SUBMITTED TO THE

OFFICE OF THE PRESIDENT-ELECT

NATIONAL MEDIATION BOARD TRANSITION TEAM

TRANSITION ISSUES PAPER

JANUARY 9, 2009

SUBMITTED BY

THE RAIL CONFERENCE AND THE AIRLINE DIVISION OF THE

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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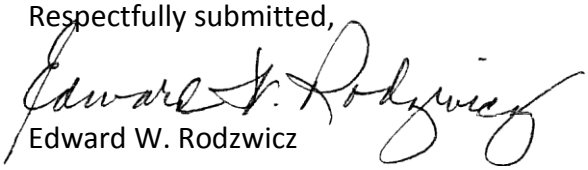
INTRODUCTION

The Teamsters Rail Conference consists of the memberships of the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the Brotherhood of Maintenance of Way Employes Division (BMWED), two autonomous divisions within the larger Teamsters union. Collectively, the Rail Conference represents almost one half of the organized railroad workers in the United States. The Teamsters Airline Division represents over 40,000 workers in the aviation industry in every craft and class. We respectfully submit the following report and proposal regarding policy initiatives that we believe should be implemented by the National Mediation Board (NMB or Board). Our report begins with an Executive Summary and is followed by the full report which contains an attachment representing a joint labor-management proposal submitted to the NMB in 2007 that addresses one of our policy initiatives.

The actions and activities of the NMB have an immediate impact on the working lives of Rail Conference and Airline Division rank and file members. The Board conducts mediation of collective bargaining disputes and is the gatekeeper regarding a party's release from mediation into the 30 day cooling off period that can end in a strike or lockout. The NMB also oversees "representation disputes," involving the attempts by unions to organize those unrepresented employees working in the railroad and airline industries. Finally, the Board assists in the administration of the arbitration of contract grievances in the railroad industry.

Respectfully submitted,



Edward W. Rodzwicz
BLET National President

Freddie N. Simpson
BMWED National Division President

Captain David Bourne
IBT Airline Division Director

EXECUTIVE SUMMARY

The general purposes of the Railway Labor Act were set forth in 1926 and remain unchanged to this day. This Congressional mandate forbids "any limitation upon freedom of association among employees;" demands, "the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions;" and requires the "prompt and orderly settlement" of contract grievances." The National Mediation Board (NMB or Board) has done nothing over the past eight years to further these important policy objectives. Indeed, as explained in detail within our report, the NMB has engaged in actions which seriously compromise and contravene the national labor policy expressed in the general purposes of the Railway Labor Act. Accordingly, the Rail Conference and the Airline Division strongly urge the following changes in policy regarding the NMB.

Union Organizing Campaigns:

- Certification of employee representatives through a check of authorization cards;
- Increased "freedom of association" for employees in the workplace during an organizing campaign that should include the following necessary reforms —
    - That the employee organizations are given correct names and addresses of all employees in the bargaining unit at the outset of the election process so that the union may communicate directly with all prospective voters in the same manner as the carrier; and
    - That the employee representatives are provided access to the carrier's facilities to hold voluntary meetings with the employees on the same terms as carriers.
- Certify unions on the basis of receiving a majority of votes cast in favor of representation.
- Eliminate the "derivative carrier" rule whereby employers with only tangential contact with air or rail operations are wrongly classified as "carriers" because they perform certain types of subcontracted work under the nominal "control" of a carrier.
- Allow accretions of employee classifications upon the NMB's finding that a classification is part of a craft or class, without need for the filing of authorization cards or other dilatory process.
- Conclude handling of the notice published at 35 NMB No. 61 in accordance with the recommendations contained in the joint comments filed on September 3, 2008, by the BLET and the United Transportation Union.

Mediation of Collective Bargaining Disputes:

- The NMB must stress that mediation is the "last stop" in the collective bargaining process that will require frequent, intensive bargaining to reach an agreement; and

- The NMB must acknowledge that parties bargaining in good faith may not reach agreement and a release from mediation is simply another part of the collective bargaining process designed by Congress.
- When Rail Labor Organizations express a formal desire to bargain as a coalition with one or more carriers, the Board's mediation efforts for all such Organizations should be included in a single docket.

Conduct of Arbitration of Contract Grievances:

The Board must acknowledge that the day to day administration of the grievance arbitration machinery created by Congress in the Railway Labor Act is reserved to labor and management and should, therefore, attempt to aid those parties in the implementation of labor and management's joint recommendations to the NMB in 2007 regarding efficient changes to that arbitration machinery. Additionally, the Board should restore the position of Chief of Staff to facilitate its administration of grievance arbitration and coordinate mediation and representation activities.

Introduction

Any set of policy prescriptions for the National Mediation Board (NMB or Board) cannot be understood without reviewing the origin of the agency and its relationship with Rail Labor for almost 100 years. Without a brief summary of the history of the NMB, any policy prescriptions will lack context and may appear unnecessary or quixotic. What follows is a brief history of the agency, the current problems the Rail Conference and the Airline Division confront with the Board, and our policy prescriptions to make the agency work in the interests of working men and women employed in the railroad industry.

Historical Background

The Transportation Act of 1920 returned operation of the nation's railroads to private control following Federal operation during World War One. That omnibus act attempted to regulate both labor relations in the rail industry and rail economics — specifically railroad mergers and acquisitions as well as railroad capital finance. Specifically, the 1920 Act created a Rail Labor Board with limited oversight regarding collective bargaining and granted the Interstate Commerce Commission the authority to approve rail mergers and acquisitions that might otherwise run afoul of antitrust laws.

The Railroad Labor Board was a nine member panel composed of representatives of rail management, rail labor and the "public." The Board was given the authority to issue decisions in favor of one side or the other in a collective bargaining dispute and publicize any violation of its decisions. The Board's inability to resolve the Shopmen's Strike of 1922 led to a union boycott of the Board. Similarly, the provisions in the 1920 Act regarding adjustment of grievances was permissive rather than mandatory and also proved unworkable. These developments demonstrated the 1920 Act was insufficient to produce stable labor relations in the rail industry.

In 1926, Congress enacted the Railway Labor Act, legislation jointly drafted by representatives of rail labor and rail management, in an attempt to create a comprehensive scheme for ordering labor relations in what was the pre-eminent transportation mode of the time. Serious difficulties under the Act remained until the Congress passed substantial amendments to it in 1934. The history of "modern" labor relations in the rail industry can be traced to those amendments. The 1934 amendments created the current National Mediation Board and conferred upon it the authority to investigate disputes among employees regarding the identity of their collective bargaining representatives with rail carriers. Additionally, the 1934 amendments created the National Railroad Adjustment Board, a permanent body given exclusive jurisdiction to arbitrate grievances arising under collective agreements and a process whereby those decisions could be enforced or reviewed in federal court.

The 1934 Amendments created a Railway Labor Act that:

- viewed collectively bargained agreements as the best way to develop and preserve reasonable rates of pay, rules and working conditions in the railroad industry;
- fostered bargaining of those agreements through the *status quo* provisions of the Act that prohibit unilateral action by either party during bargaining;
- favored the self-organization of railroad employees represented by labor organizations of their own choosing; and
- mandated federally-subsidized arbitration of all grievances arising out of collective bargaining agreements rather than subject these disputes to strikes or court actions.

The National Mediation Board is directly involved in promoting those national labor policies through --

- its obligation to investigate organizing campaigns on rail carriers and certify, when appropriate, a labor organization as the employees' representative;
- its administration of the assignment and payment of arbitrators at the National Railroad Adjustment Board and Public Law Boards created under the 1966 amendments to the Railway Labor Act; and
- its conduct of mediation in collective bargaining disputes between labor and carriers.

Over the last eight years, the Board has failed miserably in all three areas.

<u>Employee Organizing</u>

Section 2 Ninth of the Railway Labor Act grants the NMB exclusive jurisdiction to investigate any dispute "among a carrier's employees as to who are the representatives of such employees." In conducting such an investigation the NMB is authorized by Congress "to take a secret ballot of the employees involved, **or to utilize any other appropriate method of ascertaining the names of their duly designated an authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.**" (emphasis added) Presently, the NMB will certify a union based upon a card check of authorizations, provided that the carrier does not object.[1]

The Railway Labor Act permits the NMB to certify employee representatives based upon checks of authorization cards signed by a majority of employees. The NMB should immediately develop procedures to utilize in its investigation of representation disputes that would permit the certification of employee representatives by card check.

[1] Section 7, NMB Representation Manual.

The NMB's utilization of a card check certification in organizing campaigns also would have the salutary effect of involving the Board in fewer cases of investigating election interference in such campaigns. Presently the NMB reviews complaints of election interference under a standard called the "laboratory conditions," which are designed to permit the employees to exercise a free choice of their representative. In practice, the laboratory conditions are standardless and for the past eight years have been used to shelter anti-union behavior from official sanction. A recent example from the railroad industry demonstrates this problem.

In *Train Dispatchers and Union Pacific R.R.*, 34 N.M.B. 21 (2006) the NMB found that the carrier increased its communications with employees regarding the merits of remaining unorganized and increased the number of "voluntary" meetings to further spread its message. The Board found that such increased communication in direct response to an organizing campaign did not taint the laboratory conditions. We submit that no organizational campaign is truly free and fair unless:

- the employee organizations are given correct names and addresses of all employees in the bargaining unit at the outset of the election process so that the union may communicate directly with all prospective voters in the same manner as the carrier; and
- the employee representatives are provided access to the carrier's facilities at reasonable times to hold voluntary meetings with the employees.

A failure to permit the union to engage in the same type of communication with employees that the employing carrier utilizes is inherently unfair and coercive. The NMB's refusal to provide parties to its representation procedures with the names and addresses of employees involved in representation disputes improperly enhances the power of the employer in the workplace, and no free or fair election is possible under these conditions; moreover, the neutrality of the agency and the integrity of legal processes are called into serious question. The National Labor Relations Board has long required an employer to distribute an "Excelsior" list of employee names and addresses at the commencement of the NLRB's election procedure. Provision of this list is generally acknowledged as an effective means of allowing fair discussion of the merits of unionization. Basic fairness requires the distribution of such a list in RLA-governed cases even more than NLRA cases, given the nationwide scope of RLA crafts or classes and the NMB's non-workplace-based method for conducting balloting. Carriers should accordingly be required to provide employees' addresses as part of the list of eligible voters provided at the very outset of the election process. Furthermore, the NMB should change its practices to allow unions to provide address corrections and duplicate ballot requests; allowing the carrier the control over providing addresses gives a non-party control over who gets to cast a vote .

