NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 523
(Procedural)

Parties to the Dispute United Transportation Union (Enginemen) and Penn Central Company (Southern Region)	:	OPINION AND AWARD Case No. A-8303

Appearances

For the United Transportation Union (Enginemen):

Mr. K. W. Pritchett, General Chairman
United Transportation Union (Enginemen)

For the Penn Central Company:

Mr. E. Gibson, Superintendent-Labor Relations and Personnel

Mr. Hermon Wells, Esq.

A meeting of Public Law Board No. 523 was held on Thursday, April 30, 1970, in the Conference Room in the Railroad Station, Indianapolis, Indiana. Each party presented written submissions and each argued its position orally. Arrangements were made to hold an Executive Session at the offices of the Penn Central Company, Six Penn Center, Philadelphia, Pennsylvania, on May 14.

Issues Presented

(1) Is the claim asserted December 20, 1968, by Mr. I. D. Ingram, former General Chairman of the United Transportation Union (E), on behalf of the estate of deceased employee A. M. Easton, properly referable to a Public Law Board?

(2) If the answer to question No. 1 is "yes", the Procedural Neutral will prepare an agreement setting forth the procedures under which the merits board will function to dispose of the claim.

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Clauses Cited

National Mediation Agreement, June 25, 1965:

Article II, EXPENSES AWAY FROM HOME

(1) When the Carrier ties up a road service crew (except short turn-around passenger crews), or individual members thereof, at a terminal (including tie up points named by assignment bulletins, or places listed in Schedule Agreements, or observed by practice, as regular points for tying up crews) other than the designated home terminal of the crew's assignment four (4) hours or more, each member of the crew so tied up shall be provided suitable lodging at the Carrier's expense or an equitable allowance in lieu thereof. Suitable lodging or an equitable allowance in lieu thereof shall be worked out on a local basis. The equitable allowance shall be provided only if it is not reasonably possible to procure lodging.

If an allowance is being made in lieu of lodging as well as other considerations under provisions of existing agreements the amount attributed only to lodging shall be removed if suitable lodging is supplied, or offset against an equivalent allowance. This shall be worked out on a local basis.

The provisions of this agreement shall be made effective at a date no later than 30 days following the effective date of this agreement.

Mediation Agreement, September 14, 1968:

Article IX, PAYMENTS TO EMPLOYEES INJURIED UNDER CERTAIN CIR-CUMSTANCES

Where employees sustain personal injuries or death under the conditions set forth in paragraph (a) below, the carrier will provide and pay such employees, or their personal representative, the applicable amounts set forth in paragraph (b) below, subject to the provision of other paragraphs in this Article.

(a) Covered Conditions:

This Article is intended to cover accidents involving employees covered by this agreement while such employees are riding in, boarding, or alighting from off-track vehicles authorized by the carrier and are

(1) deadheading under orders or

(2) being transported at carrier expense.

(b) Payments to be Made:

In the event that any one of the losses enumerated in subparagraphs (1), (2) and (3) below results . . . directly from an accident covered in paragraph (a) . . . the carrier will provide . . . the following benefits:

(1) Accidental Death or Dismemberment

. . .

Loss of Life $100,000

Background

Fireman A. M. Easton was involved in a fatal accident on November 27, 1968.

On December 20, 1968, the Organization made a claim on behalf of the estate of A. M. Easton in the amount of $100,000. In making the claim the Organization cited Article IX of the Mediation Agreement with the former Brotherhood of Locomotive Firemen and Enginemen / now United Transportation Union (E)__/ dated September 14, 1968.

The claim was processed but no agreement was reached.

On October 20, 1969 the Organization proposed a Public Law Board asserting that the dispute was otherwise referable to the National Railroad Adjustment Board. Mr. J. W. Jennings was designated the employee member of the proposed board. The Organization requested the Carrier to designate the employer member. On November 25, 1969, the Union again requested a Public Law Board.

On December 2, 1969, the Carrier named Robert E. Brown, Director of Labor Relations, to serve on any board established pursuant to the October 20, 1969, request of the Organization, but stated that in the view of the Carrier the Organization claim was not referable to the proposed special board of adjustment.

On December 5, 1969, the Organization requested the appointment of a procedural neutral. The present board was established on March 4, 1970, under NMB Rule 1207.1 (b).

Carrier's Case

It is the contention of the Carrier that the claim on behalf of the estate of A. M. Easton is not properly referable to a Public Law Board.

The Carrier quotes Article II of the National Agreement, June 25, 1964 and Article IX, of the Mediation Agreement, September 14, 1968, as pertinent to the instant dispute.

The Carrier's brief includes background information on the duties of Fireman Easton on a work train performing track maintenance on the St. Louis Division. On October 22, 1968 Track Supervisor N. B. Sellars granted verbal authorization to use privately-owned vehicles of crew members between the work site and a lodging facility. During the work week beginning Monday, November 25, 1968 the work train crew was lodged at the Hi-Cafe Motel near Livingston, Illinois. On completion of duty on November 27, the entire crew, transported by Fireman Easton, went directly to the motel, arriving about 4:00 P.M. About three hours and fifty minutes later, and approximately four miles from the motel, the fatal traffic accident involving both Fireman Easton and Engineer Moulton, occurred.

