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

C. The Proposed Fee[6] Structure Should Not Be Imposed.

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

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

The proposed rules attempt to transfer the NMB's administrative costs in meeting its statutory obligation to pay referee compensation from the NMB to the parties. In order to pay referees, the NMB must know who is assigned to hear what cases before which boards, and whether the referee in fact issues decisions. Many of the procedures for which the NMB proposes to impose fees on the parties, such as certification of the referee, the notice of intent and others discussed in detail below are necessary for the NMB to be able to pay referee compensation. The RLA places the responsibility to pay referee compensation on the NMB, and the NMB may not shift the cost of meeting that obligation to the parties.

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[6]The term "fee" is a misnomer, which we use herein only to avoid confusion. The NMB is proposing to impose a tax on acts required by the RLA - namely, the compulsory arbitration of minor disputes.

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

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

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

The Railway Labor Act (RLA) was amended in 1934 to provide for final, binding compulsory arbitration. The RLA was amended again in 1966 to introduce Public Law Boards. At that time, a proposal by the carriers to amend the RLA to terminate government funding of referee compensation was rejected by Congress. The Act imposes the costs of arbitration on the NMB, not the parties.

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

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

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

To be sure, the number of unionized rail employees has declined during this period from approximately 373,000 to 200,000.

But even taking this reduction into account, the number of pending grievances and new grievances filed have been markedly reduced.[7]

Comparisons with other industries are inappropriate. As recognized by the Supreme Court from the point of view of industrial relations, the railroads are "a thing apart" and the railroad world "is like a state within a state." As such, the Court has warned "against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inappropriate judicial remedies." Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711, 725 (1945) (Brandeis J. dissenting). See, California v. Taylor, 353 U.S. 553, 565-66 (1957).[8] We submit that the proposed regulation is exactly the type of activity which Justice Brandeis urged should be avoided.

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

New cases received during fiscal year 1985 were 8,425 which equates to 23 grievances per 1,000 employees being filed on an annual basis.	New cases received during fiscal year 2004 were 906 which equates to 4.5 grievances per 1,000 employees being filed on an annual basis.

(Miller Declaration at ¶ 6)

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

The parties have not been unresponsive to the NMB's recent initiative to increase efficiency. The section 3 committee established a consolidation committee that was close to reaching an agreement addressing this issue when the NMB consolidated certain cases involving CSX, which resulted in the termination of this committee's work. (Miller Declaration at ¶ 7. We urge that the NMB work through the section 3 committee to develop a consensus on new rules that could be adopted by the NRAB, the agency responsible under the RLA for adopting such procedures. Such an approach is consistent with the history of the RLA in which basic changes in the statute itself or its administration have been agreed to by the parties.

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

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

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

brief description of our understanding of the proposed fees follows:

Fees for the NRAB

1) Notice of Intent - $75

A party files a case at the NRAB by filing a notice of intent. At the time of filing, NRAB staff designate the case with a number, which is used in subsequent filings. In fiscal year 2004, 1509 cases were filed at the NRAB so that during that fiscal year, under the proposed rules, the NRAB would have been paid $113,375 for designating a number. Unions, not carriers, submit the overwhelming number of cases to the NRAB so that the burden of this fee will fall overwhelmingly on labor organizations.[9]

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

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

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[9]Individual employees may also present grievances to the NRAB. We assume, although the regulations are unclear, that the fees will also be charged to them.

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

In the overwhelming majority of cases the partisan members of the NRAB agree upon a referee. (Miller Declaration at ¶ 14) However, where they are unable to do so, they may request that the NMB provide a panel of arbitrators, from which the parties make the selection. Sometimes, if they are unable to make a selection from the panel provided, another panel is requested. It is unclear whether the union, carrier or both parties are responsible for this fee.

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

Fees for Public Law Boards and SBA's[10]

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

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

[10]SBA's are listed separately with the same structure of fees. Referees to PLB's also refer to SBA's.

2) Certification of a referee - $50.00

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

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

The partisan members of the PLB have authority to select a referee. In the overwhelming number of cases the partisan members do so and the PLB agreement submitted to the NMB designate the referee. (Miller Declaration at ¶ 14) If the parties are unable to reach such an agreement, the partisan members may request the NMB to furnish a panel of arbitrators from which they can make a selection. If they are unable to do so, they may request an additional panel. It is unclear whether the union, carrier or both parties are responsible for this fee.

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

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

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

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

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

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