

FINAL DRAFT - September 21, 2004

NATIONAL MEDIATION BOARD

NMB DOCKET NO. 2003-01N

NOTICE OF PROPOSED RULE MAKING

**COMMENTS AND REQUEST FOR A HEARING OF
THE RAIL LABOR DIVISION OF THE
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO**

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A. Introduction

These comments of the Rail Labor Division of the Transportation Trades Department (RLD), AFL-CIO, and its affiliated organizations¹ are being filed consistent with the Federal Register notice of proposed rulemaking dated August 9, 2004. 69 Federal Register 48177.

Because of the importance of these matters, the RLD hereby requests that the NMB holds a hearing on the proposed rules. It is noted that the hearing held on December 19, 2003, dealt with the six questions posed by the NMB in its notice of November 26, 2003. No hearing has as yet been held on the proposed rule in the ANPRM of August 9, 2004.

The proposed new rules provide, inter-alia, 1) the establishment of fees for arbitration services; 2) that the parties and referees must adhere to a time schedule established by the NMB or the referee's fees will not be paid; and 3) that the Director of Arbitration Services may consolidate the arbitration of minor disputes.

If the NMB adopts the proposed rules requiring fees for the several ministerial functions it performs in connection with the statutory arbitration scheme, the Board will be negating an historic arrangement which is the foundation for a seventy year labor relations regime in the industry, and the predicate for the prohibition against strikes over "minor disputes". In

Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co., 353 U.S. 30 (1957)

("Chicago River") the Supreme Court found that in the 1934 amendments to the Railway Labor

¹These organizations are: American Train Dispatchers Association; Brotherhood of Locomotive Engineers and Trainmen, IBT; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; National Conference of Firemen and Oilers SEIU; Sheet Metal Workers International Association; Transportation•Communications International Union; Transport Workers Union of America.

Act (“RLA”), Rail Labor had agreed to forego strikes over contract interpretation disputes in return for mandatory, final and binding, government-paid arbitration.

By now imposing fees on that process, despite the absence of statutory authority to do so, seventy years of practice to the contrary, and the refusal of Congress to create such a requirement when it has re-visited this issue since 1934, the Board would be acting in excess of its authority. Moreover, the Board would be undercutting a key element of the statutory scheme, and undermining the rationale for the interpretation of the Act in Chicago River. The RLD urges the Board to step back from this precipice, to refrain from exceeding its authority and from fundamentally altering labor relations in the railroad industry.

We begin our analysis by demonstrating that the RLA does not authorize the NMB to adopt procedural rules for the National Railroad Adjustment Board (NRAB), Public Law Boards (PLB’s), or Special Boards of Adjustment (SBA’s).² We will demonstrate that the proposed rules conflict with the RLA and with express statements in the legislative history of the 1934 amendments that were relied on by the Court in Chicago River as justifying the conclusion that courts could enjoin strikes in minor disputes. We will also show that the Courts have repeatedly rejected arguments that the Board possesses plenary authority or a general interpretative role under the RLA. Detroit and Toledo Shore Line Railroad v. United Transp. Union, 396 U.S. 142, 158-159 (1969) (“Shore Line”); Chicago & North Western Transp. Co. v. UTU, 402 U.S. 570, 580 (1971)(“CNW v. UTU”); and Railway Labor Execs. Ass’n. v. NMB, 29 F.3d 655, 670 (D.C. Cir. 1994).

²The terms SBA and PLB are used interchangeably to refer to boards created under the second paragraph of 45 U.S.C. § 153, Second. We will use the term PLB to cover both PLB’s and SBA’s.

We will demonstrate that authority for adoption of procedural rules for the NRAB is vested in the NRAB, not the NMB. And we will show that the NMB's reliance on the general authority to make various expenditures, contained in Section 4, Third of the RLA is misplaced, and that this claim is belied by the plain meaning of the RLA, its legislative history, and seventy years of experience in applying the Act.

B. **The NMB Has Exceeded Its Authority In the Proposed Rules Which Are Contrary to the Railway Labor Act.**

The RLA explicitly provides that the NRAB, not the NMB, has the authority to adopt procedures for arbitration, 45 U.S.C. § 153 First (v), and that the NMB “shall” pay the compensation for referees serving on the NRAB, and public law boards, 45 U.S.C. § 153, First (l), and 45 U.S.C. § 153, Second. The RLA does not provide that the NMB can charge fees for arbitration services, and the NMB's responsibility to pay the compensation of referees is not conditioned upon either the referee or the parties adhering to a timetable established by the NMB.

For seventy years, since the RLA was amended in 1934, the NMB has not attempted to promulgate rules of procedure for the NRAB, and, until now, has accepted that it lacked authority to do so. The proposed rules represent a radical departure from this lengthy history, the plain meaning of the RLA and its legislative history. As the RLD and the National Carriers Conference Committee (NCCC) stated in their comments in response to the NMB ANPRM of August 3, 2003, these proposed rules are beyond the scope of the NMB's authority.

We set forth below a detailed analysis of the RLA, its legislative history, and its application.

1. The 1934 Amendments to The Railway Labor Act.

- a. The 1934 amendments were passed as a compromise in which rail labor agreed to forego strikes over minor disputes in return for mandatory, final and binding, Government-paid, arbitration before the NRAB.**

In 1934 Federal Transportation Coordinator Joseph Eastman sponsored an amendment to the 1926 Railway Labor Act. Coordinator Eastman was identified by the Chicago River Court as the “principal draftsman of the 1934 bill,” and his testimony was cited in that decision. (353 U.S. at 37) Among his proposals was the establishment of a national board of arbitration known as the National Railroad Adjustment Board. That proposal was designed to cure problems under the 1926 Act, which called upon carriers and labor organizations to form boards of adjustment consisting of an equal number of members to resolve minor disputes. Under the 1926 Act, the parties had often been unable to agree on the establishment of such boards. In that event, minor disputes were submitted to the Board of Mediation, the predecessor of the National Mediation Board. However, under the 1926 Act, the Board of Mediation had no means of compelling arbitration, and thousands of unresolved cases remained on its docket. Under the 1926 Act, even when the parties agreed to establish boards, there was no means to require partisan members to select an arbitrator. As a result, thousands of cases were deadlocked with no means of resolution. See, Brotherhood of Railway Trainmen v. Chicago River, 353 U.S. 30, 35-37 (1957).

The 1934 amendment required that unresolved grievances or minor disputes be submitted to the NRAB. Coordinator Eastman testified that this provision was perhaps “the most important part of the bill” and that, in agreeing to compulsory arbitration before the NRAB, rail labor had made “a very important concession.” Hearings Before the Committee on Interstate Commerce, U.S. Senate 73rd Congress, 2nd Session, on S. 3266, April 10, 1934, at p. 13 (referred

to as Hearings on S. 3266).

