P.L.B. No. 6161
Case No. 01
Award No. 01

PROCEDURAL PUBLIC LAW BOARD
NO. 6161

Parties to Dispute: **COLORADO AND WYOMING RAILWAY CO.**

and

NATIONAL CONFERENCE OF FIREMEN & OILERS

BACKGROUND FACTS

The undersigned received, under date of September 10, 1998, an official certificate to act as the Third and Procedural Neutral Member of Public Law Board No. 6161 ("Board"), issued by the National Mediation Board. The Board convened on November 2, 1998, in Washington, D.C. The record shows the following.

Under letter dated November 26, 1997, the Organization's General Chairman filed a claim with the Carrier on behalf of Paul Salinas, who was a laborer for the Carrier assigned to its facilities at Pueblo, Colorado. The claim sought as follows:

a. Reinstatement to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired with compensation for all lost time (October 13, 1997 continuing until settled) plus 5% annual interest,

b. Reimbursement of all losses sustained account of loss of coverage under Health and Welfare and Life Insurance Agreements during the time held out of service.

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c. The mark removed from his record, to your office for settlement.

The claim factually alleged as follows:

On October 1, 1997, the CF&I Steel Mill workers exercised the right to "self-help" and struck the plant at the expiration of their contract. The Colorado and Wyoming, which provides rail service to the plant; continued to operate. The Steel Mill and the railroad are separate subsidiaries of Oregon Steel. The C&W established a "safe" gate for our members to enter work. However, on October 13, 1997, the Steel Mill workers commenced picketing that gate as C&W had allowed Steel Mill workers to utilize the C&W gate to avoid picketers. The Claimant, fearful for his safety and that of his family, along with respect for the picketing workers; has not crossed the picket line. The Claimant last performed service on October 10. With all due respect to Mr. Porter's letter of October 29, 1997, the Claimant is not aware of any arrangements "to provide transportation of its employees to and from their place of residence and their work site at C&W expense." By letter on October 21, 1997, we asked the C&W to re-establish a "safe" gate, but Mr. Porter in a letter of October 30 indicated the gate was out of his control. By letter of October 29, 1997, Mr. Porter advised that the Claimant was being "permanently replaced" and that C&W had begun hiring permanent replacements. Initially, **the Railway Labor Act does not allow permanent replacement of striking workers**; much less those unable to work without crossing a picket line of a separate company (ie the Steel Mill). Secondly the dismissal of the Claimant could only occur after a fair and impartial hearing (note page 27 of the schedule rules dated July 1, 1980). In this case, the Claimant was not even afforded a hearing prior to being dismissed. Therefore, the C&W has violated the agreement and the provisions of the Railway Labor Act. We ask that the claim be allowed as presented. If the C&W is planning to deny this claim, then we request expedited handling to a Board of Arbitration.

Furthermore, the C&W has advised the Claimant that his insurance medical benefits will be terminated on October 31, 1997. This would be inappropriate under our medical plan as insurance for a "dismissed" employee continues for 4 months after the month in which the last service was performed. We further seek the appropriate insurance medical benefits for the Claimant.

The Claimant reports to the designated gate each work date and notifies management that he is unable to work as "picketers" are present. If the C&W would provide a safe

gate, then the Claimant would continue to work. The Claimant is rested and available for service. He has been improperly dismissed, and "permanently replaced." The claim should be allowed as presented. Please advise. (emphasis in original).

The Carrier responded to the claim in a December 5, 1997, letter, as follows:

We are in receipt of your claim letter dated November 26, 1997, regarding the above mentioned subject.

Please be advised that Mr. Salinas was not dismissed. He failed to show up for his scheduled work assignment, therefore, a permanent replacement worker has been hired to fill the vacancy he created. In the event of a future vacancy, Mr. Salinas will be contacted and given the opportunity to return to work for the Company.

Accordingly, your claim is respectfully denied.

The Parties then conferenced on April 14, 1998, regarding the claim, but no resolution with the Carrier's highest designated officer was reached.

The Organization submitted to the Carrier an agreement to establish a Public Law Board on April 16, 1998. The Carrier responded with a counter proposal on May 22, 1998. The Parties were not able to resolve their differences regarding the establishment of a Public Law Board, and, by letter dated June 3, 1998, the Organization's General Chairman requested the National Mediation Board to establish a Procedural Board.

