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Accountability \* Integrity \* Reliability

Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** National Mediation Board—Compensating Neutral Arbitrators  
Appointed to Grievance Adjustment Boards Under the Railway  
Labor Act

**File:** B-305484

**Date:** June 2, 2006

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### DIGESTS

(1) The National Mediation Board (NMB) incurs an obligation when it appoints a neutral arbitrator to a grievance adjustment board to hear a specific case or a specified group of related cases. To comply with the Antideficiency Act, NMB must have an appropriation available to cover the estimated costs of the arbitrator at the time it incurs the obligation. 31 U.S.C. § 1341(a). Because NMB does not control the number of days an arbitrator will work before submitting an award, NMB should record an obligation based on its best estimate of the costs of paying the arbitrator and adjust the obligation up or down as more information becomes available. NMB should liquidate the obligation from the appropriation current at the time NMB incurs the obligation, notwithstanding that the arbitrator's performance may extend into the next fiscal year. To the extent we indicated in two prior decisions, B-217475, Dec. 24, 1986, and B-217475, May 5, 1986, that NMB may record obligations monthly based on the anticipated expenditures it approves in monthly compensation requests, they are overruled.

(2) An availability of funds clause is not sufficient to protect NMB from violating the Antideficiency Act. The obligation to pay an arbitrator arises at the time of appointment in the full amount of the liability incurred, and NMB must have an appropriation available at that time to pay the full cost.

(3) Pending cases to which NMB has not yet appointed an arbitrator constitute a contingent liability of NMB. Contingent liabilities are not recordable as obligations until the contingency actually materializes.

(4) NMB will violate the Antideficiency Act if it appoints an arbitrator to a new or existing board and incurs an obligation in excess of its apportionment or any other subdivision of funds as specified in its administrative fund control regulations. If

NMB does not have an administrative fund control system, it should work with the Office of Management and Budget to establish one.

(5) NMB does not incur an obligation to pay a neutral arbitrator when the parties to a grievance enter into an agreement to form a Special Board of Adjustment or Public Law Board. NMB may anticipate eventually appointing an arbitrator to hear these cases, but it is the appointment of the arbitrator by an authorized NMB official, not the organization of the Special Board of Adjustment or Public Law Board, that is the obligating event for NMB.

(6) When NMB appoints an arbitrator to a Special Board of Adjustment or a Public Law Board, the appointment does not constitute an open-ended contract to pay the arbitrator for cases referred to the Special Board of Adjustment or the Public Law Board subsequent to the appointment. The addition of a new case constitutes a new arbitrator appointment and a new obligation.

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## **DECISION**

Pursuant to 31 U.S.C. § 3529, the National Mediation Board (NMB) requested our views regarding when it incurs an obligation to pay neutral arbitrators it appoints to hear cases on a grievance adjustment board, and in what amount. We conclude that NMB incurs an obligation when it appoints a neutral arbitrator to a grievance adjustment board. The Antideficiency Act requires that NMB have an appropriation available to cover the estimated costs of the arbitrator at the time it incurs the obligation. 31 U.S.C. § 1341(a). Because NMB does not control the number of days an arbitrator will work before submitting an award, NMB should record an obligation based on its best estimate of the costs of paying the arbitrator and adjust the obligation up or down as more information becomes available. NMB should liquidate the obligation from the appropriation current at the time NMB incurs the obligation, notwithstanding that the arbitrator's performance may extend into the next fiscal year. NMB also asked our views regarding five related questions, which we address below.

## **BACKGROUND**

The National Mediation Board, established by the 1934 amendments to the Railway Labor Act, 45 U.S.C. §§ 151–188, is an independent agency that facilitates labor management relations within the railroad and airline industries.<sup>1</sup> Railroad and airline

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<sup>1</sup> Among the purposes of the Railway Labor Act are:

“ (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of

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carriers and their employees are required to “settle all disputes, . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.” 45 U.S.C. § 152.

One option NMB offers for resolving disputes is arbitration. Disputes that arise out of the interpretation of contracts or application of existing contractual rights are considered minor disputes or grievances. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*, 353 U.S. 30, 33 (1957). Minor grievances initially are dealt with through the carrier’s internal dispute resolution procedures. The Railway Labor Act forbids strikes over minor grievances. *Brotherhood of Railroad Trainmen*, 353 U.S. at 34. See also <http://www.fra.dot.gov/us/content/955> (last visited May 17, 2006). If a minor grievance is not settled through these internal procedures, either party may refer the grievance for arbitration to a grievance adjustment board composed of union and management representatives. 45 U.S.C. § 153. See also <http://www.fra.dot.gov/us/content/955> (last visited May 17, 2006). Arbitration decisions under the Railway Labor Act are final and binding with very limited grounds for judicial review. *Railway Labor Executives Ass’n v. National Mediation Board*, 785 F. Supp. 167, 168 (D.C. Cir. 1991).

