BEFORE THE
NATIONAL MEDIATION BOARD

NOTICE OF PROPOSED RULEMAKING	)	
	)	**Docket No. 2003-O1N**

COMMENTS AND REQUEST FOR A HEARING OF THE NATIONAL ASSOCIATION OF RAILROAD REFEREES

Linda J. Morgan
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5214

Counsel for the National Association of Railroad Referees

M. David Vaughn
President
National Association of Railroad Referees
13732 Lakeside Drive
Clarksville, MD 21029
(301) 854-3200

September 20, 2004

BEFORE THE
NATIONAL MEDIATION BOARD

NOTICE OF PROPOSED RULEMAKING	)	
	)	**Docket No. 2003-O1N**

COMMENTS AND REQUEST FOR A HEARING OF THE NATIONAL ASSOCIATION OF RAILROAD REFEREES

The National Association of Railroad Referees ("NARR" or the "Association") appreciates the opportunity afforded by the National Mediation Board ("NMB") to comment on the proposed rules published on August 9, 2004, regarding the administration of arbitration programs.[1]

In the hope of furthering "the resolution of minor disputes on a more timely and expeditious basis", 69 Fed. Reg. at 48177, the NMB has proposed new rules governing the arbitration process. The major provisions of these rules establish certain procedures for arbitrator appointment and removal, Proposed §§ 1210.4; 1210.5, case consolidation, Proposed § 1210.9, case scheduling and arbitrator payment, Proposed § 1210.10, and fee payment, Proposed § 1210.12.

NARR is a membership association of neutral arbitrators ("neutrals" or "referees") who hear and decide disputes arising under Section 3 of the Railway Labor Act ("RLA" or the "Act"), 45 U.S.C. § 151, *et seq*. and engage in other related activities. NARR was founded in 1990 and, for membership year 2003-2004, had 83 dues-paying members. NARR members have well over 1,000 total years as Section 3 neutrals. The Association's Annual Meeting held in September

---

[1] Administration of Arbitration Programs, 69 Fed. Reg. 48177 (proposed August 9, 2004) (to be codified at 29 C.F.R. pt. 1210).

has become, with the support of carriers, organizations and the NMB, a major source of education and training in connection with Section 3 activities. The Association also operates a web-site (http://www.rr-referees.org) and publishes a periodic newsletter (the NARRator) for its members. The Association's stated objectives include educating and improving the professionalism of its members and promoting the interests of railroad arbitration. NARR conducts ongoing liaison with the parties and the NMB in support of Section 3 programs.

NARR shares the NMB's concerns over the length and inefficiency of the arbitration process. Indeed, NARR has worked together with the NMB on a number of projects designed to improve the efficiency of Section 3 activities, such as the recent initiatives involving videoconferencing and electronic submissions.

It is this very interest in the effectiveness of the arbitration process under the RLA that causes NARR to have deep concern about whether its members could effectively serve the parties in the spirit of the RLA if these rules were adopted. While NARR applauds the NMB's overall intention of improving the efficiency of the arbitration process, it is concerned that the proposed rules exceed the scope of authority granted to the NMB by Congress under the RLA, frustrate the spirit of the RLA and the stated intent behind the proposal, and are fundamentally unfair. Even assuming the NMB has authority to promulgate such rules, NARR urges reconsideration of the rules regarding time constraints for the administration of cases, arbitrator removal, consolidation of cases, and fees. Detailed comments on these issues follow.

I. The Proposed Rules Exceed the NMB's Statutory Authority.

Although NARR shares the interest of the NMB in the efficiency and effectiveness of the arbitration process, the NMB rules regarding the process would exceed the NMB's statutory authority and must be vacated in their current form. Under the RLA, the National Railroad

Adjustment Board ("NRAB"), not the NMB, has the authority to "adopt such rules as it deems necessary to control proceedings before the respective divisions." 45 U.S.C. § 153, First (v). The NMB's role in the arbitration process is statutorily limited to appointing referees, fixing and paying referee compensation, 45 U.S.C. § 153, First (l), and funding the NRAB. 45 U.S.C. § 154, Third. The proposed rules exceed that authority.

