U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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Ranking Democratic Member

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Elizabeth Megginson, Chief Counsel

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February 24, 2005

National Mediation Board
1301 K Street, NW
Suite 250 East
Washington, DC 20005

Attention: NMB Docket No. 2003-01N

Dear Chairman Hoglander, and Members Fitzmaurice and Van de Water:

I am writing to express my opposition to the proposed regulation published in the *Federal Register* on August 9, 2004, in which the National Mediation Board (NMB) proposes to establish procedural rules for the National Railroad Adjustment Board (NRAB); condition payment of referees' compensation on compliance with those new rules; and, establish a fee schedule for arbitration services of the NMB, the NRAB, and other arbitration boards.

Last Fall, 124 of my colleagues in the House of Representatives joined me in the attached letter to the NMB opposing these regulations. In the letter, we pointed out that the proposed regulation would defy basic policies of the Railway Labor Act (RLA) and impair the right of railroad workers to arbitrate grievances. In amendments to the Act, in 1934 and 1966, Congress required the federal government to pay for binding arbitration of minor disputes. In return, railroad workers gave up their right to strike over these disputes. The proposed regulation would undermine the RLA, its legislative history, and the concessions that railroad workers made.

I urge the Board to consider the attached letter in its proceeding.

The NMB does not have legal authority to adopt the proposed regulations. To evaluate NMB's legal authority it is necessary to review the legislative history of the Railway Labor Act (RLA). The RLA was enacted in 1926 and established a Board of Mediation to handle all major and minor disputes between management and labor. In resolving minor disputes, involving grievances over interpretation or application of collective bargaining agreements, carriers and labor organizations were called upon to form boards of adjustment consisting of an equal number of members selected by the parties. However, the parties were often unable to agree on the establishment of such boards. In that event, minor disputes were submitted to the Board of Mediation, which at the time had no means of compelling arbitration. As a result, thousands upon

thousands of unresolved cases remained on its docket. Rail labor unions were free to strike, and regularly threatened to do so.

In 1934, Congress stepped in and amended the RLA. The Board of Mediation was dissolved, and major disputes were separated from minor disputes. Resolution of major disputes was assigned to the NMB, and resolution of minor disputes was assigned to two separate organizations the NRAB and Special Boards of Adjustment (SBAs).

Under Section 3, First, of the RLA, Congress defined the process used to resolve minor disputes. A dispute between management and labor may be referred by petition of the parties or by either party to one of the NRAB's four divisions. The divisions are empowered to conduct hearings and make findings upon disputes. A majority vote of the division is needed to make an award to one of the parties. If the division is unable to agree upon an award because of a deadlock or an inability to secure a majority vote, the division will agree upon and select a neutral person or "referee" to sit with the division and make an award. If the division is unable to agree upon a referee, the NMB selects and names the referee to the division. The NMB is required by law to fix and pay the compensation of the referees. In addition, the NMB is authorized to make other expenditures, including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the NMB, the NRAB, and other boards of adjustment, as may be necessary for the execution of the functions vested in those entities.

In the Notice of Proposed Rulemaking, the NMB states that Section 154 of Title 45, United States Code, grants the Board authority to consider changes to NRAB rules. Under Section 3, First, of the RLA, Congress specifically provides that the NRAB shall adopt such rules as it "deems necessary to control proceedings before the respective divisions."

Pursuant to this explicit authority, the NRAB adopted procedural rules, which were published on October 10, 1934, as Circular No. 1 and revised as recently as June 23, 2003. During the 70 years since the NRAB was established, the NMB has never claimed authority to establish procedural rules for the NRAB or the other arbitration boards. The language in Section 3, First, of the RLA and the absence of any additional language in the RLA granting the NMB the authority to issue rules with respect to the NRAB's dispute resolution procedures, affirms the fact that the NRAB has the exclusive authority to prescribe such rules.

Moreover, under general principles of statutory construction specific terms of the statute override the general terms. In this case, the specific grant of authority to the NRAB to adopt rules with respect to its dispute resolution procedures override any general rulemaking authority retained by the NMB.

In addition, the plain meaning of Section 4, Third, suggests that the NMB is exceeding its authority by issuing the proposed rule. Section 4, Third, grants the NMB authority to appoint experts and assistants, to fix the salaries of such experts and assistants, and to make expenditures for rent, books, salaries, and other expenses. Section 4, Third, limits NMB's authority to these matters, and does not grant NMB authority to issue rules or establish a fee schedule to resolve minor disputes at the NRAB.

