Public Law Board No. 4762

Parties: Transportation Communications Union (TCU)

and

National Railroad Passenger Corporation (AMTRAK)

Arbitration Board:	Jacob Seidenberg, Esquire, Chairman and Neutral Member
	John M, Livengood, Senior Director of Labor Relations - Carrier Member
	Robert A. Scardelletti, Internal Vice President - Union Member
Hearing:	October 31, 1986
Appearances	Company Jonathan Saperstein, Esquire, Associate General Counsel
	Union James M. Darby, Esquire, Associate General Counsel
Post Hearing Briefs Filed:	November 22, 1989
Issue	May the Company unilaterally ban smoking on the Company facilities on January 1, 1990 pursuant to the current collective bargaining agreement and past practice? If not, what is the appropriate remedy?

Background: The current dispute, which is centered about whether the Carrier is contractually permitted unilaterally to institute a policy totally banning smoking on Company premises,

was commenced when the Carrier, through its Assistant Vice President - Labor - J.M. Lange, wrote on October 31, 1988 to all the General Chairmen on the property, stating that because of the growing concern over the hazards of cigarette smoking and the possible side effects on non-smokers, the Carrier has begun to solicit comments and suggestions from groups of its employees (smokers and non-smokers) to determine whether its present policy on smoking is responsive to present needs (Co. Ex. #13).

On January 26, 1989 the Carrier announced in its Newsletter that it was instituting a new smoking policy wherein as of May 1989 employees would be able to smoke only in designated areas inside AMTRAK facilities and then on January 1, 1990 no smoking would be allowed inside any AMTRAK facility or vehicle (Union Ex. #3).

On February 7, 1989, Vice President Lange again wrote to all the General Chairmen referring to his October 31, 1988 letter to them, stating as a result of its study and feedback from employees, that the policy on smoking as described in the Newsletter would be adopted and in addition the Carrier would also institute a policy to assist employees to quit smoking by reimbursing them up to $100.00 for the cost of an approved smoking cessation program for each of their first two attempts to quit (Co. Ex. #14).

On March 29, 1989, General Chairman Parker wrote Mr. Lange, stating that the TUC supported the May 1, 1989 aspect of

the Company's smoking policy, provided that the Carrier would make available designated areas for smoking at each work place inside AMTRAK facilities. The letter stressed that it opposed the total ban on smoking to be effective January 1990 if it meant that employees could be disciplined for smoking (Co. Ex. #15).

On April 3, 1989, TUC General Chairman Randolph, who represents the Carrier's employees in the Northeast Corridor and Headquarters offices wrote to Mr. Lange concurring in the views expressed in Mr. Parker's letter.

Between April 14 and April 26, 1989 the Organization and the Carrier conferred with respect to the proposedsmoking policy, with the Organization primarily protesting the fact that the Carrier had not provided smoking areas inside AMTRAK facilities and was in effect banning all smoking within the Carrier's facilities.

On April 28, 1989 International President Kilroy authorized its counsel to seek an injunction prohibiting the Carrier from implementing its new no smoking policy (Co. Ex. #17).

On May 11, 1989, Senior Director of Labor Relations Livengood wrote International Vice President Scardelletti stating that smoking areas would be established by May 15. Mr. Livengood stated he was agreeable to expedited arbitration to determine whether the Carrier could implement its January 1,

1990 smoking ban (Union Ex. #15). Mr. Scardelletti replied to Mr. Livengood on May 17, 1989 again protesting the lack of designated smoking areas and requested the Carrier to restore the pre May 1, 1989 status quo until the parties could jointly work out a smoking policy. Mr. Scardelletti offered to submit the matter to expedited arbitration if the Carrier would maintain the pre-May 1, 1989 status quo during the pendency of the arbitration proceeding (Union Ex. #16).

On May 24, 1989 the parties settled their April 27, 1989 law suit, by the Organization withdrawing with prejudice its application for a preliminary injunction and the Carrier agreeing to establish designated smoking areas. The settlement was to be in effect until December 31, 1989 and was without prejudice to the respective positions of the parties in this dispute (Union Ex. #17).

On August 3, 1989, the Organization served a Section 6 Notice on the Carrier seeking to revise and supplement existing agreements to provide for specific regulations covering smoking on the Carrier's property (Co. Ex. #23 and 24).

