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September 20, 2004

VIA FACSIMILE (202-692-5086) &
FIRST CLASS MAIL

Mr. Roland Watkins
Director of Arbitration
National Mediation Board
1301 K Street NW, Suite 250 East
Washington, DC 20005-7011

Re: NMB Docket No. 2003-01N (NPRM)

Dear Mr. Watkins:

These comments in response to the National Mediation Board's proposal to establish a new Part 1210 to its rules appearing at Title 29, Code of Federal Regulations, Chapter X, 69 Fed. Reg. 48177 (Aug. 9, 2004), are submitted on behalf of the Teamsters Rail Conference, International Brotherhood of Teamsters, AFL-CIO. The Teamsters Rail Conference joins with and supports the Rail Labor Division (RLD), Transportation Trades Department, AFL-CIO, in urging that the proposed rules not be adopted, for all of the reasons set forth in the RLD's comments. Below, we question the Board's authority to promulgate the proposed rules, and suggest, moreover, that their adoption will not effectuate the Railway Labor Act's purpose of providing for prompt and orderly settlement of minor disputes. 45 U.S.C. § 151a.

The Rulemaking Initiative

The three rules of most interest to the IBT Conference are § 1210.9, relating to the consolidation of cases by the Director of Arbitration Services, § 1210.10, purporting to establish time limitations for the progression to decision of minor disputes under 45 U.S.C. § 153, and §1210.12, setting forth a schedule of application fees for arbitration services. The stated goal of the proposed rules is

the economical and efficient disposition of arbitration cases. § 1210.10(a). That goal is a laudable one. Still, the question remains whether the means the Board has tentatively chose for achieving it tend to undercut other equally important statutory policies. We believe they do.

Statutory Authority

The language of the statute does not, expressly or otherwise, vest the Mediation Board with plenary authority over the resolution of minor disputes. Section 5, First makes clear that the parties may invoke the Board's services in "major disputes" not adjusted by the parties in conference and in "any other dispute not referable to the National Railway Adjustment Board . . . ." 45 U.S.C. § 155, First (emphasis added). The authority to "adopt such rules as it deems necessary to control proceedings before the [Adjustment Board's] respective divisions . . ." is vested in the NRAB, not the NMB. Indeed, the Mediation Board's functions under § 3 are confined to administrative support for the NRAB. 45 N.M.B. § 153(e), (f), (g), (l), (w), (x). Unlike the discretionary role Congress envisioned for the NRAB, the NMB's duties under § 3 are mandatory, as demonstrated by repeated use of the word "shall," [1]/ and almost entirely ministerial. The only area in which the Mediation Board is vested with a supervisory role is in the employment and compensation of the NRAB's "assistants" under § 3(u). Id. § 153(u).

Section 4, Third contemplates that the Mediation Board "may . . . make such expenditures . . . as may be necessary for the execution of the functions vested in the . . . Adjustment Board and in the boards of arbitration . . . ." 45 U.S.C. § 154, Third. This section was not relied upon in § 1210.1 of the NPRM as a source of the NMB's authority for rulemaking. Presumably that omission is due to the statutory language of § 4, Third, which requires the NMB to exercise its discretion in carrying out the administrative matters there described in accordance with the provisions of . . . section . . . 153." Id. § 154, Third. The relevant provisions of § 153, relating to the compensation of neutrals, are set forth in mandatory terms. "The Mediation Board . . . shall fix and pay the compensation of such referees." Id. § 153, First (l), (k). "The neutral personal so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board." Id. § 153, Second. *See also,* id. § 157(e). The provisions of § 153 therefore take precedence.

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[1] *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994).

It is impossible to read into the pertinent provisions of § 3 the far-reaching authority claimed by the Mediation Board in the NPRM. This is especially so where, as here, the Mediation Board intends to reverse some seventy years of administrative practice under which the NRAB, not the NMB, controlled its own docket under procedural rules that Congress empowered the Adjustment Board to adopt, and the Mediation Board's role was confined to the compensation of referees and their occasional appointment. Even the broadest reading of § 3 falls short of empowering the Mediation Board to establish procedural time limitations that prescribe how cases before the NRAB will be progressed, and then enforcing those limitations by declining to pay the compensation of neutrals in cases where the NMB's time limitations are not met.

