

November 24, 2009

To: The Dunlop Committee Reports Review Committee (Dunlop II)
(Messrs. Robert DeLucia, Kenneth Gradia, Joel Parker and Seth Rosen)

Gentlemen:

Enclosed please find a document titled, "Report Of The Section 3 Sub-Committee To The Dunlop II Committee" which was prepared by the bi-partisan Section 3 Sub-Committee to assist you in making recommendations that will enable the National Mediation Board to better deliver arbitration service to its railroad industry customers pursuant to Section 3 of the Railway Labor Act.

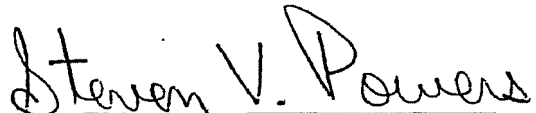
We trust that our report is self-explanatory. However, should you have questions, we would be happy to discuss our package of suggested improvements at your convenience.

Thank you in advance for your work on this important project.

Sincerely,



Michael C. Lesnik
Co-Chairman
Section 3 Sub-Committee



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

November 24, 2009

**REPORT
OF THE
SECTION 3 SUB-COMMITTEE
TO THE
DUNLOP II COMMITTEE**

INTRODUCTION

In 1993, President Clinton convened a Commission on the Future of Worker-Management Relations known as the Dunlop Commission. That Commission in turn recommended the creation of separate airline and railroad labor-management committees to make recommendations to the National Mediation Board (“NMB”) concerning operation of the Railway Labor Act (“RLA”) and its administration by the NMB. The reports of those airline and railroad committees, known as the Dunlop Commission Reports, made recommendations to improve the administration of the RLA, but ultimately recommended that no legislative change should be made to the Act.

In a letter dated August 7, 2009, the NMB announced the creation of a joint labor-management committee identified as the Dunlop Committee Reports Review Committee (“Dunlop II”). The stated purpose of Dunlop II is not only to review the NMB’s current compliance with the original Dunlop Committee reports, but to examine the “internal functions of the NMB and the delivery of its services to the industries’ customers.”

Following discussion between the Dunlop II panelists and the NMB, it was determined that issues related to the administration of Section 3 within the purview of Dunlop II could best be

addressed by a sub-committee of the Section 3 Committee, the joint labor-management committee that was established more than twenty years ago for the sole purpose of improving the handling of “minor” disputes under Section 3 of the RLA. Consequently, this report from the Section 3 Sub-Committee will address: (1) the NMB’s compliance with the Dunlop Committee Report’s recommendations concerning Section 3 and (2) specific Section 3 questions posed to the Dunlop II Committee.

However, before addressing these specific issues we believe it would be helpful to make two preliminary points. First, in 2006, the NMB requested that the Section 3 Sub-Committee make written recommendations for the improvement of Section 3. Those recommendations were presented to the NMB in a report dated February 27, 2007 (“2007 Report”). We believe that our 2007 Report not only addresses many of the questions pending before us today, but also provides historical background and context for our current report. Consequently, our 2007 Report is appended as Attachment No. 1.

Second, the central theme of our 2007 Report and the central theme of this report is that open communication and collaboration between management, labor and the NMB is essential for ongoing improvement of the Section 3 process. While we believe that rail labor and management have forged such a relationship under the auspices of the Section 3 Sub-Committee, that spirit of open communication and collaboration has not been fully realized with the NMB. The parties appreciate the fact that the NMB has worked diligently to improve the Section 3 process. However, we believe that the NMB could administer Section 3 even more efficiently if it more closely involved the parties

in the development and implementation of Section 3 policies and procedures. In the following sections of this report, we will identify specific examples where we believe the process could be improved by such an open-minded and collaborative relationship.

COMPLIANCE WITH
THE RECOMMENDATIONS
OF THE
DUNLOP COMMITTEE REPORTS

The Joint Labor/Management Rail Freight Committee submitted its Dunlop Committee Report to the NMB on June 18, 1996. Its recommendations concerning grievance arbitration under Section 3 of the Act was as follows:

“Grievance Arbitration

Insofar as this segment is concerned, the Committee recognizes, as does its airline peers, that industry practices under the RLA are significantly different. Consequently, while we take no exception to the comments submitted by the airline committee, we believe it more appropriate to direct our remarks specifically to the practices in the railroad industry. As to that we point with justifiable pride to the recent efforts of the NMB members to improving the grievance process under the RLA. The Board members have reconstituted the so-called ‘Section 3 Committee’ requiring the chief representatives of both rail labor and management to serve and through this process numerous improvements in the grievance handling process have been adopted, particularly at the NRAB. We assume that the effort will continue and unanimously support it, confidently anticipating further efficiencies will result.”