In a June 24, 1998, letter to the National Mediation Board, the Carrier opined that "there are two general disputes" between the Parties. The Carrier identified the "first dispute" as concerning the "law under which the dispute arises between the Parties." The Carrier stated its belief "that the

dispute and the resulting jurisdictional limit of the Public Law Board is defined by the Railroad Safety Act." According to the Carrier, the Organization "argues that the dispute arises under the Railroad Safety Act and the Railway Labor Act in that the Public Law Board's jurisdiction should be based on both of these laws." The Carrier went on to state that there was a "second dispute between the Parties" that concerned the "procedures to be utilized to conduct a hearing before the Public Law Board after the jurisdictional limits of the Public Law Board are established." The Carrier notified that it was filing a law suit in the United States District Court for the District of Colorado to seek a declaratory judgment concerning the jurisdiction and the law under which the Public Law Board would operate to resolve the disputes remaining between the Parties.

The Organization responded in a September 4, 1998, letter to the National Mediation Board, stating its "position" that the [federal court] Complaint is without merit, and that all of the issues raised by the Complaint, including the issue of 'jurisdictional limits' ... and the issue of whether the Claimant or the Organization has 'elected' a remedy under the Federal Railroad Safety Act ... are properly determined by a procedural Neutral, or in the alternative, a Merits Neutral, through a Public Law Board or Special Board of Adjustment." The Organization sought the "prompt appointment of a Procedural Neutral in this dispute." As noted, the undersigned Procedural Neutral received the official certificate of appointment to act in that capacity on September 10, 1998.

The scope of the Parties' dispute herein is in one sense set forth in 18 questions that have been placed before the Neutral together with the Parties' positions with respect thereto. Each of the

eighteen questions will be set forth below and answered. It is fair to say, however, that the Parties' dispute in large part turns on a resolution of an issue raised by the Carrier. The Carrier insists that the outcome of this procedural dispute is dependent on the outcome of the declaratory judgment action the Carrier has filed in Federal District Court in Colorado. The Carrier notes that its action asks for a declaration concerning what law should be applied in resolving the merits of the dispute.

Specifically, the Carrier maintains that it has taken the position in the declaratory judgment action pending in Federal District Court that the dispute arises solely under the Federal Railway Safety Act (FRSA) and that the merits of the claim must therefore be decided under FRSA. The Carrier notes its disagreement with the Organization and its argument that the claim arises under the Railway Labor Act (RLA) or the "contractual law of the workplace." According to the Carrier, the Organization and Claimant have consistently argued since at least October 13, 1997, that Claimant's refusal to cross the picket line was occasioned by his fear for his safety and the safety of his family. The Carrier states that subsection (10)(d) of FRSA prohibits the Organization from relying on any other provision of the law to protect Claimant. Thus, the Carrier posits the argument that the Organization "necessarily elected to proceed under FRSA and is now prohibited from challenging, under any other provision of law, C&W's refusal to reinstate Mr. Salinas." In the Carrier's estimation, should the Federal Court rule that the claim does arise under and is governed exclusively by FRSA, a number of procedural issue arise. In addition, the Carrier maintains, should the Federal Court rule that the claim is exclusively an issue of statutory rights under RLA, with no agreement to

Until the federal court enters an order regarding the scope of the merits arbitration, the corresponding procedural issues cannot be completely identified much less properly resolved. Therefore, this Board should stay this proceeding pending the outcome of the lawsuit.

Dated this 20th day of January, 1999.

Ronald M. Johnson

RONALD M. JOHNSON
CARRIER MEMBER, PLB. NO. 6161

PUBLIC LAW BOARD NO. 6161
CARRIER'S DISSENT

This dispute arose when Paul Salinas, a member of the Firemen & Oilers, refused to cross a stranger picket line in order to report to work at Colorado and Wyoming Railway Company ("C&W"), due to fear for his safety. Finding that the refusal to report to work was not protected by the Federal Railroad Safety Act ("FRSA") (49 U.S.C. § 20109(b)), C&W treated Mr. Salinas' actions as a voluntarily resignation of his employment and hired a permanent replacement to fill his position.