As noted above, under the 1926 Act, arbitration was not compulsory. Rail unions were free to strike over minor disputes, and regularly threatened to do so. Brotherhood of Railway Trainmen v. Chicago River, 353 U.S. at 36. During his Congressional testimony, George Harrison, then Chairman of the Railway Labor Executives Association, made clear the nature of the concession to which Coordinator Eastman testified:

These railway labor organizations have always opposed compulsory determination of their controversies. We have lived a long time and got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and which we have the right and privilege of entering into and have something to say about their terms, we are now ready to concede that we can risk having our grievances go to a board and get them determined and that is a contribution that these organizations are willing to make.

Mr. Harrison went on to testify that, unless the entire bill was passed, rail labor was unwilling to make this concession:

I just want to tie this tail on to that kite – if I may express it that way – that if we are going to get a hodgepodge arrangement by law, rather than what is suggested by this bill, then we don't want to give up that right, because we gave up the right because we feel that we will get a measure of justice by the machinery that we suggest here.

Hearings on S. 3266, April 10, 1934, at p. 35. The Chicago River Court cited Mr. Harrison as the chief spokesman for Rail Labor and quoted his testimony linking the arbitration scheme created under the 1934 amendments to the relinquishment of the ability to strike over minor disputes. (353 U.S. at 38-39)

The compromise was clearly understood by the principals and explicitly placed before Congress: labor was giving up the right to strike over minor disputes in return for the full panoply of rights in the 1934 amendments to the RLA. As recognized by the Supreme Court, the Congressional record “is convincing that there was general understanding (between both the

supporters and the opponents of the 1934 Amendments) that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field.” See, Brotherhood of Railway Trainmen v. Chicago River, 353 U.S. at 39. A piecemeal enactment of the proposed amendments would have been opposed by rail labor.

It was equally clear that the Federal Government, as part of this compromise, would pay for the arbitrations. Chairman Eastman testified to that effect. In testimony before the House Committee on Interstate and Foreign Commerce on May 22, 1934, he stated:

...the expenses of that National Board outside of the compensation of the members appointed by the two parties, respectively, would be borne by the Government.

Hearings on S. 3266, April 12, 1934, at p. 154. In testimony before the House Committee on Interstate and Foreign Commerce on May 22, 1934, he stated:

Well so far as the members of the Adjustment Board are concerned, those who are selected by the carriers will be paid by the carriers, and those who are selected by the labor organizations will be paid by the labor organizations. The neutral member, when one becomes necessary, will be compensated by the Government and it is my recollection that other expenses are taken care of by the Government.

House of Representatives, Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess., on H.R 7650, May 22, 1934, at p. 51.

We also note that the then Chairman of the United States Board of Mediation, Samuel Winslow, testified before the House Committee on Interstate and Foreign Commerce on May 22, 1934, stating that “Under the provisions of this act [the proposed 1934 amendment] all the operating expenses of all kinds of boards having to do with adjustment business have to be paid by the Government.” Id. at 73.

The Supreme Court’s decision in Chicago River was not based on any express provision of the RLA prohibiting strikes over minor disputes. The Court inferred that prohibition from the

fact that Section 3, First says that NRAB decisions shall be final and binding, and from the legislative history of the 1934 amendments, relying heavily on the statements of Coordinator Eastman. 353 U.S. 34-38. Similarly, the fact that Section 3, First says that the government will pay the compensation and all expenses for the arbitrator, along with the testimony of the principal draftsman that the parties will only pay for their representatives with the government to pay all other costs, make it clear that the government was to pay for all non-partisan costs of arbitration.

Notwithstanding, the NMB now, by the proposed regulation, would impose threshold fees on the use of arbitration. Those costs would apply even before appointment of an arbitrator whose fees would ultimately be paid by the Government. In the many cases the fees would exceed the monetary value of the claims, Government payment of the arbitrator's fees would then be a moot point because the fees would stop processing of the claims at the outset.

b. The 1934 amendment vested the NRAB, not the NMB, with authority to adopt rules governing its processes.

Congress adopted Commissioner Eastman's amendment which clearly delineated the responsibility of the NRAB and the NMB. Section 3 of the RLA grants the NRAB autonomy in resolving minor disputes. The 1934 amendments explicitly gave the NRAB, not the NMB, authority to "adopt such rules as it deems necessary to control proceedings before the respective divisions." 45 U.S.C. § 153, First (v). Pursuant to this explicit authority, the NRAB, not the NMB, adopted procedural rules originally published on October 10, 1934, as Circular No. 1 and revised by NRAB as recently as June 23, 2003. (Declaration of William R. Miller ("Miller Declaration"), Exhibit A) The RLA further provides that any Division of the NRAB may

establish regional boards which shall adopt the same procedures as the NRAB. 45 U.S.C. § 153 First (X).

As noted above, the 1934 Amendments provide for the autonomy of the NRAB as an agency separate and apart from the NMB with its own rulemaking authority. Indeed, the NRAB and the NMB must adopt rules by means of different procedures. While the NMB must comply with the panopoly of procedures for adopting rules set forth in the Administrative Procedures Act , the NRAB is exempted from these requirements. See, Jones v. Seaboard Systems RR, 783 F. 2d 638, 642 (6th Cir 1986); Kotakis v. Elgin Joliet & Eastern Ry., 520 F. 2d 570, 576 n.5 (7th Cir. 1975).

While the NRAB is given broad authority in resolving minor disputes, including the authority to adopt its own rules, the NMB's responsibility is carefully limited to the appointment of referees, should the partisan members not be able to select one, and the payment of referees' compensation. The 1934 amendments that created the NMB removed its predecessor's responsibility for the mediation of grievances. The Board of Mediation, unlike the NMB, was responsible for the mediation of both major and minor disputes. The 1934 amendments separated the responsibility for the resolution of minor disputes, which was assigned to the NRAB, from the mediation of major disputes, assigned to the NMB. While giving the NMB very limited responsibility for minor disputes, the RLA provides a detailed statutory arrangement giving the NRAB sweeping responsibility for the reduction of such disputes.

Parties submit disputes directly to one of the four divisions established by the Act. 45 U.S.C. § 153, First (h) and (i). The members of the NRAB are authorized to agree on an award and select a neutral to sit with the division to issue final and binding awards and interpretations of awards, in the event the partisan members are unable to do so. 45 U.S.C. § First (k), (l), (m).

Only in the event that the partisan members of a division are unable to agree upon a referee is the NMB authorized to appoint a referee. 45 U.S.C. § 153 First (l).

Section 4, Third of the Act states that the NMB “may” pay for a number of listed expenses – experts, assistants, and employee’s rent, law books, periodicals, books of reference, printing and binding – including “necessary traveling expenses and expenses actually incurred for subsistence and other necessary expenditures of the Mediation Board, Adjustment Board, and Regional Adjustment Boards...” and to “make such expenditures as may be necessary for the execution of the functions invested in the Board, the Adjustment Boards, and in the boards of arbitration, and as may be provided for by Congress from time to time.” 45 U.S.C. 154, Third.

