the award and submits his bill. That procedure, in addition to being unfair to referees, will likely result in referees refusing to take railway cases.

Alternatively, the NMB might advise the parties or the referee before the decision issues that it will refuse to pay the referee's compensation. The referee is then unlikely to issue a decision, without assurance of compensation. The claims will simply sit on a docket of unresolvable cases. In that event the handling of grievances, as a practical matter, will be returned to the same status that existed prior to the 1934 Amendments, when cases remained in dockets without means of attaining a final resolution. Indeed, the 1934 amendments were intended to cure this very problem.

3. Proposed Rule 1210.12 Permits the Carrier to Place the Referee's Compensation in Jeopardy by Not Meeting Certain Time Limits.

Proposed Rule 1210.10(b)(2) states that the parties must file submissions with the NRAB within 60 days of receiving the Director of Arbitration Services acknowledgment of receipt of the Notice of Intent. In the event that the carrier fails to do so, the referee's compensation will, at a minimum, be placed in doubt and possibly denied.

As discussed below, the current NRAB rules require that submissions be filed within 75 days of the notice of intent.

Carriers could then file timely submissions more than sixty but less than 75 days after the notice of intent, and place referee compensation in jeopardy.[12] Carriers have no reason to care if the grievance remains permanently unresolved since it is the labor organization and employees that file grievances, not the carriers. The proposed rule gives the carriers no incentive to meet the time limits and affords carriers the opportunity to put a grievance into an unresolvable status or to substantially delay its resolution to carrier's advantage, simply by filing untimely.

4. The Proposed Rules Are Contrary to the Existing Rules of Procedure Adopted by the NRAB.

Proposed Rule 1210.12(b)(2) provides that submissions must be filed within sixty days of the Director of Arbitration Services letter of intent. The NRAB rules provide that submissions are due seventy five days thereafter. (Miller Declaration, Exhibit A, Rule 1(a)) Proposed Rule 1210.12(b)(3) states that NRAB partisan members will be given 30 days after the receipt of submissions to either resolve a case or deadlock. The NRAB rules currently have no time limits for the partisan members to consider a case. Further, the NRAB rules permit a reply from a party receiving third party notice. Id. at Rule 3(a). See, Transportation-Communication Employees Union v. Union Pacific Railroad, 385 U.S. 157 (1966). In

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[12]Of course, labor organizations could also do so, but normally would have no incentive to jeopardize referee compensation.

addition, in cases involving a change in seniority status, all concerned employees are afforded an opportunity to file a reply. Id. at Rule 5(a). These replies are due 30 days after the parties' submissions, which, as noted above, are due under the NRAB rules, 75 days after the notice of submission.

Under the proposed rules partisan members must resolve disputes or deadlock 30 days after the parties submissions, before receipt under the current NRAB rules of the parties', third parties' or concerned parties' response. Decision making in this manner would likely violate fundamental due process. At a minimum it is unfair and inefficient.

These time limits were originally adopted by the NRAB in 1934 under its authority to adopt procedures set forth in the RLA and revised in June 2003. 45 U.S.C. § 153(v). The effect of the NMB's proposed rules is to place referee compensation in jeopardy should the parties adhere to the time limits established by the NRAB rules of procedure.

5. Scheduling Delays Are Often Beyond the Referee's Control, and the Sixty Day Rule Will Discourage Competent Referees from Hearing Railroad Cases.

Proposed Rules 1210(b)(5) and 1210(b)(6) require that a referee hear a case within 60 days from the date of his certification, and render a decision within 60 days of the hearing.

This rule ignores that the NMB periodically directs referees to perform no further work on cases because of budgetary constraints.

In addition, delays in holding hearings are often a result of the Carrier having an inadequate number of advocates to present cases. Delays to permit advocates to attend hearings have been routinely granted by the NRAB. If Carrier members of the NRAB insist on such postponements, the referee's compensation will be placed in jeopardy.

Busy arbitrators will be prevented from acting as referees at the NRAB because they cannot guarantee decisions within sixty (60) days. Currently, the referee's compensation authorized by the NMB is significantly less than the going rates outside the rail industry for experienced arbitrators. The requirement that arbitrators give railroad cases priority over other cases from which they receive higher compensation will likely result in the industry losing access to many experienced and able arbitrators.

In summary, the NMB should not issue rule 1210.12 for the following reasons:

- The RLA provides that the NRAB, not the NMB, has authority to issue procedural rules. 45 U.S.C. § 153, First (v).
- The NMB has no authority to condition the payment of NRAB referee compensation on compliance with rules it lacks authority to issue.

- The RLA requires that the NMB pay NRAB referee compensation. 45 U.S.C. § 153, First (l). The NMB may not refuse to make such payments in the event that any party or the referee is unable to meet time limits that it sets.
- The proposed rules are in conflict with the rules adopted by the NRAB.
- The effect of the NMB's refusal to pay referee compensation is to leave cases in limbo with no means of resolution. This is the very situation that the 1934 amendments were intended to correct.
- The proposed rules permit carriers to place referee compensation in jeopardy by not filing timely submissions.
- The proposed rules put referee compensation in jeopardy when referees are unable to hold hearings or issue decisions as the result of the NMB's directives requiring referees to take no action due to budgetary concerns.
- The proposed rules likely will encourage experienced and competent referees to decline hearing further cases involving the railroad industry.