NMB asked us to address obligation issues relating to appointment of a neutral arbitrator to grievance adjustment boards functioning under section 3 of the Railway Labor Act, *codified* at 45 U.S.C. § 153. Letter to David M. Walker, Comptroller General of the United States, from June D. King, Director of Administration, NMB, May 17, 2005 (King Letter). Section 3 pertains to minor grievances that arise in the railroad industry. See 45 U.S.C. § 153. These grievances are resolved through the use of three grievance adjustment boards: the National Railroad Adjustment Board, Special Boards of Adjustment, and Public Law Boards. *Id.* See also <http://www.nmb.gov/arbitration/afaq.html> (last visited May 17, 2006). While the three grievance adjustment boards differ in origin, organization, and basic authorities, these differences are generally not significant from an appropriations law perspective and we will collectively refer to them as grievance adjustment boards.

NMB currently appoints an arbitrator by issuing a certificate of appointment (Certificate of Appointment or Certificate) to the arbitrator to hear a specific case or a specified group of related cases. King Letter at 2. NMB also issues a letter (Compensation Letter) to the arbitrator that provides the daily rate of compensation, the per diem rate (lodging, meals, and incidental expenses) and travel costs. The Compensation Letter states that arbitrators serve as independent contractors and not as employees of the federal government. See NMB Letter of Compensation. The

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grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.”

45 U.S.C. § 151a.

Certificate of Appointment and the Compensation Letter do not have a termination date. King Letter at 2.

Pursuant to NMB procedures, an arbitrator may not participate in a hearing on the case until NMB appoints the arbitrator and the arbitrator submits and NMB approves the expense and compensation request. See Form NMB-6: Official Travel/Referee Compensation Authorization Form. Because arbitrators may hear multiple cases at one time, NMB approves expenses and compensation for multiple cases submitted as part of one expense and compensation request. *Id.* NMB only approves an arbitrator's anticipated compensation and expenses on a month-to-month basis. The arbitrator must submit the request for expense and compensation at least 10 days prior to the month covered by the request when compensable services and travel are to be performed, and the arbitrator must submit a new form each month his or her work continues. The arbitrator may not begin work and may not travel until NMB approves the submitted form. NMB Compensation Letter. NMB will not pay an arbitrator for more than 20 days worked per month.<sup>2</sup> Letter from Roland Watkins, Director, Arbitration Services, NMB, to Tom Armstrong, Assistant General Counsel for Appropriations Law, GAO, Aug. 9, 2005 (Watkins/Armstrong letter). At the end of each month, the arbitrator must submit a detailed voucher showing actual expenses for time spent traveling, participating in a hearing, and writing a decision, and for travel and per diem expenditures. See, e.g., NMB Form-8, and Standard Form 1012.

NMB compensates the arbitrator, *inter alia*, for time spent traveling and participating in a hearing, and also pays him for per diem and travel expenditures, on a month-to-month basis after the arbitrator submits a voucher showing actual expenses. Charges for time spent writing the decision, however, are payable only after the arbitrator submits an award, even if the arbitrator's work continues for more than 1 month. Memorandum from Roland Watkins, Director, Arbitration Services, NMB, to Railroad Neutrals, *Timing of Payments for Personal Services (Revised)*, Dec. 17, 2004.

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<sup>2</sup> On average, an arbitrator spends approximately 3 days working on a case. Telephone conversation between Roland Watkins, Director, Arbitration Services, NMB, and Hannah Laufe, Senior Attorney, GAO, Sept. 14, 2005 (Watkins/Laufe Telephone Conversation, Sept. 14, 2005). However, in some circumstances, a case may remain unresolved for up to 2 years. In response to a 2004 notice of proposed rulemaking regarding facilitating the more timely resolution of grievances, some commenters stated that a lack of funding precluded the timely resolution of some cases. Others stated that the lack of an established time frame regarding when an arbitrator must submit an award contributed to a delay in the resolution of cases. See *Administration of Arbitration Programs*, 69 Fed. Reg. 48177, 48178 (Aug. 9, 2004).