Additionally, where carriers exercise their ability to conduct employee meetings to express their views about a union campaign, union supporters and representatives must be permitted access to company property to conduct informational meetings on the very same terms.

A recent NMB decision involving an organizing campaign by the Association of Flight Attendants-CWA at Compass Airlines has cast doubt on the Board's long-standing rules for determining the cutoff date for determining employees who are eligible to vote in a representation election. The Board's traditional rule has defined the cutoff date as the last payroll date prior to the organization's filing an application to represent the employees. In Compass, the Board agreed with a carrier position that the eligibility date should be moved forward by approximately 75 days from the application date due to hiring of new employees by the airline. This meant a significant expansion of the number of eligible employees — and thus the number of votes required to organize. By altering the traditional rule for determining the eligibility date, under the cloak of enfranchising employees, the Board actually permits the carrier to stack up the voter pool that, when combined with the Board's requirement of an absolute majority in favor of representation, helps defeat organizing. Given that carriers can make procedural filings to delay the election process, this rule is another example of the Board adopting rules that enable carriers to undermine employee organizing.

We note that a fundamental purpose of the Railway Labor Act was free and fair collective bargaining between representatives chosen by the employees and the carriers. The language of Section 2 Ninth speaks of disputes among the employees over representation, not disputes between a carrier and its employees. While the carriers may have the right to communicate with their employees, the primary goal of the Railway Labor Act and the NMB's investigation of a representation dispute is to ensure the employees' free choice of representative without influence or coercion by their employer. The current NMB's handling of representation disputes does not further that important statutory goal.

Presently, for a union to be certified as the representative of a class or craft, the NMB requires that a union receive votes from a majority of the employees in that craft or class, or in competitive elections, the union must receive the greatest number of votes against other unions, provided that a majority of the craft or class voted in the election. We believe the requirement that a "majority" of the entire craft or class vote in a representation election is an artificial barrier to representation that is not required by any provision of the Railway Labor Act. Under Section 2 Ninth, the NMB is granted substantial discretion regarding the manner in which it conducts its investigation and certification of employee representatives. While the "majority" voting provision certainly is one of a series of permissible discretionary choices, it is not compelled.

Given that many critics of certification by authorization cards contend that such a method is inconsistent with notions of "democracy" and "secret ballot choice," the 50% + 1 balloting requirement plainly fails that litmus test. No election for public office in the United States requires the successful candidate to obtain the most votes and have a majority of the potential voters vote in the election. There is no compelling reason or interest to put that obstacle before a union. Essentially, the NMB presently accepts apathy as a vote against representation which would be the same as counting all registered voters who did not vote in an election as "voting against" a candidate, even if unopposed. Accordingly, we would support the NMB adopting a form of modified "Laker Ballot"[2] for general application in representation elections. In other words, the NMB should adopt a balloting procedure that requires opponents of representation to affirmatively vote "against" representation, rather than construe passive behavior as active opposition to representation.

In recent years, the NMB increasingly has found that employers that are not carriers under the RLA are nonetheless covered by the Act because they are "derivative carriers"; in other words, they perform traditional work of carriers under the "control" of a carrier. In some cases, this rule has been sued to strip union representation from employees whose representatives were long since certified by the NLRB as collective bargaining representatives. The application of the derivative carrier rule denies employees the right to organize by placing them under the Railway Labor Act when they are not part of a carrier system that the Act envisions (obviously, a non-carrier has no such "system"); nationwide units are inappropriate for groups of employees that have no interaction and no fundamental community of interest. The Board should reconsider this recent trend and limit its jurisdiction to cases involving RLA-defined carriers and entities that contract to provide the services of an carrier's entire craft or class on a system-wide basis. Where the Board exercises jurisdiction over such non-carriers, the "system" recognized by the Board should be limited to the system of the air or rail carrier serviced by the non-carrier and should not be defined by the non-carrier's unrelated operations.

The NMB should also reconsider its accretion process. The NMB conducts elections on a craft or class-wide basis; these crafts or classes are usually comprised of many different classifications. Occasionally, a classification properly within a craft or class is excluded through accident. In such a case, a union may petition the NMB will to "accrete" the classification to its proper class or craft without an election. Under current processes, the union must provide the NMB with authorization cards from the employees in question in order to initiate such a petition. And recently, the Board has sometimes delayed accretions unnecessarily. An accretion is based upon the premise that the employees in a classification have been improperly excluded and are properly within a craft or class that is represented by a union the NMB has certified as a representative. There should be no need for a petition by authorization cards in

[2] *Laker Airways*, 8 N.M.B. 236 (1981).

such a case; the NMB's determination of the proper craft or class of a classification should dispose of any dispute over the representative of that class without further process. Indeed, any other method of addressing an accretion risks the fracturing of crafts and classes into represented and unrepresented segments, and permitting carriers to gerrymander the employee electorate.

Finally, the NMB should promptly and decisively dispose of the issues raised by the current Board in its July 15, 2008 Notice published at 35 NMB No. 61. In that Notice, NMB solicited comments regarding its intention to purportedly revise and/or clarify Sections 2.4, 3.3, 8.2, 9.2, 9.205, 13.304-2, and 19.7 of its Representation Manual (Manual).[3] In response to this Notice, the Rail Conference and the Airline Division filed comments concerning these proposals, as did the BLET and the United Transportation Union, jointly. Copies of these comments are attached to this paper for the Transition Team's ready reference. In summary:

- The Rail Conference and the Airline Division support the NMB's proposed revision to Section 2.4 to establish that a carrier's failure to provide a substantially accurate eligibility list may be considered election interference. We believe this requirement should also apply to the carrier's obligation to provide an accurate address list for eligible voters.

- We recommend the Board expressly establish the standing of intervenors under Section 1.2 of the Manual by adding a subsection that reads, "An organization or individual may intervene upon a 35 percent showing of interest following the submission of an application."

- Under Section 8.2 of the Representation Manual, the Board should not grant any greater weight to the records of carriers in determining employee eligibility than those of organizations. Further, the NMB should require carriers to demonstrate reasonable efforts to maintain the currency and accuracy of their employment records.

- We believe the Board should continue its traditionally separate rules for determining the eligibility of trainees in the airline industry and the rail industry. The Board should continue to recognize the traditional status of trainees in the rail industry in requiring only that the employee be engaged in productive work in the craft or class, rather than working full-time in the craft or class.

- We believe the NMB should recognize continuing eligibility for leave of absence under Section 9.205 only for those employees on a leave of absence established by statute or under a collective bargaining agreement.

[3] The Board later published a "clarification" with respect to the proposed creation of Section 19.701. *See* 35 NMB No. 62 (July 31, 2008).

- The NMB should maintain in Section 19.205 of the Manual its current (and historically-applied) rule in the merger of carriers that where a labor organization is the certified representative for a sufficient number of employees to constitute a majority of the combined craft or class, and no party files an application for intervention to represent the combined craft or class within the permitted period for intervention, the NMB will certify the majority union without election.

Arbitration

The Railway Labor Act requires arbitration of contractual grievances. In 1934, Congress established a *quid pro quo*, under which rail labor would obtain mandatory arbitration of grievances in proceedings where the arbitrators are paid by the Federal government and the rail unions would be denied the right to strike over grievances (called "minor disputes"). The vehicle for this arrangement is the National Railroad Adjustment Board, composed equally of labor and carrier representatives divided into four "divisions" that represent the various craft divisions within the industry: train and engine; shopcraft and mechanical; maintenance of way, signal and clerical; and others. When the Adjustment Board deadlocks on a grievance, the National Mediation Board appoints an arbitrator and compensates that appointee for time spent on the case and any other reasonable travel expenses. An alternative, complementary process was created in 1966, when Congress amended Section 3 Second to permit the creation of *ad hoc* Public Law Boards between specific carriers and unions to resolve grievances in a manner similar to the National Railroad Adjustment Board.

Over the past eight years, the NMB has meddled in and disrupted the arbitration process. Two examples clearly illustrate this problem.

In late 2006, Board Member Harry Hoglander requested that labor and management jointly devise plans to eliminate a 5,000 case backlog at the NRAB. On February 27, 20007, labor and management jointly presented a series of recommendations to Mr. Hoglander and the Board. These recommendations were the product of intense negotiations between labor and management and represented their best efforts to resolve the problem. (A copy of the parties' recommendations is attached.) Notwithstanding this effort, the NMB has made no attempt to facilitate or adopt any of the joint recommendations. Instead, the NMB continues to criticize the parties' efforts in arbitration without proposing any plan to address that criticism.

A specific example of NMB meddling in the statutory arbitration process resulted in the Board's actions being overturned by the U.S. District Court for the District of Columbia, *CSX v. NMB*, C.A. No. 04-0611 (RWR), August 29, 2005. In that case, the court found the NMB acted outside its statutory authority when it unilaterally abolished thirty one Public Law Boards created under Section 3 Second between CSX Transportation and the Brotherhood of Maintenance of Way Employes and replaced them with a single board. The litigation surrounding this illegal act

delayed resolution of the pending grievances for an extra year while the status of the cases to be arbitrated remained in judicial limbo.

We submit that the National Mediation Board should adopt and help implement the joint Labor and Management recommendations from 2007. Those recommendations are:

- The parties should continue to seek a supplemental appropriation, perhaps a "No-Year" appropriation, to address the current backlog. In the future, the NMB should consult with labor and management to determine appropriate Section 3 budgets sufficient to address pending cases and anticipated new cases.
- The NMB should meet with the parties and a representative of the arbitrators to consider ideas for revisions to current procedures for allocating travel, hearing and writing days to address the concerns identified above. Moreover, the NMB should once again provide arbitrator case load reports to designated labor and management advocates as it did in the past.
- The parties and the NMB should periodically monitor case loads so that if backlogs begin to develop between specific parties, efforts can be made to determine causes and solutions. And, we recommend that the parties and the NMB jointly plan periodic conferences to examine various means to more effectively manage the number of new cases entering the system.
- The services of appropriate NRAB labor and carrier members should be utilized informally by the NMB as an expert resource in periodically evaluating arbitrator practitioner charges.
- Future Section 3 budget allocations should take into account both the amount needed to resolve existing and anticipated cases as well as providing for an increase in the arbitrators' daily rate. Moreover, as recommended above, the parties, the NMB and a representative from the arbitrator community should meet to consider suggestions for appropriate revisions to travel, hearing and award writing authorization policies.
- The case load (30 docketed cases) and arbitrator travel (10 case minimum) pilot programs should be permanently abandoned because the legitimate concerns of the NMB that these pilot programs were designed to address can be better addressed by the various recommendations set forth above.

