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Rail Labor Division

STATEMENT OF
GEORGE J. FRANCISCO JR., CHAIR
RAIL LABOR DIVISION, TRANSPORTATION TRADES DEPT., AFL-CIO

BEFORE THE NATIONAL MEDIATION BOARD
SECTION 3 FILING FEES, NMB DOCKET NO. 2003-01N

January 11, 2005

Good morning Chairman Hoglander, and Members Fitzmaurice and Van de Water. My name is George J. Francisco, Jr. I appear before you today as both the president of the National Conference of Firemen and Oilers, SEIU, and as chair of the Rail Labor Division (RLD) of the Transportation Trades Department, AFL-CIO. The RLD is comprised of the 12 rail unions in the AFL-CIO that together represent several thousand workers at freight railroads, Amtrak and commuter rail operations across the country.[1]

At the outset, I want to convey the RLD's vehement opposition to the Board's proposal. The imposition of fees for the NMB's performance of administrative functions in connection with statutorily mandated arbitration processes under Section 3 of the Railway Labor Act (RLA or Act) is unlawful and is nothing more than a hostile federal tax on our members' right to speak out.

[1] Attached is a list of the RLD unions.

Our attorneys have shown that the Board has no authority to impose these fees and in fact to do so would violate the Act. They have also explained that the tax would negate the historic agreement for mandatory arbitration of contract interpretation disputes that was the foundation for the 1934 amendments to the Act; and that the deal made in 1934 is the sole basis for the prohibition against strikes over minor disputes. Our Section 3 committee representatives whose job it is to handle claims and grievances have explained how the proposed fees will deter the filing of arbitration of many valid claims, impede enforcement of agreements, and ultimately undermine collective bargaining agreements and the collective bargaining process. In short, contract terms that cannot be enforced are not meaningful.

It must be remembered that collective bargaining and arbitration are parts of a single process. If resolution of contract interpretation disputes is thwarted, there will be more issues for term bargaining and more complicated negotiations and mediation. The inability to resolve disputes in arbitration will only add to the issues for term bargaining and will make it even harder for the parties to reach agreements.

The Board claims that the imposition of fees is necessary to clear the backload of Section 3 cases. I guess by this reasoning the voting lines we saw this past November can be solved by the imposition of a poll tax. Just discourage enough workers from participating in the process, then all of the so-called problems will away. The Board can claim Section 3 is more efficient and in the process, the railroads get an upper hand over their employees and an even greater incentive to ignore the collective bargaining agreement. I understand why the railroads like this new deal – what's not to love from their perspective. But of course, the Board is not charged with serving the railroads interest. It is charged with serving the public interest and quite simply this proposal doesn't even come close.

In fact, the union Section 3 representatives have explained how fees could have the unintended consequence of actually exacerbating backlogs as carriers refuse to settle claims to force the unions to pay filing fees just to take cases to arbitration. In other words, the fees could have precisely the opposite effect as the NMB intended. The Section 3 representatives have also told you that the effects of the proposed fees will fall most heavily, if not exclusively, on labor. The reality is that in labor relations, management acts and the union 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. The result – we are typically the "plaintiffs" while management can simply act. If we disagree with management's interpretation of the agreement, we have to move the case to arbitration. This means labor, and not management, will typically be paying the fees the Board is seeking to impose.

So we view the proposal as hostile to working people and hostile to meaningful collective bargaining. If the Board proceeds with this proposal, I must tell you that we will bring all of our resources to bear to fight it in all possible forums.

We of course are not alone in our opposition to this proposal. Over 125 members of the House of Representative, including the Chair and Ranking Member of the Rail Subcommittee, and the Ranking Member of the full Transportation Committee, have a signed a letter to this Board urging you to reconsider the imposition of filing fees. The Chairman and Ranking Member of the Senate Appropriations Subcommittee that funds the Board has sent a similar letter as has the Ranking member of the Senate Labor Committee.[2] And most recently, Congress required the NMB to hold hearings on the negative implications of this proposal.

[2] Attached at 2 are the letters sent by Members of Congress referenced in this statement.