On August 9, 1989 the parties requested the National Mediation Board to establish a public law board and to appoint a neutral member thereto to hear and decide the smoking dispute. On August 30, 1989, the NMB appointed Jacob Seidenberg to be the third and neutral member of Public Law Board No. 4762.

The parties agreed at the October 31, 1989 arbitration hearing, at the request of the Arbitrator, that the status quo would be maintained until this Board had rendered its Award.

The rules and contract provisions relevant to this dispute are:

Company's Rules of Conduct

"I. Use of Tobacco
Employees must observe smoking regulations. Employees serving the public on or about trains or at stations and ticket offices may not use tobacco for smoking or chewing purposes while in the presence of the public."

Rule 28 of the current Agreement between this Organization and the Carrier stated: (Employees outside of Northeast corridor)

"Health and Safety

It is the policy of the company to safeguard the health and safety of employees. Both the company and employee shall cooperate in maintaining safe and sanitary conditions of company facilities."

Rule 8-c-1 of the current Agreement between the Organization and Carrier states in part: (Employees in Northeast corridor)

"Health and Safety

The health and safety of employees shall be protected. The offices in which employees are required to work shall be properly cleaned, ventilated and lighted and kept in sanitary condition."

An April 26, 1983 Memorandum to all Commissary Employees the Carrier prohibited smoking in the Satellite and stated employees who violate the rules will be dealt with accordingly (Co. Ex. #3).

Carrier's Position

The Carrier states that its proposed smoking policy is a reasonable effort on its part to safeguard the health of its employees and implements and continues a long established right which it has exercised in the past to protect employees' health and safety, without negotiating with the Union over the specifics of the regulations that it promulgated pertaining to employee health and safety.

The Carrier asserts that it has the managerial right to issue regulations for the health and safety of its employees and it has exercised this right through its promulgated regulations and the language contained in the collective bargaining agreements. The Carrier maintains that it has historically regulated smoking on the property in order to protect the health and safety of the employees as well as to protect its property. It has prohibited smoking around certain computer equipment, as well as around the storage area where commissary supplies are kept. It has issued regulations requiring protective clothing, footwear and eye wear in the material control department. It has banned smoking around

hazardous materials. It has also banned smoking at its ticket offices for those personnel dealing with customers. It has in the past permitted uniformed train personnel, because of the exigencies of their work, to smoke on trains but not in the presence of passengers.

The Carrier further adds that it has regulated smoking in its reservation sales offices with the knowledge of the Organization. For example, the operations floor of the Fort Washington Reservation Sales Offices was divided into a smoking and non-smoking section. In addition the cafeteria at the facility was divided into a smoking and non-smoking section. It adds that it also regulated smoking at the Los Angeles Reservation Sales Offices with the knowledge of the Organization by restricting smoking to lunchrooms, lockers and restrooms. It further restricted smoking to a certain section of the operations room until it could install electrostatic precipitators.

The Carrier states that it has repeatedly regulated health and safety matters including smoking, so that if it did not already have any right by contract, it obtained it by esrablishing a substantial past practice, which practice has now become an integral part of the Agreement. The Carrier stresses it has followed a consistent practice of regulating employee conduct when it has determined that employee health and safety were involved. It adds that it has modified its

health and safety regulations as scientific knowledge has developed and new hazards in the work environment became known and identified.

The Carrier states that such a situation arose when the Surgeon General of the United States issued a report in 1986 captioned "The Health Consequences of Involuntary Smoking." This Report concluded that involuntary smoking was a major cause of disease, including lung cancer in healthy non-smokers. The Report held that a non-smoker inhaling environmental tobacco smoke (ETS) suffered serious health consequences. The Report found that undiluted sidestream smoke, i.e., smoke that is emitted from the cigarette between puffs, contains significantly many of the higher concentrations of toxic and carcinogenic compounds found in mainstream smoke, i.e., smoke that is inhaled or exhaled by the smoker.

The Report states a substantial proportion of lung cancer deaths that occurs among non-smokers can be attributed to involuntary smoking, and that because of the rapid dissemination of tobacco smoke throughout the airspace, separating smokers from non-smokers reduces, but does not eliminate exposure to ETS.

