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September 16, 2004

Roland Watkins, NRAB Administrator
National Mediation Board
1301 K Street N.W., Suite 250 East
Washington, D.C. 20005
(202) 692-5000
FAX (202) 692-5086

Re: Docket No. 2003-IN
NPRM

Dear Mr. Watkins:

Please find enclosed for filing in subject docket the Comments of United Transportation Union, with service as indicated on the attached Certificate. A WordPerfect disk is also enclosed with the UPS copy of this letter.

Very truly yours,

Clinton J. Miller, III
General Counsel

Enclosures

BEFORE THE
NATIONAL MEDIATION BOARD

NOTICE OF PROPOSED RULE MAKING	)	
	)	**Docket No. 2003-IN**

COMMENTS OF UNITED TRANSPORTATION UNION

The United Transportation Union ("UTU") hereby opposes the National Mediation Board's ("NMB") proposed new rules to the extent that they establish a fee schedule for arbitration services, require adherence to a time schedule by referees in order to be paid, and grant the NMB's Director of Arbitration Services authority to consolidate cases.

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 Adjustments ("SBA's"), the rules it proposes are 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 National Railroad Adjustment Board ("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 rules are 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* 45 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 be 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 proposed rules 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. They require the NMB to pay referees. The 1966 amendments to the RLA, permitting creation of creating 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 cost 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 under the RLA. Mandatory arbitration is the basis for enjoining unions from striking over "minor disputes." *See Bhd. of Railroad Trainmen v. Chicago River & Indiana R.R., supra.* Railroads are richer than unions, and they should not benefit from a 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.

Beyond the question of the fee schedule, Section 1210.12 of the proposed rule sets time limits for grievance progression at the NRAB. If these time limits are not met, the NMB will not pay the referees.

The NRAB, not the NMB, has authority to adopt its own rules. *See* 45 U.S.C. § 153 First (v). The RLA says the NMB "shall" pay referees. *See* 45 U.S.C. § 153, First (1). The RLA does not permit the NMB to condition the payment of referees on meeting time limits it has no authority to set. Section 4 Third of the RLA, 45 U.S.C. § 154 Third, again, simply states that NMB is authorized to make expenditures. There is no authorization for the NMB to issue rules covering arbitration procedures, or conditioning the payment of referees upon adherence to rules promulgated in violation of specific statutory commands. *See, BRAC v. ABNE, supra.*

In addition, Section 1010.10(b) (2) of the proposed rules requires the filing of submissions with the NRAB within 60 days of receiving the Director's [of Arbitration Services] acknowledgment of receipt of the Notice of Intent, and if they are not so filed, the referee might not get paid. Further, proposed Sections 1210(b) (5) and 1210(b) (6) require a hearing within 60 days from the date of referee certification and rendition of an award within 60 days of the hearing. It has become commonplace for the NMB to direct referees not to work on cases because of budgetary concerns, but the proposals do not toll the 60-day period(s) when such directives are given.

Beyond that, proposed Section 1210.12(b) (2) requires submissions to be filed within sixty (60) days. The NRAB rules require submissions seventy-five (75) days after the Notice of Intent. 29 C.F.R.1210.12(b) (3). Within 30 days after the submissions, the partisan members at the NRAB must either resolve a case or deadlock it. There are no time limits for consideration of a case at the NRAB. The NRAB rules also permit the filing of replies, and parties who receive third-party notice [*see* 45 U.S.C. § 153 First (j)] also may file replies. Further, in seniority cases, all involved employees receive notice and 30 days to reply after the parties' submissions, which are due 75 days after the Notice of Intent. However,

the rules proposed by the NMB require dispute resolution deadlock 30 days after the parties' submissions, before receipt of any replies. The NRAB adopted these rules in Circular 1 in 1934 under its RLA authority to adopt procedures. *See* 45 U.S.C. § 153(v). The proposed rules would jeopardize the payment of referees even if the parties adhere to the time limits established by the NRAB.

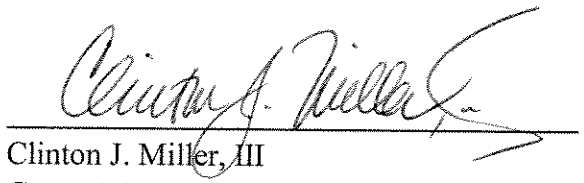
Once again, the RLA gives the NRAB, not the NMB, the authority to issue procedural rules. *See* 45 U.S.C. § 153, First(v). There is no legal basis for the NMB to condition the payment of NRAB referees on compliance with rules which violate specific statutory commands in the RLA. The RLA requires that the NMB pay NRAB referees. *See* 45 U.S.C. § 153, First (1). The proposed rules are in conflict with the rules adopted by the NRAB. The NMB's refusal to pay referees would violate its duties under the RLA.

Finally, proposed Rule 1210.9 authorizes the NMB's Director of Arbitration Services to consolidate "minor disputes" or grievances when such consolidation is in the interest of efficiency. Again, the RLA requires the NMB to appoint referees should the partisan members fail to agree on a selection, to appoint partisan members to PLB's should a party decline to make such an appointment, and to pay referees. The NMB has no general authority over "minor disputes." The NRAB has authority under the RLA to set its own rules. The partisan members of the NRAB establish the docket of cases to be heard by each division. Similarly, the parties establish a PLB by agreement, and that agreement contains its own procedures. The PLB agreement contains the docket of cases to be heard on the Attachment A to the agreement. Special Boards of Adjustment are also created by the agreement of the parties, which also contains the docket of cases. The RLA grants the NMB no authority to consolidate cases before the NRAB, PLB's or SBA's.

CONCLUSION

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

Respectfully submitted,



Clinton J. Miller, III
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed this 16th 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 Linda Morgan, Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, DC 20004, representing the National Association of Railroad Referees.

Clinton J. Miller, III