I should also note that Members of Congress would have liked to testify today, but the Board scheduled this hearing when Congress is in recess and refused a request from Congressman Oberstar to postpone the proceeding. I would hope that the Board will hold another hearing so that Mr. Oberstar and other legislators could express their opposition to this proposal directly to the Board. In any event, it should be clear that there is strong political opposition to the federal tax the Board is proposing and we will continue to enlist Members of Congress to stand with us against this misguided scheme.

However, we also want to be clear that we would like to avoid a fight if at all possible, and that we are prepared to work with the Board and the carriers on resolution of the issues that the have been identified as problems with the current Section 3 processes. As our attorneys and our Section 3 representatives have told you, there is a history of cooperation of rail labor and the carriers with the government to make rail industry labor relations more effective. We have cooperated on amendments to the Act, and on administrative processes to improve collective bargaining processes and dispute resolution. The RLA was a negotiated statute; the 1934 amendments and other amendments were negotiated, or adopted with the consent of both sides. Significant changes have been made in the administration of Section 3 by joint committee recommendations and those recommendations have resulted in a dramatic reduction in case backlogs over the past two decades. We are prepared to work cooperatively to address current concerns just as we worked cooperatively in the past, and we are confident that such cooperation can continue to yield positive results.

In closing, we urge the Board to recognize that whatever problems exist in current processing of cases under Section 3, they cannot be addressed by unilateral action by the Board to impose fees for the NMB's performance of ministerial functions that are required for Section 3 arbitration.

This is true not only because of the legal and practical restrictions we have outlined, but because of the impact that such unilateral action will have on the Board's ability to perform its other functions that are central to its mission: mediation and representation determinations. The credibility and effectiveness of the Board in both of those functions depends on the perception that it is truly neutral. In fact, the Supreme Court has emphasized that the Board must maintain its neutrality and the confidence of the parties. If this Board takes sides, as it seems poised to do in these rules, its overall credibility and effectiveness will similarly be undermined. The Board cannot make rail labor pay for a basic dispute resolution mechanism that is fundamental to meaningful collective bargaining in this industry and then expect to be viewed as a neutral actor in its other functions.

We urge you to step back from this precipice, to maintain the mandated and historic function of the Board with respect to covering all of the costs of administration of the Section 3 processes (other than the costs for partisan members and representatives), and we urge you to work with us on any Section 3 process concerns. But please do not doubt our resolve to fight this if you go ahead in spite of all that has been presented.

We will bring this fight to the halls of Congress. We will fight in the Courts. And we will mobilize our members against this misguided proposal. We will simply not accept an unlawful and partisan act and we will do everything we can to see that it is overturned.

ATTACHMENT 1

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Rail Labor Division

RLD AFFILIATES

The following labor organizations are members of and represented by the Rail Labor Division of the Transportation Trades Dept, AFL-CIO

American Train Dispatchers Association (ATDA)

Brotherhood of Locomotive Engineers and Trainmen, IBT (BLET)

Brotherhood of Maintenance of Way Employes Division (BMWED)

Brotherhood of Railroad Signalmen (BRS)

International Association of Machinists and Aerospace Workers (IAM)

International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)

International Brotherhood of Electrical Workers (IBEW)

National Conference of Firemen and Oilers, SEIU (NCF&O)

Sheet Metal Workers International Association (SMWIA)

Transportation •Communications International Union (TCU)

Transport Workers Union of America (TWU)

UNITE HERE

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

Don Young
Chairman

James L. Oberstar
Ranking Democratic Member

Lloyd A. Jones, Chief of Staff
Elizabeth Megginson, Chief Counsel

David Heymsfeld, Democratic Chief of Staff

December 9, 2004

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

Attention: NMB Docket No. 2003-01N

Dear Mr. Watkins:

We are writing in opposition to the proposed regulation published in the *Federal Register* on August 9, 2004, in which the National Mediation Board (NMB) establishes procedural rules for the National Railroad Adjustment Board (NRAB), and conditions payment of referees' compensation on compliance with those new rules. In addition, the proposed regulation provides for the institution of user fees for the arbitration services of the NMB, the NRAB, and other arbitration boards. We believe that the NMB lacks authority to issue these regulations.