The legislative history of the RLA confirms that Congress did not intend to grant the NMB authority to establish procedures for the NRAB, or to impose fees for arbitration services. While considering the 1934 amendments to the RLA, Rep. William Hess discussed the addition of referees to the NRAB's dispute resolution procedures:

> "This bill provides for the addition of neutral or impartial persons to the boards and thereby makes it possible for the boards to reach decisions. There is but little expense to the Government and what there is will be taken care of through such economies as the United States Board of Mediation will be able to make because it will now no longer be necessary for that Board to undertake to aid the parties to settle these disputes through mediation and arbitration. The expense of such proceedings is now borne by the Federal Government." *See 78 Cong. Record 11,814 (June 15, 1934).*

In return for the government-paid, compulsory arbitration, railroad workers agreed to forgo strikes on minor disputes. Federal Transportation Coordinator Joseph Eastman, the principal draftsman of the 1934 Act, testified before the Senate Committee on Interstate Commerce on April 10, 1934, that this 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."

George Harrison, former 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 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."

This compromise was clearly understood by the principal drafters of the 1934 Act. It was equally clear that the Federal Government, as part of this compromise, would pay for the arbitrations and other expenses. In testimony before the House Committee on Interstate and Foreign Commerce on May 22, 1934, Coordinator Eastman 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."

The Board notes that the proposed fees represent only a "very small portion" of the actual costs of providing arbitration services. However, the imposition of any fee is contrary to Congress' insistence that the expenses associated with the resolution of minor disputes be paid by the Federal Government, as shown by the remarks of then Chairman of the United States Board of Mediation, Samuel Winslow. Chairman Winslow testified before the House Committee on Interstate and Foreign Commerce on May 22, 1934, that "Under the provisions of this act all the operating expenses of all kinds of boards having to do with adjustment business have to be paid by the Government."

I believe that the NMB's proposed fee would discourage unions and individuals from pursuing grievances. Under the NMB's proposal, the fees for a claim, from initial docketing through

arbitration, would be a minimum of $75 and as high as $350. Many claims now filed are for contract violations where the employee involved suffers a financial loss that is less than the proposed filing fees; examples include loss of a day's pay, loss of overtime, or denial of skill differential or other special pay, travel pay, or travel expenses. The proposed fees would discourage the filing for arbitration over such claims. As a result, carriers with thousands of employees could reap substantial savings by small rules violations over years that are not challenged because the filing fees exceed the value of individual claims.

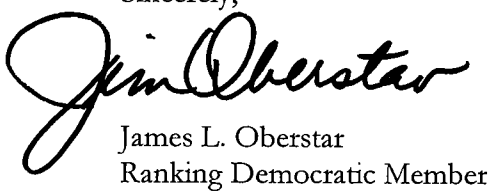
Furthermore, the proposed fee schedule provides no incentive for management to bargain in good faith over the terms of a contract. It places the entire burden on the employee who files the grievance. The vast majority of rail industry grievances are initiated by unions and individuals because the statutory scheme permits a carrier to act when challenged by a union, subject to the filing of a grievance that will later determine whether there was a violation or not. In this system, unions and workers are effectively the "plaintiffs", management can simply act and the unions must grieve and arbitrate. As the RLA has been interpreted in several court cases, management does not need to obtain an arbitrator's approval before proceeding when an interpretation of the parties' agreement has been disputed. In other words, management can just act and continue business as usual: Unions are obligated to grieve and arbitrate after the action is taken. Accordingly, a system of fees for arbitration effectively favors the carriers because the costs of invoking the statutory dispute resolution mechanism are imposed on workers and their unions, not management.

The NMB states that the purpose of the proposed regulation is to "facilitate the timely resolution of disputes in the rail industry" and eliminate the backlog of pending cases at the NRAB and the other arbitration boards. The way the NMB proposes to deal with the backlog – by cutting down on the number of cases coming in and making it harder for unions and individuals to file – is wrong. It is in direct violation of current law, and Congress' intent when it amended the RLA, to establish NRAB.

In the letter, we have asserted that NMB had no legal authority to issue these procedural regulations for other agencies. I have asked the Congressional Research Service to consider this issue, and their opinion, which is attached, confirms that NMB lacks authority to adopt these regulations.

In sum, it is inappropriate for the NMB to propose a rule that alters the procedures used to resolve minor disputes, including the imposition of fees. I therefore urge the NMB to withdraw the proposed regulation.

Sincerely,



James L. Oberstar
Ranking Democratic Member

Attachments

Congressional Research Service

Memorandum

January 27, 2005

TO: House Committee on Appropriations
Attention: Cheryl Smith

FROM: Jon O. Shimabukuro
Legislative Attorney
American Law Division

SUBJECT: National Mediation Board Proposed Rule

This memorandum responds to your request concerning a rule proposed by the National Mediation Board ("NMB") that would impose certain fees for arbitration services. On August 9, 2004, the NMB published a Notice of Proposed Rulemaking in the *Federal Register*.[1] The notice includes a proposed rule that identifies a fee schedule for arbitration services. For example, the rule would impose a $75.00 fee for each notice of intent associated with a National Railroad Adjustment Board ("NRAB") grievance filing.[2] You asked about the NMB's authority to issue such a rule.

