PUBLIC LAW BOARD NO. 1781

REMAND

Award No. 4

Case No. 4

Parties to Dispute: United Transportation Union (CT&Y) and The Atchison, Topeka and Santa Fe Railway Company

Statement of Claim: That Illinois Division Train Baggageman J. J. Darr be reinstated with all seniority, other prior rights and privileges restored and pay for all time lost including the wage equivalent of fringe benefits.

ON REMAND FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Findings: As a result of our Award No. 4 denying the appeal of the disciplinary discharge of former Train Baggageman J. J. Darr, Claimant Darr petitioned the above Court "for review of the Order of Public Law Board No. 1781 issued on May 12, 1977 upholding the discharge of Plaintiff for alleged misconduct on July 19, 1975." The formal investigation, which led to Claimant's discharge, was held on October 1, 1975, some seventy-three (73) days after occurrence of the incident giving rise thereto. Said District Court, in its Order, found:

> "Defendant Darr seeks reversal of the decision of the Public Law Board solely on the grounds that the Board had no jurisdiction because the initial investigation was not held within 30 days of the incident in question....Article 35(a) provides:

> '...Investigations will be held promptly but in any event, not later than thirty (30) days from date of occurrence of the incident to be investigated, except when the trainman, his representative or a material witness is unable to attend an investigation because of sickness or injury or the principal is in custody, the investigation may be deferred until such time as the trainman, his representative or material witness is able to attend the investigation.
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> In cases involving theft or immoral conduct the time limit provision of this Article will not apply, however, the most recent case coming to Managements attention will form the charge for investigation....'

In connection with this claim the Public Law Board interpreted Article 35 to permit the investigation within 30 days of Carrier's receipt of knowledge of the incident to be investigated."

Said Court noted:

> "The provisions of 45 U.S.C. § 153 Second for seeking compliance with Awards of Public Law Boards in the United States District Court has been interpreted to allow the Court to consider an application to set aside a board order in accordance with the standards governing judicial review of a decision of the NRAB explicitly set forth in 45 U.S.C. § 153 First (p) and (q). Broth. of Ry. Etc. v. K.C. Term. Ry. Co. 587 F. 2d 903, 906 (8th Cir. 1978); Transportation - Comm. Div. v. St. Louis - San Francisco Ry. Co., 419 F. 2d 933, 935 (8th Cir. 1970); Gatlin v. Mo.-Pacific RR Co., 475 F. Supp. 1083, 1085 n./(E. D. Ark 1979); K.C. So. Ry. Co. v. Brothers RR Trainmen, 305 F. Supp. 1142, 1147 (W. D. Mo. 1969) 45 U.S.C. § 153 First (p) relating to judicial review of decisions of the NRAB provides, in part:
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> 'The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board:

'Provided, however That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

45 U.S.C. § 153 First (q) allows for review:

If an employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order....On such review, the findings and order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

The Supreme Court has emphasized:

Section 153 First (q) unequivocally states that the 'findings and order of the [Adjustment Board] shall be conclusive on the parties' and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. Union Pacific RR Co. v. Sheehan, 439 U.S. 89, 99 S. Ct. 399, 58 L.Ed.2d 354, 359 (1978).'

"Petitioner does not contend that the Board failed to comply with the requirements of this chapter or that fraud or corruption by a board member is at issue. The sole basis for the requested relief is that the Board acted outside the scope of its jurisdiction in holding the investigation and entering a decision. In determining whether the Board has acted outside the scope of its jurisdiction the proper inquiry is whether the award is without foundation in reason or fact. Brotherhood of RR Trainmen v. Central of Georgia Rw. Co., 415 F 2d 414 (5th Cir. 1969)....Thus the issue before the Court is whether the Board's interpretation of Article 35 is:

> 'so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement as to 'manifest an infidelity to the obligation of the arbitrator.' 'Broth. of Ry., Ect. v. Kansas City Terminal Ry Co., F 2d 903, 906 (8th Cir 1978).
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> The test of the Board's jurisdiction is not whether the reviewing Court agrees with the Board's interpretation of the bargaining contract but rather the remedy is rationally explainable as a logical means of furthering the aims of that contract. 421 F. 2d 228 (5th Cir 1970).'
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> * * * *
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> ...This is not a case where the plaintiff is requesting the Court to reject one interpretation of the contract and substitute in its place another interpretation that would sustain plaintiff's contention concerning the merits of this litigation. Plaintiff is asking the Court to find that no jurisdiction existed whereby the Board could consider and decide whether plaintiff had or had not engaged in the conduct in question. Thus if plaintiff's argument had been adopted, the Board would have been unable to find for either party on the merits of the controversy. The Court recognizes that questions of contract interpretation are generally within the province of the Board not the Court. However, after examining Article 35 as well as all of the other