While Section 4, Third of the Act provides a list of expenditures that the NMB **may** make, this authorization does not override the express requirement that the Board “**shall** fix and pay the compensation” of referees. 45 U.S.C. § 153, First (p). Nor has this provision ever, as we note below, been applied to give the NMB authority to adopt rules for the NRAB and decline to pay referee compensation, if said rules were not followed.

2. The 1966 Amendments to the RLA.

In 1966 Congress passed an amendment to the RLA dealing with the problem of backlogged cases at the NRAB, the same problem that the NMB claims is being addressed in its current proposal. The 1966 amendments created so-called 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.³ Indeed, the

³During his testimony before the Stagers Committee on the 1966 amendments, J. E. Wolfe, then chairman of the NRLC, testified as follows:

Chairman of the National Railway Labor Conference testified that the solution to the problem of backlogs was to require the parties to pay for the referee. See, House of Representatives Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 89th Congress, First Session, June 9, 1965, Testimony J. E. Wolfe, Chairman, National Railway Labor Conference (NRLC), p. 207 (referred to as Staggers Committee).

This proposal was rejected by Congress which adopted Public Law Board Procedures modeled after the NRAB in that the partisan board members have the authority to resolve claims, or, should they fail to do so, they may appoint a referee. Only in the event the partisan members of the Public Law Board are unable to agree upon a referee can they request the NMB to appoint a neutral. This occurs infrequently. (Miller Declaration at ¶ 14) The 1966 Amendments, like

Mr. Staggers. Just a moment there. Does not the railroad, though, now pay for their part for the members of the Board?

Mr. Wolfe. The railroads pay for their own representatives.

Mr. Staggers. Does not labor pay for their own representatives?

Mr. Wolfe. Yes, but the Government pays the neutrals.

Mr. Staggers. If you have to have one, you mean?

Mr. Wolfe. Yes, all expenses of the Board except the salaries of the partisan members.

Mr. Staggers. I want to pursue this just a minute here. All expenses of the Board when you do not have a neutral that they pay, the Government pays?

Mr. Wolfe. It pays the secretaries, stenographer, rent.

Mr. Staggers. That is set up by law, is that not right?

Mr. Wolfe. It is set up by law.

Staggers Committee Hearings on H.R. 701, June 9, 1965, at pp. 197-98.

Section 3, First (1) of the 1934 Amendments, stated that, “The Neutral person as selected or appointed **shall** be compensated and reimbursed for expenses by the Mediation Board.” 45 U.S.C. § 153, Second. Procedures for Public Law Boards are to be agreed to by the parties in the agreement establishing these boards, and not imposed by the NMB. Ibid.

Neither in 1934 nor in the 1966 Congressional hearings, nor at any other time until now, has there been a claim that the NMB has any authority to issue procedural rules for the NRAB, or that the NMB could condition payment of referee’s compensation on compliance with such rules.

3. The NMB Previously Accepted That It Lacked Authority To Issue Rules of Procedure for the NRAB.

From the very beginning of its history, the NMB has recognized that it has no right to dictate the NRAB’s arbitration procedures. In one of the NMB’s earliest reports, for example, the Mediation Board noted that “the law makes the jurisdiction of [the NRAB] wholly independent of the National Mediation Board, except that money expenditures of the Adjustment Board must be approved by the Mediation Board, and in case any division of the Adjustment Board is deadlocked and fails to make an award, the National Mediation Board is required to appoint a referee to ... make the award.” NMB Second Annual Report (FY 1936) at 33. Roughly contemporaneous statements by the NRAB evince similar views, noting, for example, that the NRAB “does not confer with the Mediation Board before issuing regulations.” NRAB Statement to Attorney General’s Committee on Administrative Procedure (Jan. 8, 1940). Indeed, as recently as 1999, the NMB acknowledged that “it does not have the authority to require the NRAB to adopt procedures.” NMB Memorandum to Members of Section 3

Committee (June 18, 1999). (Miller Declaration, Exhibit B)

4. The NMB Lacks Plenary Authority To Regulate The NRAB and PLB's or To Impose Fees.

We have established that the RLA gives the NRAB, not the NMB, the authority to adopt its own procedural rules, 45 U.S.C. § 153, First (v)⁴ and that the RLA states that the NMB “shall” pay the referees’ compensation. 45 U.S.C. § 153, First (l), and 45 U.S.C. § 153, Second. “The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.” Ass’n of Civilian Technicians v. FLRA, 22 F.2d 1150, 1153 (D.C. Cir. 1994); see also Lexecon, Inc. V. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (“shall” is “mandatory”).

45 U.S.C. § 154, Third authorizes the NMB to make a variety of expenditures, including the payment of referee compensation. That provision does not discuss regulations for the NRAB, nor does it discuss the charging of fees. To the extent that Section 154, Third includes authorization for payment of referee compensation, the more specific provisions of the RLA, requiring that the NMB “shall” pay compensation, must govern. See Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992) (“it is a commonplace of statutory construction that the specific governs the general”); HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) (“basic principle of statutory construction that a specific statute ... controls over a general provision”).

Notwithstanding the NPRM asserts that the NMB’s authority to adopt the proposed rules is contained within 45 U.S.C. § 154, Third:

⁴The agreements establishing PLB’s and SBA’s set forth those boards’ procedural rules. 45 U.S.C. § 153, Second.

Pursuant to its authority under 45 U.S.C. § 154, Third, the NMB has been considering changes to its rules to better facilitate this timely resolution of minor disputes between grievants and carriers in the railroad industry. Because of its **fundamental role** in the administration of the NRAB, PLB's and SBA's, the NMB solicited public comments in the various factors that might be considered in accomplishing this goal.

69 Federal Register at 48178 (emphasis supplied).

As we noted above, the NMB's responsibility in this area is carefully delineated. The NMB's reliance on 45 U.S.C. § 154, Third is in effect a claim of plenary authority to issue regulations. The courts have repeatedly rejected claims that the NMB has plenary authority to issue regulations under the RLA or jurisdiction to generally interpret the RLA. In Shore Line, supra, the Court rejected a carrier's reliance on the NMB's published interpretation of the statute, stating "the Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." 396 U.S. 142 at 158-59. And in CNW v. UTU, supra, the Court rejected an argument that the Board had jurisdiction to decide whether a party had failed to bargain in good faith as required by Section 2, First. The Court stated that "the legislative history of the Railway Labor Act rather plainly disproves this contention." 402 U.S. at 580.

In RLEA v. NMB, 29 F.3d 655 (D.C. Cir. 1994), the Court reversed certain portions of a regulation the Board had issued on carrier mergers. In that case, as in the instant matter, the Board supported its claimed authority by citing to a provision of the RLA without citing to specific language to support its assertion. 29 F.3d at 660. In that case, as in the instant matter, Congress was quite precise in delineating the NMB's authority. 29 F.3d at 665. In that case, as in the instant matter, the RLA failed to give the NMB the specific authority it exercised. 29 F.3d at 666. In that case, as in the instant matter, NMB had not previously claimed to have the

authority then being claimed. 29 F.3d at 670. Indeed, in the instant matter, the NMB had previously conceded that it lacked the authority that it now claims to have.