The Railway Labor Act ("RLA") governs the labor-management relationship for rail and air carriers.[3] The RLA provides for the prompt and orderly settlement of both "major" and "minor" disputes.[4] Major disputes involve the formation or modification of collective bargaining agreements.[5] Under the RLA, the NMB is obligated to mediate in major disputes when such mediation is requested by the parties.[6] Minor disputes involve grievances and disputes concerning the interpretation or application of collective bargaining agreements.[7] Minor disputes are resolved with the assistance of the NRAB or special boards of adjustment

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[1] Administration of Arbitration Programs, 69 Fed. Reg. 48,177, 48,182 (proposed Aug. 9, 2004) (to be codified at 29 C.F.R. pt. 1210).

[2] *Id.*

[3] 45 U.S.C. §§ 151-188.

[4] *See* The Railway Labor Act 2-7 (Douglas L. Leslie ed., 1995).

[5] *Id.*

[6] *See* 45 U.S.C. § 155.

[7] The Railway Labor Act, *supra* note 4.

established through the mutual agreement of the parties.[8] The proposed rule and its fee schedule are concerned with the resolution of minor disputes.

In general, Section 3, First, of the RLA defines the process used to resolve minor disputes.[9] A dispute between the parties may be referred by petition of the parties or by either party to one of the NRAB's four divisions. Each division has jurisdiction over a specific group of employees. For example, the First Division has jurisdiction over disputes involving "train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees."[10] The divisions are empowered to conduct hearings and make findings upon disputes.[11] A majority vote of the division is needed to make an award to one of the parties. If the division is unable to agree upon an award because of a deadlock or an inability to secure a majority vote, it will agree upon and select a neutral person or "referee" to sit with the division and make an award.[12] If the division is unable to agree upon a referee, the NMB will select and name the referee to the division.[13] Section 3, First(l), states that the NMB shall fix and pay the compensation of the referees.[14] In addition, Section 4, Third, of the RLA states that the NMB may make such expenditures, including expenditures for salaries, compensation, and other necessary expenses of the NRAB and other boards of adjustment, as may be necessary for the execution of the functions vested in those entities.[15]

The NMB maintains that Section 4, Third, grants the agency authority to consider changes to its rules "to better facilitate the timely resolution of minor disputes between grievants and carriers in the railroad industry."[16] However, some have argued that this section does not provide the NMB with the authority to issue a rule like the one proposed.[17]

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[8] *See* 45 U.S.C. § 153. *See also* Jonathan A. Cohen, *Grievance Resolution and the System Board of Adjustment*, SH094 ALI-ABA 397, 400 (2003) ("In addition to the establishment of a [sic] Adjustment board, Congress also provided for so-called voluntary boards: carriers and unions were authorized to establish boards of adjustments on a system, group or regional basis, and to utilize such voluntary boards instead of the Adjustment Board, if they so desired, as a matter of mutual agreement.").

[9] 45 U.S.C. § 153, First. The special boards of adjustment operate in a manner similar to the one described for the NRAB.

[10] 45 U.S.C. § 153, First(h).

[11] 45 U.S.C. § 153, First(k).

[12] 45 U.S.C. § 153, First(l). A deadlock is possible because of the composition of the NRAB. The NRAB consists of thirty-four members, seventeen selected by the carriers and seventeen by the labor organizations of the employees. Each member of the NRAB is compensated by the party or parties he represents. *See* 45 U.S.C. § 153, First(a), First(g).

[13] *Id.*

[14] 45 U.S.C. § 153, First(l).

[15] 45 U.S.C. § 154, Third.

[16] Administration of Arbitration Programs, 69 Fed. Reg. at 48,178.

[17] *See* Comments from the United Transportation Union to the NMB (Sept. 16, 2004), *available at* http://www.nmb.gov/arbitration/arb-rulemaking.html; Comments from the Transportation Com-

(continued...)

The United Transportation Union and other labor organizations have asserted that the NRAB, and not the NMB, has the sole authority to issue regulations that govern the resolution of minor disputes.

Section 3, First(v), states that the NRAB shall adopt such rules as it "deems necessary to control proceedings before the respective divisions . . ."[18] This language, and the absence of any additional language in the RLA granting the NMB authority to issue rules with respect to the NRAB's dispute resolution procedures, would seem to support the position that the NRAB retains the authority to prescribe such rules. Moreover, principles of statutory construction advise generally that the specific terms of a statute override the general terms.[19] In this case, the specific grant of authority to the NRAB to adopt rules with respect to its dispute resolution procedures would appear to override any general rulemaking authority retained by the NMB.