(Emphasis in bold added) (1996 Joint Labor/Management Rail Freight Committee Report at P.5)

We do not believe that the fundamental spirit of the Dunlop Committee's Report has been fully realized with respect to Section 3. As we pointed out in our 2007 Report, the cooperative spirit of the Section 3 Committee was unintentionally fractured as a result of well-intentioned but ultimately counterproductive NMB initiatives in 2004. While we appreciate the fact that the NMB worked to reconstitute the Section 3 Committee in 2005 and welcome many of the constructive measures that have followed, we do not believe that the spirit of open communication between the NMB and the parties that served them so well in the past has been fully restored. At times, this has resulted in agency promulgation of Section 3 policies that are well intentioned but ultimately have unintended consequences that have frustrated realization of our shared goals in the Section 3 arena. We think, as recommended in our 2007 Report, that a renewed commitment by the Board and the parties to active and regular dialogue and collaborative problem solving in matters of mutual interest and concern would enhance the administration and delivery of Section 3 services.

For example, the Board recently announced policies and procedures for referee authorizations during the continuing budget resolution period. This was done without any prior notice to or discussion with labor or management representatives, despite assurances of an opportunity to confer beforehand. The parties had requested prior notice to assure that hearing and travel arrangements, which must be made in advance as a practical matter, would square with agency policy and guidance. As a result, the parties and grievants were forced to make costly last minute adjustments.

Subsequent efforts to secure a meeting with Board representatives to discuss agency plans for Section 3 authorizations for the current fiscal year have, to date, been unsuccessful.

We cite this anecdote not for the purpose of criticizing the Board or any of its employees, but rather as an illustration of a specific lost opportunity for collaboration that is reflective of a broader concern regarding consequences and effects of decisions and policies involving Section 3 and the working relationships between the NMB and the other stakeholders.

In order to fully realize the recommendations of the Dunlop Committee Report concerning Section 3, we believe that a more open and collaborative relationship between the NMB and the parties is essential. At minimum, this should involve quarterly or bi-annual meetings with the Section 3 Committee or designated sub-committees. And, when it is deemed helpful, these meetings should include representatives of the arbitrator community. These meetings should have formal agendas jointly developed by the parties and the NMB and should be designed to constantly monitor case backlogs and review policies and procedures, including procedures for authorizing arbitrator travel, hearing and writing days. We believe that such collaborative efforts would not only result in better services for the NMB's rail industry customers, but also holds the potential to reduce the work load for the NMB staff.

SIGNIFICANT SECTION 3 ISSUES AND CONCERNS

In this section of our report, we share our views on what we consider to be the most significant Section 3 issues and offer our recommendations on how the parties could work more effectively with the Board to improve the administration and delivery of services under Section 3.

Adequacy And Process
Of Funding

As we pointed out in our 2007 Report, when the issue of case backlogs was discussed in detail by the Section 3 Committee in February of 2006, it was determined that more cases needed to be heard more quickly in order to effect any significant reduction in the backlog. Discussions concerning ways to hear more cases each year ultimately led to the 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, hearing and writing) had been severely curtailed or suspended for several months each year. Consequently, hearing more cases faster would simply mean that Section 3 funds would be suspended or curtailed earlier in each fiscal year. The obvious conclusion was that an increased Section 3 appropriation was necessary to reduce the backlog of cases and labor and management committed to seek supplemental appropriations (2007 Report at P.4). Those lobbying efforts proved successful for Fiscal Years 2008 and 2009 as reflected in the following table:

<u>Fiscal Year</u>	<u>Section 3 Budget Allocated To Arbitrator Salary And Travel</u>	<u>Section 3 Cases Closed</u>
2007	\$1,956,000	4042
2008	\$2,590,000 (Includes Supplemental Appropriation of \$657,000)	<u>5395</u>
2009	\$2,520,000 (Includes Supplemental Appropriation of \$560,000)	<u>7073</u>

