PUBLIC LAW BOARD NO. 7290

Case 1
Award On Remand

PARTIES TO THE DISPUTE:

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY

AND

AMERICAN TRAIN DISPATCHERS ASSOCIATION

STATEMENT OF CLAIM:

(1) The American Train Dispatchers Association ("ATDA") and the dispatchers it represents violated express and implied provisions of the current collective bargaining agreement, including but not limited to Article 2(c), Article 2(a) and Article 7(f) and GCOR provisions 1.15 and 1.6 by inciting, instigating, encouraging and participating in a collective job action, without notice, on March 2, 2005.

(2) As a result of this violation, the ATDA is liable for no less than $300,000 in actual damages.

Findings:

The carrier and employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as amended June 21, 1934.

On March 2, 2005, the train dispatchers at three of the Carrier's dispatching facilities collectively walked off the job before their shifts were complete. The parties arrived at a settlement pending a determination by the United States District Court as to whether the strike was a minor dispute or a major dispute under the Railway Labor Act (RLA).

On May 12, 2005, United States District Judge Terry Means determined the dispute was a minor dispute and directed the matter be resolved in Section 3 arbitration. He determined there was no need for an injunction since there was no further threat of a strike by ATDA.

By letter dated March 29, 2005, the Carrier notified General Chairman Paul Ayers the Carrier was submitting a "claim . . .concerning ATDA's breach of the ATDA/BNSF Railway labor agreement."

That claim is the subject matter of the dispute before this Board.

On September 24, 2009, this Board issued it's Award in this matter denying BNSF's claim. The Carrier filed suit in the U.S. District Court for the Northern District of Texas petitioning the Court to set aside the award on grounds that the award exceeded the Board's jurisdiction. On July 6 2010, the federal court granted BNSF's petition for review and vacated the award. The court held the Neutral based her conclusions on nine incorrect conclusions and remanded the claim to the Board "for further proceedings consistent with this memorandum opinion and order." Moreover, the court stated: "To whatever extent there is any uncertainty on the subject, the court declares that, as a matter of law, BNSF has a statutory right pursuant to section 3 First (i) of the RLA to bring a claim in arbitration for breach of contract by ATDA and that, if a breach of contract is shown, as a matter of law BNSF is entitled to a remedy for such breach." ATDA appealed this decision to the U.S. Court of Appeals for the Fifth Circuit but its appeal was dismissed as premature because the District Court's Order was not considered a "final order" subject to appeal.

Therefore, this Board is mandated to revisit the claim and render an award in accordance with the parameters set by the federal district court. The Board has requested and considered supplemental briefs from the parties regarding the award and BNSF's contention that rendering an award at this time is barred by the doctrine of laches.

The Board denies the Carrier's laches argument. This Board finds the Organization's position persuasive on this issue. We adopt the following position which was included in their brief: *[The federal court has remanded this dispute to the Board "for further proceedings consistent with [its] memorandum opinion and order." It would violate the Court's directive if the Board did not consider the merits of BNSF's contract claim. Moreover, the doctrine of laches is not applicable in this situation. As opined by Arbitrator Zumas in UTU v Delaware and Hudson Twy. Co., Award No. 14, PLB No. 382: Laches "is a unique and seldom applied concept utilized only in extraordinary circumstances", not present here. The one-year period between the decision of the Court of Appeals and ATDA's bringing the dispute back to the Board is not*

unreasonable in the context of this dispute and BNSF did not demonstrate that it suffered any prejudice or injury by the passage of time.]

As to the merits of BNSF's claim, this Board determined in its original award that the parties' collective bargaining agreement (CBA/contract) does not contain a no-strike clause. Therefore, the Carrier based its claim on three provisions of the contract and two rules of the General Code of Operating Rules which it maintains are the equivalent of a no-strike clause. It contends ATDA can be held accountable to the Carrier for damages if dispatchers violate these provisions. The District Court's remand limits this Board's jurisdiction to a decision on whether BNSF's interpretation of these provisions is correct and whether ATDA violated these contractual provisions and rules. If this Board finds such a violation then the court must direct an appropriate remedy.

