BEFORE THE NATIONAL MEDIATION BOARD

NOTICE OF PROPOSED RULE-MAKING	)	
	)	
Fed. Reg. Vol. 69 No. 152	)	NMB Docket No. 2003-01N
	)	
	)	

STATEMENT OF RICHARD S. EDELMAN

Good morning Chairman Hoglander, and Members Fitzmaurice and Vanderwater. I am Richard Edelman, an attorney with O'Donnell, Schwartz & Anderson, P.C. I offer this statement on behalf of several affiliates of the Railway Labor Division of the Transportation Trades Department, those unions are: the American Train Dispatchers Association, Brotherhood of Maintenance of Way Employes, Brotherhood of Railroad Signalmen, International Brotherhood of Electrical Workers, National Conference of Firemen and Oilers/SEIU, and Transport Workers Union of America..

INTRODUCTION

The Unions that I am speaking for concur in the statements made on behalf of the RLD; and they expressly adopt the written comments of the RLD that were filed in response to the Board's notice of proposed rule-making. The purpose of this statement is to emphasize several points that these several Unions view as key; specifically:

1) the Railway Labor Act requires that the Federal government cover the cost of Section 3 arbitration other than the costs for the partisan members of the NRAB and Public Law Boards and party representatives;

2) the imposition of fees for the Board's performance of ministerial tasks to effectuate Section 3 arbitration would negate a key element of the deal made among Rail Labor, the carriers and the government for mandatory arbitration of minor disputes which is the sole basis for the prohibition against strikes over such disputes;

3) not only is the imposition of fees for ministerial processes for Section 3 arbitration contrary to the Act, the Board lacks plenary authority over the RLA so there is no basis for

the inference that the Board may require filing and administrative fees for such tasks merely because the Board is directed to provide those ministerial services;

4) contrary to the suggestions of some, the Board may not adopt the proposed rule based on 31 U.S.C. §9701, the so-called user fee statute; not only did the Board fail to cite that provision as a basis for the proposed rule, the statute does not override the RLA and the proposal does not and cannot satisfy the requirements of Section 9701

5) adoption of the fees proposal would effectively favor the carriers because it burdens labor and effectively shuts out grievances over certain issues; such an apparently partisan act by the Board is not only inherently misguided, it will damage the Board's credibility in performing its other functions;

6) there is no basis for the reasoning of some that fees are appropriate because the government pays no costs of arbitration in other industries; this is an instance where analogies between the RLA and the National Labor Relations Act are not appropriate.

ARGUMENT

I. THE RAILWAY LABOR ACT REQUIRES THAT THE FEDERAL GOVERNMENT COVER THE COST OF SECTION 3 ARBITRATION OTHER THAN THE COSTS FOR THE PARTISAN MEMBERS OF THE NRAB AND PUBLIC LAW BOARDS

We feel that the RLD comments in response to notice of proposed rule-making amply demonstrate that the RLA requires that the Federal government pay all costs for administration of Section 3 arbitration except those of the partisan representatives, but we want to draw your attention to several key statements in the legislative history of the 1934 Amendments to the RLA.

Arbitration of contract interpretation disputes was not required under the 1926 Act and unions frequently struck over unresolved contract interpretation disputes. A significant change in the law made by the 1934 amendments was the requirement that minor disputes be arbitrated. The Federal Transportation Coordinator Joseph Eastman testified that this was perhaps "the most important part of the bill" and that, in agreeing to compulsory arbitration before the NRAB, rail labor had made "a very important concession." Hearings Before the Committee on Interstate Commerce, U.S. Senate 73rd Congress, 2nd Session, on S. 3266, April 10, 1934, at p. 13 (referred to as Hearings

on S. 3266). And George Harrison, then Chairman of the Railway Labor Executives Association, emphasized the importance of that concession, stating:

> These railway labor organizations have always opposed compulsory determination of their controversies. We have lived a long time and got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and which we have the right and privilege of entering into and have something to say about their terms, we are now ready to concede that we can risk having our grievances go to a board and get them determined and that is a contribution that these organizations are willing to make.

