Fees for other Arbitration Boards[11]

1) Appointment of an Arbitrator for Labor Protective Matters - $75.00

Labor Protective Conditions are imposed by the Surface Transportation Board and previously by its predecessor the Interstate Commerce Commission.

These provisions provide for the arbitration of disputes and where the parties are unable to agree upon an arbitrator, for the NMB to appoint one. See New York Dock Labor Conditions, Article I, Sections 4 and 11.

Sometimes the NMB at the parties' request has provided a panel from which they can make a selection. It is unclear what fees, if any, are to be charged under those circumstances.

2) Establishment of an Arbitration Board - $100.00

Section 7 of the Railway Labor Act permits the parties to accept the NMB's proffer of arbitration to resolve a major dispute. That provision refers to the creations of a Board of Arbitration. 45 U.S.C. § 157. The parties appoint partisan members to such a board, and they in turn select the neutral. When the parties establish a Section 7 arbitration board the NMB designates the Board with a number. We assume that this provision is applicable only to Section 7 arbitration boards and not Presidential Emergency

[11]For both of the fees described below, the proposed rule is unclear whether the fees are to be paid by the union, carrier or both.

Boards which as the name implies, are created by the President of the United States, not the parties. 45 U.S.C. §§ 159(a) and 160. We also assume that this $100 fee is not applicable to the NRAB and PLB's.

The above fees share certain common features:

- In none, does the NMB explain what the costs of the services are.
- In none, does the NMB explain the anticipated income from the fees being levied.
- Many of the activities for which fees are being levied are purely ministerial, requiring a de minimis amount of time.

In the absence of any information regarding the costs of the involved "service" and the methodology used in calculating the fee, it is impossible to determine whether the fee being charged is reasonably related to the costs being incurred. The NMB has the responsibility to provide such information and the burden to establish such a connection. On its face, fees such as those being charged for designation of a number for an arbitration board, or the issuance of a form letter agreeing to the parties' request to certify and appoint a referee (Miller Declaration Exhibit D), appear far in excess of the actual cost of performing those ministerial functions, and as noted above, these functions are necessary for the NMB to meet its statutory obligations of paying

referee compensation. Indeed, rather than explaining how the fees it plans to impose would recoup actual costs of "services" provided, the Board has instead attempted to justify its plan by simply asserting that fees would generally improve the efficiency of usage of the arbitration program, reduce the case backlog, induce consolidation and create incentives for harder assessment of the merits of claims to be arbitrated. These goals do not provide a basis for the Board to require the payments of the various fees listed.

4. The Fees Proposal Would Thwart Arbitration of Many Contract Disputes and Would Effectively Favor the Carriers.

Imposition of fees will discourage unions and individuals from pursuing grievances to arbitration when recovery may be for only small amounts of money. Under the NMB's proposal, the fees for a claim, from initial docketing through arbitration, would be a minimum of $75 and possibly as high as $350. Many claims are for contract violations where the employee involved suffers a compensable loss that is less than the proposed filing fees; examples include loss of a day's pay, loss overtime, or denial of skill differential or other special pay, minimal call claim, reporting pay, travel pay or travel expenses. The proposed fees would discourage the filing for arbitration over such claims.

The amount involved in a grievance does not in itself suggest that it lacks importance. Individual grievances for small amounts can still have merit and should be heard. Furthermore, many small grievances can concern similar problems and may together constitute large amounts of money even though individual violations are involved (consolidation is not necessarily an answer, as the facts and witnesses may vary greatly from case to case, even though the claims involve the same rule). The proposed fees would apply even before appointment of an arbitrator whose compensation would ultimately be paid by the Government. Because the fees would often exceed the monetary value of the claims, Government payment of the arbitrator's compensation would then be a moot point because the fees would stop processing of the claims at the outset.

The proposed rule deals with the most basic aspect of Section 3 - the processing of a claim to arbitration. It would impose an insuperable barrier to the resolution of many cases where the filing fees would exceed the amount that could be recovered in the employee's claim (such as a claim for a lost day's pay, overtime denied, or travel expenses denied). Under these circumstances, it would not matter that the government would pay an arbitrator's fee when the filing fee itself would preclude docketing of the claim.

In such cases, the fees would negate the ability of employees and Unions to enforce collective bargaining agreements; and carriers could repeatedly disregard contract terms where the amount

of money for each individual violation would be less than the NMB's fees for arbitration. This outcome would be in derogation of the Act and the intent of Congress in adopting the 1934 amendments to make arbitration an effective process for resolution of contract interpretation disputes and a viable substitute for strikes. The Board proposes to place a financial barrier at the threshold of the process for compulsory arbitration, effectively shutting the door on the arbitration of many claims. This result is exactly the opposite of the express language of the RLA and its legislative history calling for Government-paid arbitration.

Carriers with thousands of employees could save large amounts of money by small rules violations over years that are not challenged because the filing fees exceed the value of individual claims. The carriers with greater resources should not be allowed to decline to pay such claims, knowing that unions and individuals, with more limited resources, would be discouraged from pursuing them to arbitration. The barrier that the Board would erect to the processing of small dollar value claims to arbitration is inconsistent with the purpose of the 1934 Amendments - to insure that all minor disputes can be arbitrated, and to not allow the accumulation of grievances creating frustration, giving impetus to the exercise of self help.

Additionally, the Board's proposal reveals a fundamental misunderstanding of the RLA grievance/arbitration process.

