PUBLIC LAW BOARD NO. 5232

PARTIES TO DISPUTE:

The Brotherhood of Maintenance of Way Employees

and

The Atchison. Topeka and Santa Fe Railway Company

QUESTION AT ISSUE:

The Atchison. Topeka and Santa Fe Railway Company's statement of the Question at Issue:

> Did the Carrier's actions in obtaining a Temporary Restraining Order under the Railway Labor Act prohibiting its employees from honoring stranger picket lines unlawfully established by Teamsters Local 315 at Carrier's Intermodal Terminal Facility, Richmond California, on or about August 24, 1990, violate the parties' collective bargaining agreement?

The Brotherhood of Maintenance of Way Employees' statement of the Question at Issue:

> 1. Whether the Carrier s August 27, 1990 invocation of a strike injunction from the Federal District Court for the Northern District of California before which it argued that its employees have a contractual obligation to cross picket lines and as a result of which such employees were required to cross a picket line of another organization at the Richmond Terminal in Richmond California under threat of discipline or contempt of court proceedings violated the employees' contractual right to honor the picket lines of others.
>
> 2. Whether the Carrier violated the employees' agreement rights when it obtained injunctive relief adverse to the employees' interests by claiming that its agreements require employees to cross another union's picket lines when the agreements contain no such provisions.
>
> 3. If the answer to Issue 1 or 2 is in the affirmative, whether the carrier should immediately post a notice informing all employees at the Richmond Terminal and its other facilities; 1) that there is no requirement in any express or implied agreement with the organizations who represent employees working at the Richmond Terminal requiring said employees to cross any picket line which may be

established by any labor organization or group of employees at any of the carrier's facilities; 2) that the Carrier recognizes that the employees have the right to honor such picket lines; and 3) that the carrier pledges that it will not interfere with those rights in the future.

BACKGROUND

In the instant dispute the Brotherhood of Maintenance of Way Employees (Organization) were employed in 1990 at the Atchison, Topeka and Santa Fe Railway Company's (Carrier) Richmond Terminal in California. Through June 30, 1990, Santa Fe Terminal Services, Inc., a wholly owned subsidiary of the Carrier had an agreement at the Richmond Terminal with the International Brotherhood of Teamsters (IBT) for the loading and unloading of intermodal freight. After June 30, 1990, the Carrier discontinued the use of its Terminal Services subsidiary in awarding the former IBT work to Piggyback Services, Inc. to begin on July 1, 1990.

There is no dispute between the Organization and the Carrier in the background facts at bar. Evidently, Piggyback failed to follow through with a promise to hire former IBT employees who had worked for Terminal Services. Thereafter IBT represented employees at Richmond Terminal engaged in a primary labor dispute against Piggyback. Throughout much of July and August of 1990, pickets were set up by the IBT to protest Piggyback's failure to hire former Terminal Services' employees represented by the IBT as allegedly promised. Through much of July and August the Organization and Carrier continued uninterrupted operations, as there were numerous gates at the Richmond Terminal through which employees could report to work without crossing picket lines set out by the IBT. The Organization reports that in those few areas in which employees confronted pickets, they did not cross the lines. For example, management personnel boarded trains in place of the employees and operated those trains across existing picket lines.

The instant dispute focuses upon the events beginning on and after August 24, 1990. On or around that date the IBT expanded its pickets to block all entrances to the Richmond Terminal. Thereafter, the Organization and Carrier found themselves involved in a dispute over which neither was initially involved. The primary labor dispute between IBT and Piggyback had expanded to the Organization and Carrier. As railroad unionists, by long historical commitment to the principles of collective action, the Organization did not cross the IBT picket lines.

On August 27, 1990, the Carrier petitioned the United States District Court for the Northern District of California to issue a Temporary Restraining Order (TRO). In its petition the Carrier argued that there existed "no labor agreement between Defendant Unions and ATSF which would allow any of the Defendant Unions to strike in honor of the Teamsters pickets." The Carrier argued that the dispute with the Organization was a minor dispute under the terms of the Railway Labor Act and therefore the Organization could not legally strike over a minor dispute. It argued that the sympathy strike must end and in fact, the District court issued a TRO on August 27, 1990.

By letter dated August 29, 1990, Carrier's Manager - Labor Relations wrote to the General Chairman stating the Carrier's position and further:

> ... requesting a conference with you or your representative over any dispute you may have with this interpretation of the collective bargaining agreement so that the matter may be submitted to the National Railroad Adjustment Board.