Mr. Harrison then made it clear that Rail Labor's acceptance of mandatory arbitration of minor disputes depended on passage of the entire bill with all of its features, stating

> I just want to tie this tail on to that kite – if I may express it that way – that if we are going to get a hodgepodge arrangement by law, rather than what is suggested by this bill, then we don't want to give up that right, because we gave up the right because we feel that we will get a measure of justice by the machinery that we suggest here.

Hearings on S. 3266, April 10, 1934, at p. 35.

As part of this discussion Commissioner Eastman explained that part of the deal struck in the amendments was that the Federal government would be responsible for the administrative costs of the arbitration system, other than the costs for the partisan Board members and representatives of the parties. Thus, he stated that

> ...the expenses of that National Board outside of the compensation of the members appointed by the two parties, respectively, would be borne by the Government.

Hearings on S. 3266, April 18, 1934, at p. 154. And in testimony before the House Committee on Interstate and Foreign Commerce on May 22, 1934 he stated:

> Well so far as the members of the Adjustment Board are concerned, those who are selected by the carriers will be paid by the carriers, and those who are selected by the labor organizations will be paid by the labor organizations. The neutral member, when one becomes necessary, will be compensated by the Government, and it is my recollection that other expenses are taken care of by the Government

House of Representatives, Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess., on H.R 7650, May 22, 1934, at p. 51.

That government payment of all arbitration costs including administrative expenses was part of the arrangement adopted in 1934 is also shown by the remarks of the then Chairman of the United States Board of Mediation, Samuel Winslow. Chairman Winslow testified before the House Committee on Interstate and Foreign Commerce on May 22, 1934, stating that "Under the provisions of this act [the proposed 1934 amendment] all the operating expenses of all kinds of boards having to do with adjustment business have to be paid by the Government". *Id.* at 73.

Not only are these statements quite clear about the scope of the government's obligation to pay for the Section 3 arbitration system, the speakers were authoritative speakers. Mr. Eastman was the Federal Transportation Coordinator and he was the principal draftsman of the legislation adopted in 1934; Mr Harrison was the spokesman for all of Rail Labor and Mr. Winslow was Chairman of the Board of Mediation. Indeed the Supreme Court in *Brotherhood of Railway Trainmen v. Chicago River*, 353 U.S. 30 (1957) relied heavily on the testimony of Mr. Eastman and Mr. Harrison, referring to Mr. Eastman as the "principal draftsman of the 1934 bill" (*id.* at 37) and to Mr. Harrison as "[t]he chief spokesman for the railway labor organizations" (*id.* at 38).

In response to those who may say that there is no express statement in the Act itself requiring the government to cover all administrative costs for Section 3 arbitration, in addition to the fees for the arbitrators, we note that such a suggestion ignores the history of the RLA, the manner in which it was developed by agreement, the identity of these speakers and the importance of the legislative history of the RLA in applying the statute. The Supreme Court has repeatedly relied on statements of the principals regarding the meaning of the Act. As is noted above, the Court expressly relied on

the statements of Mr. Harrison and Mr. Eastman in *Chicago River* in holding that the provision for mandatory arbitration of minor disputes implicitly included a prohibition against strikes in such disputes. *Id.* at 37-39. Indeed, it must be recognized that the RLA contains no express prohibition against strikes over minor disputes, it was inferred from the same legislative history that the Unions rely on here. *Id.* at 35-40. Since the Supreme Court has found a prohibition against strikes in the absence of express no-strike language because of the history of the Act and the testimony supporting the 1934 amendments, then it necessarily follows that the same history and testimony support a requirement that the government pay all of the costs of Section 3 arbitration, other than the costs of the partisan members and party representatives.