II. The Proposed Time Constraints are Impractical, Ineffective, and Unfair.

Even assuming the NMB has authority to promulgate such rules, the proposed rules imposing time constraints on neutrals and threatening nonpayment if these deadlines are not met raise serious concerns. Under the proposed rules, "NMB will only pay for arbitration of cases which are progressed" according to the time schedule laid out in Proposed § 1210.10(b). NARR notes, first of all, that any refusal by the NMB to pay arbitrators for work performed would violate the explicit statutory command that the NMB "shall . . . pay" the neutrals. 45 U.S.C. § 153, First (l).

Additionally, several of the time constraints would hold neutrals accountable for timing issues over which they have no control. After the filing of the Notice of Intent, the proposed rules require that "[s]ubmissions by the parties [] be filed within 60 days of the date of the Director of Arbitration Services' letter acknowledging the Notion of Intent." Proposed § 1210.10(b)(2). Then, the NRAB Members have 30 days to review the case and seek resolution. Proposed § 1210.10(b)(3). If no resolution is achieved, the NRAB has 15 days to certify the case to an arbitrator. Proposed § 1210.10(b)(4). Up until this point in the process, the neutral is not even involved. However, if any of these deadlines are not met but the neutral still hears the case, he or she would not be paid. Requiring neutrals to police such a process over

which they have no control and holding them accountable by withholding pay would be inappropriate and unfair.

The provisions involving the portion of the time schedule over which the arbitrators retain some control are also problematic. Under the rules, arbitrators must hear the case within sixty days of certification, Proposed § 1210.10(b)(4), and render a decision within sixty days thereafter, Proposed § 1210.10(b)(6). This sixty day hearing requirement is impractical in many circumstances. Even after a case has been placed by the parties and the NMB before a neutral, the neutral only has limited ability to control the timing of submissions by the parties and the scheduling and presentation of a case. Factors such as the disparate resources of the parties, the number of submissions, the number of advocates, the difference in desire among the parties to expedite the process, the complexity of the issues, and party compliance with mandatory deadlines can all affect how quickly a case is heard. Often, in the context of a full and fair dispute resolution process as envisioned under the RLA, the hearing of these cases is neither a quick nor an easy process and the sixty day hearing requirement simply could not be implemented.

The sixty day deadline for the issuance of decisions is also unworkable, and in fact, counterproductive. Neutrals sometimes hear more than thirty cases at one hearing, which saves the NMB significant travel expenses and other costs. However, given the number of cases, the demands on neutrals' schedules, and the complex nature of some cases, it would be almost impossible for neutrals to render competent decisions on all of the cases heard on the same day within sixty days. As a result, the number of cases to be heard at one time would of necessity be reduced, hearing time would not be fully utilized, more days would be spent traveling for the additional hearings necessary to process the smaller dockets, and the NMB would be forced to

pay more travel expenses. Furthermore, the reduction in the number of cases neutrals are presented in a single hearing may *increase* the backlog of cases, just the result the proposed rules are aimed at preventing.

If any of these time constraints are not complied with before the case reaches the neutral or the neutral determines that he or she would be unable to hear and decide the case within the time period allotted, the neutral would likely refuse to hear the case. The parties would then be left with the difficult task of either finding another neutral who can take the case or leaving their questions unanswered and rights unadjudicated. This would be especially detrimental to parties involved in cases that tend to be more complex, and therefore more lengthy, than others. Thus, by in effect only providing a forum for dispute resolution to some, the proposed rules would frustrate the spirit and intent of the RLA, which is to provide a full and fair forum for dispute resolution to all who need it.

