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September 20, 2004

VIA MESSENGER

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

Re: Notice of Proposed Rule Making
NMB Docket No. 2003-01N

Dear Mr. Watkins:

Enclosed please find the Railway Labor Division of the Transportation Trades Department of the AFL-CIO's Comments on the NMB's recent proposed rule making.

SEP 20 '04 PM

If for your convenience you would also like an e-mail copy of the attached or additional hard copies, please contact me.

Very truly yours,

Mitchell M. Kraus
General Counsel

MMK:fm

Enclosures

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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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Chairman, Rail Labor Division
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 organizations[1] 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.

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[1]These 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; UNITE HERE.

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 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 re-visited this issue in 1966, 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. 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).

We will demonstrate that authority for adoption of procedural rules for the NRAB is vested in the NRAB, not the NMB. The NMB's reliance on the general authority to make various expenditures, contained in Section 4, Third of the RLA is misplaced, and 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

[2]The 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.

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 promulgated 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.

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 adopt rules by means of different procedures. While the NMB must comply with the panolopy 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).