s expertise and the complexity of the statutory scheme. Id. at 227-28. At the very least, NMB’s statutory interpretation is entitled to Skidmore deference, because of the NMB’s specialized expertise in the field and the complexities of the RLA.<sup>9</sup> Id. at 235. Applying Skidmore deference, the NMB’s statutory interpretation is “entitled to respect” to the extent that it has the “power to persuade.” See Christensen v. Harris Co., 529

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<sup>9</sup> Chevron deference may even be appropriate. See Public Citizen, Inc. v. Dep’t of Health & Human Servs., 332 F.3d 654, 661-62 (D.C. Cir. 2003) (stating that Chevron deference may be appropriate where the agency’s decision contains sufficient reasoning).

U.S. 576, 587 (2000). Clearly, the NMB's interpretation of its broad budgetary authority has significant power to persuade, particularly in the absence of an express and specific prohibition on the NMB's power to attach conditions such as consolidation to its funding or make discretionary budgetary decisions. Cf. Ry. Labor Executives' Ass'n, 785 F. Supp. at 168-69 (describing the NMB's power over the purse). The NMB's statutory interpretation is not only reasonable, it also furthers Congress' purpose of the "prompt and orderly settlement" of disputes between carriers and unions that led to the passage of the RLA.

On the contrary, Plaintiff's suggested interpretation – that the NMB has absolutely no discretion to use its budget power to manage the arbitration process – is far less reasonable than the NMB's. Indeed, if Plaintiff is correct, then the parties, not the NMB, would hold the purse strings for the arbitration process, and therefore, the NMB arguably could never modify or condition arbitration in any case. This makes no sense under the statutory scheme, particularly given the fact that the demand for arbitration far exceeds the resources available to provide arbitration services. Moreover, there is no textual support for such a broad delegation of budgetary power from Congress to a non-governmental entity. Plaintiff's interpretation would frustrate Congress' purpose. Because the NMB's consolidation order is reasoned, consistent with the RLA's provisions, and furthers congressional intent, the Court should grant deference to the NMB's statutory interpretation.

When this Court takes a "peek at the merits," it is evident that the NMB's consolidation decision based on its discretionary funding authority over arbitration activities does not amount to a "gross violation" under the RLA, and hence must be upheld. As Plaintiff cannot demonstrate substantial likelihood on the merits, the requested injunctive relief should be denied.

**B. If The Court Had Jurisdiction To Review The NMB's Decision Under The APA, The NMB's Decision Nevertheless Should Be Upheld**

Plaintiff suggests that “a case can be made” that the NMB’s action is subject to “traditional review” under the APA. See Pl.App. at 8. The NMB disagrees with the proposition that its action here would be reviewable under the APA’s standards. First, NMB decisions ordinarily are reviewed under the “gross violation” standard. See, e.g., Ry. Clerks, 380 U.S. at 659-60; Prof'l Cabin Crew Ass'n, 872 F.2d at 459; Int'l Ass'n of Machinists & Aerospace Workers, 839 F.2d at 911; Ry. Labor Executives' Ass'n, 785 F. Supp. at 168; see also Part I.A.1, supra; but see Ry. Labor Executives' Ass'n, 29 F.3d at 671-73 (Randolph, J. concurring) (arguing that APA review should apply to all review of the NMB’s actions). Second, in any event, the NMB’s action is “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2).

The manner in which an agency distributes an appropriation, like that at issue here, is just the kind of a discretionary act and is not judicially reviewable under the APA. The Supreme Court has recognized that decisions regarding the allocation and use of an agency’s appropriated funds are particularly inappropriate for judicial review. See Lincoln v. Vigil, 508 U.S. 182, 192-94 (“[T]he very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.”). “A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit.” Int'l Union v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984). Indeed, where there is no specific statutory prohibition on the funding decision, there is no jurisdiction to review the matter under the APA as it is committed to agency discretion. Id. at 863. Thus, as long as the agency

acts under a lump-sum appropriation “to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude.” Lincoln, 508 U.S. at 193.

