NATIONAL RAILWAY LABOR CONFERENCE

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September 8, 2003

BY HAND DELIVERY

Roland Watkins
Director of Arbitration
National Mediation Board
1301 K Street, N.W., Suite 250 - East
Washington, D.C. 20572

Re: NMB Docket No. 2003-01; Comments of the National Railway Labor Conference

Dear Mr. Watkins:

The National Railway Labor Conference ("NRLC") submits these comments in response to the advance notice of proposed rulemaking by the National Mediation Board ("NMB") regarding administration of National Railroad Adjustment Board ("NRAB") functions and activities. See 68 Fed. Reg. 46983 (Aug. 7, 2003). The NRLC represents the nation's major freight railroads, including The Burlington Northern and Santa Fe Railway, CSXT, Inc., Kansas City Southern Railway, Norfolk Southern Railway, and Union Pacific Railroad. As such, these comments reflect the views of the substantial majority of the railroad industry that would be subject to the proposed rulemaking by the NMB.

As outlined in greater detail below, the railroads strongly oppose any rulemaking by the NMB concerning the procedures used by the NRAB in the arbitration of grievances between rail carriers and their employees. The NMB clearly lacks authority under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. to dictate rules for proceedings before the NRAB, which has maintained its own procedural rules for almost 70 years. While the RLA grants the NMB authority over funding for the NRAB, the statute expressly reserves to the NRAB itself the power to "adopt such rules as it deems necessary to control proceedings before the respective divisions." 45 U.S.C. § 153 First (v). Any NMB rulemaking that strays from funding decisions into the substance of NRAB procedures is, therefore, improper and beyond the authority of the NMB.

Subject to and without waiving this threshold objection to the NMB's proposed rulemaking, the railroads also address herein the specific questions raised in the NMB's notice. In general, the railroads are amenable to procedures that enhance the NRAB's ability to decide cases expeditiously but oppose any proposed rules that would permit the NMB to dictate consolidation of cases over the objections of carriers or employee representatives. Such consolidation should only take place where the parties agree it is appropriate.

I. The NMB Lacks Authority to Dictate Rules of Arbitration for the NRAB

In its advance notice of rulemaking, the NMB states that it is considering "initiatives it may undertake" with respect to "rules and procedures to facilitate the timely resolution of various disputes between grievants and carriers," and claims authority to do so based on "the NMB's statutory responsibility for the appointment and compensation of neutral arbitrators ('referees') to resolve deadlocks within NRAB divisions, and the NMB's overall statutory responsibility for the administrative processing of grievances." 68 Fed. Reg. 46983. The Board further asserts that "[t]he RLA provides the NMB with authority for administration, including making expenditures for necessary expenses, of the NRAB." Id.

The railroads respectfully disagree with the NMB's assertion that the RLA provides it with authority to make rules for the NRAB. The RLA, the Administrative Procedures Act ("APA"), and the long history of the relationship between the NMB and the NRAB all demonstrate that this is not so.

A. The Railway Labor Act Gives the NMB Fiscal Authority, Not Rulemaking Authority Over Arbitration Procedures.

In the 1934 amendments to the RLA, Congress established both the NRAB and the NMB. See generally 45 U.S.C. §§ 153, 154. In creating the NRAB, Congress defined, to a substantial degree, the procedures of the Adjustment Board, including the establishment of four different divisions and a headquarters in Chicago, selection of the Board's members, and various requirements for Board hearings, voting, awards, and enforcement. 45 U.S.C. § 153 First (a) – (r). But to the extent that Congress did not set the NRAB's rules and procedures, it specifically left such matters to the Adjustment Board. Section 3 First (v) states:

> "The Adjustment Board shall meet within forty days after June 21, 1934, and *adopt such rules as it deems necessary to control proceedings before the respective divisions* and not in conflict with this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary."

45 U.S.C. § 153 First (v) (emphasis added). Under the plain language of the RLA, therefore, the NRAB, not the NMB, has the responsibility to adopt rules to "control proceedings" in arbitration,

which clearly encompasses subjects such as procedures for expedited case handling and lead case designations.