This history and precedent therefore demonstrate that the proposal to impose fees for the Board's performance of ministerial functions associated with Section3 arbitration is contrary to the Act and should be withdrawn.

II. ADOPTION OF THE PROPOSED RULE WOULD NEGATE A KEY ELEMENT OF THE DEAL MADE AMONG RAIL LABOR, THE CARRIERS AND THE GOVERNMENT THAT IS THE BASIS FOR THE PROHIBITION AGAINST STRIKES OVER MINOR DISPUTES

The *Chicago River* decision is quite clear that the prohibition against strikes over minor disputes was inferred from the a deal that was made among the Rail Unions, the carriers and the Federal government; there was an express quid pro quo–labor committed to mandatory arbitration under the statutory scheme which included government payment of non-party costs, and Rail Labor agreed to relinquish the right to strike over such disputes.353 U.S. at 35-40. The legislative history of the 1934 amendments that was cited by the Court makes it clear that government payment of non-party arbitration costs was part of that deal. *Id.* However, by suddenly imposing fees for its administrative work under Section 3, the Board would be removing part of the quid pro quo in that

historic deal–the deal that was the sole basis for the inference of a prohibition against strikes. Thus, if the Board proceeds with the proposed rules, it will undermine the rationale for the current view of the statute as prohibiting strikes over minro disputes.

III. THE BOARD DOES NOT HAVE AUTHORITY TO IMPOSE FEES FOR ITS MINISTERIAL DUTIES UNDER SECTION 3 BECAUSE OF ITS "FUNDAMENTAL ROLE IN THE ADMINISTRATION OF THE NRAB, PLBS AND SBAS"

In its notice of proposed rulemaking in support of the proposed fee arrangement, the Board stated:

> 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. The Board also said that the fees proposal was a response to commenter feedback to the Board's own request for suggestions regarding its "statutory responsibilities for the administration of the NRAB". *Id.* at 48179. But the Board does not have general administrative authority over the RLA, over Section 3 or the NRAB; and it may not assume authority to impose fees based on the limited role it does play under Section 3-mainly paying for the arbitration and docketing and processing cases and assigning arbitrators.

In *Detroit and Toledo Shore Line Railroad v. United Transp. Union*, 396 U.S. 142, 158-159 (1969) (*"Shore Line"*), the Supreme Court rejected a carrier's reliance on the NMB's published interpretation of the RLA, 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. *Id.* at 158-159. And in *Chicago & North Western Transp. Co. v. UTU*, 402 U.S. 570, 580 (1971)(*"CNW v. UTU"*) 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". *Id.* at 580.

Moreover, as is shown in detail in the TTD/RLD comments, the D.C. Circuit recently firmly rejected the NMB's assertion that it had general supervisory authority under the RLA and that the Board could set general regulations under the RLA unless the statute specifically precluded it from doing so. *Railway Labor Exec.s Ass'n. v. NMB*, 29 F.3d 655, 670 (D.C. Cir. 1994). In that case the court 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. 29 F.3d at 670. 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 suggestion." *Id.*, emphasis in original. The Board's assertion that its limited responsibilities under Section 3 give it general authority to administer that provision and to therefore promulgate regulations imposing fees for utilization of Section 3 arbitration processes is analogous to its position in *RLEA v. NMB*. Once again, 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.

We also want to emphasize that its assertion of authority to impose fees for Section 3 arbitration is not supported by cases that upheld the NMB's decision to discontinue paying for office space for the partisan members of the NRAB's and to discontinue paying for referees for boards not established as PLB's under the second paragraph of 45 U.S.C. § 153 Second. *RLEA v. NMB*, 583 F. Supp. 279 (D.D.C. 1984) and *RLEA v. NMB*, 785 F. Supp. 167 (DC 1991). In the first case the statute contained a specific provision stating that, whenever practicable, the divisions of the NRAB will 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. 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 which provided for the creation of Public Law Boards at the request of either party, and expressly stated that neutrals for such Boards would be compensated by the NMB. 785 F. Supp. at 168. In both cases the Court held that specific provisions in the RLA provided that the NMB was not required to make certain expenditures, and that specific statutory language supported the inference that the disputed payments were discretionary. There is no comparable statutory support for the NMB's position with respect to the fees proposal.