The Carrier states that in light of this evidence of the dangers of cigarette smoke in the workplace on the non-smoker, it announced its plan to begin creating a smoke free environment by placing further restrictions on smoking. In

August 1988, Carrier's President, W. Graham Clayton announced steps would be initiated to establish a smoke-free environment, whenever possible. He further stated a committee composed of smokers and non-smokers would be established to shape the policy and seek input from employees to complete the details of this policy. This Committee reviewed input from employees in Los Angeles, Washington, Chicago, New York and Philadelphia who were in the major departments of the Carrier. More than 130 employees made comments and voiced concern about the subject, including employees who were representatives of the TUC. After receiving the output of these employees as well as from retained consultants, the Carrier's policy emerged as has already been stated in the preceding pages.

The Carrier states its policy is reasonable. It does not restrict or regulate employee smoking beyond the workplace. Employees may smoke before or after work, during work breaks and at lunch. The policy will take effect over an eight-month period to allow employees to cease or to modify their smoking habits. The Carrier offered information about approved cessation programs located throughout the country as well as offered to reimburse an employee up to $100.00 for the cost of completing an approved cessation program if the employee remained smoke free.

The Carrier asserts that the clear weight of medical evidence supports the conclusions and determinations set forth

in the Surgeon General's Report. The Report is based on the most balanced and accurate scientific documents available. Support for the Carrier's smoking policy can be gleaned not only from the Surgeon General's Report but alsofrom the studies of Consultants Repace and Pinney who discussed in their studies the implementation of restrictive smoking policies in the work place and the efficacy of trying to separate smokers from non-smokers in the workplace with the same ventilation and with different ventilation systems as well as barring smoking within the building. These Consultants found that barring smoking within the building was the most satisfactory policy with respect to eliminating the risk both to smokers and non-smokers from environmental tobacco smoke.

The Carrier states the Organization directly challenged the Surgeon General's health determinations as well as other studies on this subject. The Carrier adds that the Organization not only misconstrues the presented medical evidence but also relies on outdated material and studies published prior to the Surgeon General's Report as well as articles published by consultants retained by the American Tobacco Institute.

The Carrier also alludes to studies which indicate that smoking adversely affects productivity and employee attendance. The Carrier stresses that it is seeking to establish its smoking policy in order to safeguard its employees from exposure to environmental smoke in the workplace.

The Carrier states that the Organization has misconstrued the action of the Occupational Health and Safety Administration when it stated that OSHA rejected the Surgeon General's Report. OSHA only refused to issue a temporary standard, and that Agency itself was undertaking a study to determine how a smoke standard could be developed.

The Carrier asserts that its proposed policy must be evaluated in light of the consequences of exposure to ETS, and in light of the unique factors involved in regulating or eliminating ETS in the workplace and its impact on individuals. It adds there is evidence to showthat if there are designated smoking areas located on the same ventilation system, non-smokers will be exposed to recirculated tobacco smoke and that will not lower the level of ETS in the building.

It adds that separate ventilation systems are not feasible in light of the various facilities on its properties. It is not possible to reduce to an acceptable level the significantly increased cancer risk to smokers from other smokers' ETS. The risk of cancer to active smokers is already considerable and the policy of concentrating smokers in a smoking area, even one well ventilated, would result in increasing the risk of an extremely harmful habit. Moreover, the cost of separate ventilation systems would be prohibitive as well as impractical due to the numerous and diverse facilities of this Carrier.

The Carrier asserts from a health perspective a bar on smoking in the work place is the only way to protect both smokers and non-smokers from ETS.

The Carrier states that its policy is reasonable with regard to the impact upon employees. It will only bar, as of January 1, 1990, smoking on Company premises and vehicles. Employees will be allowed to smoke before and after work and during their breaks as long as it is done outside Company premises and consistent with existing regulations. Therefore, employees who smoke regularly will be able to continue to smoke, at these intervals and are not likely to suffer any alleged adverse consequences resulting from the ban on smoking in facilities and vehicles.

The Carrier states its policy allows employees adequate time to prepare for the ban by permitting them to smoke in designated areas until January 1, 1990. Employees will be given some financial assistance to undertake cessation programs. In addition the Employee Assistance Program stands ready to assist employees as appropriate. The Carrier states that the Organization is in error when it asserts that it was not aware of or had seen the EAP smoking provision. This policy was subject to extensive discussion and correspondence between the parties in preparation for litigation. At the arbitration hearing, the Organization denied for the first time that it had not been given a copy of the EAP policy. The

Carrier also maintains that the Organization has distorted its position regarding the imposition of discipline for breach of the smoking rule. The Carrier states that it is hopeful there will be no need to address discipline because of the background of the EAP program and its built-in assistance mechanisms. However, in the event a manager wanted to treat the matter as discipline, the procedures for handling discipline are well known to the Organizations. The Carrier is committed to work with its employees in a positive manner and to use discipline primarily as an educational tool. The Carrier stressed that it requires counselling prior to assessing final discipline. The Carrier notes that arbitration awards have held that if a smoking ban is fair on its face and produces just results in a given case, the plan should not be declared invalid because of the remote possibility that it could operate perversely in some hypothetical situation which has not occurred.