That Congress intended to leave to the NRAB itself the discretion to make its own rules and procedures is further confirmed by Section 3 First (x), which provides that "[a]ny division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place . . . ." 45 U.S.C. § 153 First (x). These regional boards are granted authority to "conduct hearings, make findings upon disputes *and adopt the same procedure as the division of the Adjustment Board appointing it* . . . ." Id. (emphasis added). Thus, whenever the RLA speaks of authority to create rules of procedure, it vests such powers in the NRAB and its constituents.[1]

The NMB, by contrast, does not have any direct control over arbitration procedures. To the extent that Congress gave the NMB power to supervise the affairs of the NRAB, it expressly limited that authority to two particular categories. First, the NMB was tasked with responsibility for appointing a neutral referee only when a division of the Adjustment Board is unable to agree upon a neutral. 45 U.S.C. § 153 First (l). Second, the NMB was granted authority over the NRAB's expenditures. The RLA provides that the

> "Mediation Board may . . . make such expenditures (including expenditures for rent and personal services . . . salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenditures of the . . . Adjustment Board . . .), as may be necessary for the execution of the functions vested . . . in the Adjustment Board . . . and as may be provided for by the Congress from time to time."

45 U.S.C. 154 Third; see also 45 U.S.C. § 153 First (u) (providing for NMB approval of compensation of assistants employed by Adjustment Board).

Given this line of demarcation under the RLA, it is clear that the NMB cannot simply issue new rules for NRAB arbitrations, such as the "one-year" and "lead case" proposals referenced in the Mediation Board's advance notice of proposed rulemaking. Control over NRAB expenditures is not the same as a general right to "administer" the NRAB, and certainly does not permit the NMB to dictate the content of arbitration procedures, policies, and rules.

Indeed, it is settled law that the NMB may not exceed the authority expressly provided to it under the RLA. In the case of RLEA v. NMB, the D.C. Circuit addressed an argument by the Mediation Board that it has broad, unreviewable powers to create new rules that go beyond the

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1 More generally, the RLA grants the NRAB autonomy when it comes to the actual handling and disposition of minor disputes. Parties submit disputes directly to the divisions of the Adjustment Board, which are empowered to agree on an award, select a neutral to sit with the division, and issue orders and interpretations of awards, which are considered "final and binding." 45 U.S.C. § 153 First (i), (k) – (m), (o), (q). None of these procedures call for the involvement of the NMB.

provisions of the RLA. 29 F.3d 655 (D.C. Cir.) (en banc), amended 38 F.3d 1224 (D.C. Cir. 1994) (en banc). In that case, the issue was the NMB's rules for investigation of representation disputes arising out of railroad mergers. In particular, the argument involved the NMB's assertion of jurisdiction to investigate representation disputes absent any express language in the RLA giving it the right to do so. The Court unequivocally rejected the NMB's argument that it had the authority to create such rules if the RLA did not forbid the Board from doing so. The Court held that the Mediation Board's power is no greater than that delegated to it by Congress:

> "The extent of an agency's powers can be decided only by considering the powers Congress specifically granted to it in the light of the statutory language and background. . . . The *duty* to act under certain carefully defined circumstances simply does not subsume the *discretion* to act under other, wholly different, circumstances, unless the statute bears such a reading . . . ."

Id. at 671 (emphasis in original). The same principle applies here as well: the duty to provide funding for the NRAB does not subsume the discretion to dictate its rules.

B. The Administrative Procedures Act Confirms That the National Mediation Board May Not Issue Rules for the National Railroad Adjustment Board

The carriers' argument that the NMB lacks authority to set arbitration rules for the NRAB is bolstered by the fact that the two separate agencies are subject to different rulemaking requirements under the APA. The NMB, like most federal agencies, is subject to detailed procedures for rulemaking, including public notice and comment, hearings, and the like. See generally 5 U.S.C. §§ 551 et seq. The NRAB is not subject to these formal rulemaking procedures, however, because the definition of "agency" under the APA excludes "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them." Id. at § 551(1).[2] Under the APA's "public information" provisions, the NRAB need only publish its rules of procedure in the Federal Register. 5 U.S.C. § 552(a)(1).

The current effort by the NMB to create rules for the NRAB through formal rulemaking simply ignores this distinction in the APA. By invoking formal rulemaking as it has now done, the NMB would effectively merge the rulemaking procedures of the two agencies together, contrary to the clear congressional intent in the APA (as well as the RLA) to treat the NRAB separately for purposes of rulemaking. Under the APA, the NRAB was plainly entitled to establish its own rules of procedure, and it has long since done so. Those rules, originally published in 1934 as Circular No. 1, predate the APA and are currently found in the Code of

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2 See also Jones v. Seaboard System R.R., 783 F.2d 639, 642 (6th Cir. 1986); Kotakis v. Elgin, Joliet & E. Ry., 520 F.2d 570, 576 n.5 (7th Cir. 1975). The legislative history of the APA also clearly shows that Congress intended to exempt the NRAB from the APA rulemaking requirements. E.g. Senate Doc. 248, 79th Cong., 2d session at 196; H. Rept. No. 1980, 79th Cong., 2d session (May 3, 1946) at 19. Contrary to the NMB's suggestion, the NRAB is not an arm of the NMB and is autonomous except in the limited areas specified by Congress.