In addition, the plain meaning of Section 4, Third, would appear to suggest that the NMB may be exceeding its authority to issue the proposed rule.[20] While the NMB is attempting to impose a fee schedule on the dispute resolution system of the NRAB, this section involves the NMB's authority to appoint experts and assistants, to fix the salaries of such experts and assistants, and to make expenditures for rent, books, salaries, and other expenses. The section does not address issuing rules to resolve minor disputes.

In *Railway Labor Executives' Association v. National Mediation Board*, the U.S. Court of Appeals for the D.C. Circuit relied upon the plain meaning and legislative history of the RLA to find that the NMB lacked authority to promulgate procedures for handling union representation disputes prompted by mergers, acquisitions, and consolidations.[21] The so-called "merger procedures" permitted the NMB to conduct investigations to determine whether a merger or consolidation would result in multiple certifications for the same craft or class of employees affected by the combinations.[22] The NMB maintained that Section 2, Ninth, of the RLA granted the agency authority to adopt the procedures. However, the court found that the plain meaning of Section 2, Ninth, indicates that investigations "are conducted

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[17] (...continued)
munications International Union to the NMB (Sept. 20, 2004), *available at* http://www.nmb.gov/arbitration/arb-rulemaking.html. *But see* Letter from the U.S. Dept. of Justice to George S. Ives, Chairman, NMB (Apr. 29, 1971) (on file with author) (finding that nothing in Section 3 of the RLA expressly prohibits the collection of fees).

[18] 45 U.S.C. § 153, First(v).

[19] *See* George Costello, *Statutory Interpretation: General Principles and Recent Trends*, CRS Rept. 97-589 (2003).

[20] *See* Sutherland Stat. Const. § 46.01 (5th ed. 1992) ("A basic insight about the process of communication was given classic expression by the Supreme Court of the United States when it declared that 'the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.'").

[21] 29 F.3d 655 (D.C. Cir. 1994).

[22] *Id.* at 660.

only at the behest and for the specific protection of 'employees.'"[23] The court noted that "'the duty of the Mediation Board' to 'investigate' does not arise except 'upon request of either party,' *i.e.*, 'employees.'"[24]

The legislative history of the RLA confirmed that Congress had not intended for the NMB to conduct investigations in accordance with mergers and other consolidations. The court maintained that Congress's failure to adopt a measure that would have permitted carriers to invoke the NMB's jurisdiction "[was] strong evidence that Congress did not intend the Board to have the power to confer that right on its own."[25] The court stated: "The legislative history further suggests that the *sua sponte* investigation power claimed by the Board is antithetical to congressional intent."[26]

Similarly, in this case, the legislative history of the RLA appears to suggest that the proposed fee schedule may be contrary to what Congress intended. While considering the 1934 amendments to the RLA, Rep. William Hess discussed the addition of referees to the NRAB's dispute resolution procedure:

> This bill provides for the addition of neutral or impartial persons to the boards and thereby makes it possible for the boards to reach decisions. There is but little expense to the Government and what there is will be taken care of through such economies as the United States Board of Mediation will be able to make because it will now no longer be necessary for that Board to undertake to aid the parties to settle these disputes through mediation and arbitration. The expense of such proceedings is now borne by the Federal Government.[27]

The NMB indicates that a fee schedule would encourage the efficient use of the arbitration services provided under the RLA.[28] Moreover, the agency notes that the fees represent only a "very small portion" of the actual costs of providing the respective services.[29] However, the imposition of any fee would seem contrary to Congress's seeming understanding that the expenses associated with the resolution of minor disputes would be covered by the federal government. Although it is possible that Congress wanted the federal government to pay for the referees, but was otherwise ambivalent about having the parties to a dispute pay various associated fees, the legislative history of the RLA appears to provide no guidance on Congress's position on such fees.

Nevertheless, the plain meaning of Section 3, First(v), and Section 4, Third, of the RLA would seem to suggest that it is inappropriate for the NMB to propose a rule that would alter the procedures used to resolve minor disputes.

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[23] *Railway Labor Executives' Association*, 29 F.3d at 665.

[24] *Id.*

[25] *Railway Labor Executives' Association*, 29 F.3d at 667.

[26] *Railway Labor Executives' Association*, 29 F.3d at 668.

[27] 78 Cong. Rec. 11,814 (June 15, 1934) (statement of Rep. Hess).

[28] Administration of Arbitration Programs, 69 Fed. Reg. at 48,179.

