Public Law Board No. 4962

Procedural

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
vs	)	**Case 1/Award 1**
Union Pacific Railroad Company	)	

QUESTION AT ISSUE

Should a Public Law Board Agreement between the parties to this Board contain a clause prohibiting introduction of evidence in hearings before the Board unless that evidence was introduced into the record at the time the case was being handled on the property by the parties?

Background

The parties to this procedural Board had originally docketed a case before the National Railroad Adjustment Board under title of Case 88-3-24. After that case remained pending before the Third Division for more than one (1) year the Carrier exercised its privileges under Section 153, Second of the Railway Labor Act and withdrew the case with intention of docketing it before a Public Law Board with the Organization. For the record, Section 153, Second of the statute of 1926 & amendments reads, in pertinent part, as follows:

> "If written request is made upon any individual Carrier by the representative of any craft or class

> of employees of such Carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any Carrier makes such a request upon any such representative, the Carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the Carrier and one person designated by the representative of the employees...."

On March 1, 1990 the General Chairman of the Organization in Longview, Texas sent and proposed to the Carrier's Director of Labor Relations a Public Law Board Agreement with usual provisions dealing with designation of interested members, how the neutral member of this proposed Board would be chosen and so on. Also included in this proposed Agreement was one provision which ultimately served as cause for the establishment of the instant procedural Board.

The Issue at Bar

Section 6 of the proposed Agreement contained the following language:

> "Each party is charged with the duty and responsibility of including in its written submissions all known relevant facts and documents as evidence. Submissions must be confined to data presented to the duly authorized representative of the parties in the handling of cases on the property".

The Carrier's Director of Labor Relations found the language of this proposed provision objectionable and he stated as such in letter to the General Chairman under date of March 9, 1990. Therein

the Carrier's officer stated the following, in pertinent part:

> "The Public Law Board Agreement which you have proposed is acceptable except for the provision barring the introduction of new evidence. It appears that you are attempting to incorporate the restrictions of NRAB Circular No. 1 into the Public Law Board Agreement. As you know, our main reason for withdrawing the case from the NRAB was so that evidence of past practice could be introduced...."

Discussion

The reasoning used in this case by the Carrier is clear both with respect to its intentions on the issue of evidence which ought to be permissible in Public Law Board forums, as well as, it appears, with respect to specific intentions related to the case it pulled down from the NRAB which it wants to docket before a merits board with the Organization. With respect to the latter, the Carrier makes no bones about strategy: its "main reason for withdrawing the case from the NRAB was so that (additional) evidence of past practice (related to the case) could be introduced..." Evidently, it takes no course in Aristotelian logic to permit conclusion that a restrictive evidentiary clause would cut such strategy off at the pass under a Public Law Board format dealing with that case. Having stated that the Carrier then resorts to idealized arguments related to rationality. By so doing, it states, for example, the following: "...(h)aving all evidence is a necessary precondition which must be met in order for an arbitrator to reach an informed decision". The Carrier then cites, in its submission, observations on evidence from Elkouri and Elkouri's standard text on arbitration. Therein it is noted that

"strict observance of the legal rules of evidence usually (are) not required" albeit the parties may, on rare occasions, require arbitrators to do so. Procedures to the contrary are, however, more common. In this respect, Elkouri et al. cite both Rule 28 of the AAA and the policy of the NRAB itself. Of particular interest to the Carrier, with respect to this case, is the opinion of Elkouri et al. on the admission of evidence wherein it is stated:

> "Although strict observance of legal rules of evidence usually is not required, the parties in all cases must be given adequate opportunity to present all of their evidence and argument. Arbitrators are usually extremely liberal in the reception of evidence, giving the parties a free hand in presenting any type of evidence though to strengthen and clarify their case..."