As part of its amendments to the Railway Labor Act (RLA) in 1934, Congress specifically provided for the autonomy of the NRAB as an agency separate and apart from the NMB with its own authority to "adopt such rules as it deems necessary to control proceedings before its respective divisions." *See 45 United States Code section 153.* Pursuant to this explicit authority, the NRAB adopted procedural rules, which were published on October 10, 1934, as Circular No. 1 and revised as recently as June 23, 2003. The 1934 amendments made clear that the NMB's responsibility was carefully limited to the appointment of referees, in those cases where partisan members are unable to select a referee, and the payment of referees' compensation and other authorized expenses. During the 70 years since the NRAB was established, the NMB has never claimed authority to establish procedural rules for the NRAB or the other arbitration boards.

Under the proposed regulation, the NMB intends to enforce the new procedures by only paying referees for arbitration of cases at the NRAB that have progressed according to a certain time schedule. Congress never authorized the NMB to refuse to make such payments in the event that any party or referee is unable to meet certain time limits. Furthermore, the proposed regulation states that "the NMB will only pay for the arbitration of cases on Public Law Boards and Special Boards of Adjustment (SBAs) heard and decided within one year of the addition of the case to the Board." Again, there is no authority for this under current law.

In 1966, Congress passed an amendment to the RLA to create Public Law Boards and SBAs as an option to the NRAB. Again, the NMB was provided no authority over the Public Law Boards. Public Law Board Procedures were modeled after the NRAB in that the partisan board members have the authority to resolve claims, or, should they fail to do so, they may appoint a referee. Only in the event the partisan members of the Public Law Board are unable to agree upon a referee can they request the NMB to appoint a neutral arbitrator. The 1966 amendments stated: "The Neutral person as selected or appointed *shall* be compensated and reimbursed for expenses by the Mediation Board." The NMB cannot now condition such compensation on compliance with the proposed NMB procedures, without a Congressional authorization.

The proposed regulation would also establish new user fees for the arbitration of services of the NMB, the NRAB, and other arbitration boards. This proposal is in direct conflict with the 1934 and 1966 amendments to the RLA, in which Congress required the Federal Government to pay for arbitration services that were final and binding, in return for rail labor agreeing to forgo strikes on minor disputes. Such strikes had occurred frequently prior to these amendments. The proposed regulation would therefore undermine the RLA, its legislative history, and the concessions that rail labor made.

Further, the NMB cites 45 United States Code section 154 as the general underlying agency authority to establish and collect a user fee for the purpose of making the process of arbitration more efficient. However, that statute does not contain any authority for the NMB to establish and collect a user fee. The user fee that is cited in the proposed regulation also does not meet the criteria for the establishment of a user fee under the general government authority found in 31 United States Code section 9701. Under that authority, user fees are allowed to be collected only for the purpose of offsetting the cost of services to the public. The government has no existing authority to institute a user fee for the purpose of controlling the flow or administration of government services and discouraging the American public from utilizing those services. Moreover, it is the NMB, not the disputing parties, that is required, under current law, to pay for arbitration services, and the NMB receives appropriated dollars annually to fulfill this statutory authority. Therefore, any collection of fees by the NMB would require new statutory authority from the Congress.