The Carrier states that while it is firmly committed to implement its plan on January 1, 1990, it is willing to negotiate on the issue, despite the groundless assertions made by the Organization at the arbitration hearing. It is willing to explore various proposals concerning employees who might find it difficult to refrain from smoking on their assignments including a displacement right to another craft and to waive entry rates and to credit AMTRAK service upon the recommendation of the EAP Counselor.

In conclusion the Carrier states it has produced substantial documentation that shows ETS is a health hazard to both smokers and non-smokers and that the Organization has not effectively refuted or impeached its medical evidence. The Carrier states that, both as a result of its managerial rights as well as the explicit contractual language and established past practice, it can properly regulate health and safety matters, particularly smoking. The Carrier adds that its smoking policy is a reasonable exercise of its right to regulate on this subject matter, especially in light of the care it has taken to formulate this policy, by phasing it in gradually and providing professional assistance to those employees having difficulty complying with the policy.

The Organization, on the other hand, has failed to meet its burden of proof both with regard to the health hazards of ETS and the Carrier's right to regulate health risks affecting its employees. The Union has made many assertions but assertions are not proof.

In light of the total record, the Carrier requests the Arbitration Board to find that the Carrier may unilaterally put into effect its stated smoking policy effective January 1, 1990.

Organization's Position

The Organization contends that the Carrier has no unilateral contractual right to ban totally smoking on the

property either on the basis of express or implied provisions of the existing Agreement or on the basis of an purported established past practice that allegedly has become an integral part of the Agreement. The Organization further contends that there is no implied Agreement wherein the Organization has consented to allow the Carrier to ban smoking for those employees whom the Organization represents, but on the contrary, there is an established practice in effect permitting those employees whom it represents to smoke in the workplace.

The Organization maintains that since the Carrier has no contractual right unilaterally to ban smoking totally on the premises, it is legally required to bargain or negotiate with the Organization over any change or modification of a smoking policy.

The Organization stresses that this dispute devolves around the Carrier's contractual right to make its proposed changes in its smoking policy and not around the validity or soundness of the U.S. Surgeon General's Report.

The Organization asserts that the Carrier has not met its burden of proof to show that the existing Agreement or past practice allow it to institute its proposed smoking policy. It adds that Rule I of its imposed Rules of Conduct only requires employees serving the public, either at stations or on trains not smoke in the presence of the public. It has been the Carrier' practice and the custom to allow employees under Rule

I to smoke on company premises out of the view of the public. The Organization further states that Rules 28 and 8-C-1 stating that the "health and safety of employees" shall be protected" cannot be construed to be the Organization's assent to the proposition that it agreed to a unilateral imposition of a total ban on smoking, which would subject employees addicted to smoking to discharge for the breach of the rule.

The Organization maintains that the cited Rules of conduct and the negotiated rules do not bestow upon the Carrier the exclusive right to determine what actions may be taken to protect the health and safety of employees. Being negotiated rules they suggest that unilateral attempts to impose health and safety rules is a bargaining matter between the parties. The Organization adds that if these cited provisions . . were intended to cover a total ban on smoking, then there would be nothing to prohibit the Carrier from imposing other regulations in the nature of health and safety such as requiring physical examinations on the shop floor, cutting back the hours of older employees, or to engage in strip searches.

The Organization states that there is no implied agreement or past practice that shows it has ever consented to, or granted the Carrier the authority to impose unilaterally a total ban on smoking. In order for the past practice to be binding it must be unequivocal, be of long standing, and mutually accepted by both parties without objection. The

Organization stresses none of its actions has ever risen to the status of a past practice, i.e., wherein it has agreed to a total ban on smoking in the work place. It is undisputed that the employees it represents have always been permitted to smoke at the work place when not serving the public.