Maintaining a sufficient Section 3 budget is an essential element of reducing the case backlog and reaching the ultimate goal of prompt and orderly settlement of “minor” disputes. It is clear that the supplemental Section 3 appropriations for FY’s 2008 and 2009 not only resulted in the closing of a significant number of cases, but also reduced the overall case backlog. **In this connection, the NMB reports that the pending case backlog at the close of FY 2009 was 4,059 cases, the lowest number of pending cases in modern NMB history.** Consequently, we believe that in order to continue backlog reduction efforts, the Section 3 budget allocated to arbitrator salary and travel must be maintained at or above the total FY 2008-2009 levels and that such appropriations should be sought by the NMB in its budget requests rather than using the supplemental appropriations process after the fact.

While we estimate that maintaining the Section 3 budget at FY 2008-2009 levels is necessary to continue backlog reduction efforts, that estimation is based upon continuing to pay arbitrators at the current daily rate of \$300 per day. However, as we discuss below, we recommend that serious consideration must be given to increasing that daily rate. If that daily rate is increased, proportionate increases in the Section 3 budget will be necessary.

**Ways To Reduce Number
Of Cases In The
System**

The parties jointly recognize that eliminating case backlogs will require not only hearing more cases each year, but also reducing the number of cases that enter the system. In our 2007

Report, we outlined a number of methods to reduce the number of cases in the system and we endorse those efforts here. The key point is that managing the Section 3 case load is not a “set it and forget it” process. To the contrary, case loads must be periodically monitored so that if backlogs develop involving specific carriers or unions, efforts can be made to determine causes and solutions. Our experience tells us that there is no magic bullet to control case loads. Rather, what is required is a constant bi-partisan effort to work with the NMB to analyze case load statistics on a regular basis and choose from a diverse arsenal of solutions. Among the many measures that have been taken to reduce Section 3 case loads in the past are:

1. **Vice Presidents’ Dockets** - When surging case loads are detected, senior officers from the union and the carrier (often Vice Presidents) are alerted and called upon to examine the cases and determine if alternative solutions are feasible. For example, an examination of caseload statistics by the Section 3 Sub-Committee and the NMB during 2006 revealed a significant backlog of cases involving Union Pacific and BMWED had developed at the NRAB. A Vice President’s docket was used to address those cases with the result that over 400 cases were reviewed with dozens being settled and dozens of others being consolidated for more efficient handling on PLB’s.
2. **Collective Bargaining** - Although the NMB may not be aware of how often it occurs, literally thousands of cases that have been listed on various Section 3 boards are ultimately resolved through collective bargaining. For example, CSXT and BMWED recently bargained a new agreement dated September 1, 2009 which resulted in the settlement of over 500 cases, 240 of which had been listed on Section 3 boards. Similarly, Norfolk Southern and BMWED recently negotiated a Letter of Agreement dated May 25, 2009 which resolved most of their outstanding contract interpretation disputes and settled over 250 cases.
3. **Grievance Mediation** - This alternative dispute resolution process has worked well in a number of settings. For example, BRS and New Jersey Transit recently resolved approximately 150 backlogged claims utilizing grievance mediation. And ATDA and Norfolk Southern employed a creative hybrid of grievance mediation and collective bargaining that resolved over 200 grievances and resulted in new terms governing extra positions.

4. Pilot Cases - Pilot or lead cases are often used to resolve disputes that generate repetitive claims. ATDA and CSXT are now involved in selecting approximately 6 pilot cases that will resolve 400 pending cases.

As we recommended in our 2007 Report, 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 might be doing right. Other panels could examine such topics as abeyance agreements, arbitrating questions or issues to avoid grievances, alternative dispute resolution forums and education on the duty of fair representation. In sum, the Section 3 Sub-committee recommends that 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 control new cases entering the system.