[29] *Id.*

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Don Young
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Elizabeth Megginson, Chief Counsel

David Heymsfeld, Democratic Chief of Staff

December 9, 2004

Mr. Roland Watkins
Director of Arbitration Services
National Mediation Board
1301 K Street, NW
Suite 250 East
Washington, DC 20005

Attention: NMB Docket No. 2003-01N

Dear Mr. Watkins:

We are writing in opposition to the proposed regulation published in the *Federal Register* on August 9, 2004, in which the National Mediation Board (NMB) establishes procedural rules for the National Railroad Adjustment Board (NRAB), and conditions payment of referees' compensation on compliance with those new rules. In addition, the proposed regulation provides for the institution of user fees for the arbitration services of the NMB, the NRAB, and other arbitration boards. We believe that the NMB lacks authority to issue these regulations.

As part of its amendments to the Railway Labor Act (RLA) in 1934, Congress specifically provided for the autonomy of the NRAB as an agency separate and apart from the NMB with its own authority to "adopt such rules as it deems necessary to control proceedings before its respective divisions." *See 45 United States Code section 153.* Pursuant to this explicit authority, the NRAB adopted procedural rules, which were published on October 10, 1934, as Circular No. 1 and revised as recently as June 23, 2003. The 1934 amendments made clear that the NMB's responsibility was carefully limited to the appointment of referees, in those cases where partisan members are unable to select a referee, and the payment of referees' compensation and other authorized expenses. During the 70 years since the NRAB was established, the NMB has never claimed authority to establish procedural rules for the NRAB or the other arbitration boards.

Under the proposed regulation, the NMB intends to enforce the new procedures by only paying referees for arbitration of cases at the NRAB that have progressed according to a certain time schedule. Congress never authorized the NMB to refuse to make such payments in the event that any party or referee is unable to meet certain time limits. Furthermore, the proposed regulation states that "the NMB will only pay for the arbitration of cases on Public Law Boards and Special Boards of Adjustment (SBAs) heard and decided within one year of the addition of the case to the Board." Again, there is no authority for this under current law.

In 1966, Congress passed an amendment to the RLA to create Public Law Boards and SBAs as an option to the NRAB. Again, the NMB was provided no authority over the Public Law Boards. Public Law Board Procedures were 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 arbitrator. The 1966 amendments stated: "The Neutral person as selected or appointed *shall* be compensated and reimbursed for expenses by the Mediation Board." The NMB cannot now condition such compensation on compliance with the proposed NMB procedures, without a Congressional authorization.

The proposed regulation would also establish new user fees for the arbitration of services of the NMB, the NRAB, and other arbitration boards. This proposal is in direct conflict with the 1934 and 1966 amendments to the RLA, in which Congress required the Federal Government to pay for arbitration services that were final and binding, in return for rail labor agreeing to forgo strikes on minor disputes. Such strikes had occurred frequently prior to these amendments. The proposed regulation would therefore undermine the RLA, its legislative history, and the concessions that rail labor made.

Further, the NMB cites 45 United States Code section 154 as the general underlying agency authority to establish and collect a user fee for the purpose of making the process of arbitration more efficient. However, that statute does not contain any authority for the NMB to establish and collect a user fee. The user fee that is cited in the proposed regulation also does not meet the criteria for the establishment of a user fee under the general government authority found in 31 United States Code section 9701. Under that authority, user fees are allowed to be collected only for the purpose of offsetting the cost of services to the public. The government has no existing authority to institute a user fee for the purpose of controlling the flow or administration of government services and discouraging the American public from utilizing those services. Moreover, it is the NMB, not the disputing parties, that is required, under current law, to pay for arbitration services, and the NMB receives appropriated dollars annually to fulfill this statutory authority. Therefore, any collection of fees by the NMB would require new statutory authority from the Congress.