The Carrier asserts that the examples cited by the Carrier of prohibitions on smoking are inapposite. While smoking around sensitive equipment is prohibited, employees working at these locations are permitted to smoke elsewhere in the building. The smoking restrictions in the Sales and Reservation Offices do not stand for the proposition of allowing a total ban on smoking. If anything TUC employees have always been allowed to smoke in these offices. For example, at the Fort Washington Office there was unrestricted smoking until 1981. After that date, the work area was divided into smoking and non-smoking areas following an Organization complaint on behalf of non-smokers. In 1989 the smoking area was moved to the cafeteria after consultation with the Organization. Likewise arrangements have been made at the Los Angeles SRO to allow smoking at individual work stations in designated areas on the operations floor.

The Organization adds that when the Carrier established committees to discuss the Carrier's proposal to change unilaterally the smoking policy in the workplace, the Organization's Representatives who attended these meetings

objected to any attempt to ban smoking totally on the premises. The Organization maintains that there is no evidence to prove that there is a long established past practice wherein the Organization has ever agreed with the Carrier to ban totally smoking on the property.

The Organization states, on the contrary, there is an implied agreement that permits the employees it represents to smoke at their work places out of public view, or at the minimum, there is a practice that permits the Carrier to regulate but not to prohibit smoking by employees at a particular work station, and this was done with the Organization's assent. For example, the banning of smoking at the commissary where food was stored, involved a few employees who when required to spend the entire day at the commissary, could smoke at times away from the commissary. The Organization states this action was not an agreement on its part to ban totally smoking on the property. It certainly did not constitute an interminable waiver on its part not to challenge any far reaching excessive and punitive regulation which overlooked the tobacco addiction of many TUC members.

The Organization states that the evidence shown that there is an established past practice which permits the employees whom it represents to smoke on Carrier's facilities, and this practice has risen to the level of an implied agreement. The Organization states that this implied agreement

will be breached if the Carrier implements its policy on January 1, 1990. It states many employees were hired with the understanding that they would be allowed to smoke at the workplace. This right cannot be eliminated because the Carrier now takes the position it had the inherent right to do so. The Organization notes that many of its members are not permitted to leave the work place for a break period or during lunch time. This would include Tower Operators who work alone, and for whom there would be no need for a ban to protect the health of non-smokers. The Organization maintains that it has been a fixed and established practice that employees could smoke at the work place and this was accepted without objection by both parties. The Carrier cannot now unilaterally change this established practice without antecedent negotiations under the Railway Labor Act.

The Organization further maintains, arguendo, that if there is an implied agreement allowing the Carrier to impose a rule totally banning smoking, the Carrier must demonstrate that the rule which it is seeking to impose is reasonable. The Organization maintains that the Carrier's rule is unreasonable because the Carrier cannot demonstrate that its rule is related to a legitimate business objective. Nor does the rule take into account the interests of smokers. It ignores a practice to which smokers have become accustomed. The Carrier's rule will not force employees to quit smoking and it ignores the fundamental problem of ventilation.

In elaborating on the reasonableness criteria the Organization stresses the Carrier has not shown any direct relationship between its total smoking ban and its business needs. There has been no showing that the affected employees are working near flammable or volatile substances. The only articulated purpose for the ban is to protect the safety of non-smokers. While the health and safety of its employees may be a legitimate concern of the Carrier, the business necessity of imposing health and safety regulations must be analyzed in to context of the actual health risks associated with the practice. The Organization adds where the risk is unknown or disputed, the Carrier's efforts to eliminate employee freedoms, subject to the threat of discharge, must be carefully scrutinized. The Organization states that the evidence it introduced into the record shows that there is a legitimate dispute as to the actual effects of ETS in the workplace. The Organization states that the Surgeon General's Report noted that a number of factors have to be determined in order to ascertain the actual risk of ETS to non-smokers in the work place, i.e., such factors as the size of the work space, the number of smokers, the amount of ventilation, etc.

The Organization maintains that the Carrier has presented no evidence as to these factors on a location-by-location basis. No such studies or findings were made by the Workplace Smoking Committee. The Carrier has not introduced

data showing that its non-smoking employees exposed to ETS have experienced greater health problems. The Organization stresses that the Carrier cannot impose regulations on its employees based on its notion of what is good or bad for the health of its employees.

The Organization adds the Carrier has not shown that designated smoking areas would not eliminate the potential harm to its employees. While the Carrier has made conclusory statements about "costs" and "feasibility", there is no evidence in the record, other than the Carrier' conclusory statements, that the Carrier discussed with the Organization what would be the actual cost and feasibility of establishing designated smoking areas with separate ventilation systems at Carrier facilities.