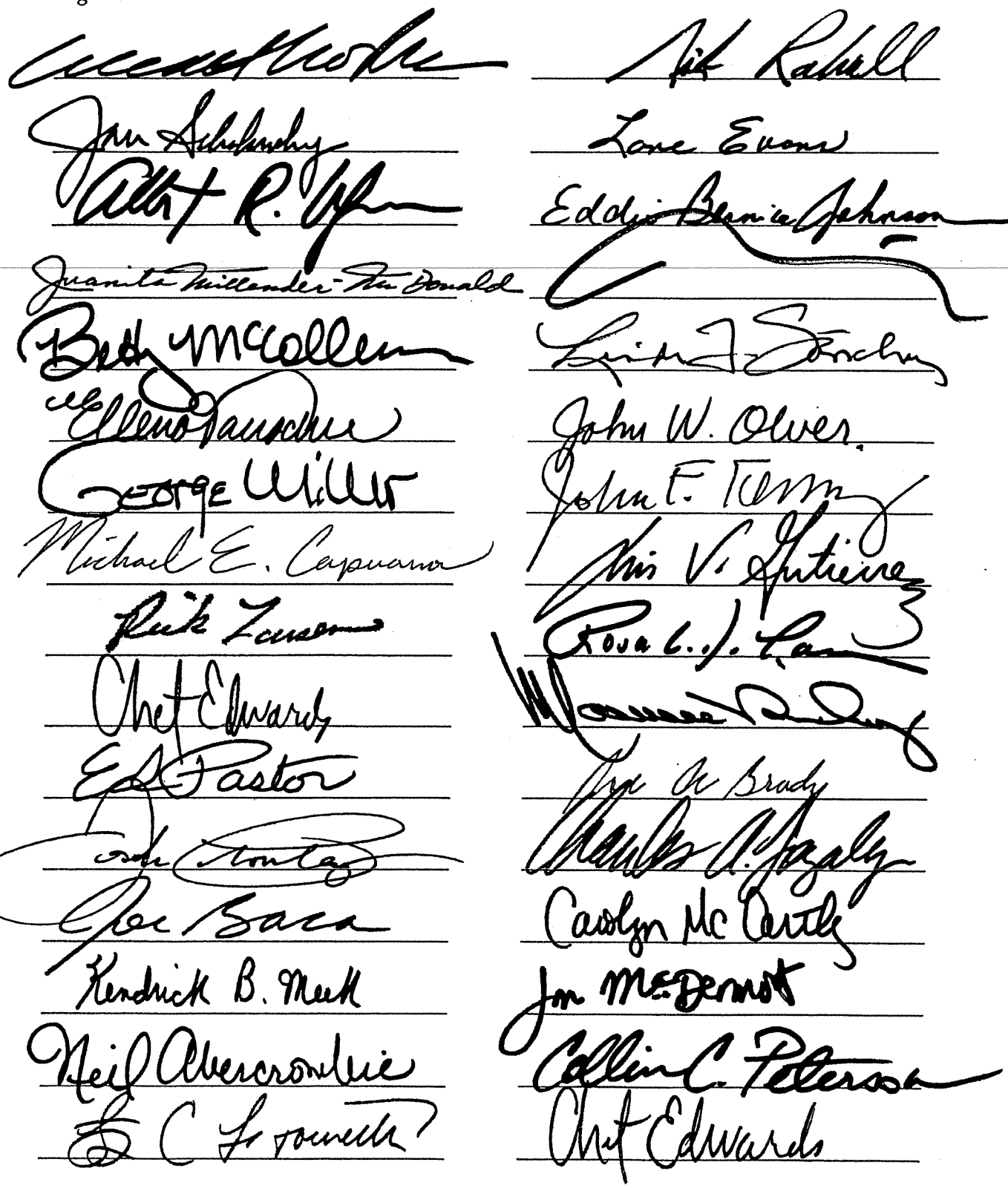
Finally, the NMB states that the purpose of the proposed regulation is to "facilitate the timely resolution of disputes in the rail industry" and eliminate the backlog of pending cases at the NRAB and the other arbitration boards. However, the backlog of pending cases has already been significantly reduced and continues to decline. In 1985, a committee of carrier and union representatives was formed to make recommendations for a more efficient arbitration system. A number of beneficial changes were made as a result of the committee's recommendations. The backlog of pending cases has now been significantly reduced from a total of 22,173 pending cases in 1985 to 5,136 pending cases in 2004.