Here, as in Lincoln, Plaintiff challenges the allocation of a lump-sum appropriation and the agency’s discretionary decision to allocate limited resources in a manner to efficiently manage arbitration programs under Section 3 of the RLA as a whole. See Watkins Decl., at ¶47. Indeed, the NMB specifically allocates approximately two million dollars for arbitration services per year and Congress leaves it to the NMB to administer and pay for those arbitration programs, which amount to approximately 18.5 percent of the NMB’s total budget. Id. at ¶9. Congress has provided in the RLA that the NMB’s funds for arbitration services should be dispersed according to its discretion and that the NMB “may” make expenditures necessary for arbitration activities. 45 U.S.C. § 154, Third. In order to best effectuate congressional intent in promoting prompt settlement of disputes and the agency’s own policies as well as preserve scarce budgetary resources, the NMB decided to require consolidation of similar PLBs. See Watkins Decl., at ¶47. Because of its expertise, the NMB “is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” Id. at 193 (citing Heckler v. Chaney, 470 U.S. 821, 831-32 (1985)).

Moreover, even if the NMB’s order were reviewable under the APA’s ordinary standards, the NMB’s decision would not violate it.<sup>10</sup> In sum, Plaintiff has not demonstrated a substantial

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<sup>10</sup> The APA directs courts to set aside an agency’s decision only when the record demonstrates that the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The APA standard accords great deference to agency decisionmaking, and the agency’s action enjoys an initial presumption of validity. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). Under this standard of review, the court simply determines whether the agency action constitutes a clear error in judgment after considering the relevant factors and only then is the action arbitrary and

likelihood on the merits. Rather, the NMB is likely to succeed on the merits.

## **II. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM THAT WOULD JUSTIFY THE ISSUANCE OF A PRELIMINARY INJUNCTION**

Plaintiff asks this Court to enjoin the implementation of the NMB's consolidation order. But the NMB's consolidation order does not irreparably harm Plaintiff because: (i) the order simply requires Plaintiff to enter into arbitration with BMW, which is not irreparable harm, and the NMB has agreed that Plaintiff does not waive its right to challenge the order through its participation in arbitration; (ii) Plaintiff had already begun the arbitration process with these issues with BMW; (iii) if Plaintiff is correct that NMB's order violated the RLA, then the order was void ab initio and is a legal nullity, meaning that after the Court decides the merits, Plaintiff will be in the same position as it was prior to consolidation; and (iv) there is no reason Plaintiff cannot seek declaratory or final injunctive relief because of the 90-day process the order sets out. In sum, Plaintiff objects to the process of arbitration that the NMB's consolidation order set forth, but Plaintiff may seek a remedy through the ordinary procedures of the Federal Rules of Civil Procedure. Plaintiff's invocation of Rule 65 is simply an attempt to have the merits of this action heard on an expedited basis.

The quintessential basis of injunctive relief in federal courts has "always been irreparable harm and inadequacy of legal remedies." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). In other words, irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction."

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capricious. See Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir.1997). For the reasons already discussed above, see supra Part I.A, and in the Watkins Declaration, see Watkins Decl., at ¶¶ 9, 46-47 & Atts. 31 & 33, attached thereto, the NMB's decision to consolidate was not contrary to law and was not arbitrary or capricious.

Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983) (quotation omitted). Indeed, in the absence of a showing of irreparable injury alone, a preliminary injunction may be denied. CityFed Financial Corp., 58 F.3d at 747 (holding that where plaintiff “has made no showing of irreparable injury . . . that alone is sufficient for us to conclude that the district court did not abuse its discretion by rejecting” a request for injunctive relief). Discussing what amounts to irreparable harm, the D.C. Circuit has held that “[m]ere injuries, however, substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958); Moore v. Summers, 113 F. Supp.2d 5, 24 (D.D.C. 2000). Moreover, the fact that “adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.” Va. Petroleum Jobbers Ass’n, 259 F.2d at 925. For an alleged injury to be irreparable, “it must be both certain and great” and “actual and not theoretical.” Wisconsin Gas Co., 758 F.2d at 674.