IV. THE SO-CALLED USER FEE STATUTE DOES NOT PROVIDE A BASIS FOR THE BOARD TO ADOPT ITS PROPOSAL TO IMPOSE FEES FOR ARBITRATION

Some have suggested that the new fees could be imposed under 37 U.S.C. §9701, the so-called user-fees statute. However, even if the RLA itself did not preclude the proposed new filing fees, the Board did not even cite the user fees statute as a basis for the proposed rule, so it cannot now rely on the statute in adopting the rule. In any event, the user-fees statute would not support the proposal to charge parties for invocation of the statutorily mandated Section 3 arbitration process.

Again, we note that the RLA requires that the Board cover the costs for Section 3 arbitration costs other than the expenses for partisan board members and party representatives. Section 9701 does not provide a basis for charging parties for costs that the government is required to cover. Those who would rely on the user fee statute as authorizing the fees proposal are either unaware of the legislative history and RLA precedent in this regard, or they fail to understand the significance of that history and precedent.

Even if the Board had cited the user-fee statute, it would not permit collection of fees for performance of the Board's ministerial functions under Section 3.

31 U.S.C. §9701, provides that agencies may properly charge fees for provision of a "service or thing of value", "to a person", provided that the fees are fair, and comport with certain standards of reasonableness; if the charge is: (1) fair; and (2) based on- (A) the costs to the Government; (B) the value of the service or thing to the recipient:(C) public policy or interests served; (D) other relevant facts. The Supreme Court has held that agencies may not levy charges that are effectively taxes; and they may not make assessments to generally defray the costs of their operations or to further general policy goals (*e.g.* to create financial incentives or disincentives with regard to certain types of conduct). *National Cable Television Ass'n. v. United States*, 415 U.S. 336, 341 (1974); *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 349-350 (1974). Nor may an agency assess fees "to recover from regulated parties costs for benefits inuring to the public generally". *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989).

In *Ayuda, Inc. v. Attorney General*, 848 F. 2d 1297, (1988), the D.C. Circuit approved INS filing fees where individuals voluntarily invoked the agency's services in order to gain specific benefits. And in *Seafarers International Union of North America v. United States Coast Guard*, 81

F. 3d 179 (D.C. Cir. 1996), the D.C. Circuit said that a person who is required to obtain an occupational license may be required to reimburse the agency for the cost of processing the license. But the Court held that an agency cannot assess fees, "purportedly in the 'public interest' to recoup some of the general costs to the government of operating a particular regulatory scheme"'. *Id.* at 88. Value to the recipient is the measure for permissible fees; fees must be related to "a specific service provided by the agency to an identifiable recipient"; and agencies may not charge fees based on a perceived furthering of public policy goals, if those fees are "unrelated to a specific service provided by the agency to an identifiable recipient". *Id.* at 88, 90, "Moreover, it should be clear that an agency is not free to add extra licensing procedures and then charge a user fee merely because the agency has general authority to regulate in a particular area. *Id.* at 186, *citing RLEA v. NMB*, 29 F. 3d at 670. The D.C. Circuit has further held that "if the service provides both a specific benefit to an identifiable beneficiary and an independent benefit to the public, then the agency must prorate its costs, lest the specific beneficiary be charged for agency costs attributable to the public benefit". *Engine Manufacturers Ass'n. v. EPA,* 20 F. 3d 1177, 1180 (D.C. Cir. 1994), citations omitted.