The Carrier, therefore, concludes that "restrictions on submission of evidence which the Organization is attempting to establish (in this case) are contrary to the basic tenants of arbitration". It furthermore argues that it is willing to accept the format of an older PLB Agreement in effect on this property between the (old) Missouri Pacific and this same Organization which was established in 1959 and is Board 279. Pertinent provision of that Agreement, which is of interest to the Carrier, is couched in the following language at Section I. There the parties agreed: "....The Board shall have authority to require the production of such additional evidence, either oral or written, as it may desire from either party". The Carrier argues that there are various Public Law Board Agreements already in effect on this property which do not contain "any restrictions on presentation of evidence". The Carrier

cites as examplesfive (5) different Agreements in effect on this property between the Eastern District of the UP and UTU(1986); the same Organization and this Carrier(1985); the BLE and the Carrier(1987); the Signalmen and the UP(1989); and the UP and (former) BRAC(1986). As a matter of arbitral precedent, the Carrier also cites Award 1 of Public Law Board 322 (1969). That Award, result of a procedural dispute between the Illinois Northern Railway and the UTU, centered on an issue somewhat parallel to the one at bar. In the Award to that procedural Board the majority, with dissent by the Organization Member, ruled in pertient part that language to an Agreement could include the following:

> "...The Employees' ex parte submission, the Carrier's answer thereto, and the Employees' rebuttal statement which are in the file to be withdrawn from the First Division of the NRAB shall be part of the Board's record herein, but the record need not be confined to the same. The Board shall have authority to request the production of additional evidence from either party".

In effect, the neutral member of the Board, in that case, agreed with the Carrier's proposal for such language to be included in the provisions of a Public Law Board Agreement.

Lastly, the Carrier argues that conclusions found in Award 1 of PLB 363 also can be incorporated herein, by reference, with its position on the matter before the instant Board.

The Organization, on the other hand, argues that a Public Law Board Agreement ought to have restrictive provisions, such as that proposed to the Carrier in the instant case, in order to "insure

that (a) Board...consider (only) the facts of a dispute as they were developed and presented on property". Secondly, the Organization argues that even without such restrictive provision new evidence ought not be permitted at this stage of the process in order to provide closure.

In terms of specifics, the Organization argues that such provisions in Agreements such as they suggest do exist. For example, A Burlington Northern and a BMWE Agreement(1990) at Section 6 places restrictions on the type of information to be presented to the neutral but does provide, in pertinent part, that "...(a)ll written evidence must be submitted as provided...and no written rebuttals will be permitted, except for the provision of specific information requested by the neutral". It not exactly clear if this Agreement, nor another one cited by the Organization were submitted to the book of randum numbers, but such does surely represent language found in certain Public Law Board Agreement negotiated over time.

The Organization also argues that many Agreements have no language referring to restrictions on evidence and when that is the case arbitral conclusions serve as guide. In this respect both PLB Awards and Awards issued from various Divisions of the NRAB hold that the introduction of new evidence after a case has been docketed represent ambush.

The last arguments presented by the Organization deal with efficiency and public policy. According to reasoning offered by the

union with respect to the former if one can take two bites out of an apple, why not three or four and where would the process stop? Second, with respect to the latter, if one or the other party does not put all its cards on the table according to a given time-table and/or procedure which both can live with the result would be havoc and ultimately a "waste of public and private funds", according to argument by the union. Such, the union argues, would be particularly true if a case is pulled down from one of the Divisions of the NRAB only to be brought back to the point in the process where one side or the other would re-prepare the same case and bring it to another forum. Since that is what the Carrier is attempting to do here, according to the Organization, such would but open the "flood gates" for more abuse and misuse of the arbitration process.

Findings

The only reason for this procedural Board is to attempt to resolve the problem of how to bring a case to arbitration relative to admissible evidence. Before the NRAB, and in PLB and SBA forums in this industry where there is no specific contractual language dealing with admissible evidence, the parties leave the resolution of this question to the articulation of the doctrine of Circular No. 1 of 1934 which states, for the record, the following in pertinent part:

> "The parties are...charged with the duty and responsibility of including in their original written submission all known

relevant, argumentative facts and documentary evidence..."

Third Division Award 27576 dealing with a dispute between the Organization which is party to this case and the Delaware and Hudson Railway Company embodies arbitral precedent with respect to the question of Circular No. 1 and evidence in fairly typical language when it states the following:

> "This Board has ruled on numerous occasions that as an appellate forum it cannot frame its conclusions on information or evidence which was not submitted by the parties during the handling of a case on property. Such doctrine is codified by Circular No. 1 and articulated by Awards emanating from various Divisions of this Board..."