That these considerations are more than legal abstractions is made clear by *Railway Labor Executives Ass'n ("RLEA") v. NMB*, 29 F.3d 655 (D.C. Cir. 1994), where the court of appeals struck down portions of the NMB's Rail Merger Procedures for want of statutory authority to adopt them. There, as here, the NMB asserted authority that it earlier had not claimed to possess (id. at 669-70); the text of the statutory provision at issue is plain, in terms of the limited functions Congress intended to NMB to undertake (id. at 671); the legislative history confirms the NMB's limited role under the section of the RLA involved (id.); and the NMB claimed broad "authority to act within a given area because Congress has endowed with some authority in that area" and had not expressly forbidden the Board to act (id. at 670). We believe that the en banc majority's reasoning is equally applicable to the rules proposed here (id. at 671):

> Were courts to *presume* delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron [*U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], and quite likely with the Constitution as well.

The instant situation is quite different from those in which the Mediation Board has exercised discretionary authority granted by Congress. In *Railway Labor Executives Ass'n v. NMB*, 583 F. Supp. 279 (D.D.C. 1984), *aff'd per curium*, 757 F.2d 1542 (1985), for example, the district court held that the NMB acted within its discretionary authority under § 3, First (t), as evidenced by the statutory phrase "whenever practicable," when it stopped providing private office space for partisan members of the NRAB. To similar effect is *Railway*

Labor Executives Ass'n v. NMB, 785 F. Supp. 167 (D.D.C. 1991), where the district court declined to review the NMB's decision to stop compensating neutrals appointed to special adjustment boards created by the parties under the first paragraph of § 3, Second. Unlike public law boards designated by the NMB, § 3, Second is silent on whether neutrals serving on special adjustment boards were to be compensated by the NMB. Hence, the district court concluded that the compensation of SBA neutrals was within the Mediation Board's discretion.

Here, in contrast, § 3, First (l), (x) and the second paragraph of § 3, Second, relating to public law boards, all mandatorily require the NMB to compensate referees and other neutrals. Hence, the Mediation Board's discretionary authority under § 4, Third to pay "necessary expenses" of the Adjustment Board, which must be exercised in accordance with § 3, cannot be relied upon to authorize non-payment of neutrals. *A fortiori*, the Mediation Board is without authority to establish procedural standards relating to the consolidation and progression of cases before the NRAB because Congress expressly committed those and other matters "necessary to control proceedings before the respective divisions" to the discretion of the NRAB. 45 U.S.C. § 153(v).

The NPRM Conflicts With Important Statutory Policies

Consolidation

Proposed § 1210.9 purports to authorize the Director of Arbitration Services to consolidate grievances and other minor disputes for arbitration "when . . . this will serve the interests of economy and/or efficiency of the NMB's program for the administration of arbitration services . . . ." As an experienced neutral, the Director is as capable as any referee to decide when cases should be consolidated if he acts on a record setting forth sufficient facts to inform his decision and assure that one party or the other will not be disadvantaged. Therein lies the problem. To obtain the necessary factual development and assure fairness, the Director will have to invite participation from the parties in most cases. Otherwise, he would have to decide fact-specific issues arbitrarily without any factual record.

Even if truly useful consolidation criteria can be developed, a doubtful assumption, litigation of consolidation issues before the Director of Arbitration Services almost certainly will delay the progression of arbitration cases to final decision before the Adjustment Board and the public law boards. It will also increase the cost to the parties of minor dispute resolution. And, we submit, it will confound rather than improve the efficiency of the NMB's arbitration service

program. The NPRM's summary section, 69 Fed. Reg. 48179, indicates that the consolidation proposal set forth in § 1210.9 enjoys almost no public support, because the pitfalls of case consolidation without participation by the parties is well understood. The proposal should not be adopted in the final rules.

Non-Payment of Neutrals

As indicated, we do not believe that the NMB has been authorized by Congress to withhold the payment of fees and expenses of a neutral who does not issue a decision within sixty (60) days of hearing an Adjustment Board case, or who does not hear and decide a public law or special adjustment board case within one year of the addition of the case to the board. The establishment of decisional time limitations is a procedural matter of the sort Congress has committed to the NRAB's discretion, 45 U.S.C. § 153(v); moreover, no reasonable reading of § 153(l) and the Act's legislative history could support the notion that the Mediation Board is empowered to fix the compensation of neutrals at 0.