Subsequently, by letter dated September 4, 1990, the Carrier notified the General Chairman that as the primary dispute between the IBT and Piggyback had settled, the issue was moot and the request for conference withdrawn. However, the Organization did not agree and in fact filed Claim with the Carrier dated October 19, 1990 that the TRO was obtained through and based upon inaccurate

assertions. The Organization stated in its letter of October 19, 1990 that:

> There is no contract, express or implied, between the Organization and the Carrier that requires our members to cross any picket line at any Carrier facility, or that prohibits this Organization from authorizing a 'sympathy strike' in aid of any other organization... for Section 2 Eighth of the Railway Labor Act provides that the protections given by Section 2 Fourth of the Act, guaranteeing employees an absolute right to refuse to report for work in response to any peaceful call for such aid by other employees, are made a part of the contract of employment between the carrier and each employee.

The Organization and Carrier failed to agree on property with any of the major aspects of either procedure or merits. This gave rise to the separate questions at issue now before the Board wherein the Carrier asks whether its actions in obtaining a TRO violated the collective bargaining agreement and the Organization asks whether the Carrier's actions violated the employees' agreement rights to honor the picket lines of another union.

THE CARRIER'S POSITION

It is the position of the Carrier that the Claim is defective procedurally and deficient with regard to merits. With regard to the procedural issues, the Carrier makes several arguments applicable to the instant case. By letter dated December 11, 1990, the Carrier argued that it was "filed on behalf of unknown and unidentified claimants, and secondly, it was not presented to the designated Carrier Officer authorized to receive claims..." The initial letter from the Organization was filed directly with the Manager - Labor Relations. It stated that:

> ... beginning on August 27, 1990 and ending on August 31, 1990, the Carrier improperly deprived its employees at the Richmond Terminal facility of their statutory and contractual rights to honor picket lines established by the International Brotherhood of Teamsters (IBT).

The Carrier argued on property and before this Board that Rule 14(a) requires that the first appeal be directed to the Regional Manager prior to appeal to the Manager - Labor Relations. It also requires that the grievance identify the "employees." By letter dated April 3, 1991 the Carrier additionally argued procedural defect in that the Organization failed to cite any Rule violated by the Carrier and reaffirms its earlier argument that the minor dispute is moot in that all issues were dismissed and resolved prior to this Claim. Accordingly, the Carrier asserts that this Board may not reach the merits in the first place, but if the Board should, the Organization's argument is deficient with respect to the merits.

The Carrier maintains on property that the fundamental issue on merits is whether their exists under the Agreement and by practice as a part of the "law of the shop" a requirement that employees report to work. The Carrier holds that it has a right to require the employees to "report for work as assigned" and this implicitly means that the employees may not honor the picket lines of the IBT in these circumstances. The Carrier is careful to delimit the issue on property to these specific facts, that the secondary IBT picket lines were unlawfully designated and that the Organization's members could not refuse to report to work across picket lines established by a union <u>not</u> representing employees of the Carrier. The Carrier does not argue before this Board on the right of the Organization's employees from honoring picket lines of other Organizations <u>representing</u> Santa Fe employees. As the Organization's employees sought to withhold their labor in support of the IBT's action against Piggyback, the Carrier's action was legal and in full compliance with the collective bargaining Agreement. In fact, the

Carrier maintains that there exists no Agreement right permitting the employees to respect stranger pickets. There does however exist numerous Rules (Rules 15, 17, 18 and 22) requiring employees to work a forty hour week and giving exceptions thereto for specific justifications such as jury duty or vacations.

In short, the Carrier holds that the question at issue cannot be reached due to procedural violations. The Carrier maintains that on merits the Board must find that the Carrier's actions did not violate the collective bargaining agreement.

THE ORGANIZATION'S POSITION

The Organization pursued its Claim on property by letters dated October 19, 1990 and August 7, 1991. It is the position of the Organization that the Carrier obtained the TRO by improperly arguing the existence of Rules and practice that require Santa Fe employees to cross the picket lines of the IBT. The Organization maintains that the Carrier has never been able to point to any Agreement provision that requires employees to cross picket lines. It further argues that at no point in the handling of this Claim on the property or before this Board has the Carrier ever pointed to the existence of any probative evidence of practice that would support the Carrier's position.

With respect to Rule support, the Organization argues that there are no express or implied Rules which would either require employees to cross a picket line at Richmond Terminal or which prohibit a sympathy strike in support of the IBT or another union. On the contrary, there does exist Agreement rights protecting the employees from honoring picket lines. As the Organization states on property:

> Section 2 Eighth of the Railway Labor Act expressly guarantees, by its incorporation in the agreements of the provisions of Section 2 Fourth, these rights to our members.