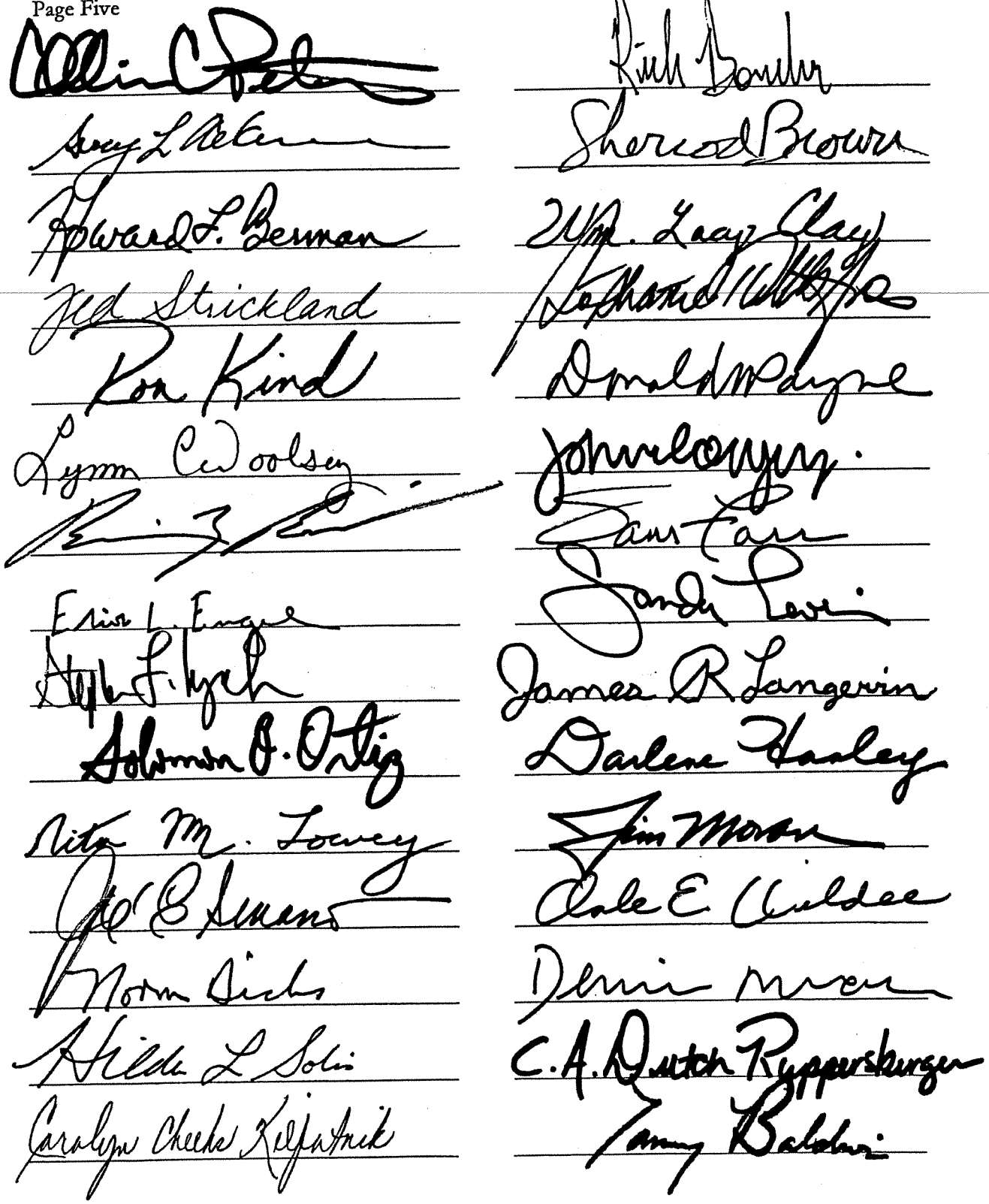
We believe the proposed regulation will result in unions and individuals being discouraged from pursuing grievances. Under the NMB's proposal, the fees for a claim, from initial docketing through arbitration, would be a minimum of $75 and as high as $350. Many claims are for contract

