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Rail Labor Division

STATEMENT OF
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BEFORE THE SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES, EDUCATION AND RELATED AGENCIES
ON THE
NATIONAL MEDIATION BOARD'S PROPOSAL TO IMPOSE SECTION 3 FILING FEES (NMB DOCKET NO. 2003-01N)

APRIL 15, 2005

On behalf of the Rail Labor Division (RLD)[1] of the Transportation Trades Department (TTD), I want to thank you for providing rail labor with the opportunity to submit this statement as the Committee considers its FY 2006 appropriations bill for agencies under its jurisdiction. While the labor movement has a number of issues that are covered in this bill, I would like to focus my comments on a proposed rulemaking issued last year by the National Mediation Board (NMB) that would, among other things, impose filing fees for Section 3 arbitration services for rail workers.

At the outset, I want to convey the RLD's vehement opposition to the Board's proposal.[2] The imposition of fees for the NMB's performance of administrative functions in connection with statutorily-mandated arbitration processes under Section 3 of the Railway Labor Act (RLA or Act) is unlawful and is nothing more than a hostile federal tax on our members' right to speak out on critical work-place issues.

The Board has no authority to impose these fees and in fact to do so would violate the Act. In the rail industry, workers are prohibited from striking over so-called "minor disputes" – those that go to the interpretation or application of a collective bargaining agreement. Instead, these disputes are subject to mandatory arbitration. In exchange for the loss of the right to strike in these instances, Congress provided for government-paid arbitration. The original 1926 RLA did not require contract interpretation disputes to be arbitrated, and unions frequently resorted to strikes over unresolved issues. As part of the 1934 amendments to the RLA, rail labor gave up this right and agreed to binding arbitration in return for government-paid arbitration services. The Supreme Court subsequently affirmed that workers do not have the right to strike over minor disputes, citing the purpose and legislative history of the 1934 amendments to the RLA. For the NMB to now try and renege on this promise would not only violate the Act, but would upset the careful balance the RLA represents.

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[1] The RLD is comprised of the 12 rail unions in the AFL-CIO that together represent several thousand workers at freight railroads, Amtrak and commuter rail operations across the country. Attached is a list of RLD unions.

[2] It should be noted that the 35 affiliated unions of the TTD have also spoken out against this proposal. Attached at 2 is a policy statement adopted TTD Executive Committee condemning the Board's Section 3 filing fee initiative.

The proposed fees will deter the filing of arbitration of many valid claims, impede enforcement of agreements, and ultimately undermine collective bargaining agreements and the collective bargaining process. In short, contract terms that cannot be enforced are not meaningful. It must be remembered that collective bargaining and arbitration are parts of a single process. If resolution of contract interpretation disputes is thwarted, there will be more issues for term bargaining and more complicated negotiations and mediation. The inability to resolve disputes in arbitration will only add to the issues for term bargaining and will make it even harder for the parties to reach agreements.

The Board claims that the imposition of fees is necessary to clear the backload of Section 3 cases. I guess by this reasoning the voting lines we saw this past November can be solved by the imposition of a poll tax. Just discourage enough workers from participating in the process, then all of the so-called problems will go away. The Board can claim Section 3 is more efficient and in the process, the railroads get an upper hand over their employees and an even greater incentive to ignore the collective bargaining agreement. I understand why the railroads like this new deal – what's not to love from their perspective. But of course, the Board is not charged with serving the railroads' interest. It is charged with serving the public interest and quite simply this proposal doesn't even come close.

In fact, these fees could have the unintended consequence of actually exacerbating backlogs as carriers refuse to settle claims to force the unions to pay filing fees just to take cases to arbitration. In other words, the fees could have precisely the opposite effect as the NMB intended. In a public hearing held earlier this year, the Section 3 labor representatives told the Board that the effects of the proposed fees will fall most heavily, if not exclusively, on labor. The reality is that in labor relations, management acts and the union must grieve and arbitrate. As the RLA has been interpreted, management does not need to obtain an arbitrator's sanction before proceeding under a disputed interpretation of the parties' agreement. The result – we are typically the "plaintiffs" while management can simply act. If we disagree with management's interpretation of the agreement, we have to move the case to arbitration. This means labor, and not management, will typically be paying the fees the Board is seeking to impose.