> portions of the Rates, Rules and Regulations for Trainmen provided to the Court, the Court concludes that the interpretation of the Board was without foundation in reason and fact and was so unconnected with the wording of the collective bargaining agreement as to manifest infidelity to the obligation of the arbitrator. The language of Article 35 is explicit and not ambiguous in stating that the investigation will be held promptly but in any event not later than thirty days from the date of the occurrence or incident to be investigated.
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> ...However, the Article continues to provide two exceptions to the thirty day period...In view of this explicit language the Court believes that the Board's interpretation is so unconnected with the wording of the agreement as to manifest infidelity to the obligation of the arbitrator...
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> ...Review of the briefs presented to the Board indicates that the Carrier argued that the Board had jurisdiction because Mr. Darr's actions could be characterized as 'immoral conduct' to which the thirty day period did not apply. The Board based their decision on an interpretation of the thirty day requirement and did not reach the issue of whether the petitioner's conduct fell within an exception to this thirty day requirement. The question of whether the thirty day requirement is inapplicable involves issues of contract interpretation which are for the Board and not this Court. Therefore, the Court will remand this case to the Board for determination of whether an exception to the thirty day requirement would have allowed the Board to have conducted this investigation..."
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> (Underscoring supplied)

The Eighth Circuit Court of Appeals held that said Remand Order was not appealable.

Pursuant thereto Public Law Board No. 1781, was reactivated.

Hearing thereof convened in Kansas City, Missouri, on March 13, 1981. Claimant and his attorney were permitted to participate. Said Counsel was also permitted to submit his comments in a post hearing statement which was received on March 30, 1981.

Public Law Board No. 1781 will, of course, conform with the Court's Order. However, in light of reference by the Court in its Order and, similarly, as made by Claimant's Counsel as to the function of the Board it is necessary for the sake of the record that a prefatorial statement be made.

Award No. 4 is by reference incorporated herein and made part hereof.

It is a fact of record that Public Law Board did not hold an investigation hearing as is referred to in Article 35. Said Board in handling the dispute created in the Darr case acted properly within the limited jurisdiction of an appellate body and reviewed the record on that basis.

Public Law Board No. 1781 is a statutory quasi judicial body. Its jurisdiction, as prescribed in the Railway Labor Act, may not be enlarged or diminished by the Court or even by stipulation of the parties.

Railroad Boards of Adjustment established under Section 3, First and/or Second, of the Railway Labor Act, as amended, differ totally from the National Labor Relations Board. The latter Board (NLRB) polices and enforces a public policy concerning statutory defined unfair labor practices in industries in or affecting interstate commerce from which Congress deemed it appropriate to exclude the railroad industry. The NLRB, on petition of either party thereto, interprets agreements also through its General Counsel, as the moving party, inititiates and prosecutes it complaints before a trial examiner. The NLRB participates in making the record in an adversary proceeding. Further, it has the power to petition a Court for enforcement of its orders. In contrast an Adjustment Board established under the Railway Labor Act, a clearly unique and distinguishable statute reflecting differing public policy, is an appellate body which hears and decides disputes on the basis of the record made on the property by the parties to the dispute. Consequently, the role of said Adjustment Boards differs markedly from that of the NLRB whose role in other industries caused courts in some railroad cases to appear to draw an analogy in their review, findings and conclusions of law relative to awards rendered by railroad adjustment boards.

The Court in Whithouse v. Illinois R.R. Co., 359 U.S. 366 (1955) cautioned against analogies drawn from other industries to railroad problems:

> "Both its history and the interest it governs show the Railway Labor Act to be unique. 'The Railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary and lives according to rules of its own making.' Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale LJ. 567, 568-569." 349 U.S. at 371.

While said railroad adjustment boards have exclusive jurisdiction to hear and determine contract disputes between a union and carrier they must do so in the light of evidence as to usage, custom and practice. Order of Railway Conductors v Pitney, 326 U.S. 561; Slocum v. Delaware Lackawanna R.R. Co., 339 U.S. 239.

