

National Mediation Board

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section 5, First of the Railway Labor Act, as amended, are matters of official record and are available for inspection and examination.

(c) Interpretations of mediation agreements by the NMB, arising out of section 5, Second, of the Railway Labor Act, as amended, are public records and are therefore open for public inspection and examination.

§ 1208.6 Schedule of fees and methods of payment for services rendered.

(a) *Definitions.* For the purposes of this section the following definitions apply:

(1) *Direct costs* means those expenditures which the National Mediation Board actually incurs in searching for, duplicating, and, in the case of commercial requesters, reviewing documents to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus sixteen percent of the rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space and heating or lighting the facility in which the records are stored.

(2) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page and line-by-line identification of material within documents. Searches may be done manually or by computer using existing programming.

(3) *Duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk), among others.

(4) *Review* refers to the process of examining documents located in response to a commercial use request (see paragraph (a)(5) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues

regarding the application of exemptions.

(5) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the NMB will look first to the use which a requester will put the document requested. Where the NMB has reasonable cause to doubt the use is not clear from the request itself, the National Mediation Board may seek additional clarification before assigning the request to a specific category.

(6) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research.

(7) *Non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as that term is defined in paragraph (a)(5) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(8) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. These examples are not intended to be all inclusive. In the case of “freelance” journalists, they may be regarded as working for a news organization if they demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but the NMB may also look to the past publication record of a requester in making this determination.

(b) *Exceptions of fee charges.* (1) With the exception of requesters seeking documents for a commercial use, the

NMB will provide the first 100 pages of duplication and the first two hours of search time without charge. The word “pages” in this paragraph (b) refers to paper copies of standard size, usually 8.5”x11”, or their equivalent in microfiche or computer disks. The term “search time” in this paragraph (b) is based on a manual search for records. In applying this term to searches made by computer, when the cost of the search as set forth in paragraph (d)(2) of this section equals the equivalent dollar amount of two hours of the salary of the person performing the search, the NMB will begin assessing charges for computer search.

(2) The NMB will not charge fees to any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself.

(3) (i) The NMB will provide documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(ii) In determining whether disclosure is in the public interest under paragraph (b)(3)(i) of this section, the NMB will consider the following factors:

(A) *The subject of the request.* Whether the subject of the requested records concerns “the operations or activities of the government”;

(B) *The informative value of the information to be disclosed.* Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;

(C) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* Whether disclosure of the requested information will contribute to “public understanding”;

(D) *The significance of the contributions to the public understanding.* Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities;

(E) *The existence and magnitude of a commercial interest.* Whether the requester has a commercial interest that

would be furthered by the requested disclosure; and, if so

(F) *The primary interest in disclosure.* Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

(iii) A request for a fee waiver based on the public interest under paragraph (b)(3)(i) of this section must address the factors of paragraph (b)(3)(ii) of this section as they apply to the request for records in order to be considered by the Chief of Staff.

(c) *Level of fees to be charged.* The level of fees to be charged by the NMB in accordance with the schedule set forth in paragraph (d) of this section, depends on the category of the requester. The fee levels to be charged are as follows:

(1) A request for documents appearing to be for commercial use will be charged to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.

(2) A request for documents from an educational or non-commercial scientific institution will be charged for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) The NMB shall provide documents to requesters who are representatives of the news media for the cost of reproduction alone, excluding charges for the first 100 pages.

(4) The NMB shall charge requesters who do not fit into any of the categories above such fees which recover the full direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished

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without charge. All requesters must reasonably describe the records sought.

(d) The following fees shall be charged in accordance with paragraph (c) of this section:

(1) *Manual searches for records.* The salary rate (i.e., basic pay plus sixteen percent) of the employee(s) making the search. Search time under this paragraph and paragraph (d)(2) of this section may be charged for even if the NMB fails to locate responsive records or if records located are determined to be exempt from disclosure.

(2) *Computer searches for records.* The actual direct cost of providing the service, including computer search time directly attributable to searching for records responsive to a FOIA request, runs, and operator salary apportionable to the search.

(3) *Review of records.* The salary rate (i.e., basic pay plus sixteen percent) of the employee(s) conducting the review. This charge applies only to requesters who are seeking documents for commercial use and only to the review necessary at the initial administrative level to determine the applicability of any relevant FOIA exemptions, and not at the administrative appeal level or an exemption already applied.