Federal Regulations at 29 C.F.R. §§ 301 et seq. It cannot be that the NMB is entitled to override the NRAB's published rules – in whole or in part – by relying on a wholly separate APA rulemaking process that does not even apply to the NRAB.

C. *The History of the Relationship Between the NMB and the NRAB Also Supports the NRAB's Independent Rulemaking Authority*

From the very beginning of its history, the NMB has recognized that it has no right to dictate the NRAB's arbitration procedures. In one of the NMB's earliest reports, for example, the Mediation Board noted that "the law makes the jurisdiction of [the NRAB] wholly independent of the National Mediation Board, except that money expenditures of the Adjustment Board must be approved by the Mediation Board, and in case any division of the Adjustment Board is deadlocked and fails to make an award, the National Mediation Board is required to appoint a referee to . . . make the award." NMB Second Annual Report (FY 1936) at 33. Roughly contemporaneous statements by the NRAB evince similar views, noting, for example, that the NRAB "does not confer with the Mediation Board before issuing regulations." NRAB Statement to Attorney General's Committee on Administrative Procedure (Jan. 8, 1940).

To be sure, the NMB has at times exercised its power of the purse to press for more efficient arbitration procedures. It has, for example, regularly sought input from labor and management regarding possible means of enhancing the efficient administration of railroad arbitrations. See Letter from William A. Gill, Jr. to Ronald P. McLaughlin and Robert F. Allen (Jan. 31, 1994). But to our knowledge, the NMB has never assigned to itself the unilateral right to *impose* arbitration procedures, which inevitably impact the substantive rights of carriers and employees under their collective bargaining agreements. Indeed, as recently as 1999, the NMB acknowledged that "it does not have the authority to require the NRAB to adopt" the same sort of procedures for expediting cases at issue today. NMB Memorandum to Members of Section 3 Committee (June 18, 1999). The Mediation Board may certainly urge changes in arbitration procedures – and its control of NRAB finances is a powerful persuasive tool – but dictating such changes is well beyond its authority.

The simple fact is that for almost seventy years, the RLA community – the carriers and the unions, as well as the NMB and the NRAB – has operated with the understanding that the NMB controls finances, but the NRAB sets the rules of procedure for arbitrations. This rulemaking initiative is, therefore, an unprecedented break with a long-settled and well-respected division of responsibility between the two agencies.

II. New Arbitration Procedures Intended to Produce Greater Efficiencies Should Not Sacrifice the Substantive Rights of the Parties

Subject to the foregoing comments regarding the NMB's authority to impose formal rulemaking on the NRAB, the industry does not, as a general matter, oppose rules designed to streamline arbitration, reduce costs, and improve the efficiency of the minor dispute resolution

process. As carrier representatives have stated during Section 3 Committee proceedings, the railroads support reduction of the current backlog at the NRAB and expeditious handling of new cases. They cannot, however, countenance new rules that impact the parties' substantive rights. New rules must not weaken procedural defenses, bypass legitimate distinctions between facially similar cases, or force summary handling of significant issues.

The questions posed by the Mediation Board in its advance notice of proposed rulemaking indicate, however, that the proposed rules could have such adverse consequences for the parties' substantive rights. If simple efficiency is the primary (or the only) consideration, the imposition of a "one-year" rule or a mandatory "lead case" designation may very well affect the fairness and legitimacy of the arbitral system. Gains in efficiency are not worth sacrificing the working perception among carriers and employees that the current NRAB process is, for the most part, functional and fair. With these basic considerations in mind, we address below each of the specific questions raised by the NMB.

Question One: *If the NMB promulgates procedures for the administrative processing of NRAB cases in which the parties request that the Government compensate the neutral ("referee"), what should be the criteria or guidelines for these procedures?*

In general, any new procedures for the use of neutral referees within the NRAB system must start with the NRAB's June 23, 2003 Uniform Rules of Procedure as a baseline. Wholesale replacement of the current rules would likely cause more delay and inefficiency – at least in the short-term – than savings. To the extent that reform is appropriate, it should be narrowly targeted at those particular practices that generate delay. Specifically, the railroads recommend that the following steps be taken to enhance the efficient use of neutral referees:

1. Case categorization and prioritization

The NRAB rules currently allow the Members, by agreement, to categorize and prioritize cases before they are placed with a neutral referee. Such steps allow the Board to ensure the expeditious handling of the disputes most important to the parties. The Members frequently do this now, particularly with dismissal and significant rules cases. The carriers are committed to working with labor to build upon and improve upon these strategies to expedite and streamline the process.