The Organization adds another reason why the Carrier's smoking proposal is unreasonable is that it fails to accommodate the interests of the smokers and represents an "all or nothing" approach to the problem of workplace smoking. It is unreasonable for the Carrier to discipline employees who have smoked all their lives and are addicted to tobacco. The Organization asserts that, while the Carrier wants the Arbitrator to believe that it would be sympathetic to smokers in its application of discipline, the EAP program has been used as a device to dismiss employees faster. In any event, the Organization notes the Carrier has stated that a breach of the

no smoking rule will be enforced like any other carrier rule or policy.

The Organization states the last reason why the Carrier's smoking policy is unreasonable is that in refusing to do anything about improving the ventilation systems in their facilities, the Carrier is ignoring the fact that the prevalence of ETS may be a sign of improper ventilation subjecting its smoking and non-smoking members to other harmful contaminants in the workplace. The Organization refers to several studies made by consultant groups such as ACVA and the NIOSH that state ETS represents only a small percentage of the indoor air problems in buildings.

In conclusion the Organization asserts that the Carrier's unilateral ban on total smoking on the premises cannot be sustained because the Carrier has no contractual authority, either express or implied, to institute such a ban. There is no evidence that the Organization has ever acquiesced in or consented to the Carrier's right to impose such a total ban. What the evidence does show is that there is a well established, long standing practice to permit TUC represented employees to smoke at their workplaces with limited well defined exceptions. The Organization asserts that the Carrier cannot unilaterally modify its fixed and well established practice without proceeding in accordance with the requisite mandatory provisions of the Railway Labor Act.

The Organization adds that even if the Carrier could demonstrate that it had the authority to make the change in the smoking policy, or in the alternative, that the Organization had consented to the Carrier's authority to change the smoking rules, the Carrier's authority would still be limited by the test of "reasonableness". The Carrier's total ban on smoking fails this test because its all or nothing rule does not accommodate the interests of smoker employees and threatens the job security of those employees addicted to tobacco. Nor is the Carrier's proposed policy sanctioned by being a legitimate business objective.

The Organization asserts, contrary to the Carrier's allegations, that no thought and analysis preceded the Carrier's proposed total ban. Rather the Carrier presented its plan as a fait accompli without ever engaging in meaningful discussions with the Organization over the formulation and impact of the proposed smoking policy. The record is devoid of any evidence of consideration of the factors that could result in a rational approach to this problem. The Organization maintains that the parties should negotiate a policy which will have designated smoking areas that will accommodate the interests of all the parties, and which will at the same time allow the medical and scientific community the opportunity to evaluate the effects of ETS in the workplace, and permit the parties to identify what may be its actual effects in Carrier facilities on smokers as well as on non-smokers.

The Organization requests the Arbitrator to hold the Carrier has no unilateral authority to impose its proposed total ban on smoking.

Findings: Despite the plethora of data and evidence introduced by both parties dealing with collateral matters, the basic issue in this dispute devolves upon whether the Carrier, operating in the context of collective bargaining, has the contractual authority unilaterally to ban all smoking on its premises and vehicles, effective January 1, 1990, on the basis of protecting the health and safety of its employees.

The Board finds that the Carrier does not possess the requisite contractual authority and therefore it may not appropriately unilaterally act in the manner in which it proposes.

The Board, upon review and analysis of the cited rules, the contract provisions, the past practices and management rights, concludes that these underpinnings upon which the Carrier relies to support its position, do not do so.

The Board finds that neither the Carrier's Rules of Conduct, i.e., Rules I or D, nor Contract Rules 28 and 8-c-1 invest the Carrier with the authority to effect its far reaching and all encompassing smoking ban. The Board finds the language of the Rules of Conduct prescribe rules directed only at a smoking policy for employees who have contact with the

Carrier's customers or public. But these rules did not purport to ban employee smoking at locations where these employees had no contact with the public.