The Court in RLEA v. NMB, supra, noted that “For more than fifty years following its creation, the Board unvaryingly conducted representation investigations only at the behest of employees or their representatives. In 1987, however, with no direction from the Congress, the Board decided that existing procedures under Section 2 Ninth were inadequate...” Id. at 659. After reviewing the language of the statute and its legislative history the Court also stated that it found it “telling that only in the last five years of its sixty year history has the Board claimed that Section 2 Ninth affords it the authority [it claimed].” Id. at 669. The D.C. Circuit said, “...the Board would have us presume a delegation of power from Congress absent an express withholding of such power. This comes close to saying that the Board has the power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible.” Id. at 659 (emphasis in original). The Court rejected the argument that simply because Congress had endowed the NMB with some authority in an area, it had given the Board plenary authority to act within that area. The Court stated “Unable to link its assertion of authority to any statutory provision, the Board’s position in his case amounts to the bare assertion that it possesses plenary authority to act within a given area because Congress has endowed it with some authority to act in that area. We categorically reject that. Id. at 670 (emphasis in original).

The NMB is essentially making the same discredited argument here. The position of the NMB with respect to the proposed rules for Section 3 arbitration is analogous to its position with respect to the merger rules struck down in RLEA v. NMB – there is no statutory authority for its proposal, the proposal conflicts with the language of the 1934 amendments and the clear purpose of Congress in enacting them, the proposal flies in the face of decades of contrary practice, and

the NMB appears to presume that it has authority to issue the new rules because such authority was not withheld by Congress. The Act does not give the NMB authority to adopt rules for either the NRAB or Public Law Boards, to decline to pay referees their compensation in the event these rules are not followed, or to charge parties fees for performing its obligations. To be sure, the RLA does not expressly prohibit the NMB from engaging in such activities, but the Court held that the RLA's failure to forbid the NMB from acting in an area does not amount to a grant of authority to act in that area. 29 F.3d at 666. See also U.S. Airways v. National Mediation Board, 177 F. 3d 985, 989 n.2 (D.C. Cir 1999).

District court decisions to uphold the NMB's decision to discontinue paying for partisan members of the NRAB's office space and to discontinue paying for referees for boards not established as PLB's under the second paragraph of 45 U.S.C. § 153, Second, are not to the contrary. RLEA v. NMB, 583 F. Supp. 279 (D.D.C. 1984) and RLEA v. NMB, 785 F. Supp. 167 (DC 1991). The first above-cited case concerned an NMB decision to cease paying for office space for the partisan members of the NRAB (whose salaries are paid by the parties). The RLA contains a specific provision stating that, whenever practicable, the divisions of the NRAB will be supplied with suitable quarters. This language was viewed as expressly making the provision of offices for partisan members discretionary with the NMB. 583 F. Supp. at 281. There is no provision of the RLA that expressly gives the NMB authority to adjust rules of procedure for the NRAB or PLB's; or gives the Board discretion to impose filing fees for arbitration.

The second case concerned compensation of neutrals for Special Boards of Adjustment that were established by agreement under the first paragraph Section 3 Second, before the 1966 amendments which added the second paragraph that provided for the creation of Public Law

Boards. The second paragraph, unlike the first, expressly stated that neutrals for such PLB's would be compensated by the NMB. 785 F. Supp. at 168. By contrast, no provision of the RLA expressly excludes filing fees for a certain class of arbitrations from which one could infer a Congressional intent to allow filing fees for other classes of cases.

In both cases the Court held that specific provisions in the RLA provided that the NMB was not required to make certain expenditures. The NMB has not, and cannot, point to any similar specific authorization on this matter.

The proposed rule deals with the most basic aspect of Section 3 - the processing of a claim to arbitration. As is explained more fully below, the proposed rule would impose an insuperable barrier to the resolution of many cases where the filing fees would exceed the amount that could be recovered in the employee's claim (such as a claim for a lost day's pay, overtime denied, or travel expenses denied). It then would not matter that the government would pay an arbitrator's fee when the filing fee itself would preclude docketing of the claim. In such cases, the fees would negate the ability of employees and Unions to enforce collective bargaining agreements; and carriers would repeatedly disregard contract terms where the amount of money for each individual violation would be less than the NMB's fees for arbitration. This outcome would be in derogation of the Act and the intent of Congress in adopting the 1934 amendments to make arbitration an effective process for resolution of contract interpretation disputes and a viable substitute for strikes. In this matter unlike the above-cited cases the Board proposes to place a financial barrier at the threshold of the process for compulsory arbitration, effectively shutting the door on the arbitration of many claims. This result is exactly the opposite of the express language of the RLA and its legislative history calling for Government-paid arbitration.

In summary the NMB lacks authority to issue the proposed regulations because:

- The 1934 amendments do not give the NMB general authority over Section 3 arbitrations. The amendments give the NRAB, not the NMB, authority to issue its own rules. These amendments remove the authority over minor disputes previously enjoyed by the NMB's predecessor, the Board of Mediation, and carefully delineated the NMB's remaining responsibility in this area.
- The Supreme Court found that the 1934 amendments represented a compromise accepted by Rail Labor and advocated by Railroad Coordinator Eastman: the Unions would forego the right to strike over minor disputes in return for the arbitration mechanism created by the new Section 3 which included government financial responsibility for all NRAB expenses, except compensation for the partisan members. To remove part of what Labor received in 1934 is to undermine the concession made by Labor in return for relinquishment of the ability to strike over minor disputes.
- The 1966 amendments creating PLB's also required the NMB to pay for referee compensation. In passing these amendments, Congress rejected carrier proposals to require that the parties pay the referees.
- The 1966 amendments gave the parties authority to set forth the procedures for each PLB in the agreement that established it.
- The NMB has never issued rules governing the NRAB and PLB's, and has never issued rules in conflict with the rules adopted by the NRAB. Not only has the NMB never claimed such authority, but it has acknowledged that it lacks such authority.

- The NMB has never, until now, overridden the parties' agreement on procedural rules for PLB's.
- 45 U.S.C. § 154, Third is a general listing of expenses that the NMB is authorized to expend. That provision does not give the NMB authority to decline to meet its obligation to pay referee compensation in 45 U.S.C. § 153, First (1) and Second, or to condition the payment of compensation on adherence to procedural rules.
- The NMB does not enjoy plenary authority to issue regulations. Some specific responsibility in an area does not give the NMB general authority to regulate in that area. RLEA v. NMB, *supra*.

⁵C. **The Proposed Fee Structure Should Not Be Imposed.**

1. The Fee Proposal Is Contrary to the Railway Labor Act Requirement That the NMB Pay Referee Compensation.

Not only do the proposed fees exceed the NMB's authority, but the imposition of these fees is contrary to the RLA. The RLA specifies that the NMB **shall** pay referee compensation. On the face of this clear commandment, the NMB is prohibited from shifting any portion of referee compensation or its administrative cost in processing the payment of such compensation to the parties.

