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

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

2. The 1966 Amendments to the RLA.

In 1966 Congress passed an amendment to the RLA dealing with the problem of backlogged cases at the NRAB, the same problem that the NMB claims is being addressed in its current proposal. The 1966 amendments created so-called public law boards as an option to the NRAB. Congress was well aware, at that time, that the 1934

amendments required the NMB to pay all expenses of the NRAB, except the partisan members' salaries and expenses.[3] Indeed, the Chairman of the National Railway Labor Conference testified that the solution to the problem of backlogs was to require the parties to pay for the referee. See, House of Representatives Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 89th Congress, First Session, June 9, 1965,

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

> Mr. Staggers. Just a moment there. Does not the railroad, though, now pay for their part for the members of the Board?
>
> Mr. Wolfe. The railroads pay for their own representatives.
>
> Mr. Staggers. Does not labor pay for their own representatives?
>
> Mr. Wolfe. Yes, but the Government pays the neutrals.
>
> Mr. Staggers. If you have to have one, you mean?
>
> Mr. Wolfe. Yes, all expenses of the Board except the salaries of the partisan members.
>
> Mr. Staggers. I want to pursue this just a minute here. All expenses of the Board when you do not have a neutral that they pay, the Government pays?
>
> Mr. Wolfe. It pays the secretaries, stenographer, rent.
>
> Mr. Staggers. That is set up by law, is that not right?
>
> Mr. Wolfe. It is set up by law.

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

Testimony J. E. Wolfe, Chairman, National Railway Labor Conference (NRLC), p. 207 (referred to as Staggers Committee).

This proposal was rejected by Congress. The 1966 Amendments, like Section 3, First (l) of the 1934 Amendments, stated that, "The Neutral person as selected or appointed **shall** be compensated and reimbursed for expenses by the Mediation Board." 45 U.S.C. § 153, Second. Procedures for Public Law Boards are to be agreed to by the parties in the agreement establishing these boards, and not imposed by the NMB. Ibid.

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

From the very beginning of its history, the NMB has recognized that it has no right to dictate the NRAB's arbitration procedures. In one of the NMB's earliest reports, for example, the Mediation Board noted that "the law makes the jurisdiction of [the NRAB] wholly independent of the National Mediation Board, except that money expenditures of the Adjustment Board must be approved by the Mediation Board, and in case any division of the Adjustment Board is deadlocked and fails to make an award, the National Mediation Board is required to appoint a referee to ... make the award." NMB Second Annual Report (FY 1936) at 33. Roughly contemporaneous statements by the NRAB evince similar views, noting, for example, that the NRAB "does not confer with the Mediation Board before issuing regulations." NRAB Statement to Attorney General's

Committee on Administrative Procedure (Jan. 8, 1940). Indeed, as recently as 1999, the NMB acknowledged that "it does not have the authority to require the NRAB to adopt procedures." NMB Memorandum to Members of Section 3 Committee (June 18, 1999). (Miller Declaration, Exhibit B)

4. The NMB Lacks Plenary Authority To Regulate The NRAB and PLB's, Including the Imposition of Fees.

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

45 U.S.C. § 154, Third authorizes the NMB to make a variety of expenditures, including the payment of referee compensation. That provision does not discuss regulations for the NRAB, nor does it discuss the charging of fees. To the extent that Section 154, Third includes authorization for payment of referee compensation,

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

the more specific provisions of the RLA, requiring that the NMB "shall" pay compensation, must govern. See Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) ("basic principle of statutory construction that a specific statute ... controls over a general provision").

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

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

69 Federal Register at 48178 (emphasis supplied).

As we noted above, the NMB's responsibility in this area is carefully delineated. The NMB's reliance on 45 U.S.C. § 154, Third is in effect a claim of plenary authority to issue regulations and interpret the RLA, which the courts have repeatedly rejected. In Shore Line, supra, the Court rejected a carrier's reliance on the NMB's published interpretation of the statute, stating "the Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." 396 U.S. 142 at 158-59. And in CNW v. UTU, supra,

the Court rejected an argument that the Board had jurisdiction to decide whether a party had failed to bargain in good faith as required by Section 2, First. The Court stated that "the legislative history of the Railway Labor Act rather plainly disproves this contention." 402 U.S. at 580.

In RLEA v. NMB, 29 F.3d 655 (D.C. Cir. 1994), the Court reversed certain portions of a regulation the Board had issued on carrier mergers. In that case, as in the instant matter, the Board supported its claimed authority by citing to a provision of the RLA without citing to specific language. 29 F.3d at 660. In that case, as in the instant matter, Congress was quite precise in delineating the NMB's authority. 29 F.3d at 665. In that case, as in the instant matter, the RLA failed to give the NMB the specific authority it exercised. 29 F.3d at 666. In that case, as in the instant matter, the NMB had not previously claimed to have the authority then being claimed. 29 F.3d at 670. Indeed in the instant matter, the NMB had previously conceded that it lacked the authority that it now claims to have.