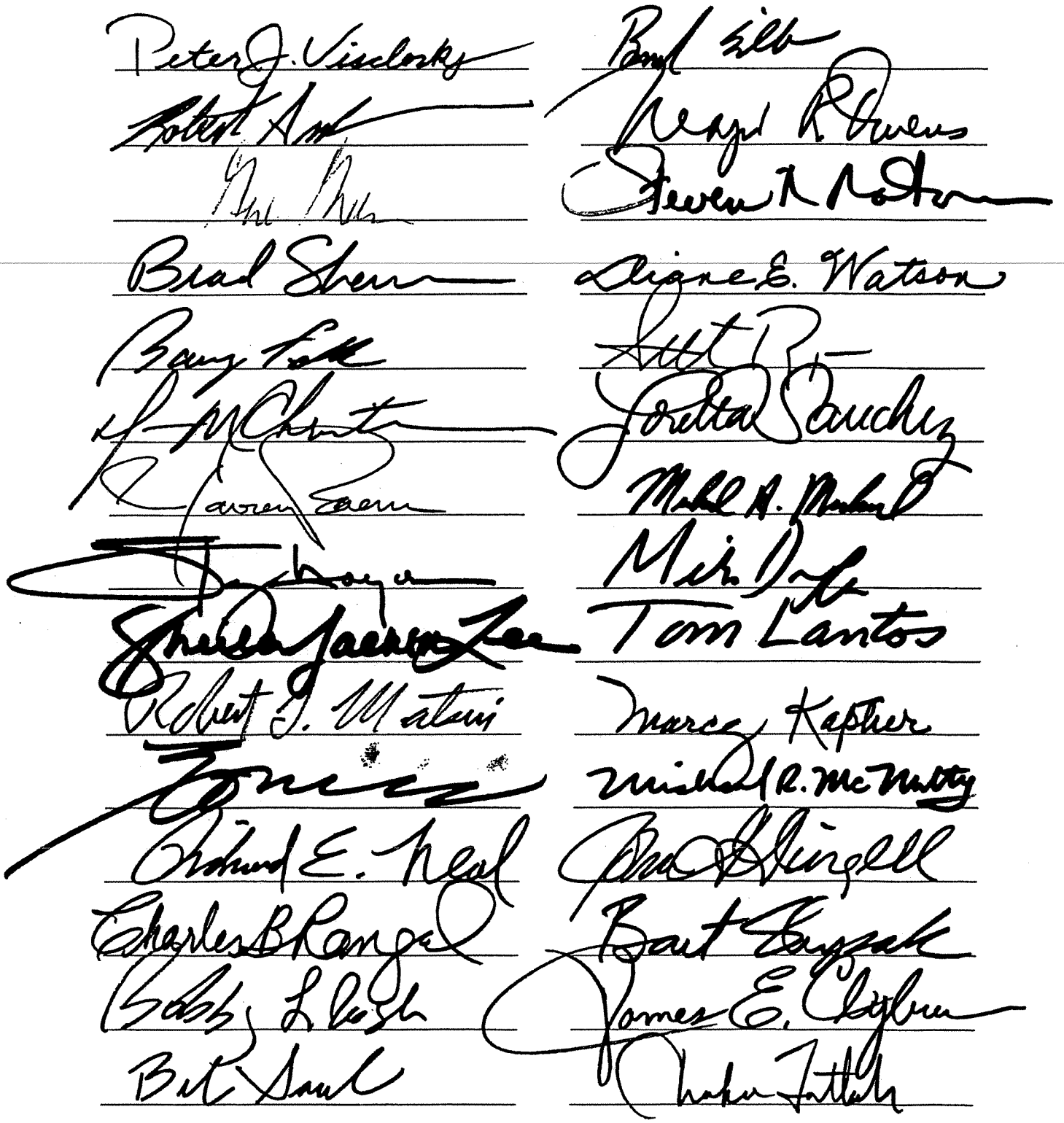
violations where the employee involved suffers a financial loss that is less than the proposed filing fees; examples include loss of a day's pay, loss of overtime, or denial of skill differential or other special pay, travel pay, or travel expenses. The proposed fees would discourage the filing for arbitration over such claims.