Time Frame
For Resolving
Grievances

The Section 3 Sub-Committee certainly shares the NMB's concern over reducing the amount of time it takes to resolve grievances. However, once again there is no single solution or magic bullet. Instead, we believe that reducing the time frame for resolving grievances will be a byproduct of instituting or continuing the various Section 3 improvements recommended in this report and our 2007 Report. Maintaining a sufficient level of Section 3 funding is certainly a key element to reducing the amount of time for resolving grievances. However, it is equally important to utilize alternative dispute resolution procedures to control the number of new cases coming into the system. In addition to these broad remedies, some of the more specific steps the parties have instituted to speed the resolution of grievances include: (1) the use of expedited discipline boards; (2) reorganization of carrier members at the NRAB which has reduced the time for hearing grievances at the NRAB; and (3) the "aged case" program whereby the NMB identifies cases that have been pending for excessive time and requests prompt attention by the parties.

All of these countermeasures seem to be producing results and should be continued. At the most recent Section 3 Sub-Committee Meeting on September 23, 2009, the NMB reported that the average delay in resolving Section 3 disputes had been reduced from more than 30 months to 18.5 months. Moreover, at the close of FY 2009, the NMB announced that 75% of the pending Section

3 cases were two years old or younger. The Section 3 Sub-Committee believes that substantial improvement in these statistics can be achieved if the parties and the NMB implement the various measures recommended in this report.

Level Of Expertise
And Experience
Of Neutrals

Maintaining a roster of qualified neutrals is critically important to rail industry management and labor. This is a matter of growing concern because we see clear evidence that an increasing number of highly qualified neutrals are abandoning Section 3 work. Our interview of neutrals with Section 3 experience, including those who remain active and those who have abandoned Section 3 work, revealed a consistent pattern of dissatisfaction. First and foremost, Section 3 neutrals uniformly expressed frustration with increasing bureaucratic authorization and reporting policies and procedures. While traditional “paperwork” has been eliminated, it has been replaced by increasing burdensome electronic authorization and reporting procedures that seem to frustrate all Section 3 neutrals and have caused many to discontinue Section 3 work. Moreover, some of those same authorization policies (e.g., not receiving authorization for travel and hearings in a particular month until the first week of that month) frustrate labor and management as they attempt to schedule hearings.

In our 2007 Report, we recommended that the NMB meet with representatives of the parties and a representative of the arbitrators to consider ideas for revisions to current procedures for

authorizing travel, hearing and writing days (2007 Report at PP.5&8). That recommendation was not implemented, but we believe it remains vital and renew that recommendation here. In doing so, we stress that we are fully cognizant of the NMB's duty and responsibility to efficiently administer Section 3 funds. Our goal would be to simplify and streamline the process in a way that allows the NMB to perform its duty, while perhaps improving the process for all involved parties, including the NMB's staff (e.g., a pilot program authorizing neutrals to work for two months instead of one could potentially cut authorization work by half).

The second factor that effects the attraction and retention of qualified neutrals is the rate of pay. As we noted in our 2007 Report, the current daily rate of \$300 was set February 1, 2000. This rate was well below the market rate when it was set and it is not reasonable to expect highly skilled practitioners to continue working without an increase in pay for over nine years. This is particularly true when the rate is well below the market rate. In this connection, statistics published by the Federal Mediation And Conciliation Service on September 30, 2009, show that the average per diem for arbitrators on its roster was \$1035, while the minimum was \$450 and the maximum was \$2500. We do not expect Section 3 rates to match those levels. But we do recommend that in order to attract and retain qualified neutrals, future Section 3 budgets allocations should take into account both the amount needed to resolve existing and anticipated cases as well as providing for incremental increases to the arbitrators' daily rate.

Section 3 Committee
Effectiveness And
Need For Change

We see no need to change the structure of the Section 3 Committee, but we do believe that change in the interaction between the Section 3 Committee and the NMB could make the committee more effective and lead to substantial improvements in the Section 3 process. Indeed, that is the theme of this report.

The structure of the Section 3 committee has been inherently flexible. When the Section 3 Committee was formed in 1987, it consisted of the chief representatives of rail labor and management. That full committee generally meets on an annual basis. However, in order to execute the ongoing work of the committee, a sub-committee consisting primarily of labor and management practitioners was established. This group is known as the Section 3 Sub-Committee and it often meets in the interim between annual meetings of the Section 3 Committee. Finally, smaller ad hoc working groups are routinely established to study various topical issues. In some cases, a single individual may represent his or her organization at all three functional levels of the Section 3 Committees and working groups and in some cases those individuals vary. While we view this flexible structure as an inherent strength, we are certainly willing to consider changes to that structure if the NMB believes that such changes may be beneficial.