Mediation

The NMB may become involved in a collective bargaining dispute upon request of either labor or management. Additionally, the NMB may intervene *sua sponte* "in case any labor emergency is found by it to exist at any time." Regardless of the manner in which the NMB becomes

involved, the statute commands it to "promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement." Despite the clear exhortation to expedition contained in the statute, the NMB's conduct of mediation has been the dysfunctional opposite.

The poster child for NMB fecklessness in mediation was the seven year long process involving several unions and Amtrak that culminated in Presidential Emergency Board No. 242. In that case, which effectively spanned two rounds of bargaining in the freight railroad industry, the NMB conducted few meetings, passively accepted insults from Amtrak management and otherwise treated the bargaining process as not worthy of respect. The effects of this long drawn out process can be shown from the retroactive pay awards to Amtrak employees that total in the tens of thousands of dollars per employee. Due to the extreme duration of this mediation case, the ability of Amtrak to fund its full backpay obligations under the contract remains in doubt. Indeed, a failure of Amtrak to make its second installment of retroactive payments to employees in the spring would trigger a new countdown permitting the employees to strike Amtrak.

Both the Amtrak bargaining and the national freight bargaining round that concluded in 2007 featured something relatively new for the railroad industry — joint bargaining by a coalition of unions representing a significant majority of the workforce. After learning of the carriers' objections to formal recognition of these coalitions, the Board once again adopted an obstructionist posture, in naked violation of its statutory duty to assist in the "prompt and orderly" resolution of disputes, by docketing separate mediation cases for each coalition union. The incoming Board should repudiate such conduct by adopting a policy that, when Rail Labor Organizations express a formal desire to bargain as a coalition with one or more carriers, the Board's mediation efforts for all such Organizations should be included in a single docket.

We view the mediation philosophy of the current NMB as nothing more than a carrier-friendly way to put contentious bargaining disputes on ice. That is not the proper function of the Board. Instead, mediation should be seen as the last step in collective bargaining, after the parties' voluntary efforts to reach agreement have failed. In other words, the NMB should treat the mediation process from its onset as the culmination of collective bargaining by forcing the parties to remain at the table, bargaining frequently with only short periods in between intensive bargaining sessions. If such intensive bargaining under the auspices of a mediator is unsuccessful, the NMB should proffer arbitration to the parties and begin the 30 day cooling off period. In other words, the NMB should actively push serious bargaining in mediation and if that bargaining is unsuccessful, move the parties to the next stage in the statutory process. Presently, the NMB has treated mediation as a process whereby carriers are permitted to avoid their collective bargaining obligations for months or years at a time. No other industry has such long and drawn out bargaining, especially once mediation has been invoked.

We submit the NMB should develop an internal timetable for the prompt resolution of mediation cases on its docket. Parties should be called to the table frequently and required to bargain intensively when they are there. If the parties refuse to engage in collective bargaining or are unsuccessful in bargaining, the NMB should allow the statutory processes to work and promptly proffer arbitration to the parties. It has been the experience of the members of the Rail Conference and the Airline Division that many agreements are hammered out once the parties realize that the only statutory alternatives left to them besides agreement are the strike and the lockout.

Administration

Since 2004, the Mediation Board has operated without a Chief of Staff. This position existed at the Board for decades to provide it with executive administrative leadership (under different previous titles.) The Chief of Staff is able to oversee the entirety of the Board's functions, and give continuity to the Board's administration through transitions of the tenure of Board members. Further, the Chief of Staff assists the Board members with strategic policy assistance.

The lack of a Chief of Staff has deprived the Board of career executive leadership of the career staff. It has also deprived the Board of coordinated executive leadership of the Board's various functions. The Airline Division and the Rail Conference believe the appointment of a Chief of Staff for the Board is urgently required to improve the Board's operations.

Conclusion

The Bush administration's disdain for effectively-functioning government has been exemplified throughout the Executive Branch and its agencies. While the NMB's handling of the Amtrak bargaining is a poster child for ineptitude, it is only one of many, as we have demonstrated. Compounding the ideological hostility resident in a majority of the present Board is the fact that its rotating Chair left the agency rudderless for significant periods of time. We strongly believe that a key first step to straightening out the morass at the NMB is to restore the position of Chief of Staff. An effective National Mediation Board will work in a coordinated fashion at all levels, and across the full range of services it provides. A strong Chief of Staff also is needed to institutionalize the reforms we propose in this paper, so that they do not simply become the "flavor of the month" of the new Board members; rather, they will chart a new course for the NMB to follow as it finally enters the 21st Century.

Attachment:

Joint Recommendation of the Section 3 Sub-Committee for Section 3 Improvement

February 27, 2007

Honorable Harry Hoglander
Member
National Mediation Board
1301 "K" Street, N.W.
Suite 250 East Tower
Washington, DC 20572

Dear Sir:

Enclosed please find three copies of a document titled "JOINT RECOMMENDATION OF THE SECTION 3 SUB-COMMITTEE FOR SECTION 3 IMPROVEMENT" which was prepared in response to your letter dated November 15, 2006.

We look forward to discussing our package of suggested improvements with you at the Section 3 meeting scheduled for March 14, 2007 in Chicago.

Sincerely,

A. K. Gradia

A. Kenneth Gradia
Co-Chairman
Section 3 Sub-Committee

Steven V. Powers

Steven V. Powers
Co-Chairman
Section 3 Sub-Committee

JOINT RECOMMENDATION
OF THE
SECTION 3 SUB-COMMITTEE
FOR SECTION 3 IMPROVEMENT

INTRODUCTION

During the fall of 2006, the National Mediation Board introduced pilot programs on case loads (30 docketed cases) and arbitrator travel (10 case minimum) that were intended to help reduce the backlog of cases pending in various Section 3 arbitration forums (NRAB, PLB's and SBA's). While these programs were well intentioned, both management and labor representatives believed that these programs would exacerbate the backlog problem rather than help to ameliorate it. Management and labor representatives expressed this view at a Section 3 Sub-Committee meeting on November 15, 2006 and the NMB agreed to suspend these pilot programs pending a study and recommendations concerning case backlog reduction by the Section 3 Sub-Committee.

In a follow-up letter dated November 21, 2006 (Attachment "A"), the NMB clarified its concerns and requested that the Section 3 Sub-Committee specifically study and make recommendations concerning: (1) reduction of the backlog of approximately 5000 cases; (2) underutilization of the NMB Roster of Arbitrators; and (3) efficient use of Section 3 funds. The NMB initially requested that the Section 3 Sub-Committee submit its report by January 15, 2007. However, in subsequent discussions between the Board and labor and management representatives, it was determined that a longer period of deliberation would be helpful and the Sub-Committee would submit its report by February 28, 2007. Moreover, it was agreed that the report of the Sub-Committee would serve as a basis for further discussions at the Section 3 meeting scheduled for March 14, 2007. Consequently, the purpose of this report is to examine and make recommendations concerning the issues raised in the NMB's letter dated November 21, 2006. More specifically the following sections of this report will:

- **Examine Causes Of Section 3 Case Backlogs And Make Recommendations To Ameliorate That Backlog In Terms of Reducing Both The Number of Backlogged Cases And The Time It Takes To Decide Cases.**
- **Recommend Procedures To Ensure That Section 3 Funds Are Used Efficiently.**
- **Make Recommendations Concerning The Use Of Arbitrators On The NMB's Roster Of Arbitrators.**

- **Evaluate And Critique NMB Pilot Programs Concerning Case Loads (30 Docketed Cases) And Arbitrator Travel (10 Case Minimum).**

During our deliberations, the Section 3 Sub-Committee recognized that the personnel responsible for handling Section 3 matters for labor, management and the NMB had undergone substantial turnover since the inception of the Section 3 Committee in 1985. Therefore, we determined that it would be helpful to put our current task in a historical context by beginning this report with a short recounting of the history and accomplishments of the Section 3 Committee.

SECTION 3 COMMITTEE HISTORY AND ACCOMPLISHMENTS

The primary focus of this report is on Section 3 case backlogs and, therefore, it is worth noting that the NRAB and other Section 3 tribunals have been plagued with backlogs since the date of their inception. Congress created the NRAB in the 1934 amendments to the Railway Labor Act and on the day it was established the NRAB inherited a case backlog (1,200 cases on the First Division alone) from its predecessor tribunals. That backlog ebbed and flowed over time and shifted in large part from the NRAB to Public Law Boards. By the late 1980's, the total Section 3 case backlog exceeded 20,000 cases and it was this situation which led to the establishment in 1985 of a bi-partisan labor-management committee ("Section 3 Committee") for the purpose of studying and making recommendations concerning grievance handling and the reduction of case backlogs in the railroad industry.

No one disputes that further work needs to be done, but by any objective measure the bi-partisan efforts of the Section 3 Committee have been a success. At the time the Section 3 Committee issued its initial report and recommendations in 1987, the total Section 3 case backlog (NRAB, PLB's and SBA's) stood at 20,817 cases. As a result of the Section 3 Committee's continuing efforts over the next two decades, that backlog declined to 4,910 cases as of 2004 and has hovered in that vicinity since that time (see chart - Attachment "B"). Moreover, in addition to the decline in the real number of backlogged cases, the ratio of new cases per year to the number of employees in the railroad industry has also declined. In FY 1985, the year the Section 3 Committee was established, there were 23 cases filed for each 1000 employees working in the railroad crafts. By FY 2004, there were only 4.5 new cases filed per 1000 employees. Consequently, by important objective measures, there has been a significant case load decline since the inception of the Section 3 Committee.