Here, Plaintiff’s moving papers demonstrate that there is no immediate or irreparable injury caused by the NMB’s ordered arbitration process. Plaintiff claims that without injunctive relief it will suffer irreparable injury. See Pl.App. at 21-25. Yet Plaintiff’s moving papers basically fail to identify tangible actual harm to Plaintiff, irreparable or not. See id. at 21-22, 24-25. And when Plaintiff actually discusses the harm caused by the NMB’s order, the claimed injuries, even if assumed arguendo to exist, are not irreparable injury. Plaintiff has no immediate or irreparable injury through the consolidated arbitration process that the NMB ordered because any injuries to Plaintiff as a result of the NMB’s order are “mere injuries . . . in terms of money, time and energy.” See Va. Petroleum Jobbers Ass’n, 259 F.2d at 925

Indeed, Plaintiff's claimed injuries typify what the D.C. Circuit recognized as "mere injuries" that are not irreparable. The injuries Plaintiff actually cites are injuries such as "delay," "time and expense of participation in arbitration," "potential growing liability," and "significant money, effort and time." *Id.* at 23-24. However, none of these asserted injuries rise above "mere injuries" to the level of irreparable injury needed for injunctive relief. Indeed, for over forty-five years the D.C. Circuit and the District Court of the District of Columbia have expressly rejected claims that these injuries, because of their character, are irreparable. *See, e.g., Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925; *Moore*, 113 F. Supp.2d at 24. In short, injunctive relief is not warranted and should not be granted based on the injuries Plaintiff asserts.

At this point, it is worth emphasizing that the practical effect of the NMB's order is simply to require arbitration of a dispute, where the parties have already agreed to, and have engaged in, arbitration. *See Watkins Decl.*, at ¶¶14-16. While Plaintiff has complaints about the process, that is insufficient to grant injunctive relief. Indeed, many courts have held that the various costs of arbitration, in private disputes, do not amount to irreparable harm and do not form a sufficient basis to grant injunctive relief. For instance, the Seventh Circuit has flatly rejected the claim that the costs of arbitration create irreparable harm. *AT & T Broadband, LLC v. Int'l Brotherhood of Electrical Workers*, 317 F.3d 758, 762 (7th Cir. 2003) (holding that there is no irreparable injury due to arbitration costs and "there is no justification for an injunction" as "the expense of adjudication is not irreparable injury"); *see also Graphic Communications Union, Chicago Paper Handlers' & Electrtypers' Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (rejecting a stay pending appeal based on the argument that arbitration creates irreparable harm). Likewise, the Second Circuit has held that "[t]he monetary cost of arbitration

certainly does not impose . . . legally recognized irreparable harm.” Emery Air Freight Corp. v. Local Union 295, 786 F.2d 93, 100 (2d Cir. 1986) (reversing an order enjoining arbitration); accord Abernathy v. Southern Cal. Edison, 885 F.2d 525, 529 (9th Cir. 1989). The D.C. Circuit also appears to have rejected the view that arbitration creates the sort of irreparable harm needed for an injunction. See In re District No. 1, 723 F.2d 70, 78 (D.C. Cir. 1983) (rejecting the notion that irreparable harm flows from an agreed upon arbitration situation). The principle that arbitration does not cause irreparable harm<sup>11</sup> is so blatantly obvious that the Seventh Circuit has held “it [is] sanctionably frivolous to seek an anti-arbitration injunction.” AT & T Broadband, LLC, 317 F.3d at 762 (citations omitted) (emphasis added). This principle acts identically in disputes over arbitration with an agency because the claimed harm caused by arbitration is identical.