This Procedural Public Law Board was established to determine what procedures should apply in any subsequent arbitration of this dispute before a public law board created to decide the merits of the case ("Merits Board"). This board's award, dated December 12, 1998, impliedly characterizes the dispute as one arising under the parties' collective bargaining agreement and/or the Railway Labor Act ("RLA"), and, therefore, precludes consideration of the dispute as one arising under FRSA. In so doing, this Board exceeded its own jurisdiction, as a purely Procedural Board, by effectively determining the scope of the jurisdiction of any subsequent Merits Board.

The threshold issue in this case is whether the dispute is governed by FRSA, the RLA or the parties' collective bargaining agreement. Because the issues, forum, standard of proof and allocation of the burden of proof differ depending on which legal theory controls, this underlying determination will dictate not only what procedural issues must be addressed to resolve the merits of the dispute, but also whether the dispute will be resolved by arbitration through a Merits Board or by a judicial proceeding in federal court. For example, questions of statutory interpretation such as what rights are conferred by the RLA and whether an election of remedies has been made under FRSA are within the exclusive jurisdiction of the federal courts. This

the contrary, a resolution of the merits of the dispute comes within the jurisdiction of the Federal Courts since the claim cannot be resolved by an interpretation of a Collective Bargaining Agreement. The Carrier states that, other than claims that arise under FRSA, only minor disputes are governed by the RLA's arbitration provisions. According to the Carrier, it should be the role of the Federal District Court to decide if the claim should properly be characterized as a minor one under the RLA.

The Carrier maintains that the Organization has admitted during the discovery process in the Federal Court action that no provision exists in the Parties' Controlling Agreement that would have justified Claimant's refusal to cross the picket line to report to his job. It notes that the Organization has alleged that Claimant's refusal to cross the picket line because of safety concerns was protected by the "contractual law of the workplace." The Carrier maintains that the Organization's position is unfounded because "there is no 'contractual law of the workplace' independent of the parties' collective bargaining agreement." The Carrier goes on to argue that, if the Federal District Court finds that the dispute is a minor dispute under RLA, different procedural issues arise. In this regard, the Carrier argues that the Board would then have to dismiss or remand the claim since the claim based on "contractual law of the workplace" was not raised on the Property. According to the Carrier, the Organization never maintained that Claimant's conduct "was justified by the 'contractual law of the workplace'." The Carrier thus argues that it never had the opportunity to consider the claim under this theory and no opportunity to address it. It notes that, before a claim is ripe for arbitral resolution, it must be "handled in the usual manner up to and including the chief operating

officer of the carrier designated to handle such disputes." Hence, the Carrier claims that it must, in the event that the Court finds the dispute to be a minor one, be afforded the "opportunity to investigate, evaluate, and defend the allegations in that context."

The Carrier thus requests that the Board stay these proceedings until such time as the Federal District Court renders its decision in the declaratory judgment action.

In response to the Carrier's arguments that the instant proceeding should be stayed, the Organization responds that "[t]he Carrier's argument is flawed and is literally backwards, because Congress, in enacting the FRSA, clearly intended that adjustment Boards established under section 3 of the RLA ... would have exclusive primary jurisdiction to resolve all disputes under the FRSA, and that the only judicial involvement in resolving disputes arising under the FRSA should be through petition for review of such adjustment board decisions under 45 U.S.C. Section 153(q)." (Emphasis in original). Judicial authority exists, according to the Organization, to support is argument on this point. According to the Organization, the Carrier's argument that the Organization has allegedly elected a remedy under FRSA and any determination of the effect of said election on whether a claim exists under the Controlling Agreement or the RLA must be considered a "dispute arising" under the FRSA, which would mandate that such a dispute "should be presented to and resolved in the first instance by the merits board."

The Organization also disputes the Carrier's claim that it has "elected" a remedy under the FRSA while the claim was handled on the Property. According to the Organization, Claimant and

the Organization do not intend to present any claim for relief under FRSA to the Merits Board. Thus, the Organization states that it in fact has specifically made the decision "not to seek relief of any kind under FRSA, instead choosing to rely on the provisions of its controlling agreement and the Railway Labor Act." It notes that the claim as handled on the Property "explicitly cited and relied solely upon the controlling agreement and the Railway Labor Act."