A review of the various Section 3 Committee reports and initiatives undertaken over the preceding two decades establishes that the Committee did not find a magic bullet to slay backlogs. Rather, what emerges is a consistent bi-partisan effort to work with the NMB to compile and analyze backlog statistics and budget data in order to craft a wide variety of recommended practices, policies and administrative procedures to reduce the backlogs. There was no single cause for the backlog and no single solution. Among the many measures recommended by the Section 3 Committee to reduce case backlogs and improve overall grievance handling were:

1. **Supplemental Section 3 Appropriations**

2. **Identification And Dissemination Of "Best Practices" Such As Vice President's Dockets, Expedited Boards, Abeyance Agreements, Bench Decisions And Non-precedential Awards.**

3. **Experimental Projects Concerning Referee Scheduling At The NRAB.**

4. **50 Case Limit (Later Rejected As Counterproductive).**

5. **Multiple Revisions Of The NRAB Uniform Rules Of Procedure That Led To:**

    a. **Significant Reductions In Paperwork For The Parties And NMB Staff (Eliminate Extension Letters And Rebuttal Submissions).**

    b. **Fewer Documents For Arbitrators To Read.**

    c. **Significant Reduction Of Time From Case Filing To Docketing.**

    d. **Integration Of Electronic Document Handling.**

6. **Review Of Arbitrator Billing By Labor/Management Committee (Never Implemented).**

7. **Adherence To Award Precedent.**

8. **Six Month Time Limit For Arbitrators To Render Decisions.**

9. **Increase Arbitrator Pay.**

The important point about all of these recommendations is that they are not subject to a "set it and forget it" implementation. Rather, to be successful, as we believe they were for nearly two decades, recommendations of this type require constant bi-partisan monitoring and adjustment by the parties with the full cooperation and support of the NMB in an open-minded and collaborative way. We believe that spirit, which was clearly reflected in the initial December 8, 1987 Joint Resolution of the Section 3 Committee and subsequent initiatives, was unintentionally fractured as a result of well-intentioned but ultimately counterproductive NMB initiatives in 2004. We remain convinced that successful efforts to improve grievance handling and reduce case backlogs in the railroad industry will require open-minded and collaborative efforts by labor, management and the

NMB (and perhaps the arbitrator community in some cases) and we propose that we return to that method of operation.

REDUCING THE SECTION 3 CASE BACKLOG

After nearly two decades of steady decline, the Section 3 case backlog plateaued and even began to rise slightly in FY 2005. The backlog currently hovers in the range of 5000 cases. As discussed above, previous efforts of the Section 3 Committee reduced the amount of time from filing to docketing of all cases at the NRAB and reduced the amount of time arbitrators have to render decisions after a hearing by the implementation of the six month rule. Yet, the case backlog persisted. This problem was discussed in detail at the last meeting of the full Section 3 Committee on February 9, 2006 and it was determined that more cases needed to be heard more quickly in order to effect any significant reduction in the backlog.

Discussion concerning ways to hear more cases each year ultimately led to the astute observation that virtually all funds appropriated for Section 3 arbitration were being expended each year. Indeed, in virtually every fiscal year in recent memory, Section 3 activities (authorization for travel, hearings and writing) have been severely curtailed or suspended for several months each year. Consequently, hearing more cases faster would simply mean that Section 3 funds would be exhausted sooner and activities would be suspended or curtailed earlier in the fiscal year. The obvious conclusion was that an increased Section 3 appropriation was necessary to reduce the current case backlog and labor and management Section 3 Committee members in attendance at the February 9th meeting committed to engage in a joint lobbying effort to obtain additional funding for Section 3 arbitration (see March 8, 2006 letter - Attachment "C"). That lobbying effort was undertaken but has not as of this date yielded a supplemental Section 3 appropriation due to larger Congressional budget issues. **The Section 3 Sub-Committee recommends that the parties should continue to seek a supplemental appropriation, perhaps a "no-year" appropriation, to address the current backlog. In the future, the NMB should consult with labor and management to determine appropriate Section 3 budgets sufficient to address pending cases and anticipated new cases.**

A secondary cause of delay in the scheduling of hearings has arisen in connection with NMB policies concerning the allocation of the Section 3 funds that it does receive. While the NMB may have the best of intentions, suspension of hearing and travel days to conserve funds for award writing significantly contributes to the backlog of cases because, in most cases, a hearing must be held before awards can be written to resolve the cases. In other words, authorization for travel and hearings are every bit as essential as authorization for award writing and one should not be sacrificed to conserve funds for the others. Similarly, delayed authorization for referee hearings and travel frustrates and delays case scheduling (i.e., not receiving authorization for travel and hearings in a particular month until the first week of that month). And, finally, case scheduling problems were exacerbated when the NMB discontinued providing advocates with arbitrator case load reports, i.e., those arbitrators at or near the 6 month time limit. In the absence of these reports, which the NMB has not provided in several years, advocates may choose and attempt to schedule hearings with

particular arbitrators only to later be informed by the NMB that the arbitrator will not receive authorization to hear more cases. This causes unnecessary delay in the scheduling of hearings and resolution of cases. While these scheduling issues all contribute to the backlog, they are all subject to relatively ready remedies at limited cost to the NMB. **The Section 3 Sub-Committee recommends that the NMB meet with the parties and a representative of the arbitrators to consider ideas for revisions to current procedures for allocating travel, hearing and writing days to address the concerns identified above. Moreover, the NMB should once again provide arbitrator case load reports to designated labor and management advocates as it did in the past.**

In addition to resolving the cases that are currently in the backlog, the parties recognize that any long term resolution of the Section 3 case backlog must also focus on more effective controls on cases entering the arbitration system. As we discussed above, the initial report of the Section 3 Committee identified various best practices and sought to extend them throughout the industry. But, as we also discussed above, this is not a "set it and forget it" process. To the contrary, case loads must be periodically monitored so that if backlogs begin to develop involving specific carriers or unions, efforts can be made to determine causes and solutions. For example, an examination of case load statistics by the Section 3 Sub-Committee and the NMB during 2006 revealed that a significant backlog of cases involving Union Pacific and BMWED had developed at the NRAB. Both parties were receptive to addressing the problem though a process sometime referred to as a Vice President's Docket. By the time this process is completed in March of this year, over 400 cases will have been reviewed with dozens being settled and dozens of others being grouped or consolidated for more efficient handling on PLB's.

In addition to periodic examination of Section 3 case loads to identify and remedy developing backlog problems, it may be helpful to convene periodic industry-wide conferences to continue identifying and disseminating best practices. The initial conference that led to the establishment of the Section 3 Committee was sponsored by the NMB in conjunction with a professional society (SPIDR) and it may be helpful to schedule future conferences in conjunction with an industry related professional society. In light of the turnover in labor, management and NMB personnel, reviewing and updating past initiatives may be helpful along with looking to those carriers and unions with the smallest backlogs to determine what they may be doing right. Other panels could examine such topics as abeyance agreements, arbitrating questions or issues to avoid grievance, alternative dispute resolution forums and education on the duty of fair representation. **The Section 3 Sub-Committee recommends that the parties and the NMB periodically monitor case loads so that if backlogs begin to develop between specific parties, efforts can be made to determine causes and solutions. And, we recommend that the parties and the NMB jointly plan periodic conferences to examine various means to control new cases entering the system.**

Finally, there are a variety of other measures that could be implemented that would also help to manage more effectively the number of new cases entering the system. The Section 3 Sub-Committee recommends that the parties and the NMB evaluate all of these available options.

EFFICIENT USE OF SECTION 3 FUNDS

The Sub-Committee believes that the overwhelming majority of arbitrator practitioners are skilled in their craft and can differentiate between those cases which require greater deliberation and more detailed awards and those cases that can be resolved more expeditiously with shorter awards. Moreover, given the nature of Section 3 proceedings these practitioners are often able to hear 10 to 20 cases in a single day and sometimes many more on expedited boards. Thus we believe that, on the whole, the use of Section 3 funds is extremely efficient. However, the NMB has noted occasional differences between practitioners as to the average number of days billed for cases and suggested that some type of review may be necessary. The problem that arises is that the NMB has the billing data, but it does not have the necessary information or expertise to evaluate the difficulty level of cases; that knowledge and expertise lies with the labor and management advocates who prepare and present the cases. This issue was apparently confronted by the Section 3 Committee in the past because it made the following recommendation in its 1987 report:

> "It was also suggested that there should be a review of how Referees currently charge the National Mediation Board at both the N.R.A.B. as well as P.L.B.'s and that appropriate Labor and Carrier Members should be allowed to review the charges."

As far as we can determine, that recommendation was never implemented by the NMB. However, we remain convinced that arbitrator billing can not be fairly and effectively evaluated without the assistance of labor and management advocates. **Consequently, the Section 3 Sub-Committee recommends that the services of appropriate NRAB Labor and Carrier Members should be utilized informally by the NMB as an expert resource in periodically evaluating arbitrator practitioner charges.**

USE OF ARBITRATORS ON THE NMB'S ROSTER OF ARBITRATORS

Labor and management have no aversion to bringing new arbitrators into the Section 3 system. We have traditionally done so and do not perceive a problem in this area. Our concern is maintaining highly qualified arbitrators and the parties have developed a practice over the years of initiating new arbitrators with less complex cases to evaluate them and then selecting those who we deem most skilled for more complex cases and continued work. While the NMB seems to have determined that using a larger number of arbitrators will result in more cases being decided, we do not share that view for several reasons. First, as long as an arbitrator decides cases assigned to him or her within the six month time limit, it makes no difference if one arbitrator writes 20 awards or two arbitrators write 10 awards each. Second, new arbitrators may be substantially less efficient due to inexperience and the inability to differentiate between those cases which require more deliberation and longer awards and those that do not.

