BEFORE THE
NATIONAL MEDIATION BOARD

NOTICE OF PROPOSED
RULE MAKING MEETING

UNITED TRANSPORTATION UNION WRITTEN STATEMENT

The United Transportation Union ("UTU") hereby opposes the National Mediation Board's ("NMB") proposal to establish a fee schedule for arbitration services.

While there is no question that the NMB plays a significant role in the administration of the National Railroad Adjustment Board ("NRAB"), Public Law Boards ("PLB's") and Special Boards of Adjustment ("SBA's"), the fee schedule it proposes is beyond its statutory authority and would violate specific statutory commands. The Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, was amended in 1934 to, *inter alia,* create the NRAB, and in 1966 to permit creation of PLB's and SBA's to deal with the existing backlog of grievances, but proposals to end government funding of referees in 1966 were not enacted. Moreover, there have been beneficial changes to arbitration administration because of recommendations made by the Section 3 Committee, and UTU suggests the NMB and the parties should continue to use this cooperative vehicle to achieve desired results.

It is the NRAB, not the NMB, that has the authority to adopt procedures for arbitration. *See* 45 U.S.C. § 153 First (v). The NMB is required to pay NRAB referees, or those serving on PLB's or SBA 's. *See* 45 U.S.C. § 153, First (1); 45 U.S.C. § 153 Second (second paragraph). As rail labor and the National Carriers' Conference Committee ("NCCC") stated in their comments in response to the NMB's ANPRM of August 3, 2003, the proposed fee schedule is beyond the scope of the NMB's authority under the RLA.

Prior to the 1934 amendments to the RLA, rail unions could strike over "minor disputes," which concern the interpretation or application of agreements. *Bhd. of Railroad Trainmen v. Chicago*

River & Indiana R.R., 353 U.S. 30, 36 (1957). Rail labor gave up the right to strike over "minor disputes" in exchange for government funding of arbitration in the 1934 amendments to the RLA. *Id.* at 39.

The NMB's sole functions in the mandatory arbitration process are the appointment of referees and that it "shall fix and pay the compensation" of referees at the NRAB. *See* 45 U.S.C. § 153, First (1). The 1934 amendments give the NRAB, not the NMB, authority to "adopt such rules as it deems necessary to control proceedings before the respective divisions." *See* U.S.C. § 153, First (v). The NRAB adopted procedural rules in 1934 in Circular No. 1, which have been periodically revised since. In the 1966 amendments to the RLA, it is stated that, "The Neutral person as selected or appointed [by the parties] shall become compensated and reimbursed for expenses by the Mediation Board." *See* 45 U.S.C. § 153, Second (second paragraph).

In 1999, the NMB acknowledged that "it does not have the authority to require the NRAB to adopt procedures." NMB Memorandum to Members of Section 3 Committee (June 18, 1999). The NPRM of the NMB now asserts that its authority to adopt the fee schedule is contained within Section 4 Third of the RLA, 45 U.S.C. § 154, Third, to wit:

> Pursuant to its authority under 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.

While Section 4 Third of the RLA, 45 U.S.C. § 154 Third, authorizes the NMB to make expenditures, it does not purport to regulate the NRAB, or to permit a fee schedule for arbitration.

The NMB's reliance on Section 4 Third simply does not bear analysis. The D.C. Circuit rejected a previous attempt by the NMB to exercise authority beyond its statutory charter. *See RLEA v. NMB,* 29 F.3d 655 (D.C. Cir. 1994). The court there noted that the Congress has been quite clear as to what authority the NMB has, and it did not give the NMB specific authority to promulgate Merger Procedures that could be invoked by the Board or carriers. *Id.* at 665-66. The D.C. Circuit summarily rejected the NMB's position that because Congress gave it broad authority in deciding representation disputes, such authority was plenary.

The 1934 amendments to the RLA do not give the NMB plenary authority over Section 3 arbitrations either. They require the NMB to pay referees. The 1966 amendments to the RLA, permitting creation of PLB's and SBA's, required the NMB to pay referees serving on them as well. Section 4 Third of the RLA, 45 U.S.C. § 154 Third, only gives the NMB the ability to pay referees as required by 45 U.S.C. § 153, First (1) and Second (second paragraph). The NMB simply cannot recover the administrative costs of paying referees by requiring the parties to pay according to the proposed fee schedule because to do so would violate specific statutory commands that it shall pay referees. *See* 45 U.S.C. § 153, Second (second paragraph); *see also BRAC v. ABNE,* 380 U.S. 650 (1965).

Further, even assuming the NMB had statutory authority to promulgate a fee schedule, the current proposals contain no justification of the costs for the involved "services." Fees such as those proposed for designation of a number for an arbitration board, or the signature on a letter prepared by the parties certifying the appointment of a referee, are not justified by the actual costs of performing those ministerial functions.

The proposed fee schedule does not state whether the moving party, usually a union, or both the union and the carrier, are responsible for the payment of the involved fees. It is apparent that if

fees are to be imposed, both parties should pay them. The carriers are the beneficiaries of the mandatory arbitration system that limits the right to strike without having to pay equally.

In summary, the NMB has no specific statutory authority to impose fees. Section 4 Third of the RLA, 45 U.S.C. § 154 Third, gives the NMB authority to pay expenses, but it does not authorize imposition of fees on the parties. The RLA requires the NMB to pay the referees. *See* 45 U.S.C. § 153 First (1); § 153 Second, (second paragraph). Moreover, even if the NMB could charge fees, it has not justified the fees proposed. Finally, if there are to be fees, the railroads should pay too.

For the foregoing reasons, the NMB should not adopt the proposed fee schedule discussed hereinabove because it lacks statutory authority under the RLA to promulgate it, and to do so would violate specific statutory commands of the RLA.