Claimant's Counsel, and the Court by lending its support thereto, have modified the parties discipline rule, Article 35, by adding language contrary to its purpose and the intent of the parties. The Courts Order, in essence, states that it was argued that an investigation may not, pursuant to Article 35(a), be held if the date thereof is in excess of thirty (30) days from the date of occurrence giving rise to the need therefor. Unless, of course, any of the exceptions provided in said Article 35 are permissive reasons for such delay. Such argument and conclusion simply stated is repugnant to railroad discipline rules. Article 35(a) in part pertinent, reads:

> "A trainman shall not be dismissed from the service of the Company or otherwise disciplined without a formal investigation unless such trainman shall accept discipline by record in writing and waive formal investigation.

'Investigations shall be held promptly but in any event not later than thirty (30) days. ...etc,"

The Referee of Public Law Board No. 1781 can not recall from his almost four (4) decades of familiarity with such rules of reading any Award, or authoritative document, including the Railway Labor Act, as amended, specifically supporting that erroneous conclusion. Nothing estops Carrier's right, or its lawful obligation, to conduct investigations. As many hundreds of Adjustment Board Awards have pointed out a Carrier may well forfeit its right to assess discipline arising therefrom because of a failure to properly comply with the specific requirements of the discipline rule involved.

The brevity of Award No. 4 possibly may have misled its reviewers. However, said Award was written for and directed towards the experienced and sophisticated partisan labor relations practitioners who constituted the membership of Public Law Board No. 1781. The membership of Public Law Board No. 1781 represented the equivalent of about a century of railroad labor relations expertise. They were representative of that peculiar and unique expertise recognized of railroad people and often referred to by the Courts. See, for example, Gunther v San Diego & Arizona Eastern Rw. Co; 382 U.S. 257 (1966). They are and were familiar with the canons of contract construction. That such Board members might not always be in agreement is not indicative of a weakness in their knowledge or expertise. Rather it's reflective only of their perception as to the

weight to be assigned by such knowledge. Said board members also are and were familiar with the varying nuances of various collective bargaining rules, particularly those covering discipline and investigations. Further, all of the said board members have experienced the negotiations of investigation and discipline rules with and without time limitations being contained therein. All are and were familiar with the innumerable Awards rendered by the National Railroad Adjustment Board, Special Boards of Adjustment and Public Law Boards on the subject matter. Their experience permitted immediate recognition that in disciplinary matters the role of Public Law Boards is to determine whether the employee involved received the due process to which entitled under the contractual discipline applicable to his craft and class and second, whether the conclusions or findings reached by Carrier, were supported by substantial evidence contained in the transcript of the investigation involved and lastly, whether the discipline assessed was unreasonable.

In the Darr case, a fact, apparently overlooked, is that Claimant was constructively employed by and on behalf of the National Railroad Passenger Corporation (AMTRAK). Darr was paid by Carrier to help operate AMTRAK's trains. However, Carrier billed AMTRAK for the expense thereof. In effect Carrier was a human "Hertz" by providing the manpower to operate AMTRAK's trains over its tracks. Although Conductor J. P. Lindberg was Claimant's only

direct supervisor and had recorded the July 19, 1975 incident in his train book, he violated Carrier's Operating Rules, General Rule E, 802(a) and 807, by failing to report such incident to Carrier. Had Conductor Lindberg done so it would thereby have given Carrier knowledge and placed Carrier on notice as to its obligation under Article 35(a), to conduct an investigation within 30 days. The complaints by the two women passengers of necessity were filed with AMTRAK's representative. AMTRAK necessarily took time to conduct and investigation of the incident occurring on it's Train No. 3.

Certainly, a willingness to contractually agree to insert a time constraint in Article 35 must mean that such constraint could be applicable only so long as the party affected thereby had control or knowledge of the situation to cause tolling of the agreed upon constraint. Agreeing to insertion of a time limitation in rules like Article 35 is not unusual. Such limitations are sometimes necessary. But, they are agreed upon within the common framework of the parties knowledge and common usage of such terms and wordage and above all within their capability to perform. Hence, here, absent knowledge, Carrier could not and was unable to perform on its part of the agreement. However, Carrier did conduct the investigation within ten days of receipt of notification of the incident by AMTRAK. Therefore, when Public Law Board No. 1781 in its Award No. 4 agreed with and adopted the findings of Award No. 1 of Public

Law Board No. 1410, particularly:

> "...while the rule requires a hearing within ten days from the date of the offense was alleged to have been committed, knowledge by Carrier of the occurrence is necessarily implicit in the rule. Obviously, in the absence of such knowledge, the Carrier cannot be expected to give notice of hearing. Furthermore, the rule cannot be reasonably construed to mean the wrong doers escape disciplinary action merely because their conduct was not discovered for ten days..."