The proposed rules attempt to transfer the NMB's administrative costs in meeting its statutory obligation to pay referee compensation from the NMB to the parties. In order to pay referees, the NMB must know who is assigned to hear what cases before which boards, and whether the referee in fact issues decisions. Many of the procedures for which the NMB

⁵The term "fee" is a misnomer, which we use herein only to avoid confusion. The NMB is proposing to impose a tax on acts required by the RLA - namely, the compulsory arbitration of minor disputes before the NRAB and PLB's.

proposes to impose fees on the parties, such as certification of the referee, the notice of intent and others discussed in detail below are necessary for the NMB to be able to pay referee compensation. The RLA places the responsibility to pay referee compensation on the NMB, and the NMB may not shift the cost of meeting that obligation to the parties.

The NMB states, with no explanation, that the proposed fees “represent only a very small portion of the actual costs of the respective services.” The proposed fees appear to be a small portion of the costs of the referee’s compensation, but the RLA requires the NMB to pay those costs in their entirety. Contrary to the unsupported assertion, it appears that the fees are significantly higher than the costs of performing the specific ministerial acts referred to in the proposal, and that in fact these fees are the NMB’s effort to transfer its obligation to pay referee compensation to the parties. (Miller Declaration at ¶¶ 10-11)

2. The NMB’s Observation of the Existence of a Backlog of Cases to Be Arbitrated Does Not Justify the Proposed Revamping of the RLA Arbitration Scheme

The NMB justifies these new initiatives by the backlog of cases to be arbitrated and its claim that its responsibility to pay referees gives it “a fundamental role” in the administration of the NRAB and PLB’s. As discussed above, the NMB has limited responsibility for minor disputes and does not play a fundamental role in the administration of the NRAB or PLB’s. Section 3, Fourth of the RLA, upon which the NMB bases its claimed authority, authorizes making certain expenditures, not the adoption of rules ostensibly designed to alleviate a backlog of cases.

The Railway Labor Act (RLA) was amended in 1934 to provide for final, binding compulsory arbitration. The RLA was amended again in 1966 to introduce Public Law Boards.

At that time, a proposal by the carriers to amend the RLA to terminate government funding of referee compensation was rejected by Congress. The Act imposes the costs of arbitration on the NMB, not the parties.

The Advance Notice Proposed Rulemaking (ANPRM) suggests that the parties have ignored the problem of backlogs and that only by the NMB imposing new procedures can it be addressed. The record is to the contrary. A committee of carrier and union representatives was formed in 1985 to make recommendations for a more efficient arbitration system. A number of beneficial changes were made as the result of recommendations made by this “section 3” committee. Through the work of this standing committee, and the cooperation of the parties, the backlog of pending cases has been significantly reduced as indicated below:

	<u>Fiscal Year 1985</u> <u>Pending Cases</u>	<u>Fiscal Year 2004</u> <u>Pending Cases</u>
NRAB	2,036	1,509
PLB	16,759	3,151
SBA	<u>3,378</u>	<u>476</u>
Total	22,173	5,136

Source: NMB Annual Report 1985 and 2004. (Miller Declaration at ¶ 6).

To be sure, the number of unionized rail employees has declined during this period from approximately 373,000 to 200,000. But even taking this reduction into account, the number of pending grievances and new grievances filed have been markedly reduced.⁶

⁶William R. Miller, Executive Director, Industry Relations, and Chairman of the NRAB, testified before the NMB’s hearing on December 19, 2003, that new grievances have been reduced as follows:

New cases received during fiscal year 1985 were 8,425 which equates to 23 grievances per 1,000 employees being filed on an annual basis.

New cases received during fiscal year 2004 were 906 which equates to 4.5 grievances per 1,000 employees being filed on an annual basis.

Comparisons with other industries are inappropriate. As recognized by the Supreme Court from the point of view of industrial relations, the railroads are “a thing apart” and the railroad world “is like a state within a state.” As such, the Court has warned “against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inappropriate judicial remedies.” Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711, 725 (1945) (Brandeis J. dissenting). See, California v. Taylor, 353 U.S. 553, 565-66 (1957).⁷ We submit that the proposed regulation is exactly the type of activity which Justice Brandeis urged should be avoided.

The parties have not been unresponsive to the NMB’s recent initiative to increase efficiency. The section 3 committee was making progress in reaching a consensus on time limits and productive discussion were being held on case consolidation rules when the NMB issued the first ANPR in this matter. We urge that the NMB work through the section 3 committee to develop a consensus on new rules that could be adopted by the NRAB, the agency responsible under the RLA for adopting such procedures. Such an approach is consistent with the history of the RLA in which basic changes in the statute itself or its administration have been agreed to by the parties.

3. The NMB Has Failed to Establish Any Reasonable Relationship Between the Fees Being Charged and the Services Being Performed.

(Miller Declaration at ¶ 6)

⁷Unlike the RLA, the LMRA does not limit the right to engage in primary strikes, nor does it impose a system of arbitration. While the RLA, unlike the LMRA, requires the NMB to pay for arbitrations, it does not provide for Government prosecution of unfair labor practices, as is the case under the LMRA.

The ANPRM states that the NMB is proposing to establish fees for certain arbitration services and that these fees “represent only a very small portion of the actual costs” of providing the services.

The proposed rule does not offer any explanation for how these fees were calculated and the actual costs of providing the involved services. As we demonstrate below the fee structure is a confusing multiplicity of charges, frequently layered one atop the other. A brief description of our understanding of the proposed fees follows:

Fees for the NRAB

- 1) Notice of Intent - \$75

A party files a case at the NRAB by filing a notice of intent. At the time of filing, NRAB staff designate the case with a number, which is used in subsequent filings. In fiscal year 2004, 1509 cases were filed at the NRAB so that during that fiscal year, under the proposed rules, the NRAB would have been paid \$113,375 for designating a number. Unions, not carriers, submit the overwhelming number of cases to the NRAB so that the burden of this fee will fall overwhelmingly on labor organizations.⁸

- 2) Certification of an arbitrator to any division of the NRAB – \$50 per certification.

Once a referee is selected the partisan members take turns in preparing a letter requesting the NMB to issue a “Certificate of Selection” to a referee to hear a docket of cases. The letter is submitted to Director of Arbitration Services who subsequently issues a form letter certifying the involved referee. (Miller Declaration at ¶ 11)

⁸Individual employees may also present grievances to the NRAB. We assume, although the regulations are unclear, that the fees will also be charged to them. In no event should fees be imposed on individuals since they have no control over scheduling.

- 3) Request for a Panel of Arbitrators - \$50.00 per request

In the overwhelming majority of cases the partisan members of the NRAB agree upon a referee. (Miller Declaration at ¶ 14) However, where they are unable to do so, they may request that the NMB provide a panel of arbitrators, from which the parties make the selection.