In arriving at its determination that the author of Award 7290 exceeded her jurisdiction, the District Court directed she was incorrect in the following propositions:

(1) The fact that monetary damages cannot be awarded for a violation of the provisions of the RLA has relevance to whether BNSF has a remedy for breach of contract.

(2) Damages cannot be awarded for breach of the agreements if the agreements do not expressly provide the right to seek damages for an illegal strike.

(3) The fact that BNSF was unsuccessful in causing a no-strike provision to be included in the agreements is evidence that the parties never intended that a breach of the agreements would provide BNSF access to a claim for damages.

(4) Absence of evidence that there was a mutual understanding that the contractual provisions relied on by BNSF in this case provided BNSF the right to file a claim and seek damages under the agreements causes BNSF's contention that it has those rights to be not tenable.

(5) For BNSF to be entitled to enforce its contract with ATDA by seeking a monetary award for damages suffered by reason of ATDA's violation of the agreements, BNSF was required first to advise ATDA that it believed that the language of the agreements gave BNSF the right to recover damages for breach of the agreements.

(6) The fact that the parties agreements were collective bargaining agreements rather than private contracts causes BNSF not to have an

implied right to recover damages from ATDA suffered by reason of ATDA's breach of contract.

(7) BNSF's failure to show that ATDA was not sincere in its belief that the dispute that led to the strike was not a minor dispute is relevant to whether BNSF is entitled to receive a monetary award for loss it suffered by reason of ATDA's breach of the agreements by engaging in the illegal strike.

(8) The fact that ATDA has not demonstrated a callous disregard for BNSF in the past is relevant to whether BNSF has a contractual right to recover monetary damages caused by ATDA's breach of the parties' agreements.

(9) The statutory claims process (apparently meaning the claims process prescribed by the RLA) does not contemplate an award of monetary damages to BNSF for breach of contract as part of the statutory dispute scheme.

The Board accepts these propositions, as it is obligated to do by the District Court's Order.

In the instant case, over objections of the Organization at the hearing, the Board admitted into the record the NRAB , First Division Award 26448, *Union Pacific Railroad Company and United Transportation Union* (2007). In the Board's opinion that case provides little guidance in the instant case. The claim did not involve these same parties or the contract language allegedly violated here. That case alleged a violation of a supplemental agreement which contained a "no-strike" provision, whereas the contract between ATDA and BNSF does not.

After a thorough review of the record in this case, the Board finds that the Carrier has failed to demonstrate ATDA violated any provision of the contract.

In the Board's view the General Code of Operating Rules (GCOR) cannot be used to support the Carrier's claim because the rules were unilaterally imposed and never incorporated into the contract. The rules established the acceptable behavior of employees. The failure of employees to follow these rules could result in disciplinary actions against those employees. However, there is no evidence the parties intended to incorporate these rules into the contract or that ATDA could be held accountable for these violations.

Furthermore, there is nothing in the actual provisions of the Agreement cited in the Carrier's claim which provides the Carrier with grounds to seek damages for the Dispatcher's walkout on March 2, 2005. There is nothing in the language of Articles 2(c), 2(a) and 7(f) which supports the Carrier's interpretation.

Moreover, there is persuasive evidence in the record that the parties recognized that none of the contract provisions or GCOR applied to a strike situation. That obviously is why the Carrier sought on more than one occasion to negotiate a "no-strike" provision into the Agreement. In 1988, the Carrier proposed the following provision:

> Engaging in or respecting strikes, picketing and/or secondary boycott activities are prohibited. Appropriate penalties will be applied for an employee and/or Organization which violates such commitment.(Union's Exhibit 59)

This bargaining proposal was subsequently presented to Presidential Emergency Board (PEB) No. 219. The Carrier presented the following proposal:

> . . .
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> 3. The Organization shall not, in connection with any dispute as to which, or at a time when, a resort to self help by the Organization violates the Railway Labor Act, authorize, cause, encourage or engage in any strike, picketing, refusal to, cross a picket line, or other work stoppage of or refusal to work for the Carrier.
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> 6. No employee of the Carrier represented by the Organization shall, in connection with any dispute as to which, or at a time when, a resort to self help by the Organization violates the Railway Labor Act, participate or engage in any concerted strike, picketing, refusal to cross a ;picket line, or other concerted work stoppage of or refusal to work for the Carrier.
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> 7. In the event that employees violate paragraphs 4, 5 or 6 above, the Organization shall exert every good faith effort to have such actions discontinued at the earliest possible time.
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> 8. If the Organization violates either paragraph 1, 2, 3 or 7 above, any agreement requiring employees of the Carrier to be or to become members of the Organization as a condition of continued employment, any agreement providing for the deduction by the Carrier from the wages of employees represented by the Organization, and any other agreement between the Carrier and the Organization made pursuant to or authorized by Section 2 Eleventh of

the Railway Labor Act, shall terminate and shall no longer be of any force or effect unless and except to the extent that the Carrier in its sole discretion waives the application of this provision.

9. The violation by an employee of either paragraph 4, 5 or 6 above shall constitute cause for the employee's discharge from employment by the Carrier or for such lesser discipline that the Carrier in its sole discretion determines to be appropriate, subject to contractual discipline procedures.

10. The remedies provided in paragraphs 8 and 9 above shall be in addition to, and shall not foreclose resort by the Carrier to, any other remedies it may have against the Organization or any employee for violation of the above contractual obligations or of the Railway Labor Act, including damages and injunctive relief.

By way of explanation the Carrier provided the following rationale:

It is not surprising, therefore, that the first expressed purpose of the RLA is to "avoid any interruption of commerce or to the operation of any carrier engaged therein," and thus that, as the courts have long recognized, the "major purpose of. . .the Railway Labor Act was 'to provide a machinery to prevent strikes.'" Unfortunately, the RLA has proven to be inadequate fully to achieve that purpose.

Section 3 of the RLA provides for mandatory arbitration by an adjustment board of so-called "minor" disputes over the application or interpretation of existing agreements that are not settled on the property; hence, strikes over such disputes are illegal and may be enjoined by the courts. However, even though that clearly has been the law at least since the Chicago River decision by the Supreme Court in 1957, strikes and threatened strikes over minor disputes continue to be relatively frequent. This has been true despite the arbitration remedy afforded by the statute and despite the fact that, if a union believes that a carrier does not have an arguable basis for the disputed action, the union may sue for an injunction on the ground that the carrier has made a unilateral change in its agreements without exhausting the major dispute provisions of the Act. Such strikes over minor disputes invariably are enjoined, but this may take a few hours or occasionally even days during which the operations of the carrier are substantially if not completely halted with a consequent loss of business and revenue. And, in any event, the carrier is subjected to substantial expense in the preparation and handling of the litigation. In short, in such circumstances the union appears to proceed on the basis that it has little to lose, since it can always resort to arbitration or litigation, and can punish the carrier for taking the dispute action.

There can be no justification for such illegal strikes over issues as to which the unions have a remedy by arbitration or in the courts, and it seems plain that a

contractual deterrence is both needed and otherwise justified since the prohibitions of the RLA have not sufficed in many instances to prevent such strikes or threats of such strikes. Thus, while not its principal purpose, the proposed no strike clause would apply to all strikes and picketing that are unlawful under the RLA, and would subject both the union and the employees involved to penalties for such illegal strikes and picketing. By thus making clear that the unions and employees do have something to lose if they engage in such illegal activities, future such strikes and strike threats, and their attendant costs to the carriers, should be deterred. (Union Exhibit 60, pp 10-12, footnotes omitted)

In its explanation of the proposal, the Carrier provided the following:

The proposed no strike clause would apply separately to each of the unions and to the employees represented on a particular carrier by a particular union. With respect to a union and to the employees it represents on a carrier, paragraphs 1 and 4 in essence would prohibit participation in or the honoring of secondary strikes and picketing of the carrier,. . .paragraphs 4 and 6 in essence would prohibit strikes or picketing that violate the RLA. The prohibitions applicable to the employees are limited to concerted action and thus would not apply to purely individual refusals to work, etc. . .

The reasons for those prohibitions have been set forth in the above discussion of the Background and Reasons for the Proposal and need not be repeated. It may be desirable, however, to provide some further explanation of the reasons for the proposed penalties for violations of the no strike clause.