Question Two: *If a stated goal of any new procedures to be adopted by the NMB is to have the cases decided within one year from the date of the filing of the Notice of Intent, what steps do you recommend comprise this procedure? Do you believe that a one year goal is reasonable? If not, why not?*

The carriers agree, in principle, with the goal of resolving all new cases within one year of the date of filing, and believe that such a goal is reasonable and attainable in most circumstances. A plausible schedule for regular (non-expedited) cases would be as follows:

1. Notice of intent is filed;

2. Submissions filed within 75 days with a possible 15 day extension upon approval of the NRAB;

3. Board members review the case and attempt resolution for 30 days, after which the case is deemed deadlocked;

4. Board members shall, within 15 days of deadlock, certify the case to a neutral referee;

5. Neutral referee shall render a decision within 120 days after hearing the case.

   Additional time may be required in disputes involving third parties.

Under this schedule, the final decision will ordinarily be rendered within one year of the notice of intent. This assumes adequate funding for referees.

Question Three: *If the parties do not agree to follow the procedures adopted by the NMB, should there be any adverse consequences? Should the parties have options with respect to these procedures? What would you recommend be the steps that comprise an efficient case resolution procedure?*

Efficient case resolution procedures are generally flexible, and account for changing or unique circumstances. Hence, any solution to the problem of failure to conform to rules or time limits within the NRAB system is necessarily contextual. As the experience of state and federal court systems show, it is impossible to anticipate all potential reasons why parties may fail to meet deadlines or otherwise follow mandatory procedures. It is appropriate to have similarly flexible responses to such problems in the NRAB system as well. The railroads do not believe that the existing rules are inadequate in this respect.

It is true, moreover, that parties to a minor dispute are always free to agree on alternative methods of dispute resolution. If either side does not like the procedures adopted by the NRAB for a particular case, they can invoke public law board procedures under Section 3 Second of the RLA or agree to a different, ad hoc arbitration process. The only "adverse consequence" of the ad hoc approach is that the parties must fund the dispute resolution themselves. In this regard, therefore, the parties already have "options" with respect to resolution of minor disputes. The carriers believe that the NMB could usefully take a more active role in encouraging the use of

such alternative arbitral procedures.

As for the possible steps to an efficient case resolution procedure, we have already discussed several such concepts above. Most of these steps concern procedures for dealing with cases after they reach the arbitration stage. In addition, any effort to streamline the arbitration process must be combined with renewed means of reducing the flow of grievances to the arbitration stage in the first place. Thus, as we have in the past, the carriers recommend that the NMB sponsor joint educational programs on the various properties to teach and encourage problem-solving and dispute resolution.

Question Four: *What should happen to those cases still pending after one year in which the parties have not placed the cases before a Public Law Board, pursuant to 45 U.S.C. § 153 Second? If the cases are placed before a Public Law Board, should a time limit be imposed for the resolution of those cases?*

The procedures for utilization of public law boards are set by statute and may not be changed by the parties or the NMB. Section 3 Second of the RLA expressly provides that only *the parties* – carriers and representatives of employees – may request the establishment of a special board of adjustment or public law board. 45 U.S.C. § 153 Second (second para.). Nothing in the RLA states or suggests that the NMB may "place" cases before a public law board. Even apart from the NMB's lack of rulemaking authority generally, such a requirement would clearly exceed the NMB's powers under the RLA, just as the D.C. Circuit found in RLEA v. NMB when the Board claimed the right to initiate representation investigations without a request by a party to a representation dispute.

For the same reasons, the NMB lacks authority to impose any "time limit" – or any other procedures for that matter – on public law board proceedings. The schedule, composition, powers, jurisdiction, and procedures of such boards are set by agreement of the parties, and the RLA provides for a "procedural neutral" process if the parties are unable to agree on such matters. Id. There is no basis whatsoever for the NMB to trump these statutory provisions by imposing its own rules on the public law board or special board of adjustment process.