According to the Carrier, which is what started the instant controversy in the first place, the precedent outlined above does not, and even ought not, apply to PLB forums. To support its argument, the Carrier cites various PLB Agreements currently in force on its property. A review of the language of these Agreements, in pertinent part shows that the following provision, in part, is common: "...(t)he Board will have authority to require the production of such additional evidence, either oral or written, as it may desire from either party..." (Emphasis added). This language is found in a UTU Agreement with the Carrier (1986) & (1985), in substance with slightly different wording in a BLE Agreement with the Carrier (1987) and in a TCU (old BRAC) Agreement with the Carrier (1986). A newer Agreement (1989) between the Signalmen and the Carrier has language which appears to be a little at variance with the above and this Agreement states the following,

in pertinent part: "...(t)the Board shall have the authority to permit or require the parties to produce additional evidence, either written or oral, as it deems necessary, providing that the additional evidence pertains materially to the issue or issues raised by, OR PRESENTED IN, the record of the case..." (Emphasis added). Evidently, this latter agreement presented by the Carrier does not support its position since it precisely wishes to add to the record of the case which its wants to present, on its merits, before a Public Law Board which is a case it pulled down from the NRAB.

None of the Agreements cited by the Carrier, however, albeit they certainly go further than the restrictions stricto dicto found in Circular No. 1, permit either interested party the license to introduce new evidence or arguments at the hearing stage of a case. What the language of these Agreements does is permit the neutral members certain subpoena powers, so to speak, to request additional information if the neutral so wishes. Such powers might be useful, from this neutral's experience, not with respect to the merits of a case, but with respect to the operationalization, for example, of relief in certain types of cases dealing with continuing liability and so on. The Carrier quotes fairly extensively Elkouri & Elkouri as support of its position. Clearly this manual on arbitration centers on arbitral procedures generally designated as de novo hearings albeit there is a school of arbitral thought which holds that all discipline cases are, in fact, appellate by

definition and that the introduction of totally new evidence at a hearing which had not been handled by the parties in prior steps of the grievance procedure is improper. Although it is true also that the strict rules of evidence do not apply to arbitration hearings under such format it is also true, as a point of information, that certain union contracts handle an issue such as the one before this Board in a contractual manner. Such is the case with such national level contracts negotiated between the United Mine Workers of America and the Bituminous Coal Operators' Association, and between the American Postal Workers Union and the U.S. Postal Service. Thus the issue raised in this case is neither new nor novel to other forums and contractual restrictions of the type requested by the Organization, in this case, also apply.

The Carrier's strongest argument is found in a prior Award issued in 1969 under title of PLB 322 (Procedural Board). This older Award appears to go beyond the bounds of any other arbitral, procedural or Agreement restrictions cited in the foregoing and appears to explicitly permit the parties to add new evidence to the record of a case after it has been pulled down from the NRAB and proposed for PLB handling. In the Award (unumbered) to that Board, the neutral states the following, in pertinent part:

"...(t)he Employees' ex parte submission, the Carrier's answer thereto, and the Employees' rebuttal statement which are in the file to be withdrawn from the first Division of the NRAB shall be part of the Board record herein, but the record need not be

confined to the same. The Board shall have authority to request the production of additional evidence from either party..." The problem with this Award is that it appears to open itself to the possible interpretation of permitting the parties themselves to add to the record of a case pulled down from the Board whether, in fact, that is the only possible interpretation possible or not. If that is what this Award says, or can be interpreted to mean, it is highly idiosyncratic and would be considered by the vast majority of neutrals in this industry to be ill-reasoned.

The primary basis of the argument by the Carrier is that a neutral must have the full record before him or her in order to arrive at a well-framed Award. As a rational principle,that is indisputable. On the other hand, neutrals in this industry and in every other one work with what the parties present to them: cases have been won and lost on basis of quality of preparation. Such is no well-guarded secret in arbitral arenas. At some point the process must have closure: by tradition and precedent this is when a case, appealed and conferenced by the parties, is at impasse and the parties agree to docket it before a neutral forum. The parties have full freedom to develop their case(s) up to that point. At some point, however, the process of discovery has to stop. Forums in this industry have concluded on basis of Circular No. 1 that the process absolutely stops at docketing, or PLB's have used the more liberal formula of permitting the neutral, under title of the "Board" to solicit additional information if a point is obscure

(presumably) or if questions of relief arise and so on. PLB 322 may or may not (depending on interpretation) have gone further than that. If it did, it is off the beaten track. The proposal by the Carrier in this case would be viewed by all opponents, if not all neutrals, as an invitation to an unending process of discovery. To rule in the Carrier's favor would set precedent which would permit all parties, Carriers and Organizations, free rein to pull down cases from all of the Divisions of the NRAB and then add to their records in a potentially non-ending process. If information can be added to the record after a first docketing, why not after argument of the case before the neutral before the issuance of the Award, etc.? The language suggested by the Organization in this case is but verbalization of arbitral precedent absent any language at all in an Agreement of the kind at bar. Less restrictive language could, no doubt, be used but that option is not before this Board. Given the record before this Board, therefore, and the question posed to it, the answer to the query must be in the affirmative.