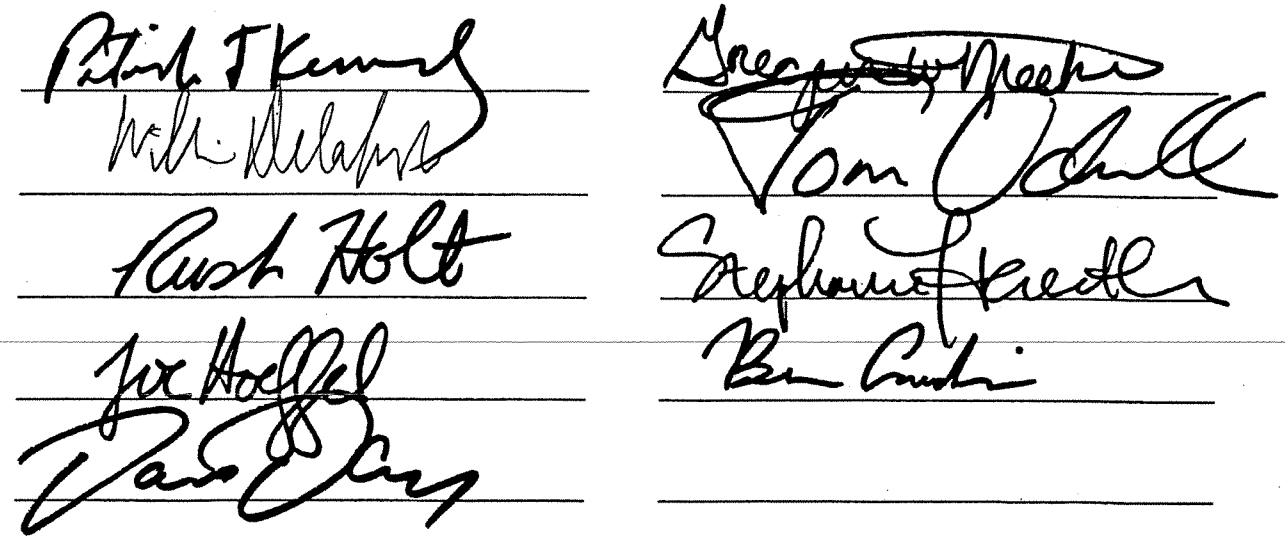
We, therefore, urge the NMB to withdraw this proposal.

Sincerely,









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United States Senate

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

September 20, 2004

Roland Watkins
Director of Arbitration/NRAB Administrator
National Mediation Board
1301 K Street, NW, Suite 250-East
Washington, D.C. 20005

Re: NMB Docket No. 2003-01

By facsimile - (202) 692-5086

Dear Mr. Watkins:

I'm writing to comment on the proposed rules changes published by the National Mediation Board (NMB) for comment in the Federal Register on August 9, 2004. I commend the NMB's efforts to promote timely resolution of employee grievances, but I believe that adoption of the proposed rules will violate the letter and spirit of the Railway Labor Act and undermine the NMB's effectiveness in fulfilling its statutory role. I urge NMB to reconsider the proposed rules, and in keeping with the Act's history, work with the parties to reach a consensus on any new procedures for the arbitration of labor-management disputes in the railroad industry.

I'm concerned that the proposed rules, particularly those imposing filing fees for mediation and arbitration services, are at odds with the history and purpose of the Railway Labor Act. The Act was jointly drafted and broadly supported by representatives of rail carriers and labor unions. Its primary purpose is to prevent interruption in the nation's interstate commerce and encourage the prompt and orderly settlement of labor-management disputes through mediation and binding arbitration. 45 U.S.C. §151a.

The Act sets forth a comprehensive, exclusive system of binding arbitration for resolution of labor-management disputes, including employee grievances. The strength and effectiveness of this system was made possible by the unions' agreement to limit their right to strike over employee grievances, in return for federally financed arbitration of the grievances. A principal author of the 1934 amendments strengthening the arbitration system characterized this major concession by labor as the most important part of the bill. *Testimony of Joseph Eastman, Federal Coordinator of Transportation, Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 7650*, 73rd Cong. 2d Sess. 47, 58, 60 (1934).

When Congress amended the statute in 1966, it specifically refused to accept the proposal by the then-Chairman of the National Railway Labor Conference to require the parties to pay the

expenses of the arbitrator (or "referee," as the statute reads). *Testimony of J.E. Wolfe, Hearings Before the House Committee on Interstate and Foreign Commerce, on H.R. 702 and related H.R. 706,* 89th Cong., 1st Sess. 198 (1965).