After the Board released its proposal, some suggested that the filing fees could be imposed under 37 U.S.C. § 9701, the so-called user fee statute. However, even if the RLA itself did not preclude the proposed new filing fees, the Board did not even cite the user fee statute as a basis for the proposed rule, so it cannot now rely on the statute in adopting the rule. In any event, the user-fee statute would not support the proposal to charge parties for invocation of the statutorily-mandated Section 3 arbitration process. Again, the RLA requires the Board to cover Section 3 arbitration costs and § 9701 does not provide any basis for charging parties for the costs that the government is required to cover. Indeed, the Supreme Court has held that agencies may not levy charges that are effectively taxes; and they may not make assessments to generally defray the costs of their operations or further general policy goals. *National Cable Television Ass'n V. United States*, 415 U.S. 336, 341 (1974). But that is exactly what the Board is attempting to do in this case. Furthermore, the NMB has not established that the fees are actually for provision of specific services to individual recipients that are services of value – a key component of the user fee statute.

We of course are not alone in our opposition to this proposal. Over 125 members of the House of Representatives, including the Chair and Ranking Member of the Rail Subcommittee, and the Ranking Member of the full Transportation and Infrastructure Committee, have signed a letter to the Board urging it to reconsider the imposition of filing fees. And in last year's Labor-HHS Appropriations Conference Report, report language was included directing the NMB to hold hearings on the possible negative consequences of this proposal. While the Board has held just one hearing, the opposition from workers and even rail arbitrators to this initiative was clear.

Rail labor is prepared to work with the Board and the carriers on resolution of the issues that have been identified as problems with the current Section 3 processes. There is a long history of cooperation between rail labor, the carriers and government to make labor relations more effective. We have cooperated on amendments to the Act, and on administrative processes to improve collective bargaining processes and dispute resolution. The RLA was a negotiated statute; the 1934 amendments and other amendments were negotiated, or adopted with the consent of both sides. Significant changes have been made in the administration of Section 3 by joint committee recommendations and those recommendations have resulted in a dramatic reduction in case backlogs over the past two decades. We are prepared to work cooperatively to address current concerns just as we worked cooperatively in the past, and we are confident that such cooperation can continue to yield positive results.

But for cooperation to work, the Board must withdraw its filing fee proposal. It must be recognized that whatever problems exist in current processing of cases under Section 3, they cannot be addressed by unilateral action by the Board. This is true not only because of the legal and practical restrictions we have outlined, but because of the impact that such unilateral action will have on the Board's ability to perform its other functions that are central to its mission: mediation and representation determinations. The credibility and effectiveness of the Board in both of those functions depends on the perception that it is truly neutral. In fact, the Supreme Court has emphasized that the Board must maintain its neutrality and the confidence of the parties. If this Board takes sides, as it seems poised to do, its overall credibility and effectiveness will similarly be undermined. The Board cannot make rail labor pay for a basic dispute resolution mechanism that is fundamental to meaningful collective bargaining in this industry and then expect to be viewed as a neutral actor in its other functions.

We urge you to work with rail labor to ensure that the historic function of the Board with respect to covering all of the costs of administration of the Section 3 processes (other than the costs for partisan members and representatives), is maintained. Thank you for the opportunity to present our views on this important matter. We would happy to provide further information to the Committee upon request.

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Rail Labor Division

ATTACHMENT No. 1

RLD AFFILIATES

The following labor organizations are members of and represented by the Rail Labor Division of the Transportation Trades Dept, AFL-CIO

American Train Dispatchers Association (ATDA)

Brotherhood of Locomotive Engineers and Trainmen, IBT (BLET)

Brotherhood of Maintenance of Way Employes Division (BMWED)

Brotherhood of Railroad Signalmen (BRS)

International Association of Machinists and Aerospace Workers (IAM)

International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)

International Brotherhood of Electrical Workers (IBEW)

National Conference of Firemen and Oilers, SEIU (NCF&O)

Sheet Metal Workers International Association (SMWIA)

Transportation•Communications International Union (TCU)

Transport Workers Union of America (TWU)

UNITE HERE

ATTACHMENT No. 2

THE NMB'S FEDERAL TAX ON RAIL WORKERS

At the behest of the railroad industry, Bush appointees to the National Mediation Board (NMB) are poised to use the thin bureaucratic smokescreen of new "filing fees" to suppress rail workers from speaking out on critical issues of working conditions, safety, and pay. Transportation labor strongly condemns this egregious and misguided effort to silence workers.