Sometimes, if they are unable to make a selection from the panel provided, another panel is requested. It is unclear whether the union, carrier or both parties are responsible for this fee.

In points 2 and 3 above, the NMB is imposing a fee based on the actions of officials of a separate agency – namely, the partisan members of the NRAB. One agency cannot and should not impose fees on the actions of officers of another agency taken in their official capacity.

Fees for Public Law Boards

- 1) Establishment of a Public Law Board - \$100.

Public Law Boards are established by the agreement of the parties, not the NMB. When the parties reach an agreement establishing a Public Law Board, the NMB is furnished a copy and it designates the Board with a number. It is unclear whether the union, carrier or both parties are responsible for this fee.

- 2) Certification of a referee – \$50.00

The NMB merely certifies the referee named in the parties' agreement, thereby indicating the approval of his appointment. It is unclear whether the union, carrier or both parties are responsible for this fee.

- 3) Request for a Panel of Arbitrators - \$50.00 per panel

The partisan members of the PLB have authority to select a referee. In the overwhelming number of cases the partisan members do so and the PLB agreement submitted to the NMB designate the referee. If the parties are unable to reach such an agreement, the partisan members

may request the NMB to furnish a panel of arbitrators from which they can make a selection. If they are unable to do so, they may request an additional panel. It is unclear whether the union, carrier or both parties are responsible for this fee.

4) Designation of a partisan member of the PLB - \$75.00

Partisan Members of the PLB are normally designated by the parties in the PLB Agreement. We assume that this charge will not be levied on the parties, when the NMB plays no role in the appointment. The RLA provides that in the event one of the parties decline to designate a member to the PLB, the NMB shall designate a member to represent that party's interests. Such situations are very unusual. We assume that this is the circumstance to which this particular fee is directed.

5) Designation of a Neutral Member for a Public Law Board - \$75.00

If the partisan members of a PLB can not agree upon a referee then the RLA authorizes the NMB to make such an appointment. It is unclear whether this fee is in addition to the fees charged for certification of the referee, or providing a panel of arbitrators. It is unclear whether the union, carrier or both parties are responsible for this fee.

6) Request to add a case to an Existing Board - \$50.00

A PLB agreement designates the disputes to be resolved by the PLB. The parties may wish to add cases to the docket and may do so by notifying the NMB, which sends a confirming letter to the referee, with a copy to the parties. It is unclear whether this \$50.00 fee is for each case added or whether it is for each request, which may include a number of cases. It is also unclear whether this fee is to be charged where the Director of Arbitration Services exercises his authority under the proposed rule to consolidate cases.

Fees for other Arbitration Boards⁹

1) Appointment of an Arbitrator for Labor Protective Matters - \$75.00

Labor Protective Conditions are imposed by the Surface Transportation Board and previously by its predecessor the Interstate Commerce Commission.

These provisions provide for the arbitration of disputes and where the parties are unable to agree upon an arbitrator, for the NMB to appoint one. See New York Dock Labor Conditions, Article I, Sections 4 and 11.

Sometimes the NMB at the parties' request has provided a panel from which they can make a selection. It is unclear what fees, if any, are to be charged under those circumstances.

2) Establishment of an Arbitration Board - \$100.00

Section 7 of the Railway Labor Act permits the parties to accept the NMB's proffer of arbitration to resolve a major dispute. That provision refers to the creations of a Board of Arbitration. 45 U.S.C. § 157. The parties appoint partisan members to such a board, and they in turn select the neutral. When the parties establish a Section 7 arbitration board the NMB designates the Board with a number. We assume that this provision is applicable only to Section 7 arbitration boards and not Presidential Emergency Boards which as the name implies, are created by the President of the United States, not the parties. 45 U.S.C. §§ 159(a) and 160. We also assume that this \$100 fee is not applicable to the NRAB and PLB's.

The above fees share certain common features:

- In none, does the NMB explain what the costs of the services are.
- In none, does the NMB explain the anticipated income from the fees being levied.

⁹For both of the fees described below, the proposed rule is unclear whether the fees are to be paid by the union, carrier or both.

- Many of the activities for which fees are being levied are purely ministerial, requiring a de minimis amount of time.

In the absence of any information regarding the costs of the involved “service” and the methodology used in calculating the fee, it is impossible to determine whether the fee being charged is reasonably related to the costs being incurred. The NMB has the responsibility to provide such information and the burden to establish such a connection. On its face, fees such as those being charged for designation of a number for an arbitration board, or the issuance of a form letter agreeing to the parties’ request to certify and appoint a referee, appear far in excess of the actual cost of performing those ministerial functions, and as noted above, these functions are necessary for the NMB to meet its statutory obligations of paying referee compensation.

4. The Fees Proposal Would Thwart Arbitration of Many Contract Disputes and Would Effectively Favor the Carriers.

Imposition of fees will discourage unions and individuals from pursuing grievances to arbitration when recovery may be for only small amounts of money. Under the NMB’s proposal, the fees for a claim, from initial docketing through arbitration, would be a minimum of \$75 and possibly as high as \$350. Many claims are for contract violations where the employee involved suffers a compensable loss that is less than the proposed filing fees; examples include loss of a day’s pay, loss overtime, or denial of skill differential or other special pay, minimal call claim, reporting pay, travel pay or travel expenses. The proposed fees would discourage the filing for arbitration over such claims.

The amount involved in a grievance does not in itself suggest that it lacks importance. Individual grievances for small amounts can still have merit and should be heard. Furthermore,

many small grievances can concern similar problems and may together constitute large amounts of money even though individual violations are involved (consolidation is not necessarily an answer, as the facts and witnesses may vary greatly from case to case, even though the claims involve the same rule).

Carriers with thousands of employees could save large amounts of money by small rules violations over years that are not challenged because the filing fees exceed the value of individual claims. The carriers with greater resources should not be allowed to decline to pay such claims, knowing that unions and individuals, with more limited resources, would be discouraged from pursuing them to arbitration. The barrier that the Board would erect to the processing of small dollar value claims to arbitration is inconsistent with the purpose of the 1934 Amendments – to insure that all minor disputes can be arbitrated, and to not allow the accumulation of grievances creating frustration, giving impetus to the exercise of self help.

Additionally, the Board's proposal reveals a fundamental misunderstanding of the RLA grievance/arbitration process. The vast majority of grievances are initiated by Unions and individuals because the statutory scheme permits a carrier to act when challenged by a Union, subject to the filing of a grievance that will later determine whether the collective bargaining agreement was violated. In a minor dispute, a carrier may continue its course of action and a Union is generally obligated to grieve and arbitrate after the action is taken. Railway Labor Execs. Ass'n. v. Chesapeake Western Ry, 915 F. 2d 116, 120-121(4th Cir, 1990); Air Line Pilot's Ass'n. v. Eastern Air Lines, 869 F. 2d 1518, 1520-1521(D.C. Cir. 1989); Int'l. Ass'n of Machinists and Aerospace Workers v. Eastern Air Lines, 826 F.2d 1141 (1st Cir. 1987). Ordinarily, there is no status quo requirement in a minor dispute unless the union can demonstrate irreparable harm or likely frustration of the arbitration process. Brotherhood of

Locomotive Engineers v. Missouri-Kansas-Texas Ry. Co., 363 U.S. 528, 534-535 (1960);
Chicago and North Western Transp. Co. v. Railway Labor Execs. Ass'n., 855 F.2d 1277, 1287-1288 (7th Cir, 1988).