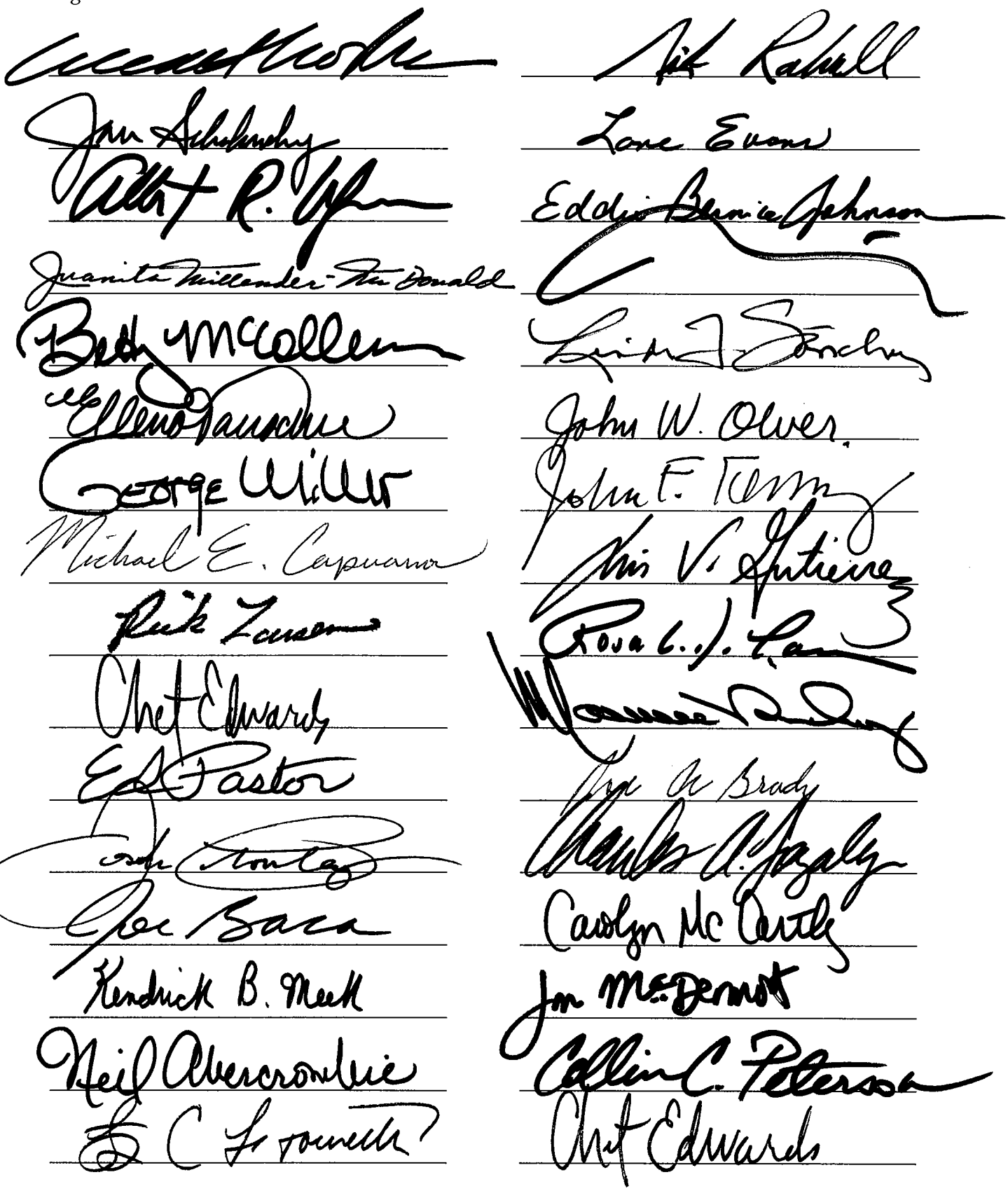
Finally, the NMB states that the purpose of the proposed regulation is to "facilitate the timely resolution of disputes in the rail industry" and eliminate the backlog of pending cases at the NRAB and the other arbitration boards. However, the backlog of pending cases has already been significantly reduced and continues to decline. In 1985, a committee of carrier and union representatives was formed to make recommendations for a more efficient arbitration system. A number of beneficial changes were made as a result of the committee's recommendations. The backlog of pending cases has now been significantly reduced from a total of 22,173 pending cases in 1985 to 5,136 pending cases in 2004.