The Court in RLEA v. NMB, supra, noted that "For more than fifty years following its creation, the Board unvaryingly conducted representation investigations only at the behest of employees or their representatives. In 1987, however, with no direction from the Congress, the Board decided that existing procedures under Section 2 Ninth were inadequate..." Id. at 659. After reviewing

the language of the statue and its legislative history the Court also stated that it found it "telling that only in the last five years of its sixty year history has the Board claimed that Section 2 Ninth affords it the authority [it claimed]." Id. at 669. The D.C. Circuit said, "...the Board would have us presume a delegation of power from Congress absent an express withholding of such power. This comes close to saying that the Board has the power to do whatever it pleases merely by virtue of its existence, a suggestion that we view to be incredible." Id. at 659 (emphasis in original).

The Court rejected the argument that simply because Congress had endowed the NMB with some authority in an area, it had given the Board plenary authority to act within that area. The Court stated "Unable to link its assertion of authority to any statutory provision, the Board's position in his case amounts to the bare assertion that it possesses plenary authority to act within a given area because Congress has endowed it with some authority to act in that area. We categorically reject that. Id. at 670 (emphasis in original).

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

Congress in enacting them, the proposal flies in the face of decades of contrary practice, and the NMB appears to presume that it has authority to issue the new rules because such authority was not withheld by Congress. The Act does not give the NMB authority to adopt rules for either the NRAB or Public Law Boards, to decline to pay referees their compensation in the event these rules are not followed, or to charge parties fees for performing its obligations. While the RLA may not expressly prohibit the NMB from taking some of these actions[5], the RLA's failure to forbid the NMB from acting in an area does not amount to a grant of authority to act in that area. 29 F.3d at 666. See also U.S. Airways v. National Mediation Board, 177 F. 3d 985, 989 n.2 (D.C. Cir 1999).

District court decisions to uphold the NMB's decision to discontinue paying for partisan members of the NRAB's office space and to discontinue paying for referees for boards not established as PLB's under the second paragraph of 45 U.S.C. § 153, Second, are not to the contrary. RLEA v. NMB, 583 F. Supp. 279 (D.D.C. 1984) and RLEA v. NMB, 785 F. Supp. 167 (DC 1991). The first above-cited case concerned an NMB decision to cease paying for office space for the partisan members of the NRAB (whose salaries are paid by the parties). The RLA contains a specific provision stating that, whenever practicable, the divisions of the NRAB will

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[5]As we discuss below, not only does the RLA not authorize charging the parties fees, but the imposition of such fees is prohibited by the Act.

be supplied with suitable quarters. This language was viewed as expressly making the provision of offices for partisan members discretionary with the NMB. 583 F. Supp. at 281. There is no provision of the RLA that expressly gives the NMB authority to adjust rules of procedure for the NRAB or PLB's; or gives the Board discretion to impose filing fees for arbitration.

The second case concerned compensation of neutrals for Special Boards of Adjustment that were established by agreement under the first paragraph Section 3 Second, before the 1966 amendments which added the second paragraph that provided for the creation of Public Law Boards. The second paragraph, unlike the first, expressly stated that neutrals for such PLB's would be compensated by the NMB. 785 F. Supp. at 168. By contrast, no provision of the RLA expressly excludes filing fees for a certain class of arbitrations from which one could infer a Congressional intent to allow filing fees for other classes of cases.

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

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

- The 1934 amendments do not give the NMB general authority over Section 3 arbitrations. The amendments give the

NRAB, not the NMB, authority to issue its own rules. These amendments remove the authority over minor disputes previously enjoyed by the NMB's predecessor, the Board of Mediation, and carefully delineated the NMB's remaining responsibility in this area.

- The Supreme Court found that the 1934 amendments represented a compromise accepted by Rail Labor and advocated by Railroad Coordinator Eastman: the Unions would forego the right to strike over minor disputes in return for the arbitration mechanism created by the new Section 3 which included government financial responsibility for all NRAB expenses, except compensation for the partisan members. To remove part of what Labor received in 1934 is to undermine the concession made by Labor in return for relinquishment of the ability to strike over minor disputes.
- The 1966 amendments creating PLB's also required the NMB to pay for referee compensation. In passing these amendments, Congress rejected carrier proposals to require that the parties pay the referees.
- The 1966 amendments gave the parties authority to set forth the procedures for each PLB in the agreement that established it.