Instead of focusing on new arbitrators (whom the parties are not opposed to initiating), we believe that the focus should be on retaining highly qualified and experienced arbitrators who are abandoning Section 3 work due to the low daily rate of pay and frustration over the cumbersome authorization policies discussed above. The current daily rate of $300.00 was established more than seven years ago on February 1, 2000. This rate was well below market value when it was set and it is not reasonable to expect highly skilled practitioners to continue working without an increase in their rate of pay for over seven years. **The Section 3 Sub-Committee recommends that future Section 3 budget allocations should take into account both the amount needed to resolve existing and anticipated cases as well as providing for an increase in the arbitrators' daily rate. Moreover, as recommended above, the parties, the NMB and a representative from the arbitrator community should meet to consider suggestions for appropriate revisions to travel, hearing and award writing authorization policies.**

THE NMB PILOT PROGRAMS

The parties recognize that the case load (30 docketed cases) and arbitrator travel (10 cases minimum) pilot programs were promulgated for the worthy intention of reducing case backlogs. However, as explained at the November 15, 2006 Section 3 Sub-Committee meeting, management and labor are firmly convinced that these pilot programs would exacerbate the backlog problem rather than help to ameliorate it. For example, the 30 case limit could very well undermine expedited boards on which arbitrators hear dozens of less complex or less significant cases over a two or three day period. Instead of hearing 60 cases in a two-day session, the arbitrator would be restricted to only 30 cases in two separate one-day sessions resulting in an increase in both NMB costs and the time required to resolve the cases.

Similar detrimental results would flow from the 10 case travel limit. For example, at the urging of the Section 3 Committee, parties often arbitrate issues or lead cases to resolve disputes that could lead to hundreds of continuing grievances. These types of arbitrations are often complex and hearing a single case may require an entire day. While these types of lead case or issue arbitrations are clearly beneficial to the parties and the NMB in terms of time and expense, they would be thwarted by the ten case travel rule. Moreover, certain smaller carriers and unions may not generate ten cases in an entire year and it would be grossly unfair to make a dismissed employe wait for a year or longer to have his case heard simply because there were not nine other cases to list on the docket. **The Section 3 Sub-Committee recommends that the case load (30 docketed cases) and arbitrator travel (10 case minimum) pilot programs should be permanently abandoned and that the legitimate concerns of the NMB that these pilot programs were designed to address can be better addressed by the various recommendations set forth above.**

SUMMARY AND CONCLUSION

The Section 3 Sub-Committee is convinced that any successful efforts to improve grievance handling and reduce case backlogs in the railroad industry will require open-minded and collaborative efforts by labor, management and the NMB, as well as the arbitrator community in some instances. It is in that spirit that we have recommended the following:

- The Parties Should Continue To Seek A Supplemental Appropriation, Perhaps A "No-Year" Appropriation, To Address The Current Backlog. In The Future, The NMB Should Consult With Labor And Management To Determine Appropriate Section 3 Budgets Sufficient To Address Pending Cases And Anticipated New Cases.

- The NMB Meet With The Parties And A Representative Of The Arbitrators To Consider Ideas For Revisions To Current Procedures For Allocating Travel, Hearing And Writing Days To Address The Concerns Identified Above. Moreover, The NMB Should Once Again Provide Arbitrator Case Load Reports To Designated Labor And Management Advocates As It Did In The Past.

- The Parties And The NMB Should Periodically Monitor Case Loads So That If Backlogs Begin To Develop Between Specific Parties, Efforts Can Be Made To Determine Causes And Solutions. And, We Recommend That The Parties And The NMB Jointly Plan Periodic Conferences To Examine Various Means To More Effectively Manage The Number Of New Cases Entering The System.

- The Services Of Appropriate NRAB Labor And Carrier Members Should Be Utilized Informally By The NMB As An Expert Resource In Periodically Evaluating Arbitrator Practitioner Charges.

- Future Section 3 Budget Allocations Should Take Into Account Both The Amount Needed To Resolve Existing And Anticipated Cases As Well As Providing For An Increase In The Arbitrators' Daily Rate. Moreover, As Recommended Above, The Parties, The NMB And A Representative From The Arbitrator Community Should Meet To Consider Suggestions For Appropriate Revisions To Travel, Hearing And Award Writing Authorization Policies.

- The Case Load (30 Docketed Cases) And Arbitrator Travel (10 Case Minimum) Pilot Programs Should Be Permanently Abandoned Because The Legitimate Concerns Of The NMB That These Pilot Programs Were Designed To Address Can Be Better Addressed By The Various Recommendations Set Forth Above.

The Section 3 Sub-Committee suggests that the specific manner in which these recommendations should be implemented should be the subject of discussion at the March 13, 2007 Section 3 Meeting.

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

VIA Facsimile

November 21, 2006

Steven V. Powers
BMWED/IBT
150 S. Wacker Drive, Suite 300
Chicago, IL

Kenneth Gradia
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C.

Gentlemen:

The National Mediation Board (NMB) has placed on its web site, notice informing concerned parties that the NMB has suspended its current pilot program pending a study and recommendations by the members of the Section 3 Working Group on January 15, 2007.

As per our agreement, the recommendations should deal with the issues addressed by the NMB pilot program which address the backlog of cases and the underutilization of our Roster of Arbitrators. The Government Performance and Results Act (GPRA) mandate the efficient use of taxpayers' monies. GPRA is about results and effectiveness. The reduction of the backlog is the NMB's mandated objective under GPRA. The President's Management Agenda requires that the NMB improve its performance in these areas. The NMB's efforts have been directed to reducing the backlog which would result in a more efficient Section 3 process meeting the Railway Labor Act's objective of the prompt resolution of minor disputes.

I want to make clear to you as the respective leaders of the Section 3 Working Group that in order for your report to be effective it should contain concrete recommendations to reduce the backlog which is presently about 5,000 cases.

Thank you for your efforts so far.

Sincerely,

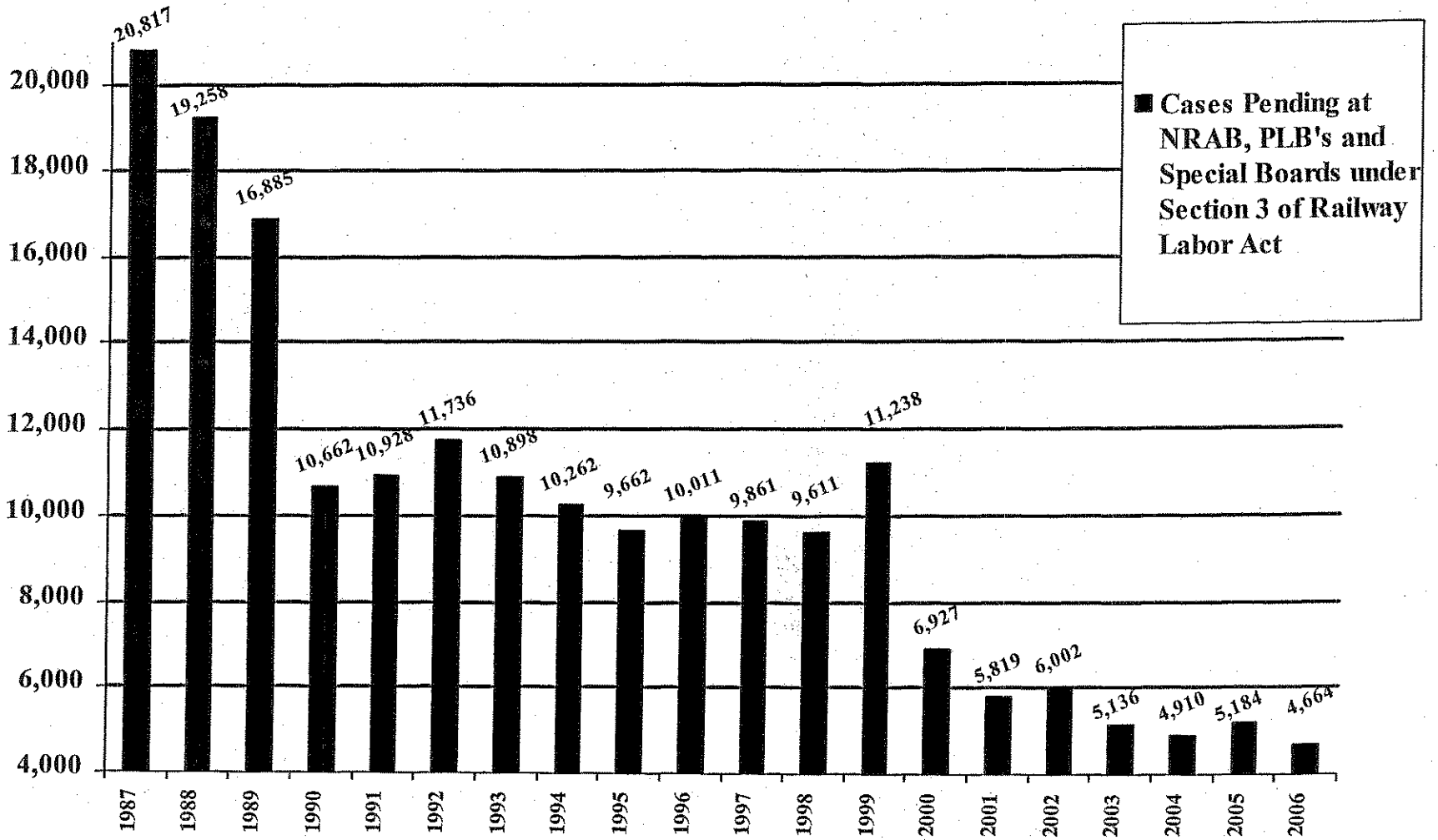
Harry R. Hoglander

Harry R. Hoglander
Member, National Mediation Board

ATTACHMENT "A"

ATTACHMENT "B"

SECTION 3 BACKLOGS 1987 – 2006



Source: Cases Pending Statistics are taken from the NMB Annual Reports

March 8, 2006

Mr. Robert F. Allen, Chairman
National Railway Labor Conference
1901 "L" Street, N.W.
Suite 500
Washington, DC 20036

Dear Mr. Allen:

This is in reference to the February 9, 2006 meeting of the Section 3 Committee where you proposed that rail labor and management engage in a joint lobbying effort to obtain additional funding for arbitration under Section 3 of the Railway Labor Act.

At the Section 3 meeting, the National Mediation Board expressed concern because the trend showing a steady decline in the number of backlogged Section 3 cases had been reversed. NMB records show that the number of cases pending in various Section 3 tribunals increased from 4,910 at the close of FY 2004 to 5,184 at the close of FY 2005. Moreover, the NMB reported that preliminary statistics for 2006 indicated that the number of backlogged cases was continuing to climb. You astutely pointed out that all funds appropriated for Section 3 arbitration were being expended each year and proposed that rail management and labor undertake a joint lobbying effort to obtain additional appropriations for Section 3 arbitration.