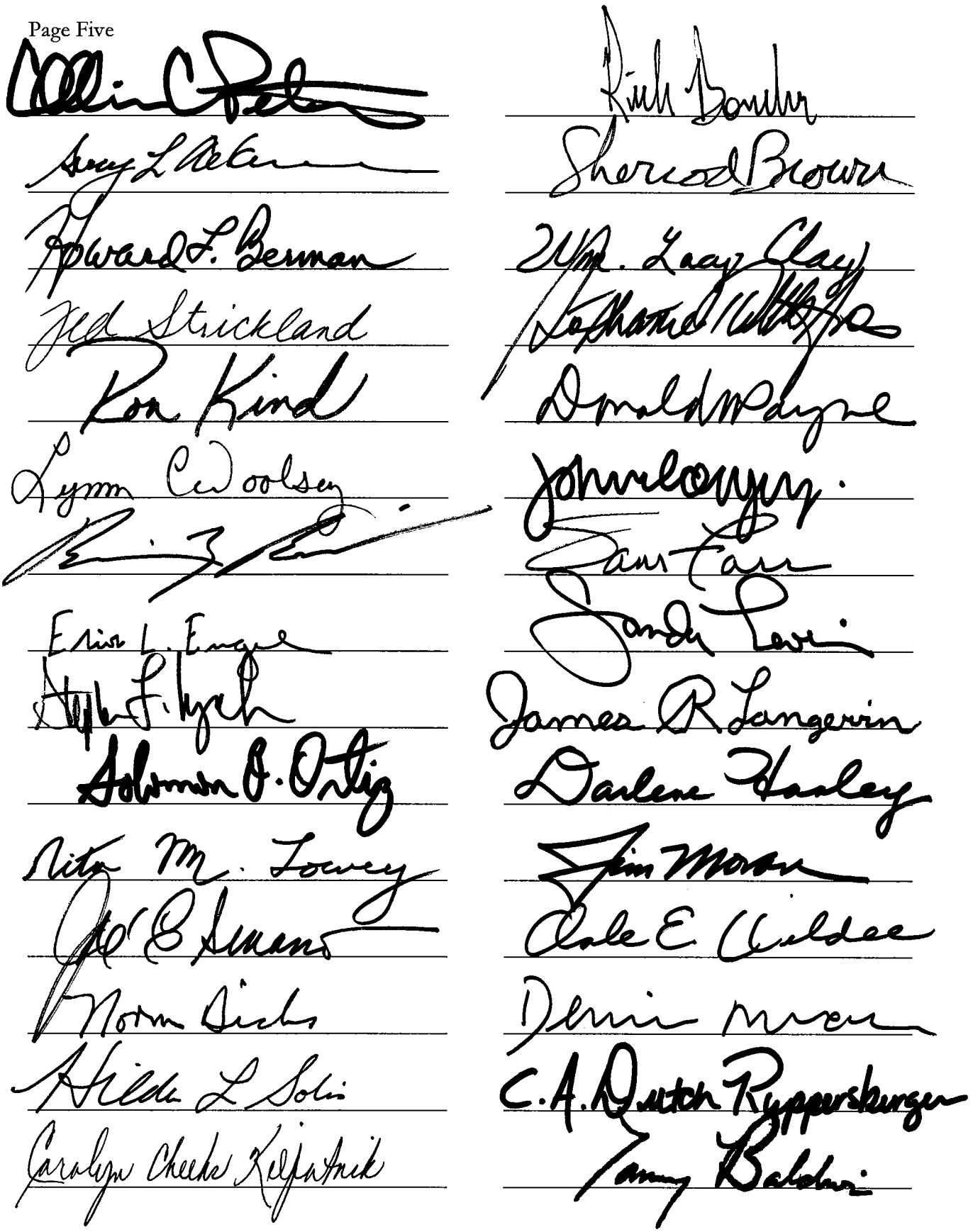
We believe the proposed regulation will result in unions and individuals being discouraged from pursuing grievances. Under the NMB's proposal, the fees for a claim, from initial docketing through arbitration, would be a minimum of $75 and as high as $350. Many claims are for contract

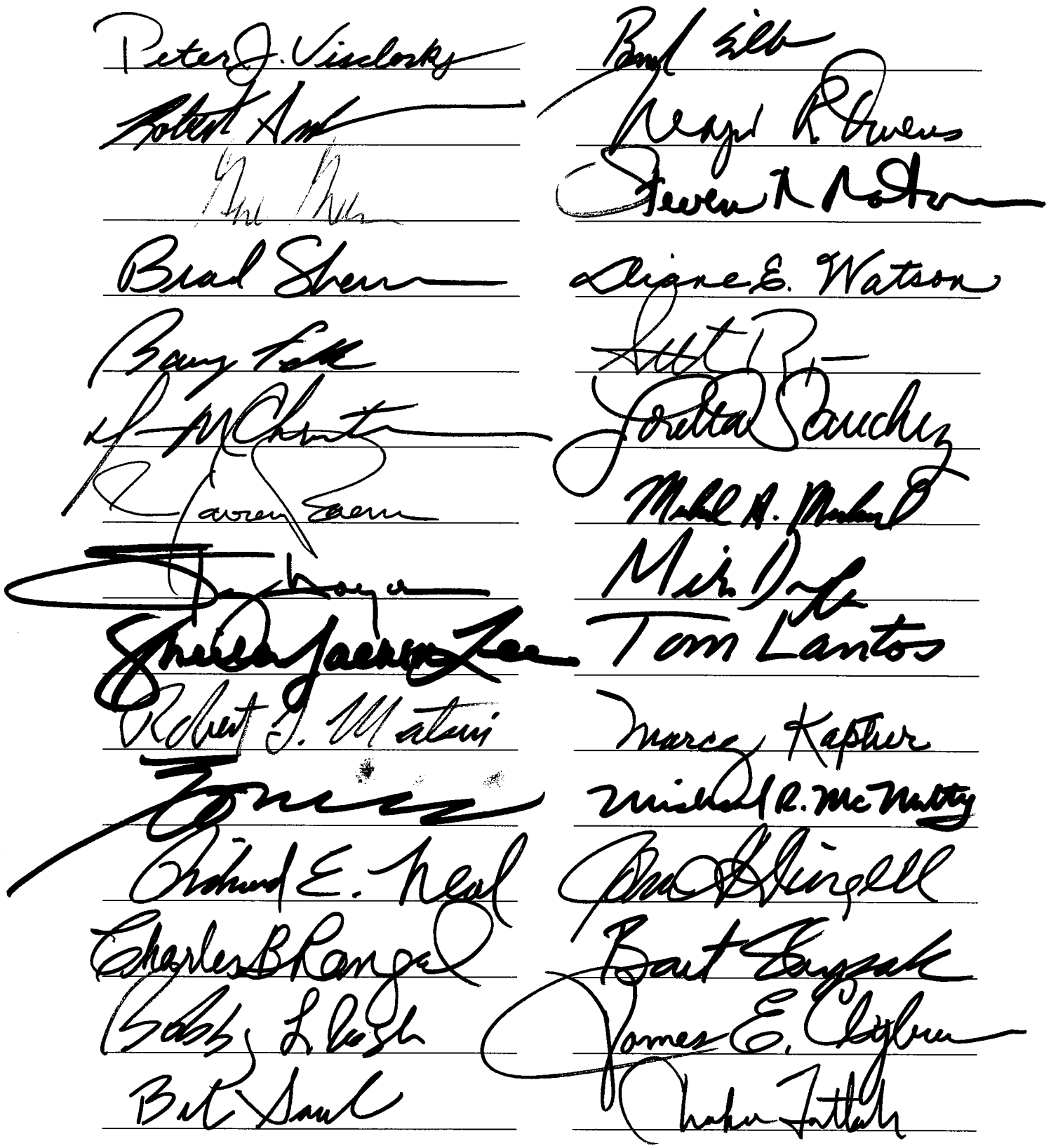
violations where the employee involved suffers a financial loss that is less than the proposed filing fees; examples include loss of a day's pay, loss of overtime, or denial of skill differential or other special pay, travel pay, or travel expenses. The proposed fees would discourage the filing for arbitration over such claims.