E. Proposed Rule 1210.9 Involving Consolidation of Cases Exceeds the NMB's Authority and Its Expertise.

Proposed Rule 1210.9 authorizes the Director of Arbitration Services to consolidate minor disputes or grievances when he determines that such consolidation is in the interest of efficiency.

As discussed above in greater detail, the NMB's responsibility for grievances or minor disputes is carefully delineated to the appointment of referees, should the partisan members fail to agree on a selection, the appointment of partisan members to PLB's should a party decline to make such an appointment, and the payment of referee compensation. The NMB has no general authority over minor disputes. The RLA gave the NRAB authority to adopt its own rules of procedure. It is the partisan members of the NRAB, not the NMB, who establish the docket of cases to be heard by each referee.

The RLA provides that the parties establish a PLB by agreement, and that agreement establishes the procedures to be followed. The parties through their agreement establishing the PLB set forth the docket of cases to be heard by the PLB.

The NMB has no authority to direct the consolidation of cases before the NRAB or PLB's. The RLA gives either the NRAB or the parties themselves in establishing PLB's responsibility for determining the docket of cases to be heard.

The NMB plays no role in the substantive resolution of minor disputes. While the NMB closely monitors the activities of the

NRAB and PLB's, it does so for purposes of funding, not for purposes of keeping track of the development of arbitral precedent. Accordingly, it has no experience, much less expertise, in substantive arbitration issues. (Miller Declaration at ¶ 23)

As Rail Labor noted in its comments to the NMB's August 3, 2003 ANPRM:

> Rail Labor is opposed, however, to the NMB requiring the parties to consolidate cases. Cases often involve complex rules, and factual nuances can make cases that initially may appear similar, not be so. The parties are best able to determine which cases should be consolidated. The consolidation of cases not appropriate for such action is likely to result in greater confusion, delay, and the expenditure of limited resources by the parties and the NMB. While the NRAB has permitted the combination of separate but factually linked claims into a single dispute (First Division Award 24530 and Third Division Award 31456), the NRAB has warned that inappropriate combinations of cases will result in dismissal. (Third Division Award 33016). In a recent decision involving the UP and BLE, respected Arbitrator Dana Eischen dismissed claims which he concluded were not properly consolidated. (First Division Award No. 25212).

RLD Comments at p. 5.[13]

It remains a mystery what occurs if a referee were to conclude that a consolidation ordered by the NMB's Director of Arbitral Services is improper. What is clear, however, is that the NMB, lacking any background in substantive arbitration, will likely order consolidations which make the arbitration more complicated and more expensive and that such consolidations will restrict employees' rights to have their cases treated separately, rather

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[13]RLD incorporates by reference these earlier comments.

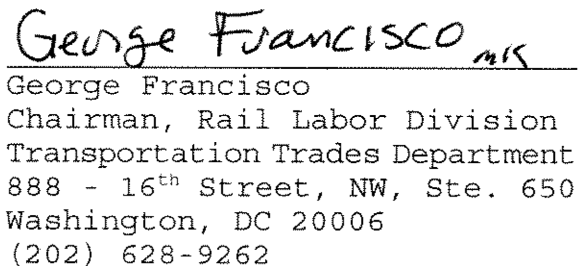
than be improperly consolidated with cases raising different factual, policy, and legal issues. (Miller Declaration at ¶ 24)

For the foregoing reasons giving the Director of Arbitration authority to consolidate cases is beyond the scope of the NMB's authority, beyond the scope of its experience and expertise, and is likely to result in greater delay and expense.

F. Conclusion

It is respectfully submitted that the proposed regulations should not be adopted, and the NMB should continue working with the Section 3 Committee to assist the NRAB in adopting appropriate procedures to improve the efficiency of case handling.

Respectfully submitted,



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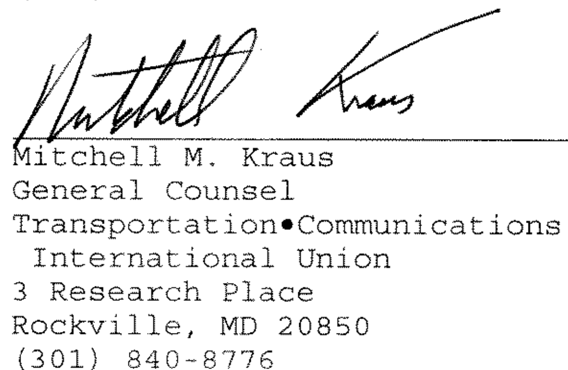

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Certificate of Service

I hereby certify that a copy of the foregoing has been sent this 20th day of September, 2004, via e-mail and first-class mail, postage prepaid, to the following:

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