These time constraints are also of concern to NARR because of their inflexibility in the face of administrative limitations beyond the control of the neutrals. It has become common practice for the NMB to restrict the number of days for which neutrals are permitted to work. For example, during times when continuing resolutions fund the NMB at some percentage of its prior year's budget, the number of days neutrals are permitted to work may be significantly lower than the full allocation. Also, work days are sometimes reduced near the end of the fiscal year or completely eliminated during government shutdowns. For example, as was the case in July and August, 2004, arbitrators are sometimes granted fewer work days than they request. Under the current formulation of the rules, there is no provision to toll the time constraints during these periods. Thus, arbitrators who are unable to comply with the time constraints

because of circumstances beyond their control even though they are ready and willing to do so would still be denied pay. This result does not make sense.

These provisions also do not allow for the parties to waive or relax the deadlines, even if they agree that the deadlines cannot (or even should not) be met. Although Proposed § 1210.10(d) allows for an extension if granted by the Director of Arbitration Services (the "Director"), the proposed rules contain no standards by which the Director is to make extension decisions and would require additional paperwork and expense. It is counter-intuitive to require arbitration to proceed according to certain deadlines when the parties, the very entities the new rules are designed to protect, agree that to do so would be detrimental to the full and fair resolution of the dispute.

Furthermore, the proposed rules could put undue strain on the relationship between the parties and the arbitrator. In order to effectively and competently serve the parties, neutrals must have positive and professional relationships with the parties whose disputes they hear. By placing neutrals in the position of having to arbitrarily police the case processing, scheduling and submissions of the parties, in many cases to the detriment of their arbitral rights, this relationship is threatened and there is a greater potential for conflict and less efficient and less effective dispute resolution.

Finally, NARR suggests that more research be conducted regarding these proposals before changes are proposed. NARR is aware of no relevant study or analysis demonstrating widespread case processing delay or revealing the causes for any such delays. Before imposing drastic systematic changes, NARR suggests that the NMB first investigate the amount of cases that are excessively delayed and the number of neutrals involved in these delays in order to

determine whether a more targeted approach might be more prudent and effective in responding to whatever problems may exist.

III. The Proposed Arbitrator Criteria and Removal Provisions Violate Fundamental Due Process and are Overbroad.

NARR also urges the NMB to seriously reconsider the provisions of the rules dealing with arbitrator removal. These rules would be inequitable in implementation and could potentially deprive the arbitrators of their positions without due process of law.

Under the proposed rules, the NMB is granted authority to "establish procedures for the removal from the Roster [of Arbitrators] of those arbitrators who fail to adhere to" any provision in the proposed rules. Proposed § 1210.4(f). Thus, the Director can remove a neutral for no longer meeting the criteria for admission, Proposed § 1210.5(f)(l) (under Proposed § 1210.5(b), these criteria include subjective judgments regarding whether the neutral is "experienced, competent, and acceptable in decision-making roles in the resolution of labor disputes") or failing "to render timely awards," Proposed § 1210.10(d)(2). Such vague standards give significant discretion to the Director and open the door for arbitrary or discriminatory removal. Under the proposal, for example, a disgruntled party could complain about a neutral to the Director, and the Director could then independently conclude that the neutral was no longer "acceptable in decision-making roles" and remove that neutral without further investigation, a result that threatens the very essence of fairness envisioned by the RLA in establishing the dispute resolution process administered by the neutrals.

Also, insufficient provision is made in these proposals for the typical due process protections. Alleged violators are not given notice of the specific standards or procedures claimed to be violated, the specific nature of the conduct or omissions claimed to constitute such violations, and the documentation in support of such claimed violations. Furthermore, no

provision is made for the presentation of exculpatory or mitigating evidence, for an NMB investigation, for a hearing, or for written notice from the NMB in support of its decision. The proposed rules lack validity and fundamental fairness without these needed protections.