## ANALYSIS

To ensure compliance with the Antideficiency Act and other fiscal laws, the federal government accounts for its use of federal funds on the basis of obligations it has incurred. 31 U.S.C. § 1341(a); B-300480, Apr. 9, 2003; B-237135, Dec. 21, 1989. Understanding the concept of an obligation and properly recording obligations, therefore, is critical. When an agency takes some action that creates a legal liability, the agency “obligates” the United States government to make a payment. The actual disbursement of money typically follows at some later time. B-265901, Oct. 14, 1997; B-116795, June 18, 1954.

A legal liability is a claim that may be legally enforced against the government. *Collins v. United States*, 15 Ct. Cl. 22 (1879). An agency may incur a legal liability in a variety of ways, such as when an agency signs a contract, grant or cooperative agreement, or by operation of law. *Id.* Generally an obligation is “a definite commitment which creates a legal liability on behalf of the government to pay appropriated funds for goods and services ordered or received.” B-265901, Oct. 14, 1997; B-116795, June 18, 1954.

The Antideficiency Act prohibits an officer of the United States from incurring obligations in excess or advance of an appropriation. 31 U.S.C. § 1341(a). To track obligations for purposes of the Antideficiency Act, an agency official must determine both when the agency incurs the obligation and in what amount. 31 U.S.C. § 1514(a). *See also* B-300480.2, June 6, 2003; B-300480, Apr. 9, 2003.

NMB, for various factual circumstances, questions when it incurs an obligation and in what amount. Underlying NMB’s questions, as discussed below, is who controls NMB’s obligations to pay neutral arbitrators.

### When Does NMB Incur an Obligation and in What Amount?

NMB’s first question is whether NMB’s financial liability arises with the issuance of the Certificate of Appointment and the Compensation Letter, and if so, must NMB ensure that it has sufficient appropriations to cover the costs of the arbitrator at the time it issues the Certificate of Appointment and the Letter of Compensation to the arbitrator.

Under the Railway Labor Act, NMB is required to appoint an arbitrator only when a grievance adjustment board cannot reach a resolution on a grievance. 45 U.S.C. § 153, First (1), 45 U.S.C. § 153, Second.<sup>3</sup> In practice, the parties use the services of a

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<sup>3</sup> The Railway Labor Act uses the headings First, Second, Third, *etc.*, to subdivide sections within the act. For example, section 3 of the Railway Labor Act, now codified at 45 U.S.C. § 153, is divided into 45 U.S.C. § 153, First, which applies to the  
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neutral arbitrator for every case that these grievance adjustment boards hear. Telephone conversation between Roland Watkins, Director, Office of Arbitration Services, NMB, and Hannah Laufe, Senior Attorney, GAO, Nov. 29, 2005 (Watkins/Laufe Conversation, Nov. 29, 2005). Consequently, when NMB appoints an arbitrator at the beginning of a case, NMB is appointing the arbitrator to hear a case, and not merely to stand by in the event that the partisan members of the board are unable to resolve a grievance.

NMB appoints an arbitrator to a case or specified group of related cases by issuing a Certificate of Appointment. The Certificate of Appointment is the “employment contract.” Watkins/Armstrong Letter. The Certificate, signed by both parties, commits NMB to pay the arbitrator to render an award for the case or group of cases and commits the arbitrator to hear the case or groups of cases. The Certificate used to appoint an arbitrator to the Railroad Adjustment Board, for example, provides that “This certificate is issued [to the arbitrator] for the purpose of sitting with the [First Division of the Railroad Adjustment Board] as a member to make awards on six (6) cases listed in the Division letter . . .” The six cases are then listed in the Certificate of Appointment.

At the same time that NMB issues the Certificate of Appointment to the arbitrator, NMB provides a Compensation Letter setting out what costs NMB will cover. NMB approves an arbitrator’s anticipated compensation and expenses on a month-to-month basis, and the arbitrator may not begin work and may not travel until NMB approves the request. While NMB appoints an arbitrator to a case by issuing a Certificate of Appointment, NMB currently records an obligation on a month-to-month basis at the time it approves the arbitrator’s compensation request. The amount of the obligation NMB records is based on the anticipated expenditures NMB approves in the monthly compensation request. *See* Form NMB-6: Arbitration Services—Office Travel/Referee Authorization.

We disagree with NMB’s current practice for recording obligations for arbitration services on a month-to-month basis. When NMB appoints an arbitrator by issuing a Certificate of Appointment, NMB incurs and should record an obligation based on the estimated cost of paying the arbitrator to submit an award.