We appreciate your commitment to lobby for addition Section 3 funding and fully support a joint labor/management effort on this matter. After carefully balancing Section 3 funding needs with practical realities, we believe we should jointly seek a supplemental appropriation of $750,000 for FY 2006 and an additional appropriation of $1 million above and beyond the normal Section 3 budget request for FY 2007.

It is also our belief that the parties, working through the Section 3 Committee, have made significant progress in improving the efficiency of Section 3 procedures and reducing case backlogs. Consequently, we are committed to reactivating the Section 3 Committee and working with the rail carriers to further improve the Section 3 process and reduce case backlogs.

ATTACHMENT "C"

We have designated Section 3 Committee Labor Chairman Robert Scardelletti as our spokesman on this matter and ask that you contact him at your earliest convenience to coordinate our joint lobbying efforts.

Sincerely,

Alan Scheer
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

Edwin D. Hill
International Brotherhood of Electrical Workers

George J. Francisco, Jr.
National Conference of Firemen and Oilers, SEIU

Don M. Hahs
Brotherhood of Locomotive Engineers & Trainmen, A Division of the Rail Conference, IBT

Mark Filipovic
International Association of Machinists And Aerospace Workers

Freddie N. Simpson
Brotherhood of Maintenance of Way Employes Division - IBT

Dewey Garland
Sheet Metal Workers International Association

W. Dan Pickett
Brotherhood of Railroad Signalmen

F. Leo McCann
American Train Dispatchers

Gary Maslanka
Transport Workers Union of America

R. A. Scardelletti
Transportation Communications International Union

Isaac Monroe
Hotel Employees and Restaurant Employees International Union

Paul C. Thompson
United Transportation Union

Attachment:

August 28, 2008 Comments of the Teamsters Rail Conference re Proposed Changes to NMB Representation Manual

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

25 Louisiana Avenue, NW
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C. THOMAS KEEGEL
General Secretary-Treasurer

202.624.6800
www.teamster.org

August 28, 2008

Mary L. Johnson, Esq.
General Counsel
National Mediation Board
1301 K Street, N.W.
Suite 250E
Washington, D.C. 20572

Re: Comments of IBT Rail Conference to NMB's Proposed Revisions to Its Representation Manual

Dear Ms. Johnson:

On behalf of the IBT Rail Conference, comprised of the Brotherhood of Locomotive Engineers and Trainmen and the Brotherhood of Maintenance of Way Employes, who represent 70,000 men and women employed in the railroad industry, I am submitting the following comments concerning the Board's proposed revisions to its Representation Manual.

Section 2.4 Eligibility List

The Board has proposed to revise Section 2.4 with the addition of the following language:

> **The carrier's failure to provide a substantially accurate list of potential eligible voters may be considered interference with the NMB's election process and therefore grounds for setting aside the election.**

The Rail Conference supports the addition of this language to the Manual as it will clarify the obligation of carriers in providing eligibility lists to the Board. It is appropriate to place carriers on notice of their duty to ensure that all affected employees in the unit are identified at the outset of the representation case. We believe the rule should be read to preclude overinclusiveness as well as underinclusiveness. The Rail Conference also believes that this requirement of accuracy should run both to the carrier's

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Special Assistant to the President for Special Projects, Director, Rail Conference, USA
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obligation to identify eligible individuals in the craft or class and to accurately identify classifications within the craft or class. Finally, this "substantially accurate" standard should be applied to the carrier's obligation to provide an address list for eligible voters since the accuracy of that list is essential if eligible employees are to have a meaningful opportunity to participate in the election process.

Section 3.3 Acceptance of additional authorizations/Deadline for intervening

The Board proposes adding the following language to Section 3.3:

> An applicant or intervenor may present the Investigator with additional authorizations up until 4 p.m., Eastern Time, on the day the Investigator receives the applicable list and signature samples. **The delivery of an applicable list and signature samples ends the opportunity for the applicant to supplement its authorization cards.**
>
> **The Investigator will not accept applications or additional authorization cards from intervenors after 4 p.m., Eastern Time, on the day an applicable list of potential eligible voters and signature samples are delivered.**

We read these changes as seeking to clarify the deadline for submission of additional authorization cards and applications to intervene. But the current language of the Representation Manual fails to clearly establish the status of intervenors. We recommend the Board first establish the standing of intervenors under Section 1.2 of the Manual by adding a subsection that reads, "An organization or individual may intervene upon a 35 percent showing of interest following the submission of an application." Having addressed the standing of intervenors under Section 1.2, the Board may then revise Section 3.3 to address only additional authorizations (as it does now). The second sentence of Section 3.3 could add "or intervenor" after "applicant"; and the third sentence could be deleted.

These changes would make clear the status of intervenors under the Manual, as well as the filing deadlines for supplementing a showing of interest.

Section 8.2 Challenges and objections

The Board proposes to revise Section 8.2 by adding:

> same job titles, etc. should be listed together. All challenges or objections **will be resolved by** substantive evidence. **Examples of substantive evidence include, but are not limited to: official carrier records; payroll statements; human resources forms; and, sworn declarations attesting to specific facts. When considering eligibility of employees and personnel matters, substantial weight will be given to the carrier's evidence as it maintains the official records relating to benefits, salary, payroll records, and job descriptions. Unsupported allegations will not be considered.** Questions or issues concerning craft or

The Rail Conference opposes the suggested language to the extent it purports to grant "substantial weight" to the records of a carrier. Granting a presumption in favor of a nonparty is inappropriate and possibly contrary to law. Further, we do not understand the meaning of the language to the extent it asserts that a carrier "maintains the official records relating to benefits, salary, payroll records and job descriptions." Official records of whom? Organizations similarly maintain records in the course of their business (for example, in the recent representation matter involving the mechanics and related employees of United Airlines, the Board considered the IBT's TITAN system records as official records.) There is no reason to grant a nonparty's business records greater weight than those of a party. There is also no reasonable basis for granting a nonparty's records greater weight than direct evidence from an employee pertaining to that employee's eligibility.

At the least, the NMB should require carriers to demonstrate reasonable efforts to maintain the currency and accuracy of their records. And in the case when a carrier alleges an employee is employed by another subsidiary within a holding company structure, the carrier should carry a substantial burden of demonstrating the employee's change of employer was a deliberate act on the part of the employee and not simply a bureaucratic reshuffling of payroll records. Moreover, any alleged transfer of employees between corporate subsidiaries after the laboratory conditions attach should establish a presumption that the employees were transferred to deny to them the opportunity to participate in the dispute; thereby interfering in their self-organization rights under the Act.

Section 9.2 Eligibility

The Board proposes to add the following language to Section 9.2:

> All individuals working regularly **and continuously** in the craft or class on and after the cut-off date are eligible to vote in an NMB representation election. Employees may not vote in more than one election at the same time.
>
> **A trainee will be considered eligible if the Carrier provides substantive evidence that the individual is on the payroll, receives benefits, accrues seniority, and has performed work in the craft or class prior to the cut-off date. In the absence of demonstrated evidence of performance of work subject to the direction of the Carrier, accrual of seniority and receipt of pay and benefits will not be determinative of eligibility. Carriers should identify any trainees upon submission of the List of Potential Eligible Voters.**

The Board does not explain its intention behind the use of the word "continuously." Where seasonal employees are in question, the Board has in prior cases decided eligibility based on an expectation of reemployment. Since nonunion employees are "at-will" (and may technically have no expectation of reemployment under a strict reading of at-will employment), the Board's proposed requirement could have the effect of disenfranchising employees from voting in the representation election if the criteria for expectation of reemployment are not carefully established.

The Board has not identified what criteria it will apply in determining whether such expectation of reemployment exists. For example, will it use fact-based criteria based on the actual practices of the employer or will it allow the employer to simply assert that no employee has an expectation of reemployment because the employees are at-will? This latter approach would be inappropriate. If a fact-based inquiry is used, there is the question of what standard is required to demonstrate an expectation of reemployment (e.g., a percentage of the workforce must be reemployed from year to year or that the individual in question must have been reemployed in the past.)

As to the requirement for trainees to have performed work in the craft or class, the Board does not indicate whether it intends to apply a uniform definition in both the rail and airline industries. We recommend, for the railroad industry, the Board establish an eligibility requirement that

an employee be engaged in productive work in the craft or class under the rates of pay, rules and working conditions governing the craft or class.

Section 9.205 Leaves of Absence

The Board's suggested revision adds the following to Section 9.205:

> Employees on authorized leaves of absence including military leave, leave for labor organization activities, or authorized sick leave **are eligible if they retain an employee-employer relationship and have a reasonable expectation of returning to work**. Employees receiving disability payments are eligible if they retain an employee-employer relationship and have a reasonable expectation of returning to work. Employees working in another craft or class, working for the carrier in an official capacity, or working for another carrier are ineligible.

For a craft or class already covered by a collective agreement, leaves of absence are established either by CBA or by statute (e.g., FMLA, USERRA, or state law.) The role of a leave of absence in the nonunion environment, however, is limited to statutory leaves of absence and any LoAs established by employer handbooks. The latter element opens the potential for employer abuse; a carrier could unilaterally change the reemployment rights of employees on LoA upon learning of an organizing campaign in an effort to expand the group of eligible voters to defeat a vote in favor of organization.

The Board does not identify its suggested criteria for establishing a "reasonable expectation of returning to work." For unionized groups, the Board has taken the position that if a collective bargaining agreement permits an indefinite right to recall, then employees on furlough or LoA remain eligible. Applying such a deferential rule however, is inappropriate for LoAs established unilaterally by an employer.

We believe that the Board should not presume eligibility of those on leave of absence where such LoA is established by an employer, rather than by law or collective bargaining agreement. To the extent the Board considers the eligibility of employees on a leave of absence under an employer handbook, it should not recognize such leaves if they are of longer than 12-months duration. Further, the NMB should not grant deference to the language of employer handbooks regarding the reemployment rights of employees on leave of absence, but should require employers to show by historic practice that employees on LoA retain reemployment rights. Finally, the Board should not consider changes to

recall or reemployment rights made by an employer during the laboratory period (i.e., after it learns of an organizing effort.)

