PUBLIC LAW BOARD NO. 5038

(Procedural)

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

National Railroad Passenger Corporation

Question at Issue

Should a Public Law Board Agreement established by the parties to adjudicate drug testing cases on Amtrak contain a clause prohibiting the introduction of evidence and arguments raised in legal proceedings related to the cases at issue?

Background

During 1985 the Carrier began drug testing of all its employees as a part of regular medical examinations, which was a change from what had been done previously. Certain individuals were medically withheld from service or disciplined as a result of these tests and their cases were heard on the property. Thereafter, some of these cases were appealed to the National Railroad Adjustment Board (NRAB). Others were held on the property. The cases which were pending before the NRAB were, after the expiration of twelve months, withdrawn from the NRAB and a request was made by the Organization to have all of the cases consolidated and heard before a single referee as the chairman of a Public Law Board. A disagreement arose between the

parties as to the wording of the agreement establishing the Public Law Board and that matter is before this procedural board for decision.

At the same time that the Organization was attempting to resolve the individual grievances, it was actively engaged in contesting the right of the Carrier to change its drug testing policy as part of a large group of labor organizations. That group, the Railway Labor Executives Association (RLEA), filed suit in federal district court in the District of Columbia attempting to convince the court that the matter was a major dispute under the Railway Labor Act. It was successful; however, the district court decision was stayed by the D.C. Circuit Court of Appeals pending the Supreme Court decision in Conrail v. RLEA and was, thereafter remanded to the district court for action consistent with the Supreme Court decision. The Supreme Court having held that the matter, whether there could be a unilateral change in testing for drugs, was a minor dispute which should be brought before an arbitrator.

Positions of the Parties

It is the contention of Amtrak that under well-established principles,

> ...the record is constituted of correspondence exchanged in the usual manner of handling of the dispute while the case was on the property. Such correspondence must have been submitted to the carrier's highest designated officer with a reasonable opportunity to respond.

It is the Organization's contention that it should have the opportunity to bring before the Public Law Board all matters which were raised as legal arguments during the course of the court cases directly involving the matter at issue, even if such matters were not raised as part of the proceedings in the individual cases on the property.

Discussion

At the hearing involving this matter it became clear that while there was a clear difference of opinion regarding the appropriateness of allowing "fresh" argument before a Public Law Board, there was no desire on the part of either side to expand the evidentiary record which was made on the property. Accordingly, although the issue, as stated by the Organization and quoted above, includes the phrase "introduction of evidence", it is the Board's view that this request is not before this Board as both parties have indicated a willingness to limit the factual record.

In its discussion of what argument should be allowed, the Carrier takes the position that the general rule has always been that only arguments which were raised on the property and of which a carrier could be aware before making its final decision are properly before a Public Law Board, just as such arguments are precluded by the NRAB rules. It has indicated that it would be unfair for the organization to change their position in those cases from that which had been presented at the time and upon

which AMTRAK's final decision was based

The Organization has argued that the general rule cited by the Carrier has a clear exception for matters which are part of the public record, such as court decisions. It believes that the arguments which were made in the courts regarding the matter in dispute (drug testing) are not new or surprise material to the Carrier, although it admits that these arguments were not raised in the individual cases when they were heard on the property. It further indicated during the hearing that it was not seeking to relitigate the matter in every case, but rather wished to have a "test" case decided on the general right of the Carrier to make the changes in drug testing and then to apply that general ruling to the particular facts present in each of the cases listed for the proposed Public Law Board.

This matter is not without significance. However, there are unique facts present in this situation which should differentiate the decision in this case from the run-of-the-mill situation where there is a dispute as to what matters may be brought before a Public Law Board. First of all, the question of whether a challenge by the Organization to the change in the drug testing could be appropriately brought before a Public Law Board was not decided until the Supreme Court had heard the matter and one of the cases stayed pending that decision involved the disputes which make up the content of the issues before the proposed Public Law Board. Second, while the legal arguments may not have been raised before the highest designated officer of the Carrier

prior to his making the decision in each of the individual cases, since the dispute between the parties was widely known, the Carrier cannot claim that it will be surprised by the arguments which the Organization wishes to raise. Finally, due process demands that prior to the discharge of an individual, such individual has the right to challenge the correctness or legality of the procedure which caused the discharge. The Organization took the position that such challenge should be in a manner which the Supreme Court found not to be appropriate. If the directions of the Supreme Court to direct the arguments to arbitration are not followed and these arguments are barred, due process will not have been afforded the discharged individuals.

In view of the foregoing, it is the Board's conclusion that the best interests of both parties will be served by allowing the Public Law Board to hear the arguments which were made to the courts regarding the change in medical testing which resulted in the Claimants' discharges. Accordingly, the agreement between the parties will be amended to reflect both a limitation of evidence to that which was presented on the property and an inclusion of all argument which was made before the courts involved in this matter.

Award

The Carrier draft of September 6, 1990 as modified by the exclusion of the second sentence of section (7) and the fourth sentence of section (10) shall constitute the agreement between

the parties except that paragraph (7)4 shall be amended to read as follows:

> 4. The position of the party, limited to the arguments expressed in the exchange on the property and made before federal courts involving these parties, including arguments made before the Supreme Court of the United States in Consolidated Rail Corp. v. RLEA, decided June 19, 1989.

Robert O. Harris
Chairman and Neutral Member

L. C. Hriczak
For the Carrier
(DISSENT ATTACHED)

Jed Dodd
For the BMWE

Philadelphia, PA, June 18, 1991
July

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CARRIER MEMBER DISSENT

This award recognizes, at page 4, the organization's admission that the arguments that may now be considered at the pending drug and alcohol board were not raised on the property. Yet, the majority finds unique circumstances that will allow for their consideration despite the well established precedent of the National Railroad Adjustment Board to the contrary. The union chose the legal forum to attempt to block the implementation of Amtrak's drug and alcohol policy and lost. This award provides them a second bite at the apple. The award in this matter is palpably erroneous.

L. C. Hriczak
Carrier Member