Given this statutory structure, imposition of filing fees would clearly favor carriers because the Board would erect a threshold barrier that will affect only unions. Carriers will remain unburdened in acting upon disputed interpretations of agreements. Thus imposition of filing fees for arbitration carries the very real risk that the Board will no longer appear effective or impartial with respect to grievance arbitration. See, Chicago and North Western Transp. Co. v. UTU, 402 U.S. at 580 (need for NMB to maintain neutrality and confidence of the parties).

5. Fees Imposed Only on Labor Organizations and Individuals Are Inequitable

As previously stated, the fee structure does not state whether the moving party, which in the overwhelming number of cases is the union, or both the union and the carrier are responsible for the payment of the involved fees. Simple equity dictates that if fees are to be imposed, both parties should pay them. The carriers benefit from the current arbitration system even though they may seldom invoke it. Compulsory arbitration is the basis for prohibiting unions from striking over minor disputes. See, BRT v. Chicago River, supra. Carriers, which have greater resources than unions, and certainly greater resources than individual employees, should not get the benefit of a system designed to limit employees' right to strike without having to share in the fee imposed to maintain that system.

6. The Fees Will Be Difficult to Allocate among Parties

In many cases the determination of which party will pay what portion of the fee imposed

will be very difficult and costly to calculate. For example, recently NMB Director of Arbitration Services Roland Watkins certified Referee G. Wallin to hear 38 cases before the Third Division of the NRAB. The thirty-eight cases were divided among the involved unions and carriers as follows:

<u>Labor Organizations</u>	<u>Carriers</u>
ATDA - 5 Cases	UP - 22 Cases
BMWE - 11 Cases	BNSF - 10 Cases
BRS - 12 Cases	Soo (CMSTPP) - 1 Case
TCU - 10 Cases	PP&U - 1 Case
	CSXT - 4 Cases
TOTAL - 38 Cases	TOTAL - 38 Cases

(Miller Declaration at ¶ 13)

The NPRM provides no insight into the methodology the NMB intends to use in allocating, among the involved carriers and labor organizations, the \$50.00 fee it would impose for certifying Referee Wallin to hear these cases. The NMB has a responsibility to do so, and we suggest this example demonstrates the complexity and costs of developing an equitable system of allocation. Furthermore, it is clear that the allocation of the fee would differ every time a docket is certified due to the number of cases and parties involved.

In summary, the fee proposal should not be imposed because:

- The NMB has cited no specific statutory authority for imposing such fees.
- 45 U.S.C. § 154, Third, which is cited by the NMB gives it authority to pay expenses, not impose fees on the parties or to issue rules directed at the backlog of cases.

- The NMB is prohibited from charging the parties any portion of referee compensation, for which payment it has sole responsibility under the RLA.
- Charging the parties for functions that track an arbitration case so that the NMB can pay referee compensation violates the RLA requirement that the NMB pay such compensation. 45 U.S.C. § 153, First (l), and § 153, Second.
- The NMB has failed to establish a reasonable connection between the fees being charged and the cost of the service being provided.
- The fees unfairly give carriers an advantage in declining claims involving small amounts of money.
- The proposed fees unfairly place a disproportionate share of fees on unions.

D. The Proposed Time Limits For the NRAB and PLB's to Resolve Cases Should Not Be Adopted.

1. NMB's Lack of Authority

Section 1210.12 of the proposed rule establishes a series of time limits for various steps for the NRAB and PLB's. In the event any of these steps are not completed in a timely manner the NMB may deny payment to the arbitrator. As previously noted the RLA gives the NRAB, not the NMB, authority to adopt rules. 45 U.S.C. § 153 First (v). The RLA give the parties to PLB's the authority to agree on rules of procedure for such boards. 45 U.S.C. § 153, Second. The RLA requires that the NMB "shall" pay the referee compensation. 45 U.S.C. § 153, First (l); 45 U.S.C. § 153, Second. No provision of the RLA gives the NMB authority to condition the payment of referee compensation upon the referee and the parties adhering to time limits established by the NMB. Section 154, Third upon which the NMB relies for such authority

simply states that NMB may make a variety of expenditures including payment of referee compensation. That provision does not authorize the NMB to issue rules for arbitration procedures, nor does it authorize the NMB to decline to pay referee compensation for failure to follow such rules in violation of its statutory responsibility. For the foregoing reasons the provisions of Section 1210.12 are beyond the scope of the NMB's authority.

2. Effect of Refusing to Pay Referee Compensation.

The provisions of Section 1210.12 leave unanswered how a case is to be resolved when the NMB refuses to pay the referee's compensation. The proposed rules do not state when the NMB might advise a referee that his fees and expenses might not or would not be paid. One possibility is that the NMB will not make it known that it is refusing to pay the fees until after the referee issues the award and submits his bill. That procedure, in addition to being unfair to referees, will likely result in referees refusing to take railway cases.

Alternatively, the NMB might advise the parties or the referee before the decision issues that it will refuse to pay the referee's compensation. The referee is then unlikely to issue a decision, without assurance of compensation. The claims will simply sit on a docket of unresolvable cases. In that event the handling of grievances, as a practical matter, will be returned to the same status that existed prior to the 1934 Amendments, when cases remained in dockets without means of attaining a final resolution. Indeed, the 1934 amendments were intended to cure this very problem.

3. Proposed Rule 1210.12 Permits the Carrier to Place the Referee's Compensation in Jeopardy by Not Meeting Certain Time Limits.

Proposed Rule 1210.10(b)(2) states that the parties must file submissions with the NRAB within 60 days of receiving the Director of Arbitration Services acknowledgment of receipt of the Notice of Intent. In the event that the carrier fails to do so, the referee's compensation will, at a minimum, be placed in doubt and possibly denied.

As discussed below, the current NRAB rules require that submissions be filed within 75 days of the notice of intent. Carriers could then file timely submissions more than sixty but less than 75 days after the notice of intent, and place referee compensation in jeopardy.¹⁰ Carriers have no reason to care if the grievance remains permanently unresolved since it is the labor organization and employees that file grievances, not the carriers. The proposed rule gives the carriers no incentive to meet the time limits and affords carriers the opportunity to put a grievance into an unresolvable status or to substantially delay its resolution to carrier's advantage, simply by filing untimely.