Question Five: *In order to ensure the most efficient use of limited Government resources, should the NMB, in agreeing to pay for the appointment of an arbitrator ("referee") require the consolidation of similar cases dealing with similar issues? If, in your view, case consolidation is a viable option for improving the resolution of cases, what should be the standards adopted for consolidation? What should the NMB do if the parties refuse to consolidate cases, when in the NMB's view, it would be appropriate to do otherwise?*

It is absolutely critical that any consolidation of cases or "lead case" designations remain solely a matter of voluntary agreement by the parties. This is because many facially similar

cases in fact have critical distinguishing features that may not be apparent to persons not intimately familiar with the underlying collective bargaining agreements. In a group of cases arising out of a subcontracting dispute, for example, there may be some that implicate unique procedural defenses, or turn on the circumstances of the individual making the claim, or involve application of related rules. Especially because many large carriers are composed of merged properties of multiple former railroads and have multiple potentially applicable agreements, issues which at first glance appear to be similar may, in fact, not be because of subtle differences in the agreements and practices. For similar reasons, it is well-settled that labor arbitration awards do not have automatic preclusive effects in later disputes. E.g. BMWE v. Burlington N. R.R., 24 F.3d 937, 940-41 (7th Cir. 1994); Elkouri & Elkouri, How Arbitration Works, 619 (5th Ed. 1997). If the NMB makes determinations about case consolidation or lead case designations, it will inevitably involve substantive decisions about cases, and may even violate the rights and responsibilities of the parties as reflected in the underlying agreements. This is not to suggest that the Mediation Board would do so intentionally, of course, but simply as a consequence of its unfamiliarity with the subtle details and distinctions between cases.

In any event, the parties already make efforts to identify lead cases on many properties, and work to limit situations where the same issue is reargued multiple times. Such efforts should be encouraged. The NMB should work with the parties to develop model Abeyance/Precedent Agreements for use in such circumstances. However, the final decision to enter into such agreements must remain with the parties.

Question Six: *As the goal of this initiative is to improve the processing of disputes before the NRAB, are there any other recommendations or suggestions that you would make to the NMB with regard to its statutory responsibilities for the administration of the NRAB?*

This question restates the flawed threshold premise that the NMB has "statutory responsibilities for the administration of the NRAB." As discussed at length above, that is not so. Again, while the railroads appreciate the NMB's efforts to assist in improving Section 3 dispute resolution procedures and recognize the NMB's financial interest in such matters, they do not agree that this process is the proper means of achieving reform.

There are, however, certain approaches to achieving enhanced efficiency that do not necessarily require any change in the rules or procedures of the NRAB itself. The central problems faced by the NRAB are two-fold: (1) a chronic backlog of cases, and (2) an ongoing flood of new claims. Both are the result of the real trouble at the heart of Section 3, namely that too many claims are being filed and too many disputes are being sent to arbitration. The existing system is like a lottery where everyone gets a free ticket and you can play as much as you like. This is the root cause of the delays and inefficiencies in the current system. If the glut of claims is adequately addressed, existing resources would be more than adequate to achieve the NMB's efficiency goals without any revisions to NRAB rules or procedures.

To that end, the railroads suggest two solutions:

1. Elimination of the backlog

The NRAB could provide for more efficient dispute resolution if the current backlog of cases is to be eliminated. That could be accomplished through the use of two mechanisms, both of which would require a temporary increase in funding by the NMB. First, the NMB could institute a grievance mediation process, whereby trained mediators would review dockets of existing cases selected by the parties and seek to facilitate settlements. Second, to the extent that the backlog cannot be addressed through mediation, the NMB could fund a temporary special panel of arbitrators with the task of issuing decisions in all cases pending as of a set date within one year. Non-precedential bench decisions by these neutrals should be considered. While these steps would require a short-term increase in funding, the elimination of the burden of the backlog will enable the NRAB to focus on expeditious processing of all new cases and thereby ensure a long-term savings.

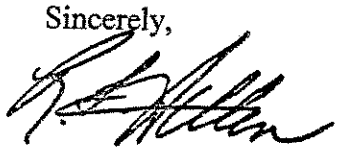
2. Administrative fees and related measures

Elimination of the existing backlog is only useful, however, if the backlog is permanently reduced. It makes no sense to devote resources to such an effort if a new backlog will quickly arise as a result of the continuing flood of new claims. One plausible means of limiting the number of new claims coming into the system is to establish some form of administrative fee for proceeding to arbitration. Filing fees would impose at least a nominal check on the frivolous claims that now clog the system. If the number of claims filed were reduced by just twenty percent, it would enable the NRAB to keep pace without any further remedial measures. The railroads are, moreover, open to any of a variety of alternative means of achieving this result. Party-pay arbitration is one possibility. Another approach is a variant on the "English rule," whereby the losing party pays the costs of the winner. Any of these options would greatly improve the efficiency of Section 3 arbitration, without the risks posed by the proposals raised in the advance notice of rulemaking.

III. Conclusion

The railroads appreciate the NMB's consideration of these comments. While we encourage the NMB to rescind any formal rulemaking efforts for the reasons stated above, the railroads stand ready to work with the NMB to achieve our shared goals.

Sincerely,



Robert F. Allen