The arbitrator’s services are in the nature of nonseverable services; that is, NMB only receives value when NMB receives the end product, *i.e.*, the award. Nonseverable services are services that represent a single undertaking and provide value only when the entire project is complete. *See* B-287619, July 5, 2001; B-277165, Jan. 10, 2000. An agency must obligate the full amount of the nonseverable service at the

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National Railroad Adjustment Board, and 45 U.S.C. § 153, Second, which applies to Special Boards of Adjustment and Public Law Boards.

time it incurs the obligation, even if performance continues into the subsequent fiscal year, or vouchers for reimbursement are submitted in a subsequent fiscal year. *See* B-287619, July 5, 2001; B-277165, Jan. 10, 2000. Consequently, NMB incurs an obligation for the cost of obtaining the award—which includes time the arbitrator spends in travel and on travel-related expenditures, time the arbitrator spends preparing for and participating in a hearing, and time the arbitrator spends writing a decision—when NMB appoints the arbitrator to hear specific cases.<sup>4</sup> The NMB appointment of the arbitrator to a grievance board is the obligating event in accordance with 31 U.S.C. § 1501(a).<sup>5</sup>

NMB should modify its practices in order to record an obligation at the time it appoints an arbitrator to a board. Under the recording statute, for an amount to be recorded as an obligation it must be supported by documentary evidence of a binding agreement that is in writing and is for specific goods or services to be provided. 31 U.S.C. § 1501(a). NMB should modify the Certificate of Appointment to make it clear that the specific service to be provided is a submitted award and that the Certificate of Appointment commits NMB to pay the arbitrator for a submitted award for the case or group of cases before the board at the time NMB appoints the arbitrator.

The amount of the obligation should be based on an estimate of the number of days the arbitrator will work before submitting an award or awards. According to the Director of NMB's Office of Arbitration Services, on average an arbitrator spends 3 days working on a case. However, at the time NMB appoints the arbitrator, NMB does not know the precise number of days it will take the arbitrator to submit an

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<sup>4</sup> When a federal employee is on travel, the federal government does not incur an obligation until the travel is actually performed or until a ticket is purchased, provided in the latter case the travel is to be performed in the same fiscal year the ticket is purchased. 35 Comp. Gen. 183, 185 (1955). However, neutral arbitrators are contractors, not federal employees. At the time the government enters into a contract for arbitrator services, the cost for travel is part of the costs of the contract.

<sup>5</sup> In two prior decisions, we looked at NMB's compensation of neutral arbitrators. In B-217475, Dec. 24, 1986, and B-217475, May 5, 1986, we concluded that NMB did not need to "obligate estimated amounts due to neutral [arbitrators] for services he may perform in the future unless the [arbitrator] submits the proper forms and estimates of compensation and expenses for advance approval, as required by NMB's . . . regulations." These 1986 decisions, however, did not address whether NMB incurs an obligation when NMB appoints the arbitrator or when NMB approves the request for compensation and expenses. To the extent that we indicated in these prior decisions that NMB may record obligations monthly based on the anticipated expenditures it approves in the monthly compensation requests, they are overruled.

award.<sup>6</sup> To ensure that NMB has adequate amounts available to cover its legal liability, that is, the cost of paying the arbitrator to participate in a hearing, to write a decision, and for travel-related expenses, NMB, at the time it appoints the arbitrator, should record an obligation in the amount of its best estimate of its legal liability. When NMB appoints an arbitrator, it is the amount of the commitment, not the commitment itself, that is uncertain. *See* B-300480, Apr. 9, 2003; 64 Comp. Gen. 45, 48 (1984); 55 Comp. Gen. 812, 824 (1976); 50 Comp. Gen. 589, 91 (1971). As stated above, the Antideficiency Act requires an agency to have an adequate appropriation at the time it incurs the obligation to liquidate its obligation. 31 U.S.C. § 1341(a). *See also*, B-300480, Apr. 9, 2003; 64 Comp. Gen. 45, 48 (1984); 55 Comp. Gen. 812, 824 (1976). As more information becomes known during the fiscal year, NMB should adjust its obligations, that is, deobligate funds or increase the obligational level, as needed. B-300480, Apr. 9, 2003.

We have recognized that where the amount of a liability is indefinite, an agency may cap its Antideficiency Act exposure by putting a limit on the extent of its liability. For example, agencies may cap indemnity clauses that subject the United States to an indefinite or potentially unlimited contingent liability. B-242146, Sept. 16, 1991. We understand NMB's concern that boards do not always resolve cases within a defined period. NMB could address this as a practical matter by capping its liability at the time of obligation, based on its best estimate of its legal liability. As more information becomes known during the fiscal year, NMB could adjust the cap upwards if it has available unobligated balances. If NMB chooses to cap its liability, it should provide specific language in the Certification and Compensation Letters stating the amount at which NMB's liability is capped.