Section 19.701

The Board proposes to revise Section 19.701 by adding the following:

> **Where there is a certified representative on one of the affected carriers but no certified representative on the other(s), the Board will exercise its discretion and extend the certification only where there is more than a substantial majority, as determined by the Board. Authorization cards may only be used to supplement the showing of interest necessary to trigger an election; they may not be used towards getting a certification extended.**

This proposed revision applies where one carrier to a merger is nonunion in the craft or class. The Rail Conference first notes that there is no basis under Section 2, Ninth of the Act for distinguishing between represented and unrepresented employees in the question of representation. The Act refers generically to "employees" under Section 2, Ninth, a term defined in Section 1, in relevant part, to mean "every person in the service of a carrier." Put simply, the Act does not permit the Board to establish differing standards for the certification of representatives for represented and unrepresented employees.

The standard proposed by the Board is itself unsound. The phrase "more than a substantial majority" does not establish any objective basis for determining the number of employees required to support representation; representatives and employees would have no way of knowing what threshold applied in a given case. This standard is contrary to Section 2, Ninth's requirement of "a majority"—historically interpreted to mean 50 percent plus one of craft or class employees in favor of representation—since it implicitly assumes a demonstration of majority status that is nonetheless considered inadequate for certification because it is not "more than a substantial majority." Even apart from the imprecision of the term "substantial majority", Section 2, Ninth of the Act does not permit the Board to establish a requirement for certification different from that prescribed by the Act; it charges the Board only to investigate the choice of representative of the majority of employees in the craft or class. Section 2, Fourth is similarly clear, "*The majority* of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

As the Board cannot contravene the Act in establishing rules for its Representation Manual (reflected in the District of Columbia Circuit's ruling in *Railway Labor Exec. Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), nullifying the Board's original merger procedures), the Board cannot establish differing standards for represented and unrepresented employees, when the Act makes no such distinction. It also may not establish a greater than majority requirement for certification in the Representation Manual contrary to Sections 2, Fourth and Ninth's express language.

Further, Section 2, Ninth only permits a person seeking to represent the craft or class to initiate a representation dispute, as made clear in the *RLEA* case. The Board only has authority to investigate the status of a representative after a dispute has been initiated. The statute nowhere permits the Board to *sua sponte* repudiate a certification previously issued. The Board's proposed change would effectively permit the Board to investigate and repudiate a valid certification even though a majority of employees in the combined craft or class have determined to be represented. It may also permit carriers to repudiate the majority status of a representative. It would put the industry in the untenable position it occupied before the Board's original merger procedures in 1987.

The IBT Rail Conference believes that conformity to the Act requires the Board to adopt a uniform rule for represented and unrepresented employees for the determination of representation questions in merger situations. The NMB should maintain its current (and historically-applied) rule that where a labor organization is the certified representative for a sufficient number of employees to constitute a majority of the combined craft or class, and no party files an application for intervention to represent the combined craft or class within the permitted period for intervention, the NMB will certify the majority union.

Thank you for your consideration of these comments.

Sincerely,

John F. Murphy,
Director, Teamsters Rail Conference

cc: E. Rodzwicz, Brotherhood of Locomotive Engineers and Trainmen
F. Simpson, Brotherhood of Maintenance of Way Employes Division
R. Wilder, Baptiste & Wilder, P.C.

Attachment:

September 2, 2008 Comments of the International Brotherhood of Teamsters Airline Division re Proposed Changes to NMB Representation Manual

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

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General Secretary-Treasurer

202.624.6800
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September 2, 2008

Mary L. Johnson, Esquire
General Counsel
National Mediation Board
1301 K Street, N.W.
Suite 250 East
Washington, DC 20005-7011

Re: Comments on NMB's Proposed Changes to Representation Manual

Dear Ms. Johnson:

The International Brotherhood of Teamsters Airline Division ("IBT-AD") has reviewed the National Mediation Board's proposed changes to its Representation Manual and provides the following comments.

Section 2.4 – Eligibility List

The IBT-AD welcomes the Board's proposed additional requirement that carriers must provide a substantially accurate list of potential eligible voters. As we read the proposed rule, the "accuracy" requirement would preclude both over-inclusiveness and under-inclusiveness. We suggest, however, that the Board's proposed "accuracy" standard also expressly apply to the carrier's obligation to provide an address list for eligible voters. Additionally, in order to better accommodate the Board's accretion policies, we suggest that the Board's "accuracy" standard should apply to the carrier's obligation with respect to not just identifying eligible individuals in the craft or class but also to accurately identifying classifications within the class or craft.

Section 3.3 – Acceptance of Additional Authorizations/Deadline for Intervening

The Board's proposed changes to Section 3.3 apparently seek to clarify the deadline for the submission of additional authorization cards and for applications to

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intervene. As drafted, these proposed changes are confusing. Inasmuch as the Board's Representation Manual does not actually identify intervenors and does not specify what rules apply with respect to them, we suggest that the Board add a subsection to Section 1.2 stating that "An organization or individual may intervene upon a 35% showing of interest following the submission of an application." The addition of such a subsection would enable the Board to avoid "introducing" intervenors in Section 3.3's "deadline" provisions. Instead, Section 3.3 could, as it does now, address only additional authorizations. The second (proposed) sentence could then simply add "or intervenor" after the word "applicant," and the third sentence could be deleted. In so doing, the status of intervenors would be made clear under the Manual.

Section 8.2 – Challenges and Objections

The Board's proposed changes regarding challenges and objections are very troubling and should be reworked. In this regard, we are particularly concerned that, with respect to matters involving employee eligibility and personnel matters, the Board intends to afford "substantial weight" to the records of a carrier. Such deference to an "interested" nonparty in a representation dispute is not appropriate and it is not warranted. Although active employees may have an incentive and the wherewithal to attempt to ensure the accuracy of their employer's records, the employer may or may not follow through to ensure that its records are accurate. Moreover, the carrier's records and information relating to furloughed employees are no more reliable than those that are maintained by the affected employees or other organizations that maintain personnel/employment-related records in the normal course of business. Indeed, to the extent than a presumption should be accorded to any information and records relating to employment-related matters, it should be accorded to the direct evidence provided by the affected employees themselves. At the very least, the Board should require carriers to demonstrate reasonable efforts to maintain the completeness and accuracy of the records.

Section 9.2 – Eligibility

The Board's proposed changes to Section 9.2 of the Manual require clarification. First, we do not know what the Board intends by including the undefined word "continuously" in the first sentence. Second, with respect to trainees, we are not certain whether the Board intends that its proposed eligibility rule is supposed to be applied uniformly in both the rail and airline industries. With respect to the airline industry, we suggest that the Board maintain its current rule requiring that an employee have completed training and be performing work in the craft or class under the rates of pay, rules and working conditions applicable to the craft or class.

Section 9.205 – Leaves of Absence

The Board should be awarded a high mark for proposing an eligibility standard for employee on leaves of absence, but its proposed solution is deficient. The problems

with the Board's proposed two-prong standard (retain an employer-employee relationship and have a reasonable expectation of return to work), are that the terms are not defined, may be applied differently in union and non-union settings, and are subject to improper gamesmanship, mischief and manipulation.

First, leaves of absence granted by carriers on non-union properties are limited to statutory leaves, such as FMLA and USERRA, and "hand-book" leaves of absence granted to at-will employees. "Hand-book" leaves of absence granted to at-will employees are ripe for employer abuse. Upon learning of an organizing campaign, for example, a non-union carrier could either extend a leave of absence to an at will employee whom it perceives to be against union representation, or it could shorten the leave of absence of an at-will employee whom it perceives to be a union supporter. It is no answer to suggest that such conduct arguably violates the RLA, because (1) the time and expense of challenging the conduct in court may be prohibitive, and (2) the chilling effect of the conduct could permeate the unit regardless of the outcome of any such litigation.

Second, the Board's standard for establishing a "reasonable expectation of returning to work" is not defined. For unionized properties, the Board has taken position that if a collective bargaining agreement permits an indefinite right to recall, then employees on furlough or leave of absence remain eligible. Such an open-ended, across-the board rule does not seem appropriate, particularly when it results in grants of eligibility to septuagenarians, for example, who may have been furloughed twenty or more years ago, and all of but a handful of the positions of those individuals have been eliminated. And, such an open-ended, deferential rule is even less appropriate in a non-union setting, where the Employer reserves total discretion to set the terms of any such furlough or leave of absence.

The current state of affairs as it applies to eligibility for furloughed employees and employees on leaves of absence is a tangled mess that requires greater thought and attention than that which has been put into the change proposed to Section 9.205. We urge the Board to conduct a thorough review of the situation and to propose comprehensive eligibility rules addressing it. In the meantime, at least as stop-gap measure until the Board is able to more thoroughly address the overall situation, the Board should not presume eligibility of employees on leave of absence where such leave is not established by law or collective agreement. Leaves of absence under employer handbooks should not be recognized if they are longer than a reasonable duration of, perhaps, twelve months. Moreover, the Board should not automatically grant deference to the provisions of an Employer handbook, but should instead engage in a more searching inquiry that requires employers to demonstrate by historic practice and records that employees on leave of absence retain reemployment rights. Finally, the Board should not consider changes to recall or reemployment rights made by an employer during the laboratory period.

Section 19.701 – Single Carrier Procedures

We believe that the Board's proposed changes to its single carrier procedures run afoul of the RLA and should be scrapped. Our concern, like that of many others, focuses in large part on the Board's proposed imposition of a standing requiring "more than a substantial majority" of union-represented employees in order to extend a union certification when there has been a merger of a non-union property with a union property.

As a threshold matter, the Board does not define the operative terms of this purported standard and, as a result, permits it to exercise unbridled discretion in single carrier cases involving non-union and union mergers and/or consolidations. Such discretion is subject to accusations of abuse, and serves only to undermine the credibility of the Board and the representation process itself.

Even if the Board were to define the operative terms, however, the standard itself would still be fatally flawed. The Board's purported standard for determining representative status relates to the actual measurement itself, not simply to the method of measurement. In so doing, the Board's purported standard seeks to impose a measurement of "more than a substantial majority," in order to extend or maintain a certification in a union/non-union merger/consolidation. Much like a rose by any other name, the Board's standard equates to a "super-majority" measurement and is still reeks of illegality. In this regard, the Board's purported super-majority standard is at odds with RLA Section 2, Ninth's requirement that a simple "majority" of employees in the craft or class support representation. As such, the Board's purported super-majority rule contravense the RLA and must be scrapped. See Railway Labor Exec. Ass'n v. NMB, 29 UF.3d 655 (D.C. Cir. 1994)(nullifying the Board's original merger procedures).