Equally important, the proposal set forth in § 1210.10 of the NPRM is flawed because it fails to address important reasons why arbitrators' decisions under § 153 are delayed. Put bluntly, the schedule of fees for compensating neutrals is so low that it is uneconomical for arbitrators to accept appointment to § 153 cases unless they can incorporate them into their workload without sacrificing more lucrative cases in other industries. Often, this means that decisions in § 153 cases must wait until better-paying assignments are concluded. Adoption of the NMB's proposal in § 1210.10 of the NPRM will thus result in the withdrawal of the most highly skilled, sought-after arbitrators from the rail industry. This consideration alone is sufficient reason for rejecting the proposed rule.

Schedule of Fees

Section 1210.12 of the NPRM proposes to adopt a schedule of fees for arbitration services provided by the NMB. With the exception of paragraph (7), "Request for a panel of arbitrators," all of the services pertain to rail cases arising under § 3 of the RLA. The overwhelming majority of requests for the services enumerated in proposed § 1210.12 are made by labor organizations. This is because a carrier is free to act on its own perception of what the collective bargaining agreement means and has little reason to initiate a grievance. If the Mediation Board's proposed fee schedule is adopted, therefore, its financial impact will be felt disproportionately by the rail labor organizations.

The stated reason for the fee schedule is "to encourage the parties to make the most efficient use of the NMB's program of arbitration services." 69 Fed. Reg. 48179. The greater "efficiency" presumably will result from the filing of fewer cases due to cost considerations. The problem with this approach, of course, is that it conflicts with the statutory purpose of assuring that all grievances and other minor disputes are subject to a mandatory dispute resolution process. In 1934, over this organization's "vehement objection," *BRT v. Chicago, R. & I. R.R.*, 353 U.S. 30, 39 (1957), rail labor yielded its right to strike over minor disputes in return for compulsory arbitration. Id. The cost of proceedings before the NRAB and the regional adjustment boards was to be borne by the Government. [2]/

It was well understand by the supporters and opponents of compulsory arbitration that disputes could "pile up" at both the national and regional adjustment boards. But, that was considered a worthwhile price for assuring the resolution of minor disputes without the threat of rail strikes. The trade-off represented by § 3 would not have occurred if the cost of progressing disputes before the NRAB and the compensation of referees had to be paid by the organizations. Then, as now, the much greater financial resources of rail carriers would have afforded management an enormous advantage over rail labor in any method of dispute resolution calling for decisions by neutrals after adversary hearings. Even today, in the airline industry, organizations are often strained to halt a series of contract violations committed by a determined carrier because of the costs of proceeding to one arbitration after the next.

The language of the Act is plain in showing that Congress did not intend to risk breakdown of the adjustment board by saddling the organizations with penalties or costs for using § 3's procedures. To the contrary, it was Congress' intention to funnel all minor disputes into that procedure. So adamant was Congress to assure that the costs of dispute resolution would not frustrate the orderly adjustment of minor disputes that it even prescribed in § 153(p) the very first fee-shifting provision in labor legislation. Payment of the costs of arbitration was revisited in 1966 when Congress created public law boards to alleviate the NRAB's congested docket and, rebuffing the carriers' opposition, again required the NMB to pay for referee compensation.

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[2] That the Government was to pay the entire cost of arbitration is made clear by the legislative history of the 1934 amendments, especially the testimony of Commissioner Eastman, which is detailed in the comments of TTD's Rail Labor Division and need not be restated here.

The fee schedule proposed in § 1210.12 of the NPRM is inconsistent with the statutory purpose of channeling all minor disputes into § 3's procedures for final resolution. Congress recognized the danger of allowing disputes to go unresolved because of the cost of arbitrating them and acted to prevent that from happening. Viewed in this light, the NPRM's approach of limiting the progression of cases to arbitration by imposing additional costs on employees and their representatives is untenable.

Conclusion

For the foregoing reasons, the proposed rules should not be adopted.

Very truly yours,

BAPTISTE & WILDER, P.C.

By: 
Roland P. Wilder, Jr.