We submit that the fee proposal here is not permitted under Section 9701 and is exactly the sort of charge that the Supreme Court has proscribed. The NMB has proposed a tax on the processing of cases to arbitration, it is planning to use the fees to defray the costs of its arbitration operation, it is seeking to create financial incentives or disincentives with regard to the arbitration of claims and it is seeking to charge parties seeking arbitration for a process that was adopted for a public benefit–cessation of strikes over minor disputes.

The Board's stated reasons for the imposition of fees are to "facilitate the more timely resolution of grievances" (69 Fed. Reg at 48177), "reduce the current case backlog", to create

"incentives to process cases expeditiously", to "creat[e] financial incentives to process cases expeditiously", to induce the parties "to file and progress those cases having merit, and to consolidate as many grievances as possible..." and "to encourage the parties to make the most efficient use of the NMB's program of arbitration services". 69 Fed. Reg. at 48179. Thus, by its own statements, the NMB has justified its actions based on a desire to generally defray the costs of the arbitration program, further general policy goals of the agency, promote actions the agency deems desirable, discourage actions the agency deems undesirable, and generally improve the efficiency of usage of the arbitration. Under the Supreme Court and appellate precedent we have cited, the NMB's proposed fee plan must fail. The Board's reasons for charging fees are not a proper basis for charging fees under Section §9701.

Furthermore, the NMB has not established that the fees are actually for provision of specific services to individual recipients that are services of value to those recipients, as opposed to furtherance of the public interest. As was shown by the *Chicago River* decision, RLA Section 3 was amended because of the proliferation of strikes over minor disputes and cumulated unresolved grievances, the use of Board of Mediation resources when minor disputes were not arbitrated, and appeals for Presidential Emergency Boards, that occurred because the prior scheme was ineffective. The change was seen as a significant benefit to the public because of the reduction of interruptions of commerce. The prior arrangement could have been retained, and unions could have continued to engage in strikes over minor disputes, but Coordinator Eastman came forward with the amendments to advance the public interest; and the Rail Unions acceded in return for the mandatory, final and binding and government paid arbitration arrangement that was presented.

The Unions are not invoking a privilege, nor are they voluntarily seeking agency action, in

arbitration cases. This is not like seeking a license or a permit. Under the decision in *Chicago River*, the Unions are required to proceed to arbitration and may not exercise self help in minor disputes. This is a direct result of an agreement among Rail Labor, the carriers and the government, by which the unions gave up the right to strike over minor disputes in return for an arbitration arrangement whereby all costs except those of partisan board members and party representatives were to be paid for by the government. It was in the government's interest to do so because of the disruptive impact of strikes in response to carrier actions. Now, when issues arise that involve existing contract terms, the Unions are forced to proceed under Section 3. If that were no longer the case, and unions were free to strike over minor disputes, then a union's invocation of NRAB dispute resolution, rather than self help could be deemed a voluntary act, and one providing a private benefit to the unions. But that is not the situation here. Assertions to the contrary simply ignore the context and history of the Act.

Finally in this regard, we note that the Board has plainly failed to provide any analysis that supports the amounts of the proposed fees; and it appears that there was no such analysis

Thus, the NMB has failed to invoke 31 U.S.C. §9701, the Board's stated rationale for the fees is impermissible under Supreme Court and appellate precedent, and the proposal would fail under Section 9701 if it had been properly invoked.

V. ADOPTION OF THE FEES PROPOSAL WOULD EFFECTIVELY FAVOR THE CARRIERS AND DAMAGE THE BOARD'S CREDIBILITY AND EFFECTIVENESS

The Board's Section 3 fees proposal would burden labor and favor the carriers because the imposition of fees will fall heavily on labor, and because the fees will effectively bar arbitration of many cases where the amounts charged by the Board would exceed the amounts that could be recovered in the claims. Adoption of such a lopsided regime would undermine collective bargaining in the rail industry and would ultimately diminish the Board's credibility and effectiveness.