NMB should continue to request and approve a compensation request in advance of each month that the arbitrator works. This is an important practice, as NMB will need to adjust the amount of its obligation as it definitizes costs. Approval of monthly expenditures, however, is not an obligating event; it is merely a way for NMB to monitor arbitrator activity and to control and track NMB obligations and expenditures on a month-to-month basis.

In response to NMB's first question, NMB incurs a legal liability at the time it appoints the arbitrator to a specific case or a specified group of related cases, and it should obligate an amount based on the estimated time it will take the arbitrator to submit an award for the case or cases to which he or she has been appointed.

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<sup>6</sup> NMB cannot control the number of days an arbitrator will work before submitting an award. NMB, however, states in its compensation letter that an arbitrator will not be able to hear additional cases if he or she does not submit an award within 6 months of the date of hearing a case. NMB Letter of Compensation.



Does the Availability of Funds Clause in the Compensation Letter Protect NMB From Violating the Antideficiency Act?

NMB's Compensation Letter states "such compensation is subject to the availability of government funds." NMB's second question is whether this language is sufficient to cover any potential liability as it relates to the Antideficiency Act.

The language in the Compensation Letter, "such compensation is subject to the availability of government funds," which is also known as "a subject to availability clause," is not sufficient to protect NMB from violating the Antideficiency Act. It is the proper recording of the obligation that protects NMB from violating the Antideficiency Act. "Properly recording" an obligation means recognizing the liability at the time it is incurred in an appropriate amount.

As we discussed above, NMB incurs an obligation to pay the arbitrator when it issues a Certificate of Appointment, and NMB must have sufficient budget authority at that point in time to cover the expected costs in order to avoid violating the Antideficiency Act.<sup>7</sup> For example, if NMB, when it appoints an arbitrator to a case, estimates that it will take 6 days for the arbitrator to submit an award, NMB, at the time of appointment, must have an appropriation available at least for that amount and purpose and must record an obligation in that amount. It is conceivable, given NMB's current practice of recording obligations on a month-to-month basis, that if the arbitrator works 4 days in one month and 2 days in a subsequent month, NMB may not have funds available to pay the arbitrator for the subsequent month.<sup>8</sup> The "availability of appropriated funds" clause in the Compensation Letter will not protect NMB from an Antideficiency Act violation in such circumstances because the obligation arises at the time of appointment in the full amount of the liability incurred.

The United States Supreme Court addressed a "subject to availability clause" in *Leiter v. United States*, 271 U.S. 204 (1926). In that case, an agency with a fiscal year appropriation entered into a multiyear lease for office space. The lease specifically provided that payment for periods after the first year was contingent on the availability of future appropriations. The Court found that the terms of the contract that extended beyond the fiscal year were in violation of the Antideficiency Act and created no binding obligations against the United States after the first year. *Id.* at 206-07. See also *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005) (the Court rejected the government's argument that because a contract contained a

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<sup>7</sup> See the response to question one for a discussion of nonseverable services.

<sup>8</sup> As discussed in the response to question one, NMB could protect itself from an Antideficiency Act violation by capping its liability at the time of obligation based on a good faith estimate of its maximum legal liability.

subject to availability clause, the government could adjust its contractual obligations to the amount available). GAO has similarly stressed that an “availability of funds” provision does not save a contract from the Antideficiency Act prohibition against binding the government in excess or in advance of appropriations. 67 Comp. Gen. 190 (1988); 42 Comp. Gen. 272 (1962); 36 Comp. Gen. 683 (1957).

Does NMB Incur a Liability for a Pending Case to Which It Has Not Yet Appointed an Arbitrator?

NMB’s third question is whether it must have funds available in its annual appropriation to cover the expenses (daily compensation, per diem, and travel) of all pending cases, or only for those cases to which it has appointed an arbitrator. NMB asks further, if it is the latter, do the remaining cases constitute a contingent liability. King Letter at 2.

Approximately 5,221 cases are pending before the three grievance adjustment boards. King Letter at 2. A pending case is a case that the parties have referred to a grievance adjustment board but which has not yet been resolved. Pending cases include cases to which NMB has not yet appointed an arbitrator; cases to which NMB has already appointed an arbitrator, but the case has not yet been heard; or the case has been heard, and the arbitrator has not yet submitted an award. Watkins/Laufe Telephone Conversation, Sept. 14, 2005.