The fees provisions in the proposed rules should be rejected now. Imposing fees on the parties is directly at odds with the Act's intent to provide a federally funded system of binding arbitration for employee grievances, in return for the unions' agreement to limit their right to strike. The Act explicitly requires the NMB to pay the expenses of referees. 45 U.S.C. §153, Second. Although NMB does not actually propose to require parties to pay referees' expenses, the proposal would compel them to pay a variety of filing fees in order to obtain the referees' services, as a way of by-passing the requirements of the statute.

Federal law generally permits agencies to charge "user fees" for their services. 31 U.S.C. § 9701. But it is unfair for agencies to impose such fees when the services of the agency benefit the public as a whole, and not just the immediate recipients of the services. The Act's federally-financed system of binding arbitration for labor-management disputes in the rail industry is explicitly designed to prevent the disruption of interstate commerce.

The "Section 3 Committee" formed in 1985 by labor and management representatives to make recommendations for a more efficient arbitration system has succeeded in significantly reducing the backlog of pending employee grievances. The NMB should rely on that Committee's work and similar initiatives, rather than issuing new rules that clearly contradict the long-standing and productive labor-management partnership that characterizes the RLA's history.

I urge the NMB to resume its work with labor and management representatives to reach a consensus on streamlining the processing of grievance cases in accord with the plain meaning, legislative history and spirit of the Railway Labor Act. Doing so will reaffirm the nation's continuing commitment to resolve labor-management differences through mutually beneficial bargaining and negotiation, and I am confident that the public will continue to benefit as well.

Respectfully submitted,

Edward M Kennedy

Edward M. Kennedy

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510–6025
www.senate.gov/~appropriations

September 17, 2004

Roland Watkins
Director of Arbitration Services
National Mediation Board
1301 K. St. NW
Suite 250 East
Washington, DC 20005

Attention: NMB Docket No.2003-01N

Dear Sir:

We are commenting on the proposed rule cited in 29 CFR Part 1210 regarding the institution of user fees for the arbitration services of the National Mediation Board (NMB). As the Chairman and Ranking Member of the Senate Subcommittee on Appropriations responsible for the operating expenses of the NMB, we are deeply opposed to this rule.

The National Mediation Board was created in 1934 to provide mediation and arbitration services under the Railway Labor Act. It continues to provide those services under the statutory authority in that Act and the annual budget authority obtained in the appropriations process. The proposed rule cites the general underlying agency authority in 45 U.S.C. 154 as the authority to establish and collect a user fee for the purpose of making the process of arbitration more efficient.

The statute 45 U.S.C. 154 does not contain any authority to establish and collect a user fee. Further, the user fee that is cited in the proposed regulation does not meet the criteria for the establishment of a user fee under the general government authority found in 31 U.S.C. 9701. That authority, had the proposed rule cited it, still would not give the NMB authority to proceed on this regulation because the stated purpose of the fees in the proposed rule do not qualify under 31 U.S.C 9701. Under that authority user fees are allowed to be collected only for the purpose of offsetting the cost of services to the public. The government has no existing authority to institute a user fee for the purpose of discouraging the American public from utilizing government services or to control the flow or administration of those services.

In addition, the proposed regulation is not clear regarding the mechanism the NMB would employ to collect the user fee and to what account these receipts would be directed. The language in the rule appears to indicate that the NMB intends to use the collected fees to further the operation of the arbitration services. **Any expenditure of funds by the NMB from the collected fees would require new statutory authority from the Congress.** OMB Circular A25 requires that user fee receipts must be deposited into the General Treasury unless specified otherwise by the Congress.

Furthermore, neither 45 USC 154 nor the authority in the annual appropriation gives the NMB the authority to decline to pay referee compensation if the rules governing the arbitration are not followed. The NMB is required to employ any referees that are appointed by the parties and the NMB receives appropriated dollars annually to fulfill this statutory obligation.

Therefore, we believe this proposed rule exceeds the legal authority of the National Mediation Board and urge its withdrawal until such time as the Congress provides legislative authority for a regulation of this kind.

Regards,

Arlen Specter
Chairman
Subcommittee on Labor, Health
and Human Services and Education
Education Appropriations

Tom Harkin
Ranking Member
Subcommittee on Labor, Health
and Human Services and
Appropriations