Award

The answer to the question at bar is: yes.

4962-1

Edward L. Suntrup, Neutral Member

A. C. Hallberg, Carrier Member

L. W. Borden, Employee Member

Date: _____

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RE: Public Law Board No. 4962 (Procedural)
Case 1/Award 1 Executive Session

Gentlemen:

The above captioned Award was issued by the Chairman and Nuetral Member of this Board on March 8, 1991. Under date of May 15, 1991 the Carrier Member requested Executive Session to discuss the Award. This session was held on June 11, 1991 wherein both parties to this case made comments. At the end of the session the neutral member of this Board informed the parties that he would make final comments on this session, for the record, to both parties to bring finality and closure to this case.

The neutral member need not review all arguments surrounding the case at bar but will center only on objections raised by the Carrier member, applicable in pertinent part, to the Award issued on March 8, 1991. This case dealt with the single issue of whether a PLB Agreement should or should not contain a clause prohibiting introduction of evidence in hearings before a PLB unless such evidence had been introduced into the record at the time the case was being handled on the property by the parties. The Organization held that such clause was appropriate. The Carrier held that such clause was not appropriate.

The brunt of the comments by the Carrier member at the Executive Session was that the Neutral Member had misconstrued the

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main argument presented by the Carrier Member in this case by quoting in the Award, at pp. 8 et alia, the boiler plate language from other Agreements between this Carrier and other Organizations which states the following:

> "...(t)he Board will have authority to require the production of such additional evidence, either oral or written, as it may desire from either party...."

According to the Carrier Member in Executive Session, the Carrier was not attempting to argue for authority to introduce new evidence into PLB hearings on basis of this language, but rather on the following boiler place language common to many of its Agreements with other Organizations which states, to wit, the following:

> "...(t)he parties may present, either orally or in writing, statements of fact supporting evidence and data and argument of their position with respect to each case being considered by the Board..."

This common language of Agreements on this property, according to the Carrier Member, automatically provided what it was requesting before this procedural Board, namely, the right to present new evidence and arguments at the hearing level of docketed cases.

Evidently, as the plain language of the boiler plate cited above indicates, the interpretation which the Carrier Member wishes to give to it is not supported by this same language. This language states nothing about new evidence. Perhaps the Carrier's interpretation of the intent of this language could be what the Carrier says it is if the parties had some oral agreement to that effect supported by past practice. Discussion during Executive Session permitted, however, conclusions to the contrary. The Carrier could give no specific instance of when both interested parties and/or a neutral for that matter, on this property, gave the interpretation to this language which the Board Member was suggesting. In fact, in recent PLB experience on this property, between these same parties, in arbitral decisions dealing with merits, the Organization Member stated that the Carrier argued exactly the opposite of what is now being argued before this neutral on procedural grounds. According to the Organization, when it attempted to introduce new evidence at a PLB hearing, which had not been introduced at prior handling of a case on property, the Carrier argued, and was upheld by a neutral, with respect to the inappropriateness of such a tactic. The Carrier Member did not deny that such had happened recently on this property.

The issue in this case, again, deals with the permissibility

of new evidence during a PLB hearing. Boiler plate language presented to the neutral in this case which addressed the new evidence issue is the language quoted at pp. 8 et al. in the Award which assigns such prerogatives to the neutral, under title of the "Board" , certainly to be used in only the most extraordinary cases.

There was no misunderstanding of the issue at bar in this case by the neutral. Such contention by the Carrier Member is an interesting, but flawed, tactic introduced in Executive Session to but continue arguing a case for which an arbitration decision has already been rendered.

A final question was raised during the Executive Session with respect to the finality of **Award 1** of **Public Law Board No. 4962** since the Award had not yet been signed by the Carrier Member as of that date. Legal status of arbitration Awards in this industry need only signatures by the majority. Such status take effect upon the date of the signature, if duly noted on the Award, of the second person of the majority.

Edward L. Suntrup, Chairman
Public Law Board No. 4962

Chicago, Illinois

Date: June 12, 1991