DECISION OF THE BOARD

The Carrier's threshold contention that this Board should stay this proceeding until such time as the Federal District Court in Colorado decides the declaratory judgment action must first be decided. The Board notes that the Carrier in both its complaint and amended complaint in the declaratory judgment action in Federal Court has sought, among other things, an order "enjoining defendants from pursuing the appointment or use of a procedural neutral to rule on the jurisdictional issue that is the subject of this action." However, no such injunctive relief directed either to the Organization or to this Board has been issued by the Federal District Court. This Board therefore finds that it must address the "merits" of the Carrier's threshold argument.

Turning to the claim of November 26, 1997, quoted above, the Board observes that the Organization raises the argument that "the Railway Labor Act does not allow permanent replacement of striking workers." Moreover, the claim asserts that the Carrier has "violated the agreement and

the provisions of the Railway Labor Act." The claim, in the Board's assessment, does not reflect, as the Carrier has argued, that it is one bottomed on the FRSA. In view of this finding and the Organization's representations made before this Board that the claim is decidedly not a claim advanced under FRSA, the Board believes that the Carrier's argument of election of remedy cannot be utilized as a basis to say this proceeding.

The Board would also state its agreement with the Organization that the Carrier's argument that the Organization and Claimant have "elected" to base the claim under FRSA is an argument that can be resolved by a Public Law Board. Thus, the Board declines to stay the proceeding as requested by the Carrier. The Board would hasten to add that its refusal to stay the proceeding does not prejudice the Carrier's ability to advance the position at a "merits" hearing that Claimant is entitled to no relief on the claim under the provisions of the FRSA.

The Board will therefore address the eighteen questions, the answers to which will set forth the procedures of the Board.

QUESTIONS FOR RESOLUTION

1. Shall the Special Board of Adjustment be established under the terms of the Railway Labor Act, as amended, by Public Law 89-456?

Based upon the Board's understanding of the claim as worded, this question is answered in the affirmative. Thus, the Special Board of Adjustment is to be established under the terms of the

Railway Labor Act, as amended by Public Law 89-456.

2. Shall the case to be resolved by the Board be listed as Paul Salinas, reinstatement?

The Carrier maintains that the "title is both misleading and too broad." The Carrier rejects the suggestion that Claimant was discharged by the Carrier and maintains that "[t]he question should be whether Paul Salinas was justified by FRSA in his refusal to cross the picket line of the United Steel Workers of America to report to work at the C&W."

The Board does not believe that the acceptance of this question prejudices the Carrier and its ability to argue that Claimant was not discharged. The Carrier's question reflects its position that the Organization and Claimant have "elected" to pursue the claim under FRSA, and this Board has earlier stated its reasons for rejecting this contention. The Board finds that the question should be as stated above.

3. Shall the Board consist of three members; a Carrier representative (as designated by the Carrier), an Employee representative (as designated by the Union), and a neutral person unbiased as between the parties?

The Parties agree to the wording of this question, and the Board accepts the question.

4. Shall the Party members meet within thirty days of the findings of PLB 6161 to select a neutral person?

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The Parties agree to the wording of the question, and the Board accepts the question as stated. The Board notes that the Carrier has added the caveat "that the findings of PLB 6161 are based on the resolution of the litigation pending before the Court and that such resolution includes a determination that the dispute is arbitrable." Needless to say, the Court's determination, when it is made, will be given full force and effect by the Board.

5. If the Party members are unable to select a neutral person, then shall the national Mediation Board be directed to appoint the neural person?

It is the Board's understanding, based upon the proceeding held before the Board in Washington, D.C., that the Parties now agree to the statement of this question, and the Board accepts the question as stated.

6. Shall the compensation and expenses of the neutral person be fixed and paid by the National Mediation Board pursuant to Public Law 89-456?

Based upon the proceeding held in Washington, D.C. before the Board, the Board understands that the Parties have agreed to the statement of this question, and accepts the question as stated.

7. Shall all other expenses be borne by the parties incurring them, unless mutually agreed otherwise?

The Parties agree to the question, and the Board will accept the question as stated.

8. Shall the Board then be empowered to schedule a hearing date and time, to hear oral arguments in the case?

Based upon the proceeding held in Washington, D.C., the Board understands that the parties agree to this question, and the Board will accept the question as stated.