While we do not perceive the need to change the flexible structure of the Section 3 Committee or its sub-committees, we do believe that improving communications and restoring a

collaborative relationship with the NMB will improve the effectiveness of the Section 3 process. We appreciate the fact that the NMB and its staff have worked tirelessly to improve the Section 3 process and believe that we share the same ultimate goals. Our concern is that policies and procedures implemented to achieve those goals often have unintended and unanticipated consequences that may be counterproductive. Instead of implementing policies and procedures and allowing the parties to react, we firmly believe that it would be beneficial for all concerned if labor, management (and sometimes the arbitrator community) could contribute their perspectives and possible solutions as part of the NMB's decision making process before policies and procedures are promulgated.

SUMMARY AND CONCLUSION

The Section 3 Sub-Committee remains 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:

- 1. A Small Working Group With Representatives From Management, Labor And The NMB Should Be Established To Systematically Review Section 3 Policies And Procedures That Apply From The Time A Case Is Filed At A Section 3 Forum (NRAB, PLB or SBA) Until The Time An Award Is Delivered To The Parties. The Goal Of The Working Group Should Be To Streamline The Process And Eliminate Unnecessary Burdens For All Parties Involved In The Process.**

- 2. The Section 3 Sub-Committee And The NMB Should Have Regularly Scheduled Meetings With Formal Agendas Jointly Developed By The Parties And The NMB. Under Appropriate Circumstances, Representatives Of The Arbitrator Community Should Be Invited To Attend. All Agenda Items Should Be Carefully Considered And The Disposition Of Each Item Should Be Clearly Reported At The Annual Section 3 Committee Meetings.**
- 3. The Section 3 Sub-Committee And The NMB Should Routinely Monitor And Review 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 Disseminate Ideas For More Effectively Managing The Number Of New Cases Entering The System.**
- 4. In Order To Continue Backlog Reduction Efforts, The Section 3 Budget Allocated To Arbitrator Salary And Travel Must Be Maintained At Or Above FY 2008-2009 Levels.**
- 5. In Order To Retain Qualified Arbitrators, The NMB's Future Section 3 Budget Requests 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, The Working Group Established Pursuant To Recommendation No. 1 Above Should Consider Appropriate Revisions To Travel, Hearing And Award Writing Authorization Policies And Procedures.**

The Section 3 Sub-Committee would welcome the opportunity to work with the NMB to implement our package of suggested improvements.

ATTACHMENT NO. 1

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. Kenneth Gradia
Co-Chairman
Section 3 Sub-Committee



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 employee 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/TBT
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 19, 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.