The obvious reason, of course, is to better assure compliance with the no strike clause by penalizing violators. Although the courts generally have held that strikes or picketing allegedly in violation of such a clause are enjoinable as giving rise to minor disputes under the RLA, as has been noted above the unions often have not been deterred from striking or threatening to strike over minor disputes even though it is clear that such strikes violate the RLA and will be enjoined by the courts. Although the injunction normally ends the strike, it has no further consequences unless the injunction itself is violated, so the union and employees may take the view that they have nothing to lose but a lawsuit. Provision of the proposed contractual penalties should make clear that such a view no longer is tenable and provide an effective deterrent to prohibited strikes and picketing.

Violation of a no strike clause by an employee would be cause for his discharge, although the carrier in its discretion could impose some lesser discipline. Discharge is a usual penalty for an employee's violation of contractual obligations, and is particularly appropriate where the employee joins an attempt to prevent his employer from operating despite an agreement not to do so.

> Penalizing a union for violating its contractual obligations is not as common, but is particularly appropriate and necessary in regard to violation of a no strike clause as the union normally instigates and orchestrates strikes and picketing. The proposed penalty is, moreover, particularly appropriate – the termination of union shop and dues checkoff agreements made between the carrier and union under or pursuant to Section 2 Eleventh of the RLA. A carrier should not be required to aid a union in maintaining its membership and collecting its dues that violates its obligation not to strike or picket the carrier and thus attempts to force it to cease operating.

Again, in 1994 and 1999, the Carrier renewed its efforts to negotiate a prohibition of strikes over minor disputes:

> In addition to prohibitions imposed by existing requirements, provide that, except for lawful primary strikes and picketing of the carrier or carriers involved in a major dispute with the Organization, engaging in or respecting strikes or picketing of any carrier or of anyone else including shippers, secondary boycotts, slowdowns and any other concerted self-help activities are prohibited. Appropriate penalties will be applied for an employee and/or Organization which violates this provision. (See Union Exhibit 61, 62)
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> This provision was also rejected and was not included in the parties Agreement.

The Carrier's contention the existing terms of the Collective Bargaining Agreement have always been available to preclude strikes and if breached provide a damages remedy for the Carrier is not tenable. The language of the contract provisions cited by BNSF is clear in its meaning. The terms of those provisions do not serve as a substitute for a no-strike clause. Not only is BNSF incorrect in assuming an implied right through such language, the Carrier never once, prior to the instant dispute, claimed the language could be applied in that way. Furthermore, its attempts to secure a no-strike clause into the Agreement belies its contention.

Quite simply, the Carrier cannot obtain through arbitration what it failed to achieve in negotiations. It is common practice for neutrals to review the bargaining history between the parties when seeking to interpret a collective bargaining agreement. In the instant case, the bargaining history proved that the Carrier has long understood that none of the current contract provisions do or were intended to apply to strikes. This was substantiated by the Carrier's repeated, albeit unsuccessful, attempts to negotiate a no-strike clause into the contract which clearly establishes that the

parties never agreed or understood that a strike would violate any provision in the collective bargaining agreement.

Moreover, arbitrators view the attempt of a party to negotiate a provision into a contract, as evidence the party does not have the rights expressed in the proposed provision. In this regard, ATDA cited the opinion of Neutral Zumas in *BLE and Southern Pacific Transportation Do.*, PLB No. 1981, Award 35 (1980) ("Evidence that no such rule exists is the fact that the Organization has twice , over the past twelve years submitted Section 6 notices under the Railway Labor Act to seek what the Organization now claims it already has. Absent a strong clear and unambiguous proscriptive rule, coupled with two attempts by the Organization through Section 6 notices to acquire such a rule compels the finding that this claim must be denied.") In addition, it cites Neutral Lieberman who opined in *TCU and Norfolk & Western RY. Co.*, PLB No. 4702, Award No. 12 (1992) ("It is obvious that such attempt [via Section implies, without question, that such a right does not exist unless the contract is changed.") This Board concurs with those Neutrals. Here the Carrier made several unsuccessful attempts to negotiate a no-strike provision into the contract that would restrict ATDA's right to strike and provide the remedy the Carrier seeks in the event of a breach.