NMB only is required to have funds available in its annual appropriation to cover the amount of the obligations it incurs during the fiscal year for arbitrators it has appointed to specific cases before a board. The pending cases to which NMB has not yet appointed an arbitrator constitute a contingent liability of NMB. As a general matter, contingent liabilities may take different forms depending on the circumstances. However, whatever form it takes, a contingent liability by definition lacks the certainty that is essential to the establishment of an obligation. Thus, GAO defines a “contingent liability” generally as “[a]n existing condition, situation, or set of circumstances that poses the *possibility* of a loss to an agency that will ultimately be resolved when one or more events occur or fail to occur.” GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 35 (emphasis added).<sup>9</sup>

Contingent liabilities are not recordable as obligations under section 1501 of title 31, United States Code (“the recording statute”), because they are not yet liabilities; that is, the agency has taken no action making a definite commitment, nor has the agency permitted some other entity to take an action that could mature into a legally

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<sup>9</sup> For a discussion of contingent liabilities, see GAO, *Principles of Federal Appropriations Law*, 3<sup>rd</sup> ed., vol. II, ch. 7, § C, GAO-06-382SP (Washington, D.C.: Mar. 2006).

enforceable claim against the United States. Rather, a contingent liability ripens into a recordable obligation for purposes of section 1501 only if and when the contingency materializes. *E.g.*, 62 Comp. Gen. 143, 145–46 (1983); 37 Comp. Gen. 691–92 (1958).

Until NMB takes an action by issuing a Certificate of Appointment to an arbitrator, NMB does not incur an obligation to pay the arbitrator. NMB will appoint an arbitrator to the pending case or cases at some future time, and NMB's obligation for the arbitrator's costs is contingent on appointment. This contingency does not ripen into a recordable obligation until NMB appoints an arbitrator to hear that specific case or a specified group of related cases.

Accordingly, in response to NMB's third question, NMB is only required to have funds available in its annual appropriation to cover the amount of the obligations it incurs during the fiscal year to pay arbitrators it appoints to specific cases before a board. NMB incurs an obligation when it appoints an arbitrator to a grievance adjustment board to hear a specific case or a specified group of related cases. The pending cases to which NMB has not yet appointed an arbitrator constitute a contingent liability of NMB. Contingent liabilities are not recordable as obligations until the contingency actually materializes.

Once NMB has Obligated All Of Its Funding for Neutral Arbitrators, Will it Violate the Antideficiency Act If It Appoints Arbitrators to New or Previously Established Boards?

The fourth question NMB asked is once NMB has obligated all of its annual appropriation that is available for neutral arbitrators, will it violate the Antideficiency Act if incurs a new obligation by appointing an arbitrator to a new or previously established board.

Under the Antideficiency Act, the President is required to apportion funds to executive branch agencies. 31 U.S.C. §§ 1512, 1513(b)(1). The President delegated this authority to the Bureau of the Budget, and it now reposes in the Office of Management and Budget (OMB). Exec. Order No. 6166, § 16 (June 10, 1933). An agency may not obligate or expend funds exceeding an apportionment or any other subdivision of funds as specified in an agency's regulations. 31 U.S.C. § 1517(a). The apportionment process is intended to prevent the obligation of amounts available within an appropriation in a manner that would require a deficiency or supplemental appropriation or a drastic curtailment of the activity for which the appropriation was made. OMB Circular No. A-11, § 120.2 (Nov. 2, 2005). Apportionments control the rate of spending during the year by limiting the amount of funds that can be obligated—typically by time periods, activities, projects, objects, or a combination thereof. *Id.* § 120.8.

The Antideficiency Act also requires all agencies to prescribe by regulation a system of administrative control of funds. 31 U.S.C. § 1514(a). The purpose of this fund

control system is to ensure that the agency keeps within the bounds of each apportionment or reapportionment and to “enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.” 31 U.S.C. § 1514(a)(2).

OMB apportions funds to NMB on a quarterly basis. Telephone conversation between Roland Watkins, Director, Office of Arbitration Services, NMB, June King, Director, Office of Administration, NMB, and Hannah Laufe, Senior Attorney, GAO, Nov. 29, 2005. It is clear that NMB may not obligate funds in excess of its apportionment from OMB. NMB, however, was unable to provide us with any information about its administrative fund control system or whether its fund control regulations subdivide funds below the apportionment level.