(4) *Certification or authentication of records.* \$2.00 per certification or authentication.

(5) *Duplication of records.* Fifteen cents per page for paper copy reproduction of documents, which the NMB determined is the reasonable direct cost of making such copies taking into account the average salary of the operator and the cost of the reproduction machinery. For copies of records prepared by computer, such as tapes or printouts, the NMB shall charge the actual cost, including operator time, of production of the tape or printout.

(6) *Forwarding material to destination.* Postage, insurance and special fees will be charged on an actual cost basis.

(7) *Other costs.* All other direct costs of preparing a response to a request shall be charged to requester in the same amount as incurred by NMB.

(e) *Aggregating requests.* When the NMB reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of

evading the assessment of fees, the NMB will aggregate any such requests and charge accordingly.

(f) *Charging interest.* Interest at the rate prescribed in 31 U.S.C. 3717 may be charged those requesters who fail to pay fees charged, beginning on the thirtieth day following the billing date. Receipt of a fee by the NMB, whether processed or not, will stay the accrual of interest. If a debt is not paid, the agency may use the provisions of the Debt Collection Act of 1982, (Pub. L. 97-365, 96 Stat. 1749) including disclosure to consumer reporting agencies, for the purpose of obtaining payment.

(g) *Advance payments.* The NMB will not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The NMB estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then the NMB will notify the requester of the likely cost and obtain satisfactory assurances of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charge in a timely fashion (i.e., within thirty days of the date of the billing), in which case the NMB requires the requester to pay the full amount owed plus any applicable interest as provided above or demonstrate that he has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester. When the NMB acts under paragraph (g)(1) or (2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., twenty working days from receipt of initial requests and twenty working days from receipt of appeals from initial denial, plus permissible extension of these time limits) will begin only after the NMB has received fee payments described in this paragraph (g).

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(h) *Payment.* Payment of fees shall be made by check or money order payable to the United States Treasury.

[63 FR 44395, Aug. 19, 1998]

§ 1208.7 Compliance with subpoenas.

(a) No person connected in any official way with the NMB shall produce or present any confidential records of the Board or testify on behalf of any party to any cause pending in any court, or before any board, commission, committee, tribunal, investigatory body, or administrative agency of the U.S. Government, or any State or Territory of the United States, or the District of Columbia, or any municipality with respect to matters coming to his knowledge in his official capacity or with respect to any information contained in confidential documents of the NMB, whether in answer to any order, subpoena, subpoena duces tecum, or otherwise without the express written consent of the Board.

(b) Whenever any subpoena or subpoena duces tecum calling for confidential documents, or the information contained therein, or testimony as described above shall have been served on any such person, he will appear in answer thereto, and unless otherwise expressly permitted by the Board, respectfully decline, by reason of this section, to produce or present such confidential documents or to give such testimony.

PART 1209—PUBLIC OBSERVATION OF NATIONAL MEDIATION BOARD MEETINGS

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§ 1209.01 Scope and purpose.

(a) The provisions of this part are intended to implement the requirements of section 3(a) of the Government in the Sunshine Act, 5 U.S.C. 552b.

(b) It is the policy of the National Mediation Board that the public is entitled to the fullest practicable information regarding its decisionmaking processes. It is the purpose of this part to provide the public with such information while protecting the rights of individuals and the ability of the agency to carry out its responsibilities.

§ 1209.02 Definitions.

For purposes of this part:

(a) The terms *Board* or *Agency* mean the National Mediation Board, a collegial body composed of three members appointed by the President with the advice and consent of the Senate.

(b) The term *meeting* means the deliberations of at least two members of the Board where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted or with respect to any information proposed to be withheld under by 5 U.S.C. 552b(d) or (e)/5 U.S.C. 552b(c).

§ 1209.03 Conduct of National Mediation Board business.

Members shall not jointly conduct or dispose of agency business other than in accordance with this part.

§ 1209.04 Open meetings.

Every portion of every Board meeting shall be open to public observation except as otherwise provided by § 1209.05 of this part.

§ 1209.05 Closing of meetings; reasons therefor.

(a) Except where the Board determines that the public interest requires otherwise, meetings, or portions thereof, shall not be open to public observation where the deliberations concern the issuance of a subpoena, the Board's