The vast majority of rail industry grievances are initiated by unions and individuals because the statutory scheme permits a carrier to act when challenged by a union, subject to the filing of a grievance that will later determine whether there was a violation or not. In this system, unions and workers are effectively the "plaintiffs", management can simply act and the unions must grieve and arbitrate. As the RLA has been interpreted, management does not need to obtain an arbitrator's sanction before proceeding under a disputed interpretation of the parties' agreement; a Union is generally obligated to grieve and arbitrate after the action is taken. *Railway Labor Exec.s 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. 2d1141 (1st Cir. 1987). Ordinarily there is no status quo requirement in a minor dispute; courts have refused to enjoin challenged carrier actions pending arbitration unless the Union can demonstrate irreparable harm or likely frustration of arbitration. *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 Exec.s Ass'n,.* 855 F. 2d 1277, 1287-1288 (7th Cir, 1988). This statutory structure effectively insures that unions will be filing the claims over disputed interpretations of agreements because a carrier need not await a ruling in arbitration; it is free to act until a decision is rendered, and it only becomes liable for a remedy after an award. Accordingly, a system of fees for arbitration effectively favors the carriers because the costs of invoking the statutory dispute resolution mechanism are imposed on workers and their unions.

The Board's proposal also favors management because even without exhausting the entire fee schedule, a typical case would cost at least $125-$175 in fees. Many claims are for contract

violations where the employee suffers a compensible loss that is less than the proposed filing fees; such as loss of a day's pay, loss overtime, denial of a skill differential or other special pay, or denial of reporting pay, travel pay or travel expenses. The proposed fees would discourage arbitration of such claims for small amounts, even when the claims are undeniably meritorious. Many small grievances concern similar contract interpretation issues and repeated application of a disputed interpretation may produce large savings for the carrier, even though individual violations are involved. Carriers with thousands of employees could reap substantial savings by small rules violations over years that are not challenged because the filing fees exceed the value of individual claims. And Unions cannot rely on a favorable ruling in one small dollar value case to cause the carrier to refrain from similar violations because arbitration decisions generally are not precedential, and carriers often continue disputed courses of action, requiring unions to arbitrate over and over again. Nor would consolidation necessarily ameliorate this problem, because the facts and witnesses may vary greatly from case to case, even though the claims involve the same contract provision. Unions would therefore be burdened in enforcement of many collective bargaining agreement provisions. And carriers would be substantially benefitted because they could repeatedly disregard contract terms where the amount of money for each individual violation would be less than the NMB's fees for arbitration. The carriers with greater resources could decline to pay meritorious claims, knowing that unions and individuals, with more limited resources, would be discouraged from pursuing them to arbitration. Imposition of fees would therefore favor the carriers. It would also effectively negate the statutory provision for the government to pay the fees of arbitrators because the filing fees would preclude docketing of many claims in the first place.

The Board's proposal also fails to recognize that grievance arbitration is an integral part of

the collective bargaining process, and that by hindering arbitration of claims, the Board will complicate and undermine the effectiveness of term bargaining. In the landmark *Steelworkers Trilogy* cases (expressly applied to the RLA in *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 308 (1989)), the Supreme Court held that grievance arbitration is part of continuous process of collective bargaining. Parties negotiate new contract terms, if they disagree about the meaning of a provision, they arbitrate, and the losing party can then seek modification of the contract in the next round of bargaining. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). By erecting a barrier to arbitration of many claims, the Board would increase the complexity of term bargaining. Collective bargaining in the rail industry is already very complicated because of the compulsion for national, multi-party bargaining. If issues that should be arbitrated are not resolved and are instead brought to the bargaining table, the term bargaining process will become even more difficult. Or, if such issues are not arbitrated, and are ignored in national bargaining because attention is limited to more traditional national bargaining issues, the effectiveness of the entire scheme will be undermined as carriers will continue to take disputed actions and employees will have no process to resolve many of their problems.