If NMB does not have a fund control system in place, we suggest that NMB work with OMB to establish such a system. Agency fund control regulations must be approved by OMB, and OMB issues guidance regarding at what level of administrative subdivision an agency should impose Antideficiency Act control. OMB Cir. No. A-11, § 145.2. For more information about administrative control of funds and the apportionment process, *see* GAO, *Principles of Federal Appropriations Law*, 3<sup>rd</sup> ed., vol. II, ch. 6, § C.4, GAO-06-382SP (Washington, D.C.: Mar. 2006), and OMB Cir. No. A-11, §§ 145, 150, and App. H.

In response to NMB’s fourth question, NMB will violate the Antideficiency Act if it appoints an arbitrator to a new or existing board and incurs an obligation in excess of its apportionment or any other subdivision of funds as specified in its administrative fund control regulations. If NMB does not have an administrative fund control system, it should work with OMB to establish one.

#### Who Can Obligate NMB’s Appropriations?

NMB’s last two questions pertain to only two of the grievance adjustment boards: Special Boards of Adjustment (SBA) and Public Law Boards (PLB). SBAs and PLBs are temporary grievance boards established by management and labor to decide a specific set of grievances.<sup>10</sup> When the parties form an SBA or PLB, the agreement establishing the board identifies the specific cases the board will hear.

NMB’s fifth question is whether NMB incurs an obligation to pay a neutral arbitrator when the parties to a grievance enter into an agreement to form an SBA or PLB. In

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<sup>10</sup> The National Railroad Adjustment Board (NRAB) is a permanent board composed of labor and management representatives whose job is to resolve grievances referred by either labor or management. 45 U.S.C. § 153, First. As the parties refer a case or group of cases to NRAB, NMB appoints an arbitrator to hear the case or group of cases.

other words, is the point at which the parties enter into an agreement to form an SBA or PLB an obligating event for purposes of NMB discharging its statutory responsibility to name and pay a neutral arbitrator?

NMB incurs an obligation when an authorized NMB official appoints an arbitrator to a specific case or a specified group of related cases. The parties' agreement to establish an SBA or PLB is not an obligating event. As explained above, when an agency takes some action that creates a legal liability, the agency "obligates" the United States government to make a payment. *Collins v. United States*, 15 Ct. Cl. 22 (1879).

As a general matter, the Antideficiency Act and the so-called purpose statute prohibit NMB from incurring an obligation to pay an arbitrator unless Congress has appropriated funds in a sufficient amount to NMB for that purpose. 31 U.S.C. § 1341(a); 31 U.S.C. § 1301. The Antideficiency Act, however, recognizes that Congress can and may authorize exceptions. 31 U.S.C. § 1341(a). One such exception is where an obligation arises by operation of law, *i.e.*, by virtue of a law requiring such obligations. B-287619, July 5, 2001; 39 Comp. Gen. 422 (1959).

While section 153 of the Railway Labor Act states that NMB "shall" compensate an arbitrator it appoints to a board, the Railway Labor Act also provides in part that:

"The Mediation Board [NMB] may . . . make such expenditures (including . . . expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards . . . ) 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.*"

45 U.S.C. § 154, Third (emphasis added).

This provision requires that Congress provide NMB with funds before NMB may incur an obligation. Accordingly, section 153 of the Railway Labor Act does not automatically give rise to an obligation. Before NMB can incur an obligation, Congress must provide NMB with funds to do so, and NMB must take some action incurring the commitment.

It is also important to note that only an authorized officer of the United States government can enter into a contract or other binding commitment on behalf of the government. *White v. United States Department of Interior*, 639 F. Supp. 82 (1986), *aff'd*, 815 F.2d 697 (3<sup>rd</sup> Cir. 1987); B-230382, Dec. 22, 1989. Consequently, if someone other than an authorized officer attempts to sign a contract or other agreement committing the government to some action, the commitment is not binding on the government. *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1355 (Fed Cir. 2002).

At the time the parties form an SBA or PLB, which is composed of specific cases, NMB may anticipate eventually appointing an arbitrator to hear these cases; however, it is the appointment of the arbitrator by an authorized NMB official, not the organization of the SBA or PLB, that is the obligating event for NMB.

Does NMB Incur an Open-Ended Liability When it Appoints an Arbitrator to a Special Board of Adjustment or a Public Law Board?