The Board did so with the full knowledge that to apply Article 35(a), as contended for by the Employees would lead to an absurd and unreasonable result. Further, it otherwise would engraft a term on the Article 35 not contracted for by the parties which would thereby permit an employee not working under the direct supervision of Carrier, such as but not limited to, a Conductor-Flag, or an AMTRAK train, to commit a wrongdoing, exclusive of theft or immoral conduct, contrary to Carrier Operating Rules and if Carrier had no knowledge thereof for 30 days such employee would evade discipline. Carrier, in such circumstance would be unable to comply with its lawful obligation to protect the safety of the public and its employees. The ability and capability to hold an investigation was clearly demonstrated to not be within the control of Carrier.

Consequently, Award No. 4 followed the sound, sensible and reasonable application of rules similar to Article 35. As was so aptly and succinctly enunciated by former Chief Justice of the Arizona Supreme Court, Thomas J. Mabry,

who sat as a Neutral and Referee in innumerable cases presented on appeal to the National Railroad Adjustment Board and other Boards of Adjustment, in First Division Award 7476:

> "The interpretation of the contract, or rule, in question contended for by claimant would, in many instances, lead to absurd results. We must know that offenses involving suspension or discharge if the charges be established, may not, in the nature of things, be known to the carrier in many cases within five days. It is true that we are not authorized to add language to a contract otherwise clear and susceptible of but one meaning; but we are authorized, and it is our duty, to interpret ambiguous rules and agreements so as to arrive at the true intent of the parties thereto, and, likewise, so to arrive at a reasonable, as distinguished from absurd, result."
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> (Underscoring supplied)

The discipline rule in said Award 7467 was no less mandatory than Article 35 in our Award No. 4.

Public Law Board No. 1781 having reached the conclusions that it did, had no reason to and therefore did not reach and pass upon "theft or immoral conduct" as referred to in Article 35(a). The District Court's Remand Order requires Public Law Board No. 1781 to now "determine as to whether an exception to the thirty day requirement would have allowed the Board to have conducted the investigation in this case".

Public Law Board No. 1781 is prohibited by law from conducting an investigation. The factual circumstances involved in the Darr case were such as to permit Carrier to conclude that a contractual exception to the thirty day time limit provision did exist.

Therefore, Carrier, pursuant to said Article 35(a), permissibly could and did conduct an investigation in said case as to Claimant Darr's conduct on October 1, 1975.

Rule 752 (C), Rules Operating Department, 1975, states:

> "Employes must not be dishonest, immoral or vicious. They must conduct themselves in a manner that will not bring discredit on their fellow employes or subject the railroad to criticism or loss of good will."
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> (Underscoring supplied)

Claimant was charged with possible violation of, among others, Operating Rule 752 (C). Said Rule covers immoral conduct by an employee. Employees are presumed to be familiar with said Operating Rules. Claimant testified that he was familiar with, among others, Rule 752 (C). Carrier concluded that there was sufficient evidence based on the written complaints of the two women passengers and their testimony given at the October 1, 1975 investigation to support its conclusion that Claimant J. J. Darr's conduct on Train 3 on July 19, 1975 was, among other things, immoral and constituted a violation of Operating Rule 752 (C), among others.

The majority of Public Law Board No. 1781 agree that Carrier's conclusion was proper and supported by sufficient, competent and probative evidence. We find no abuse of Carrier's discretionary right.

Having found Claimant guilty as charged, Carrier assessed

the discipline complained of on the basis of Claimant's service record. A review thereof and the record in this case permits the conclusion that the discipline assessed was not unreasonable. The claim will be denied.

Award Claim denied.

K. Levin, Employee Member

M. D. Quin, Jr., Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Wilmington, Delaware, April 13, 1981.

State of Delaware :
SS
County of New Castle:

4-29-81

BE IT REMEMBERED that on April 29, 1981, before me, personally appeared Arthur T. Van Wart whose signature is subscribed above.

NOTARY PUBLIC

My commission expires