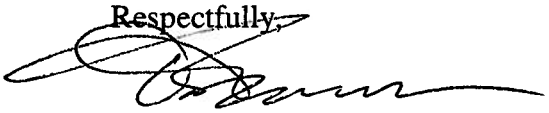
Section 2, Ninth, moreover, only permits a person seeking to represent a craft or class to initiate a representation dispute. The Board, in turn, only has authority to investigate the status of a representative after a dispute has been initiated. The RLA does not allow the Board, *sua sponte*, to repudiate a certification that was previously issued. The Board's proposed single carrier procedural changes, however, would effectively allow the Board to investigate and repudiate a valid certification without a person or organization ever first having initiated a representation dispute. It would also enable carrier to repudiate the majority status of a representative. Such results are inconsistent with the RLA and its underlying policies.

Finally, any argument that that Board's purported standard does not contravene the RLA but only provides a mechanism for employees to engage in a Board-supervised representation rests purely on ideological hokum. The sad reality is that the RLA and its election procedures are stacked against union representation. The exercise of unbridled regulatory discretion not to extend a certification or even to repudiate a certification that is supported by a majority of the craft or class will even more greatly upset the delicate and finely balanced equilibrium that the RLA was intended to maintain. The Board

should, therefore, scrap its proposed change to Section 19.701 of the Manual. The Board should instead apply the same rules as it does when only unionized properties are involved in a merger/consolidation: where a labor organization is the certified representative of employee who constitute a majority of the combined craft or class and no party files an application for intervention to represent the combined craft or class within the permitted time period, the Board should certify the majority union.

Thank you again for the opportunity to comment on the Board's proposed changes to its Representation Manual. Please do not hesitate to contact me if you have any questions.

Respectfully,



David P. Bourne, Director
Airline Division

Attachment:

September 3, 2008 Comments of the Brotherhood of Locomotive Engineers and Trainmen and the United Transportation Union re Proposed Changes to NMB Representation Manual

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united transportation union
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September 3, 2008

Via Facsimile (202) 692-5085 and U.S. Mail

Ms. Mary Johnson, General Counsel
National Mediation Board
1301 K Street, N.W.
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Washington, DC 20005-7011

Re: BLET's and UTU's Comments on Proposed Representation Manual Changes

Dear Ms. Johnson:

United Transportation Union ("UTU") and Brotherhood of Locomotive Engineers and Trainmen ("BLET") respectfully submit their comments in response to the National Mediation Board's ("NMB") July 15 and July 31, 2008 Notices regarding the NMB's Proposed Revisions to its Representation Manual.

Proposed Rule 9.2. NMB proposes to amend Rule 9.2 with respect to eligibility of trainees to vote in representation elections. Specifically, the amendment would provide that a "trainee will be considered eligible if the Carrier provides substantive evidence that the individual is on the payroll, receives benefits, accrues seniority, and has performed work in the craft or class prior to the cut-off date." Training to become a locomotive engineer is a lengthy process, which is governed by Federal Railroad Administration regulations promulgated at Part 240 of Title 49 of the Code of Federal Regulations.

Frequently, the training program for a locomotive engineer extends many months beyond the point at which a trainee is awarded and begins to accumulate seniority as a locomotive engineer. During this period, the trainee is in the "on-the-job training" segment of the training program and does not perform work as a locomotive engineer *per se*. This is a function of the sizeable territories over which locomotive engineers are required to qualify and varies in direct correlation to the size of a particular seniority district. BLET and UTU strongly urge NMB to

clarify that the clause "has performed work in the craft or class" includes performing work as a trainee.

Proposed Rule 19.701. UTU and BLET are concerned about the NMB's controversial proposal that may make it harder for workers to retain their union membership in certain airline and railroad mergers. It is particularly troubling that the Board has taken this step shortly after the announcement of the largest proposed airline merger in American history and at a time when several airlines are contemplating significant mergers. We strongly urge the Board to withdraw this troubling new proposal.

Under the Board's current rules and well-established case law, if a unionized class or craft from one airline or railroad is larger and "not comparable" in size to the class or craft performing the same work at the other airline or railroad in a merger, the former class or craft is automatically certified as the representative of all the workers on the merged airline or railroad. The Board has consistently held a unionized group of workers to be "not comparable" if it constitutes 65 percent or more of the merged group of workers.

On July 15, the Board proposed to amend Section 19 of its Representation Manual ("Manual") to change the procedures for a union to expand its certification after a merger occurs. Under the Board's new proposal, a union's certification would only be extended where that union's membership is "more than a substantial majority" of the merged group, a standard that the Board has never used which appears to be more difficult to satisfy than the current "not comparable" standard. The Board's public announcement provides no explanation for why it proposes to adopt this standard.

Under the proposed Section 19.701, the new threshold for extending certification, as noted, is "more than a substantial majority," and the Board determines what this percentage is, apparently on a case by case basis. This is, at best, an ambiguous, unknown standard with which parties will have no experience, as opposed to the long-settled and well understood comparability analysis that has applied heretofore. The new standard will grant the Board unprecedented discretion to extend or deny certification to unions involved in mergers.

This amendment to the Representation Manual which provides the Board unprecedented discretion appears to be a roundabout way of empowering the NMB to investigate a carrier's representative status on its own initiative. Obviously, as was decided in *RLEA v. NMB*, 29 F.3d 655 (D.C. Cir. 1994), the plain text and legislative history of Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, prohibit the Board from investigating a representation dispute except upon the request of the employees involved the dispute. Accordingly, this proposed modification of the Merger Procedures again poses all sorts of problems for the Board and should be withdrawn.

UTU and BLET also are troubled that the Board would consider adopting a new and uncertain standard for when a union may extend its certification after a merger. For nearly 20 years, the Board has consistently applied the current "not comparable" standard to determine whether a union continues to enjoy majority support from employees subsequent to a merger. Imposing an ambiguous and potentially more difficult standard for automatically extending a certification would cause many covered employers and unions to engage in costly and contentious representation fights when majority union representation has already been established.

When a union represents a majority of a combined class or craft after a merger, the Board in the past would err on the side of extending union certifications and collective bargaining agreements. Losing a union's certification after a merger is exceptionally adverse for the workers, who lose their collectively-bargained wages, job security, and benefits, and is disruptive to stable labor relations. Therefore, any rule change that makes it harder for workers to retain the union's certification – essential to maintaining those contractual terms and conditions of employment – is a reason for grave concern for any represented aviation or railroad worker and the public at large. Such a change could even embolden carriers to merge to eliminate their employees' union membership and impose wage and benefit cuts. While such carriers may see very short-term advantages from reduced labor costs when workers no longer have a voice on the job, the public is the medium and long-term loser. The public will bear the costs associated with protracted labor disputes and a demoralized, less effective workforce, due to the disruption and the assault on worker's rights and terms of employment that the proposed Board rule is inviting.

UTU and BLET are also very concerned with the Board's decision to add a final sentence to Section 19.701 in its July 31, 2008 notice, regarding the use of authorization cards in extending a union's certification. We understand that the Board intends for this language to codify its current policies, which allow a labor organization to extend its certification through a check of authorization cards or voluntary recognition, when the carrier consents to such procedures. Nevertheless, it is unclear to us whether the proposed language adequately conveys the Board's current policies, even after the Board modified the language on July 30. Moreover, since a labor organization may indeed extend its certification through a check of authorization cards, we fail to see why the Board would adopt language stating that "[a]uthorization cards … may not be used towards getting a certification extended."

Finally, BLET and UTU understand that two of the Board members have expressed the view that this modification is not intended to work a substantive change in relation to its settled "comparability" analysis concerning the situations in which a certification can be extended without an election. In that case, the rule change is needless, and can only sow confusion and suspicion. As a result, UTU and BLET ask that this proposal be withdrawn.

Proposed Rule 13.304-2(5). UTU and BLET find troubling on several levels the Board's proposal to change the longstanding Representation Manual provisions dealing with

Void Ballots in proposed Section 13.304-2(5). This new provision would, for the first time, put the Board in the position of divining the intent of the voter by requiring a determination as to whether an otherwise facially valid vote should not be counted because the representative selected was not actually intended by the voter to serve as a true representative in cases where the vote was for "a current political candidate or other widely known individual …." This proposed rule is unclear on its face. It would sow unneeded confusion in the process. Voters or organizations may be unclear, for example, as to what the terms "current political candidate or other widely known individual" means and how they would be applied by the Board. For example, is the rule talking about public political candidates for federal, state or local elected office, and if so, which ones, or is the rule talking about union political leaders? This standard is far too vague and would provide the Board too much discretion to negate otherwise clearly valid votes for representation.

The substantive intent of the rule change is even more troubling, however, than its wording. The rule would mark a significant departure for the Board, which has for decades been careful not to engage in the subjective task of divining voter intent concerning the bona fides of a chosen representative. Up to this point, the Board has appropriately determined only the facts of whether the voter is eligible and has in fact clearly expressed a desire for some form of representation. Indeed, in every election, the parties know well and ensure that voters well understand that any valid ballot cast is a vote for representation. There is no need to make the fact-finding role of the Board any more subjective than is necessary to determine whether the voter has clearly expressed a desire for some form of representation. If the Board decides that it must engage in such subjective analysis to determine whether to disqualify some otherwise valid votes for representation, the Board, to be evenhanded, should also determine whether non-voters were improperly influenced by management into not returning a ballot, for example, which is something that the Board typically does not do.

In short, the confusing and subjective standards introduced by this rule change are unnecessary, and will lead to unnecessary and avoidable questions concerning the Board's neutrality in the election process. UTU and BLET believe that the Board's existing rules and practice in this area are sound, well understood, and have served the Board and the parties well for many years. They should not be changed.

Conclusion. UTU and BLET ask the Board to reconsider its proposals to change Rule 19.701 and Rule 13.304-2(5) and withdraw them. BLET and UTU also ask the Board to interpret Rule 9.2 in the manner suggested by these parties. In addition, UTU and BLET adopt and incorporate by reference the arguments made by the AFL-CIO's Transportation Trades Department in its comments submitted in this proceeding regarding the NMB's proposed changes to the Representation Manual.

Respectfully,

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