9. Shall the hearing be held in Denver, Colorado?

The Parties have stated their agreement to this question, and the question is accepted by the Board as stated.

10. Shall the Parties exchange a written submission fifteen (15) days before the hearing?

Based upon the proceeding held before the Board in Washington, D.C., the Board understands that the Parties agree to this question, and the question will be accepted by the Board as stated.

11. Shall the Parties' written submission contain; relevant facts upon which each party relies, documentary evidence in exhibit form, and arguments in support of their position?

The Carrier resists this question as stated. According to the Carrier, "this question presumes that the issue will be other than whether Mr. Salinas's refusal to work was justified by FRSA." Based upon its analysis of the Carrier's threshold contention and the Board's adoption of question "1 and 2" above, the Board rejects the Carrier's position. The question will be accepted as stated.

12. Shall such written submission be limited to the issues raised by the Parties during the handling of the dispute on the property?

The Carrier also resists this question as stated. According to the Carrier, "[t]he issue, if any, to be dealt with by a Merits Board should be whether Mr. Salinas was justified by FRSA in refusing to cross the picket line to work at the C&W." For the reasons reflected in the Board's decision on the Carrier's threshold contention and the Board's acceptance of questions "1," "2," and "11" above, the Board does not accept the Carrier's position. The Board will therefore accept the question as stated.

13. Shall the Board make its findings of fact and render a written award?

The Parties agree to this statement of this question except that the word "finding" should be changed to "findings." The Board therefore accepts the question as stated with this change.

14. Shall the Award be final and binding on both Parties to the dispute?

The Carrier does not accept this question as stated because of its position as stated in the threshold contention and at various points in response to the eighteen questions. The Board's rejection of the Carrier's threshold contention leads it to not accept the Carrier's position in regard to this question. The Board will accept the question as stated.

15. If the Award is in favor of the Claimant, then shall the Carrier be required to comply therewith; on or before 30 days after the date of the Award?

The Carrier does not accept this question as stated because of its belief that it is not appropriate "to establish at this time a specific time limit by which the carrier would have to comply with an award, if such an award were issued in favor of the claimant." It also contends that "the 30-day time limit suggested by the Union in its question ignores the right of the carrier to appeal or otherwise obtain judicial review of an adverse award, which should not be enforceable until after the judicial review process has been finally concluded."

The Board finds that the thirty day time limit, based upon the experience of the Neutral, is a typical one in disputes of this nature. The Board will therefore accept the question as stated. The Board notes that the Carrier would have the right to seek a stay of enforcement of any Award from a Court of competent jurisdiction.

16. Shall each member of the Boar have one vote, and shall any two members vote be sufficient to render an award and to make any decision which the Board is empowered to make by statute or in procedure?

The Carrier expresses reservation to the wording of this question, arguing that there is certainty lacking regarding the "procedural decisions ... contemplated by the question." In addition, the Carrier contends that the phrase "make by statute" lacks clarity because there is no identity of the statutes. Essentially, the Carrier's position is tied to its threshold contention that there should be a "judicial determination before establishing a procedures for a Merits Board."

The Board believes that the question reflects the typical procedure and powers of a Merits

Board, and therefore accepts the question as stated.

17. Shall either Party have the right to request an interpretation of the Board?

The Parties agree to the question as stated, and the Board therefore accepts the question.

18. Shall the right to request an interpretation be limited to sixty (60) days after the effective date of the Award?

Based upon the proceeding held in Washington, D.C., the Board understands that the Parties agree to this question as stated, and the Board accepts the question.

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AWARD

The Board declines to stay the proceeding as requested by the Carrier and directs that the Organization claim will proceed to a decision by a Merits Board.

The eighteen questions as accepted by the Board will constitute the procedures to be followed by the Chairman of Public Law Board mutually selected by the parties or designated by the National Mediation Board.

DATE: 12/12/05

THOMAS N. RINALDO, ESQ, NEUTRAL MEMBER

Ronald M. Johnson

R. M. JOHNSON, ESQ., dissent
CARRIER MEMBER

Roger A. Burrill

ROGER A. BURRILL,
ORGANIZATION MEMBER