The Board further finds that the cited contract provisions relied upon the Carrier are too general and non-specific to allow the Carrier unilaterally to ban totally smoking on the premises under the patina of protecting employee health and safety. The Board holds that the Carrier's right to "ban" is not subsumed under the right to "regulate", especially for a Carrier that operates within the ambit of collective bargaining. It must be recognized by the Carrier, albeit reluctantly, that the very institution of collective bargaining itself is a restraint on the Carrier's freedom of action, regardless of how sincerely and deeply the Carrier is convinced that its proposed actions are needed and warranted. The Board has to take cognizance of facts in the record which indicate that the Carrier has made adjustments in the past in its smoking policy, and many of them at the request of and with the concurrence of the Organization. It is in light of this record that the Board has no recourse but to conclude that neither the cited Rules of Conducts or the negotiated provisions sanction or provide a valid foundation for the Carrier to make the quantum leap from regulating the locations where employees may smoke to banning totally smoking on the premises. The Board finds that such a broad exercise of authority is not

encompassed within the Carrier's managerial prerogatives, but rather is a matter that has to be negotiated with the designated representatives of the affected employees because it is a term and condition of employment.

The Board finds that the Carrier's ban on smoking in the commissary building or the ban on smoking in the main computer room, or in the Traffic and Power Control area or the ETC offices, do not support the Carrier's position in this dispute. There is no evidence that the Organization objected to the Carrier's actions to ban smoking in an area where food was stored or in areas where smoke could affect the operation of technical equipment. Moreover, the Carrier's smoking policy in these areas did not prohibit smoking on the premises outside of these designated areas.

The Board also finds that, in addition to the Carrier's promulgated rules and the negotiated contract provisions, there is no valid basis for the Carrier's contention that past established practices support its position in this case. There is no evidence that any past practice has been totally banned smoking on the property. On the contrary, the evidence discloses that the Carrier in the past effected a modus vivandi designed to cope with the smoking problems of both smoking and non-smoking employees, and the Carrier's actions in these matters were done with the knowledge and consent of the Organization. In the main the Carrier's smoking policy banned

smoking in certain designated areas and permitted it in other areas. The Board does not find that the Carrier's actions in these matters established any past practice that rose to the level of an implied term of the collective bargaining agreement that authorized the Carrier unilaterally to ban smoking totally on the premises on the basis of regulating the health and safety of employees.

In the case at hand, the Board finds that the protests of General Chairmen Parker and Randolph as well as the objection of Vice President Scardelletti and the Organization's legal action to restrain the Carrier from putting its smoking policy into effect, are timely and overt manifestations of the Organization's firm conviction that the Carrier's proposed smoking program was impermissible under the existing Agreement.

The Board finds no evidence in this record that the Organization acquiesced in, or had accepted the Carrier's theory that the Carrier possessed, either on the basis of promulgated rules or negotiated contract provisions or implicit contract authority, the managerial right to ban smoking on the premises for the purpose of regulating the health and safety of the affected employees, without obtaining the concurrence of the Organization.

The Board is aware that the Carrier concludes that, while it has always had the right to regulate smoking on the property to protect the health and safety of its employees by

virtue of its promulgated rules as well as express and implied contract provisions, its right to ban smoking totally has been fortified and strengthened by the issuance of the 1986 Report of the U.S. Surgeon General.

The Board must reiterate and stress that the Carrier's right to act unilaterally must flow from its contractual authority and not from any Report and Findings of the Surgeon General. The issue is one of contract and not one of health. The Board's responsibility in this dispute is to determine the metes and bounds of the Carrier's contractual authority and not the scientific or medical validity of the Surgeon General's findings on ETS vis a vis lung cancer.

The Board has concluded that the Carrier does not possess the contractual authority to unilaterally ban smoking totally on the property and vehicles in the interest of employee health and safety because the Carrier functions in the circumscribed area of collective bargaining. The Board must hold that if the Carrier wishes to promulgate a smoking policy that takes cognizance of the Findings and Conclusions of the U.S. Surgeon General's 1986 Report, it must do so within the relevant statutory framework of the Railway Labor Act. Within that bargaining framework the parties are at liberty to raise such matters as have been stated in this dispute, i.e., size of work place, different types of ventilations systems, number of employees working in a given area as well as the costs and feasibility of an operative smoking policy.

The Board is confident that the parties will effect a reasonable resolution to this difficult problem since they are knowledgeable and sophisticated practitioners of the art of collective bargaining and they will approach their bargaining responsibility in good faith.

Award: The Carrier may not unilaterally put into effect on January 1, 1990 its proposed policy providing for a total ban on smoking on its properties and vehicles, but must negotiate with the Organization regarding the implementation of such a smoking policy.

Jacob Seidenberg, Chairman and
Neutral Member

J.M. Livengood
Carrier Member

R.A. Scardelletti
Organization Member

December 7, 1989