Thus, the barrier that the Board would erect to the processing of small dollar value claims to arbitration 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. Moreover, because the imposition of filing fees for arbitration clearly favors the carriers, there is a very real risk that the Board will no longer appear impartial. And the perception of partiality will not be confined to this area. The Board's overall appearance of neutrality will be impacted and it will become less credible and effective in its other core functions

such as mediation and representation investigations. Indeed, a key aspect of the RLA was its separation of mediation from decision-making, and the removal of the mediation agency from a role of issuing findings adverse to parties; this separation was deemed critical to the credibility of the mediation agency. *Chicago & North Western v. UTU, supra.*, 402 U.S. at 580-581. We urge the Board to consider the potential impacts of its proposal that we have just outlined and to refrain from taking an action that would damage its credibility and effectiveness.

VI THERE IS NO BASIS FOR CONCLUDING THAT FEES ARE APPROPRIATE BECAUSE THE GOVERNMENT PAYS NO COSTS OF ARBITRATION IN OTHER INDUSTRIES

Some would attempt to justify imposition of the new fees by noting that the government pays no costs of arbitration in other industries. But such reasoning is entirely without force. Courts have repeatedly cautioned that care must be used in drawing analogies between the RLA and the National Labor Relations Act. This is a situation in which analogy is not appropriate.

First, the NLRA scheme for arbitration is different from the RLA because arbitration of contract interpretation disputes under the NLRA is not mandated by statute, as it is under the RLA. Additionally, unions covered by the NLRA did not affirmatively relinquish a pre-existing right to strike over contract interpretation disputes in return for a statutory guarantee of government paid arbitration of such disputes.

Second, there are other differences with respect to the government's role in labor law enforcement under the two statutes that demonstrate that comparison of the government's role in the RLA arbitration scheme to arbitration under the NLRA does not provide a disproportionate advantage to Rail Unions. The NLRA created the National Labor Relations Board and gave it responsibility for prosecuting and adjudicating unfair labor practice charges. The NLRB has a

structure of General Counsel staff, regional offices and administrative law judges responsible for investigating unfair labor practice charges, litigating unfair labor practice complaints, seeking stays of employer actions in appropriate cases, adjudicating such complaints, enforcing NLRB orders and prosecuting contempt charges. Similar structures exist in federal sector labor relations and in many State labor relations statutes. By contrast, the Rail Unions use their own resources to investigate, prosecute and enforce the RLA equivalent of rail industry ULPs. Accordingly, it is simply specious to maintain that the Rail Unions have an anachronistic and disproportionate advantage over other unions in having the government administer and pay for arbitration without contribution of the Rail Unions.

Thus, to the extent that analogy to arbitration in other industries is cited as justifying the fees proposal, and is a sub-text for the proposed rules, the analogy is simply false.

CONCLUSION

The ATDA, BMWE, BRS, IBEW, NCFO and TWU appreciate this opportunity to address the Board on this important issue, especially since the fee proposal was a late addition to the Board's consideration of rules for Section 3 arbitration. These unions feel certain that once the Board has had an opportunity to consider the RLD's comments and statement, and this supplemental statement, it will realize that the proposed fees for the ministerial acts that the Board performs under Section 3 are in conflict with the RLA and would negate the historic arrangement which is the foundation for a seventy year labor relations regime in the industry, and the predicate for the prohibition against strikes over minor disputes. It should also be clear to the Board that it simply does not have general authority to promulgate such rules; that, even if it had properly invoked 31 U.S.C. Section 9701, that provision would not permit the proposed fee schedule; and that the imposition of the rules would

favor the carriers and damage the credibility and effectiveness of the Board in its various other functions. Simply put, the proposed rules cannot be sustained, they should therefore by rejected.

Respectfully submitted,

Richard S. Edelman

For: American Train Dispatchers Association, Brotherhood of Maintenance of Way Employes, Brotherhood of Railroad Signalmen, International Brotherhood of Electrical Workers, National Conference of Firemen and Oilers/SEIU, and Transport Workers Union of America

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