Virtually all grievances are initiated by Unions and individuals. The statutory scheme for minor disputes permits a carrier to act when challenged by a Union, subject to the filing of a grievance that will later determine whether the collective bargaining agreement was violated. Generally, a carrier may continue its course of action and a Union is generally obligated to grieve and arbitrate after the action is taken. Railway Labor Execs. Ass'n. v. Chesapeake Western Ry, 915 F. 2d 116, 120-121(4th Cir, 1990); Air Line Pilot's Ass'n. v. Eastern Air Lines, 869 F. 2d 1518, 1520-1521(D.C. Cir. 1989); Int'l. Ass'n of Machinists and Aerospace Workers v. Eastern Air Lines, 826 F.2d 1141 (1st Cir. 1987). Ordinarily, there is no status quo requirement in a minor dispute unless the union can demonstrate irreparable harm or likely frustration of the arbitration process. Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Ry. Co., 363 U.S. 528, 534-535 (1960); Chicago and North Western Transp. Co. v. Railway Labor Execs. Ass'n., 855 F.2d 1277, 1287-1288 (7th Cir, 1988).

Given this statutory structure, imposition of filing fees would clearly favor carriers. The Board's proposal erects a threshold barrier that will affect only unions. Carriers will remain unburdened in acting upon disputed interpretations of agreements. Thus imposition of filing fees for arbitration carries the very real risk that the Board will no longer appear effective or impartial with respect to grievance arbitration. See, Chicago

and North Western Transp. Co. v. UTU, 402 U.S. at 580 (need for NMB to maintain neutrality and confidence of the parties).

5. Fees Imposed Only on Labor Organizations and Individuals Are Inequitable.

As previously stated, the fee structure does not state whether the moving party, which in the overwhelming number of cases is the union, or both the union and the carrier are responsible for the payment of the involved fees. Simple equity dictates that if fees are to be imposed, both parties should pay them. The carriers benefit from the current arbitration system even though they may seldom invoke it. Compulsory arbitration is the basis for prohibiting unions from striking over minor disputes. See, BRT v. Chicago River, supra. Carriers, which have greater resources than unions, and certainly greater resources than individual employees, should not get the benefit of a system designed to limit employees' right to strike without having to share in the fee imposed to maintain that system.

6. The Fees Will Be Difficult to Allocate among Parties.

In many cases the determination of which party will pay what portion of the fee imposed will be very difficult and costly to calculate. For example, recently NMB Director of Arbitration Services Roland Watkins certified Referee G. Wallin to hear 38 cases before the Third Division of the NRAB. The thirty-eight

cases were divided among the involved unions and carriers as follows:

Labor Organizations	Carriers
ATDA - 5 Cases	UP - 22 Cases
BMWE - 11 Cases	BNSF - 10 Cases
BRS - 12 Cases	Soo (CMSTPP) - 1 Case
TCU - 10 Cases	PP&U - 1 Case
	CSXT - 4 Cases
TOTAL - 38 Cases	**TOTAL - 38 Cases**

(Miller Declaration at ¶ 13)

The NPRM provides no insight into the methodology the NMB intends to use in allocating, among the involved carriers and labor organizations, the $50.00 fee it would impose for certifying Referee Wallin to hear these cases. The NMB has a responsibility to do so, and we suggest this example demonstrates the complexity and costs of developing an equitable system of allocation. Furthermore, it is clear that the allocation of the fee would differ every time a docket is certified due to the number of cases and parties involved.

In summary, the fee proposal should not be imposed because:

- The NMB has cited no specific statutory authority for imposing such fees.
- 45 U.S.C. § 154, Third, which is cited by the NMB gives it authority to pay expenses, not impose fees on the

parties or to issue rules directed at the backlog of cases.

- The NMB is prohibited from charging the parties any portion of referee compensation, for which payment it has sole responsibility under the RLA.
- Charging the parties for functions that track an arbitration case so that the NMB can pay referee compensation violates the RLA requirement that the NMB pay such compensation. 45 U.S.C. § 153, First (l), and § 153, Second.
- The NMB has failed to establish a reasonable connection between the fees being charged and the cost of the service being provided.
- The fees unfairly give carriers an advantage in declining claims involving small amounts of money.
- The proposed fees unfairly place a disproportionate share of fees on unions.

D. The Proposed Time Limits For the NRAB and PLB's to Resolve Cases Should Not Be Adopted.

1. NMB's Lack of Authority.

Section 1210.12 of the proposed rule establishes a series of time limits for various steps for the NRAB and PLB's. In the event any of these steps are not completed in a timely manner the NMB may deny payment to the arbitrator. As previously noted the RLA gives

the NRAB, not the NMB, authority to adopt rules. 45 U.S.C. § 153 First (v). The RLA give the parties to PLB's the authority to agree on rules of procedure for such boards. 45 U.S.C. § 153, Second. The RLA requires that the NMB "shall" pay the referee compensation. 45 U.S.C. § 153, First (l); 45 U.S.C. § 153, Second. No provision of the RLA gives the NMB authority to condition the payment of referee compensation upon the referee and the parties adhering to time limits established by the NMB.

Section 154, Third upon which the NMB relies for such authority simply states that NMB may make a variety of expenditures including payment of referee compensation. That provision does not authorize the NMB to issue rules for arbitration procedures, nor does it authorize the NMB to decline to pay referee compensation for failure to follow such rules in violation of its statutory responsibility. For the foregoing reasons the provisions of Section 1210.12 are beyond the scope of the NMB's authority.

2. Effect of Refusing to Pay Referee Compensation.

The provisions of Section 1210.12 leave unanswered how a case is to be resolved when the NMB refuses to pay the referee's compensation. The proposed rules do not state when the NMB might advise a referee that his fees and expenses might not or would not be paid. One possibility is that the NMB will not make it known that it is refusing to pay the fees until after the referee issues