Aside from Plaintiff’s complete failure to allege any injury that is irreparable, two other considerations make it apparent that Plaintiff can pursue its legal remedy in this Court. First, the NMB order sets out a 90-day process before any award will issue. See Watkins Decl., at ¶47 & Att. 33. The parties presumably can fully brief this dispute prior to the conclusion of the 90-day process. Second, there is no irreparable or imminent harm because of the nature of Plaintiff’s challenge. Plaintiff alleges that the NMB’s consolidation order is unlawful under the RLA. Id. Assuming arguendo that the NMB’s order was an ultra vires action, then it must be the case that the order was void ab initio and is a legal nullity that had no effect. If so, then the consolidation

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<sup>11</sup> The only exception to this principle are those cases where the dispute is not subject to arbitration at all. See McLaughlin Gormley King Co. v. Terminix Int’l Co., L.P., 105 F.3d 1192, 1194 (8th Cir. 1997). However, as Plaintiff readily concedes, Pl. App. at 21-22, this dispute is absolutely subject to arbitration as a minor dispute under Section 3 of the RLA. Thus, this line of cases, and the exception to the general principle, is inapplicable.

would be vacated and the separate PLBs that Plaintiff prefers would proceed to arbitrate the dispute. If, however, the NMB is correct on the merits, as argued above, then Plaintiff is not entitled to injunctive relief. Either way injunctive relief is inappropriate.

Plaintiff's attempt to use Rule 65 for an expedited decision on the merits should be rejected. Because there is no showing of irreparable harm, this Court should deny Plaintiff's request for injunctive relief. CityFed Financial Corp., 58 F.3d at 747

### **III. A PRELIMINARY INJUNCTION WOULD CAUSE SUBSTANTIAL HARM TO THE NMB AND OTHERS**

This Court should deny the injunctive relief requested because the entry of such relief would work a substantial hardship on the NMB and the BMW, whereas the harm to Plaintiff is, at most, minimal by comparison. Moreover, while Plaintiff's alleged injury is, in large measure, speculative and contingent upon the outcome of arbitration, the injury to the NMB by the grant of injunctive relief is concrete.

Current federal budgetary pressures require the NMB, as the steward of taxpayer funds, to ensure that the limited resources available to it be used to achieve maximum productivity in the arbitration process. See Watkins Decl., at ¶¶9, 47. As indicated in the Watkins Declaration, the consolidation of PLBs that share common issues of law and fact could result in substantial recurring annual savings in NMB operations that go toward the payment of neutrals. Id. at ¶47. Indeed, the Douglas Arbitration alone that resolved only eight grievances and one PLB cost the NMB \$18,600 in operating costs. Id. at ¶14. If the other individual PLBs required similar resources, the cost of even the existing PLBs on this issue could reach over \$500,000. Id. at ¶46 & Att. 31. Moreover, the consolidation of PLBs will save the NMB significant funds that can be

used for other arbitration services. See id. at ¶47 at pp. 20-22.

From a practical standpoint, therefore, by consolidating these PLBs, the NMB is simply taking reasonable steps to promote efficiency in fulfilling its responsibilities under the RLA. If an injunction were issued and the NMB were prevented from carrying out the consolidation, it would require the NMB to allocate its finite resources in a manner inconsistent with its statutory duties under the RLA, by eliminating projected cost savings and undermining the efficiency of NMB arbitration activities. Id. at ¶¶9, 47. As discussed above, the NMB, like most federal agencies, enjoys substantial latitude in its funding decisions and Congress, in the NMB's enabling statute, has indicated that the NMB does have broad discretion in funding and attaching conditions, such as case consolidation to that funding. See 45 U.S.C. § 154, Third; see also supra Part I. Enjoining the consolidation order would impair the NMB's discretion over such funding matters and would greatly impact the NMB's authority to consolidate PLBs and would amount to greater funding costs for the NMB and reduced arbitration services that the NMB could offer. This would unquestionably harm the NMB.

In addition, the BMW and its members who have grievances over the subcontracting issue would be harmed if the Court entered an injunction. This dispute between Plaintiff and the BMW over subcontracting has been pending for over four years and after two years of snail-like progress of arbitration there has been little resolution of the grievances. Watkins Decl., at ¶¶10-15. Indeed, only sixteen grievances have been resolved on two PLBs during this time, with more grievances being added to new PLBs. Id. at ¶¶14-15 & 46. Consolidation of these PLBs, which share common issues of law and fact, promises a prompt resolution of the dispute, which is in the best interest of both Plaintiff and the BMW. Finally, in no case cited by Plaintiff, or found by

the NMB, has a court ever ordered the NMB to terminate one form of arbitration in favor of another form of arbitration. This is due to the strong deference owed to the NMB and the courts limited authority to review the NMB decisions in managing disputes among the parties. Cf. Local 808, 888 F.2d at 1433 (reversing the District Court’s attempt to halt mediation).