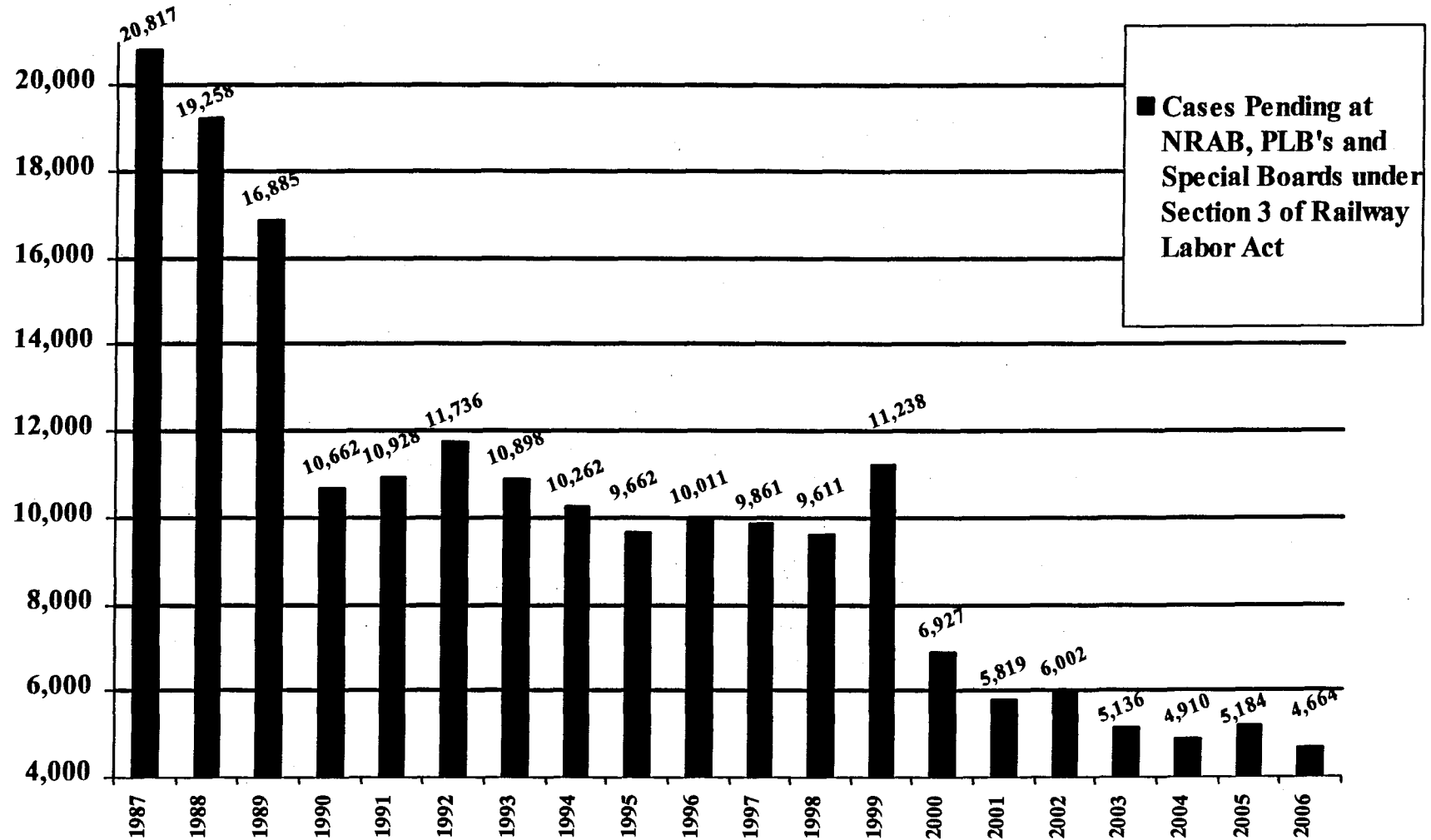
Thank you for your efforts so far.

Sincerely,

Harry R. Hoglander
Member, National Mediation Board

ATTACHMENT "A"

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"

Mr. Robert F. Allen, Chairman

March 8, 2006

Page Two

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



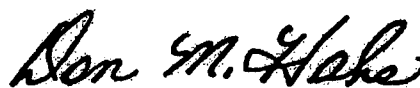
Edwin D. Hill

International Brotherhood of
Electrical Workers



George J. Francisco, Jr.

National Conference of Firemen and
Oilers, SEIU



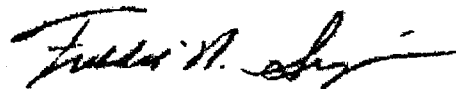
Don M. Hahs

Brotherhood of Locomotive Engineers &
Trainmen, A Division of the Rail Conference, IBT



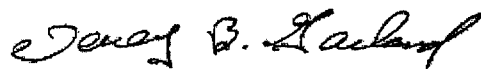
Mark Filipovic

International Association of Machinists
And Aerospace Workers



Freddie N. Simpson

Brotherhood of Maintenance of Way
Employees Division - IBT



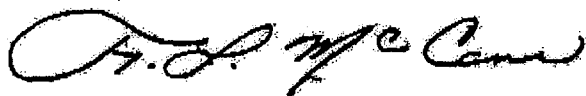
Dewey Garland

Sheet Metal Workers International Association



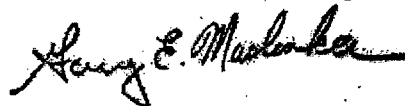
W. Dan Pickett

Brotherhood of Railroad Signalmen



F. Leo McCann

American Train Dispatchers



Gary Maslanka

Transport Workers Union of America



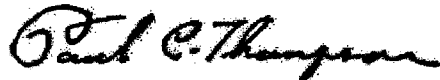
R. A. Scardelletti

Transportation Communications
International Union



Isaac Monroe

Hotel Employees and Restaurant Employees
International Union



Paul C. Thompson

United Transportation Union