The Carrier points out it was part of a congress of carriers who attempted to negotiate the no strike clause. Therefore, they urge the presentation of this proposal did not mean they did not already have the right to pursue a damages claim against the Organization for a breach of other provisions of the Agreement in the event of a strike. The fact that other carriers participated in the negotiations does not support the Carrier's claim. To the contrary, the fact that there was more than one carrier proposing the language demonstrates the universal understanding held in this industry that absent a no-strike clause in the collective bargaining agreement with that Organization, the Carrier cannot obtain damages.

The Board has arrived at its conclusions based solely on the interpretation of the collective bargaining agreement between the parties. We are aware of the Court's concerns as well as the constraints set out in the remand Order. The District Court found it "[o}f interest [that] the author did not disagree with BNSF that the illegal strike violated the parties' agreements." That certainly was not the Board's intent and we hope any confusion in this regard is clarified by this Award on remand.

The Carrier has failed to show that any provision of the contract was violated by ATDA's conduct. Therefore, it is unnecessary to consider arguments relative to an appropriate remedy.

For the reasons cited herein, the claim is denied.

Carol J. Zamperini
Impartial Neutral and Chairperson

See dissent! RK (attached)
Rob Karov
Carrier Member

F. L. McCann
Employee Member

Submitted this 22nd day of October, 2012.

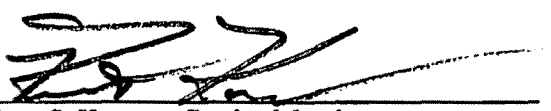
Carrier Member's Dissent
Public Law Board No. 7290 Award on Remand

Second chances are rare. When a second chance does arise, most responsible individuals welcome the opportunity to reassess, correct mistakes, and do a better job than the first time around. But not the majority of this Public Law Board.

Despite painfully clear instructions by the federal court, the Board has once again failed to grapple with the substance of the rules cited by BNSF. Instead, it stubbornly repeats the same obvious mistakes. First, the Board says nothing about Article 2(a), 2(c), and 7(f), save for a conclusory statement that they do not "support" the Carrier's interpretation. Why, exactly, is that? The Board is unable to say. It ignores the plain language of those rules, which require dispatchers to remain at their posts until relieved. Second, the Board clings to the notion that the absence of a no-strike clause is dispositive. It repeats its earlier conclusion that there is no "substitute for a no-strike clause." That is nonsensical. It should be obvious that a strike can breach any number of different contractual obligations, above and beyond just a traditional "no-strike" clause. That is the point of the award in *Union Pacific v. UTU*, NRAB First Div. No. 26448 – which was argued in this case. That award stands for the proposition that when self-help violates contractual commitments, a no-strike clause is not required in order for the carrier to obtain a remedy for the breach. While the neutral persists in asserting that the *Union Pacific* case involved an agreement that "contained a 'no-strike' provision, that is simply incorrect. Just as in this case, there was no clause in the Union Pacific agreement that specifically addressed strikes. The neutral member's refusal to correct this mistake from her original award is representative of the sloppy analysis that pervades the new decision. Finally, the Board again states that the General Code of Operating Rules ("GCOR') cannot "be used to support the Carrier's claim because the rules were unilaterally imposed." As BNSF has asserted over and over, the GCOR is relevant as evidence of *implied* agreements, including an implied agreement that employees will come to work and stay at their desks until relieved. Here again, the Board simply refuses to address the Carrier's argument.

And aside from everything else, the award on remand would still be suspect because it was drafted by the ATDA. In its submission on remand, the union took the vacated original award and made some edits, offering it to the neutral member as a substitute award – which she accepted. As a result, in addition to its many other flaws, the new award is devoid of any independent thought or consideration by the neutral member. The point of remand is not to creep as close as possible to the original award while giving lip service to the Court's directives. The original award was vacated and this matter remanded in order to give this Board another chance to do its job – to interpret the agreement and craft an appropriate remedy. It is a travesty that the Board has continued to refuse to do that job.

For these reasons, I dissent.



Robert S. Karov – Carrier Member