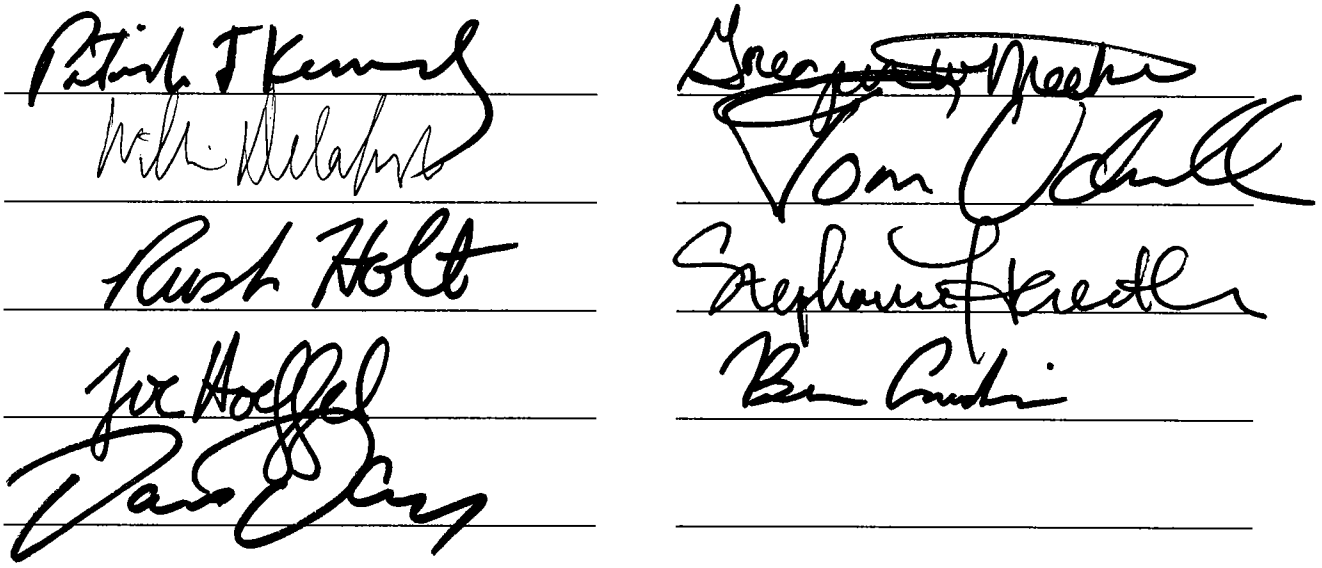
We, therefore, urge the NMB to withdraw this proposal.

Sincerely,









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Rep. Marcy Kaptur

Rep. Michael R. McNulty

Rep. John D. Dingell

Rep. Bart Stupak

Rep. James E. Clyburn

Rep. Chaka Fattah

Rep. Gregory W. Meeks

Rep. Tom Udall

Rep. Stephanie Herseth

Rep. Ben Cardin