4. The Proposed Rules Are Contrary to the Existing Rules of Procedure Adopted by the NRAB.

Proposed Rule 1210.12(b)(2) provides that submissions must be filed within sixty days of the Director of Arbitration Services letter of intent. The NRAB rules provide that submissions are due seventy five days thereafter. (Miller Declaration, Exhibit A, Rule 1(a)) Proposed Rule 1210.12(b)(3) states that NRAB partisan members will be given 30 days after the receipt of submissions to either resolve a case or deadlock. The NRAB rules currently have no time limits for the partisan members to consider a case. Further, the NRAB rules permit a reply from a

¹⁰Of course, labor organizations could also do so, but normally would have no incentive to jeopardize referee compensation.

party receiving third party notice. Id. at Rule 3(a). See, Transportation-Communication Employees Union v. Union Pacific Railroad, 385 U.S. 157 (1966). In addition, in cases involving a change in seniority status, all concerned employees are afforded an opportunity to file a reply. Id. at Rule 5(a). These replies are due 30 days after the parties' submissions, which, as noted above, are due under the NRAB rules, 75 days after the notice of submission.

Under the proposed rules partisan members must resolve disputes or deadlock 30 days after the parties submissions, before receipt under the current NRAB rules of the parties', third parties' or concerned parties' response. Decision making in this manner would likely violate fundamental due process. At a minimum it is unfair and inefficient.

These time limits were originally adopted by the NRAB in 1934 under its authority to adopt procedures set forth in the RLA and revised in June 2003. 45 U.S.C. § 153(v). The effect of the NMB's proposed rules is to place referee compensation in jeopardy should the parties adhere to the time limits established by the NRAB rules of procedure.

5. Scheduling Delays Are Often Beyond the Referee's Control, and the Sixty Day Rule Will Discourage Competent Referees from Hearing Railroad Cases.

Proposed Rules 1210(b)(5) and 1210(b)(6) require that a referee hear a case within 60 days from the date of his certification, and render a decision within 60 days of the hearing. This rule ignores that the NMB periodically directs referees to perform no further work on cases because of budgetary constraints.

In addition, delays in holding hearings are often a result of the Carrier having an inadequate number of advocates to present cases. Delays to permit advocates to attend hearings have been routinely granted by the NRAB. If Carrier members of the NRAB insist on such

postponements, the referee's compensation will be placed in jeopardy.

Busy arbitrators will be prevented from acting as referees at the NRAB because they cannot guarantee decisions within sixty (60) days. Currently, the referee's compensation authorized by the NMB is significantly less than the going rates outside the rail industry for experienced arbitrators. The requirement that arbitrators give railroad cases priority over other cases from which they receive higher compensation will likely result in the industry losing access to many experienced and able arbitrators.

In summary, the NMB should not issue rule 1210.12 for the following reasons:

- The RLA provides that the NRAB, not the NMB, has authority to issue procedural rules. 45 U.S.C. § 153, First (v).
- The NMB has no authority to condition the payment of NRAB referee compensation on compliance with rules it lacks authority to issue.
- The RLA requires that the NMB pay NRAB referee compensation. 45 U.S.C. § 153, First (l). The NMB may not refuse to make such payments in the event that any party or the referee is unable to meet time limits that it sets.
- The proposed rules are in conflict with the rules adopted by the NRAB.
- The effect of the NMB's refusal to pay referee compensation is to leave cases in limbo with no means of resolution. This is the very situation that the 1934 amendments were intended to correct.
- The proposed rules permit carriers to place referee compensation in jeopardy by not filing timely submissions.
- The proposed rules put referee compensation in jeopardy when referees are unable to hold hearings or issue decisions as the result of the NMB's directives

requiring referees to take no action due to budgetary concerns.

- The proposed rules likely will encourage experienced and competent referees to decline hearing further cases involving the railroad industry.

E. Proposed Rule 1210.9 Involving Consolidation of Cases Exceeds the NMB's Authority and Its Expertise.

Proposed Rule 1210.9 authorizes the Director of Arbitration Services to consolidate minor disputes or grievances when he determines that such consolidation is in the interest of efficiency.

As discussed above in greater detail, the NMB's responsibility for grievances or minor disputes is carefully delineated to the appointment of referees, should the partisan members fail to agree on a selection, the appointment of partisan members to PLB's should a party decline to make such an appointment, and the payment of referee compensation. The NMB has no general authority over minor disputes. The RLA gave the NRAB authority to adopt its own rules of procedure. It is the partisan members of the NRAB, not the NMB, who establish the docket of cases to be heard by each referee.

The RLA provides that the parties establish a PLB by agreement, and that agreement establishes the procedures to be followed. The parties through their agreement establishing the PLB set forth the docket of cases to be heard by the PLB.

The NMB has no authority to direct the consolidation of cases before the NRAB or PLB's. The RLA gives either the NRAB or the parties themselves in establishing PLB's responsibility for determining the docket of cases to be heard.

The NMB plays no role in the substantive resolution of minor disputes. While the NMB

closely monitors the activities of the NRAB and PLB's, it does so for purposes of funding, not for purposes of keeping track of the development of arbitral precedent. Accordingly, it has no experience, much less expertise, in substantive arbitration issues. (Miller Declaration at ¶ 23)

As Rail Labor noted in its comments to the NMB's August 3, 2003 ANPRM:

Rail Labor is opposed, however, to the NMB requiring the parties to consolidate cases. Cases often involve complex rules, and factual nuances can make cases that initially may appear similar, not be so. The parties are best able to determine which cases should be consolidated. The consolidation of cases not appropriate for such action is likely to result in greater confusion, delay, and the expenditure of limited resources by the parties and the NMB. While the NRAB has permitted the combination of separate but factually linked claims into a single dispute (First Division Award 24530 and Third Division Award 31456), the NRAB has warned that inappropriate combinations of cases will result in dismissal. (Third Division Award 33016). In a recent decision involving the UP and BLE, respected Arbitrator Dana Eischen dismissed claims which he concluded were not properly consolidated. (First Division Award No. 25212).

RLD Comments at p. 5.

It remains a mystery what occurs if a referee were to conclude that a consolidation ordered by the NMB's Director of Arbitral Services is improper. What is clear, however, is that the NMB, lacking any background in substantive arbitration, will likely order consolidations which make the arbitration more complicated and more expensive and that such consolidations will restrict employees' rights to have their cases treated separately, rather than be improperly consolidated with cases raising different factual, policy, and legal issues. (Miller Declaration at ¶ 24)

For the foregoing reasons giving the Director of Arbitration authority to consolidate cases is beyond the scope of the NMB's authority, beyond the scope of its experience and expertise, and is likely to result in greater delay and expense.

F. Conclusion

It is respectfully submitted that the proposed regulations should not be adopted, and the NMB should continue working with the Section 3 Committee to assist the NRAB in adopting appropriate procedures to improve the efficiency of case handling.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing has been sent this 20th day of September, 2004, via e-mail and first-class mail, postage prepaid, to the following:

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