#### **IV. DENIAL OF THE MOTION FOR INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST**

Even where a Plaintiff has made the required showing of imminent and irreparable injury, preliminary relief may be withheld where its issuance would be contrary to the public interest. Yakus v. United States, 321 U.S. 414, 440-41 (1944). This public interest factor is “uniquely important” to a court’s analysis. Nat’l Ass’n of Farmworkers Organizations v. Marshall, 628 F.2d 604, 616 (D.C. Cir. 1980).

Here, the issuance of an injunction would unquestionably harm the public interest for several reasons. First, as discussed above, there is a strong public interest in the efficient and economic use of taxpayer funds. The NMB acted as a guardian of that public interest by ordering the consolidation of these PLBs in the interest of efficiency and economy. As the Watkins Declaration explains, the NMB’s resources that it spends on arbitration services such as PLBs is limited. Watkins Decl., at ¶9. Further, the NMB’s grievance arbitration funds are in a pool of the NMB’s total budget and are not designated as separate PLB, SBA or NRAB funds. Id. The funds necessary to resolve all the cases on the NMB caseload far exceeds the NMB’s arbitration budget. Id. Thus, the cost of PLBs are to the detriment of NMB’s other arbitral functions. See id. Indeed, budgetary limitations cause the NMB to limit arbitral operations under 45 U.S.C. § 153. For instance, during the last two months of Fiscal Year 2003, the NMB limited activities

under 45 U.S.C. § 153 due to the unavailability of funds and only funded portions of those activities. See id. & Att. 2, attached thereto. Thus, enjoining the consolidation of these PLBs, which share common issues of law and fact, will require the NMB to fund all of the unconsolidated PLBs. This will reduce the total number of neutral arbitrators that the NMB will be able to employ and reduce the availability of arbitration activities under the RLA. Id. at ¶47.

Moreover, the NMB's order furthers Congress' stated public policy in the RLA. Congress passed the RLA and created the NMB to effectuate the "prompt and orderly settlement" of labor-management disputes in the railroad industry to prevent interruptions in interstate commerce. See 45 U.S.C. § 151a. By consolidating the existing PLBs on the underlying subcontracting issue, the NMB has attempted to encourage a prompt settlement of an issue that has not been promptly resolved after four years of legal dispute and over two years of arbitration of through individuals PLBs. Watkins Decl., at ¶¶10-15. Prompt arbitration of the underlying dispute, which the NMB order mandates, will effectuate Congress' stated public policy in passing the RLA. Thus, enjoining the NMB's order, thereby preventing the NMB from implementing a more efficient and economic arbitration process, would frustrate Congress' purpose and the public interest.<sup>12</sup>

Thus, it is clear that in the overall scheme of arbitration under the RLA, the luxury of individual PLBs, which each deal with common issues of law and fact arising out of the same dispute, must yield to the need to achieve maximum productivity in the arbitration process given

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<sup>12</sup> Additionally, Congress has repeatedly recognized that the public interest favors mediation and arbitration in the resolution of labor-management disputes that cautions against injunctive relief while arbitration is continuing. See generally, 29 U.S.C. §§ 101, 108; Federal Arbitration Act, 9 U.S.C. §§ 1, et seq.

the finite resources currently available to the NMB.<sup>13</sup> The NMB's order furthers the public interest.

**CONCLUSION**

For the foregoing reasons, the Defendant respectfully requests that the Court deny Plaintiff's motion for a preliminary injunction.

Dated April 30, 2004

Respectfully submitted,

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<sup>13</sup> Plaintiff and BMW may, however, have as many arbitration panels as they choose to provided that they pay for the costs of arbitration. Watkins Decl., at ¶47. The NMB's funds, however, come with conditions because the NMB must administer ensure the health of the entire set of arbitration services offered. Id.