Additionally, Proposed § 1210.5(e)(1) would preclude employees of federal, state, and local governmental entities, whether full-time or part-time, from serving on the Roster, regardless of the nature and extent of their governmental employment. This language would prevent professors at public institutions, part-time employees of state and local labor agencies and a variety of other neutrals who have long served on NMB's roster and whose jobs pose no conflict with their duties as Section 3 neutrals from continuing to serve as arbitrators. NARR does not believe that it was the intent of the Board to exclude these categories of neutrals, but there is no provision for exemption or waiver. If adopted, the language would exclude a number of qualified neutrals and deprive the parties of the availability of their services.

IV. The Proposed Case Consolidation Rule Would Diminish the Parties' Rights.

NARR notes that requiring case consolidation could seriously prejudice the parties, especially considering the fact that the proposed rules provide no specific standards for consolidation. Traditionally, the choice to consolidate has been left to the parties, as they understand the unique but important distinctions among the cases. Under the proposed rules, the Director "may consolidate the arbitration of minor disputes (i.e., grievances) when he/she determines that this will serve the interests of economy and/or efficiency of the NMB's program for the administration of arbitration services." Proposed § 1210.9. Apart from the broad concepts of "economy" and "efficiency," no other standards are given to guide the Director's decision to consolidate. Notably absent in the proposed rules is any mention of the need to balance these concerns against the interests of the parties.

Additionally, it is unlikely that the Director could become sufficiently familiar with the similarities and differences among particular cases and groups of cases, especially where there are no standards available to guide the decision-making and where the cases often turn on subtle distinctions. It should also be noted that parties often have valid reasons for separating disputes and limiting the binding effect of the arbitration. Any process whereby one individual is empowered to unilaterally consolidate such disputes would undermine the rights of the parties and should be approached with extreme caution. Under the proposed rules, case consolidation would thus be an arbitrary process, depriving the parties of the full and fair dispute resolution mechanism envisioned by the RLA.

V. The Proposed Fee Structure

NARR finally observes that the application and arbitration fees required under Proposed § 1210.12 would fundamentally change the traditional structure of the arbitration process. Since the RLA was amended in 1934 to provide for compulsory arbitration, these fees and costs have been borne by the NMB. A change requiring individual parties to pay these costs could significantly alter the nature of the arbitration process and diminish the rights of parties and claimants. While NARR leaves it to the parties to raise their specific concerns regarding this aspect of the proposed rules, NARR notes that caution should be exercised before imposing such a significant change on the arbitration process.

VI. Conclusion

For the foregoing reasons, NARR urges the NMB to reconsider these significant and systematic changes in the arbitration process and requests a public hearing on the proposed rules and the opportunity to participate in such a hearing. NARR looks forward to working with the NMB in discussing alternative means of promoting efficiency in the arbitration process while still complying with the RLA and ensuring fairness in the process and for the parties to ensure that their claims are effectively heard.

Review and Approval by NARR Executive Board and Membership

The submission of comments has been reviewed and approved by the NARR Executive Board and reviewed, debated and approved by unanimous vote of the members of NARR present at its annual business meeting held in Chicago, Illinois on September 11, 2004.

Respectfully submitted,

Linda J. Morgan

Linda J. Morgan
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5214

Counsel for the National Association of Railroad Referees

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Comments of the National Association of Railroad Referees to be served by hand delivery and electronic mail, this 20th day of September, 2004, on the following:

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

I also hereby certify that copies of the foregoing have been mailed this 20th day of September 2004, via first class mail, postage prepaid, to Joanna Moorhead, General Counsel, National Railway Labor Conference, 1901 L Street, N.W., Washington, DC 20036-3514, Mitchell M. Kraus, General Counsel, Transportation Communications Union, 3 Research Place, Rockville, MD 20850, representing the Rail Labor Division of the Transportation Trades Department of the AFL-CIO, and Clinton J. Miller, III, General Counsel, United Transportation Union 14600 Detroit Avenue, Cleveland, OH 44107-4250.

Linda J. Morgan