For the first time in its history, the NMB is proposing unnecessary and unfair filing fees on Section 3 arbitration services for rail workers that are nothing more than a federal tax on an employee's right to speak out on critical workplace issues. The proposal is contrary to the Railway Labor Act (RLA), would unfairly tilt the balance of labor relations in favor of the railroads and would jeopardize the neutrality of the NMB. The NMB must withdraw this proposal and allow the parties – labor and management – to work cooperatively to address any problems with the current arbitration process.

In the rail industry, workers are prohibited from striking over so-called "minor disputes" – those disputes that go to the interpretation or application of a collective bargaining agreement. Instead, these disputes are subject to mandatory arbitration. In exchange for the loss of the right to strike in these instances, Congress provided for government-paid arbitration. The original 1926 RLA did not require contract interpretation disputes to be arbitrated, and unions frequently resorted to strikes over these unresolved issues. As part of the 1934 amendments to the RLA, rail labor gave up this right and agreed to binding arbitration in return for government-paid arbitration services.

The Supreme Court subsequently affirmed that workers do not have the right to strike over minor disputes, citing the purpose and legislative history of the 1934 amendments to the RLA. For the government to now renege on its promise to pay for mandated arbitration would not only violate the Act, but would upset the careful balance that the RLA represents.

Under the proposal, the fees for a claim, from initial docketing through arbitration, would be a minimum of $75 and as high as $350. It must be remembered that these fees would mostly, if not exclusively, fall on workers. Rail companies can take actions that are contrary to the collective bargaining agreement without going through any arbitration process. If workers object, their only recourse is to file a claim and eventually arbitrate.

The NMB tax will unfairly discourage many meritorious claims. Some of the individual claims under Section 3 may be for small amounts – maybe less than the filing fee. But in the aggregate, if these claims are not brought, the carrier will reap a significant cost savings. Thus, the filing fees will actually encourage carriers to violate their collective bargaining agreements, knowing that

individual workers will have a disincentive to file a claim. Moreover, the result of this fee scheme will be greater caseload backlog as the rail companies may force cases to arbitration that would have otherwise been settled.

If the NMB moves ahead with this proposal over transportation labor's objections, the agency's credibility and neutrality will be called into question and its ability to carry out its other functions, such as contract mediation and representation cases, will also be jeopardized. Furthermore, if resolution of contract interpretation disputes is thwarted, contract negotiations will be that much more difficult and contentious.

To date, over 125 Members of the House and Senate have spoken out against these fees including the Chair and Ranking Member of the House Rail Subcommittee, the Ranking Member of the full House Transportation and Infrastructure Committee, and the Chair and Ranking Member of the Senate appropriations Subcommittee that funds the agency. In January, the NMB, pursuant to a Congressional requirement, held a hearing on this proposal to examine the negative impact of imposing fees on Section 3 arbitration services. The hearing clearly demonstrated the wide and universal opposition this proposal has generated in rail labor. It is also significant that the association representing professional railroad arbitrators formally spoke out against the NMB's proposal.

Previous efforts to address problems with the Section 3 process have been made on a consensus basis. Given the inherent problems created by the NMB's unilateral action in an area in which it has no legal authority, the NMB must not proceed with this rule and allow the parties to resolve differences without interference. If the Board does issue a final rule, transportation labor will urge Congress to reverse this tax on rail workers that is both unfair and threatens to jeopardize labor-management relations in the industry. Given all the safety and security challenges facing our nation's railroads, it is both dangerous and illogical to silence rail workers.

Policy Statement No. W05-02
Adopted February 27, 2005