NMB's last question is whether NMB incurs an open-ended liability for an arbitrator's costs when it appoints an arbitrator to a Special Board of Adjustment or a Public Law Board. When NMB appoints an arbitrator to an SBA or PLB, it appoints the arbitrator to the specific number of cases on the SBA or PLB at the time of appointment. The agreement between the parties establishing an SBA or PLB has no termination date and there is no limit on the number of cases that the parties can add to an already established board to which NMB has already appointed an arbitrator. However, the parties may not add a new case to a board without NMB's approval.

Absent specific statutory authority, an agency may not enter into an agreement that is open-ended. *Hercules, Inc. v. United States*, 516 U.S. 417, 426–428 (1996); B-242146, Aug. 16, 1991. An agency may not enter into an agreement that is open-ended because at the time it incurs a liability, it does not know the amount of that liability, so it has no way of ensuring that appropriations will be available to cover the legal liability it incurs upon entering into the agreement. This could result in the agency incurring a legal liability in excess of its appropriation in violation of the Antideficiency Act, 31 U.S.C. § 1341(a). *Hercules*, 516 U.S. at 426–28; B-242146, Aug. 16, 1991.

We do not find NMB's commitment to pay an arbitrator for all of the cases before an SPB or PLB at the time of a board's creation to be open-ended. NMB generally appoints an arbitrator to a PLB or SBA at the time the parties submit an agreement to NMB in which they have agreed to the establishment of a board. The parties submit the agreement to NMB for administrative purposes. King Letter at 2. When NMB appoints an arbitrator, the arbitrator becomes a member of the board, and as such, the arbitrator commits to hearing all of the cases currently on the board. *See, e.g., Public Law Board Agreement Between Delaware and Hudson Railway, Inc. and United Transportation Union*, GO 300, Feb. 11, 2004. Consequently, when NMB appoints an arbitrator to a PLB or SBA, it appoints the arbitrator to hear all of the cases currently before the board.

Because NMB appoints an arbitrator to an SBA or PLB to hear the cases on the board at the time NMB appoints the arbitrator to the board, it only incurs an obligation to cover the arbitrator's costs to hear those cases. NMB must approve any new cases that the parties wish to add to an already established board. Watkins/Laufe Telephone Conversation, Nov. 29, 2005. *See, e.g., Public Law Board Agreement Between Delaware and Hudson Railway, Inc. and United Transportation Union*, GO 300, Feb. 11, 2004. If an SBA or PLB wish to add a new case, and if NMB

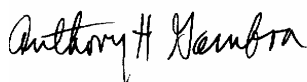
approves the addition, NMB is creating a new obligation and must obligate additional funds to pay the arbitrator to hear the additional case or cases. In addition, NMB must provide a new Certification Letter to the arbitrator that specifies the additional cases the arbitrator will hear and the arbitrator's estimated payment. As explained in the response to the previous question, the parties establishing a board cannot obligate NMB's appropriation; only NMB can do that and NMB does that by taking the action of approving the addition of new case to the board. Because NMB's appointment of the arbitrator to the new case is a new obligation, NMB must charge the obligation against the fiscal year in which it appoints the arbitrator to these new cases.

In a 1977 decision, we concluded that the appointment of a commissioner to a continuing land commission by itself did not obligate the Department of Justice (Department) to pay the salary of the land commissioner. 56 Comp. Gen. 414 (1977). Rather, the Department incurred an obligation when a court had both appointed a land commissioner to the continuing land commission and referred a specific case to the commission. *Id.* Our discussion here is consistent with the land commission decision. As with a land commission, the continued existence of a grievance board does not by itself create an obligation. For obligational purposes, the liability arises when NMB appoints the arbitrator to the additional case. It is at this point that NMB incurs a new obligation and is required to charge the payment to the fiscal year in which it incurs the new obligation. *Id.* Conversely, if NMB does not have an appropriation available for that purpose, it cannot approve the addition of the case.

In response to NMB's sixth question, NMB does not enter into an open-ended contract to pay an arbitrator when it appoints an arbitrator to an SBA or a PLB. The parties to a grievance may not add a new case to a board without NMB's approval, and NMB must appoint the arbitrator to hear the new cases. The appointment to a new case constitutes a new obligation.

## CONCLUSION

NMB incurs an obligation when it appoints a neutral arbitrator to a grievance adjustment board to hear a specific case or a specified group of related cases. The Antideficiency Act requires that NMB have an appropriation available to cover the estimated costs of the arbitrator at the time it incurs the obligation. 31 U.S.C. § 1341(a). To protect itself from violating the Antideficiency Act, NMB could cap its liability at the time of obligation based on its best estimate of its legal liability. As more information becomes known during the fiscal year, NMB could adjust the cap upwards if it has available unobligated balances.



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