The Carrier's brief states:

> The issue is the extent of the authorization granted by Track Supervisor Sellars on October 22, 1968. There was then, and is now, no question of the adequacy of the Hi-Cafe Motel. The facility provided both suitable lodging and suitable eating accommodations ...There was obviously no requirement that the members of the crew use that facility exclusively, but if an employee elected to do otherwise he did so at his own volition and no responsibility can be affixed to the carrier because of an employe's election to utilize a

facility other than the one designated. The Organization seeks to impugn the signed statement of the Track Supervisor relative to the extent of the authorization granted October 22, 1968, but has produced no evidence substantiating that impugnment. That is the factual issue before this Board, not one arising under either the June 25, 1964 National Agreement or the Mediation Agreement of September 14, 1968.

The Carrier makes a distinction between cases submitted to Adjustment Boards and those properly referable to a Public Law Board.

In support of its contention the Carrier cites Public Law Board No. 417 (Procedural), Brotherhood of Locomotive Engineers and Indiana Harbor Belt Railroad Company, Chairman and Neutral Member, David Dolnick. In its Discussion and Findings the Board observed:

> Disputes submitted to Adjustment Boards are accepted and docketed pro forma. Jurisdictional and procedural, as well as substantive merit issues are considered and adjudicated by Adjustment Boards. That is not the procedure under Public Law 89-456.

The Carrier also referred to Public Law Board No. 447 (Procedural) United Transportation Union and Chesapeake and Ohio Railway Company, Neutral Member, David L. Kabaker, in which the Board observed:

> The position of a procedural Public Law Board is somewhat different than the National Railroad Adjustment Board, in that the procedural board is required to and authorized to decide whether the case before it can and should be referred to a Public Law Board for a decision on the merits. In making such a determination the Board must examine the claim to see whether it puts in issue a disputed fact under the Agreement or whether an interpretation of the Agreement is involved.

Referral to a merits board was denied in both of these cases, on the ground that there was no disputed fact under the agreement and that no issue involved interpretation or application of the agreement. Both cases concerned claims for reinstatement based solely on leniency, and did not raise the issue of the severity of the penalty. It was ruled in these cases that the action of the Carrier was solely within its discretion and not the subject of a referable grievance.

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The Carrier contends that in the instant case there is no disputed fact under the agreement, nor is the interpretation of the governing agreements involved.

The Organization Case

The Organization, while stating that it has no intention of arguing the merits of its claim before a procedural board, contends that a dispute exists which can be decided only by a merits neutral. The dispute concerns the Carrier's insistence that the claimant "was neither deadheading under orders or being transported at carrier's expense.", as that language is used in Article IX, of the September 14, 1968 agreement. Conversely, the Organization argues that the claimant was being transported at carrier expense by virtue of the fact that he was being compensated at the rate of 9 cents per mile for the use of his automobile for the purpose of transporting himself and other crew members. According to the Organization this dispute involves the interpretation of an existing agreement.

In the view of the Organization, there is no question that the dispute is referable to the National Railroad Adjustment Board, since it involves an interpretation of Article IX, and such being the case, it is also referable to a Special Board of Adjustment (Public Law Board) under the mandatory provisions of Public Law 89-456. The Organization contends further that the notice served on the Carrier, dated October 20, 1969, was in full compliance with Section 3, Second.

In the Organization view, if the Carrier were sustained in its contention that the case was not referable to a Public Law Board, there would be no way to resolve the instant dispute.

OPINION

A procedural board is required to decide whether the case before it can and should be referred to a Public Law Board for a decision on the merits. A procedural board has authority to examine the dispute only to find out if the

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issue involves a disputed fact under the agreement or an interpretation or application of the agreement. It is not the function of a procedural board to look at the validity of the arguments presented, but only to ascertain that there is disagreement of an issue covered by an agreement.

The cases cited by the Carrier do not bear directly on the instant case, since they involved appeals against discharge, based solely on leniency. Since no question as to the severity of the penalty was raised, it was found that the matter was within the discretion of the employer, and there was no referable grievance. The Discussion and Findings in these cases, however, emphasize that it is the function of a procedural board to determine whether a dispute involves interpretation or application of an existing agreement. When it so finds, the procedural board is authorized to refer a case to a Public Law Board for a decision on the merits.

In the instant case this Board finds that a dispute exists concerning the nature of the authorization to provide private transportation. The dispute also involves the interpretation and application of Article IX, which refers to transportation "at company expense."

AWARD

This Board finds that the dispute is referable to a Public Law Board for determination of the merits. An agreement setting forth the procedures under which the merits Board will function to dispose of the dispute is attached.

/s/ Morrison Handsaker

Morrison Handsaker
Neutral Member and Chairman

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/s/ J. W. Jennings

J. W. Jennings
Employee Member

/s/ Robert E. Brown

Robert E. Brown
Carrier Member