The Carrier therefore violated the Organization's rights when it obtained a TRO requiring employees to cross picket lines or face discipline and be held in contempt of court. When the Carrier relied upon nonexistent contract provisions in obtaining the TRO, they violated the employees' rights at Richmond Terminal to honor the picket lines of the IBT. When the Carrier went before the District Court with the erroneous assertion that the Agreement prohibited the Organization from instructing its employees to honor the IBT picket lines it violated the employees' statutory and contractual rights.

The Organization also takes serious issue with the Carrier's assertion of past practice. As in the case of cited Rule provisions the Organization argues that should the Carrier now raise any specific arguments they would be "procedurally and jurisdictionally barred." In fact, the Organization maintains that both legislative history and past practice support the rights of the employees to honor picket lines which were in existence at the Carrier's facility at Richmond Terminal. In support of that argument the Organization presented statements from employees indicating that a practice did exist supporting the employees' rights to honor picket lines.

Importantly, the Organization notes that the practice belies the distinction argued by the Carrier between railroad labor union picket lines and non-railroad IBT picket lines. The statement provided by one employee attests to the fact that under nearly identical conditions an IBEW member at the Carrier's Hobart Piggyback Unloading facility in Los Angeles refused to cross an IBT picket line without "even a threat of discipline for such actions from the carrier." It is the Organization's position that the practice on this property upholds the employees right to withhold their labor in sympathy to other trade unionists.

The Organization takes serious issue with the Carrier's argument that the claim is moot. To the Organization it is irrelevant that the Carrier has dismissed the complaint and dissolved the TRO. The fact is that the employees' rights were violated on August 27, 1990. As the Organization argues "there is absolutely no requirement that this violation continue in order to prevent a claim from becoming moot." Before this Board the Organization maintains that the Claim is actionable at the time it occurs and is at this point real and not hypothetical. Before this Board, the Organization argues that we have a procedurally valid Claim which is to be sustained on its merits.

FINDINGS:

The Board has carefully and fully reviewed the volumes of material presented in each of the separate but interrelated claims that lie before it. In that respect we have carefully reviewed the Complaint for the TRO filed by the Carrier in ATSF v. Brotherhood of Locomotive Engineers, et. al., No. C-90-2452 (August 27, 1990), the Memorandum and declarations in support of the TRO Complaint by the Trainmaster, Manager - Labor Relations and Director of Labor Relations for the ATSF. The Board has read the TRO, the stipulation dissolving the TRO, the decision of the NLRB Administrative Law Judge on the complaint against IBT and the Notice Required by the TRO ordering the unions to "cross all picket lines at any facility of ATSF..." with prompt disciplinary proceedings against any employee who fails to comply. The Board has similarly reviewed the Agreement and the Safety and General Rules. In our consideration we have also been presented by the parties with evidentiary support and have carefully considered it all, including the Section 6 Notices served by the National Carrier's Conference Committee on behalf of the ATSF and the sworn declaration of Jim Middleton. The Board has also read all of the Awards submitted by the parties to this dispute. The parties have variously relied upon and argued

numerous case authority from the federal courts and Congressional enactments. This Board has carefully considered and reviewed the submitted Legislative History to the Taft Hartley and Landrum Griffin Acts. We have carefully reviewed the numerous non-railroad Arbitration decisions on all procedural and merits arguments raised in this dispute. The Board has read and considered the July 8, 1992, July 10, 1992, August 25, 1992 and August 31, 1992 correspondence and attachments to the Chairman and Neutral Member of this Board. The Supreme Court's decision in Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 489 U.S. 426 (February 28, 1989) and the decision of the United States Court of Appeals for the Fourth Circuit in Richmond, Fredricksburg & Potomac R.R. v. Transportation Communications International Union, No. 92-1007, 1992 U.S. App. LEXIS 19008 (4th Cir. August 17, 1992) has been reviewed. This Board has studied and relied upon each submission in its determination of the applicable background to the detailed procedural and substantive issues herein before us.

From the hearing and from among all of the materials submitted, this Board has found countless instances in which new argument has been presented by both parties to this dispute. This Board considers no material facts and/or lines of argument used by either party in their ex parte submissions which were not a part of the record as handled on property. This is a firmly established principle codified by Circular No. 1 and at the base of so many Awards in the railroad industry that they no longer need citation. The Findings of this Board must rest full weight upon the record as developed on property and the governing collective bargaining Agreement between the parties.

PROCEDURAL ISSUES

In addition to opposing the Claim on its merits, the Carrier argues that the Claim was inappropriately filed with the wrong Carrier officer. The Carrier maintains that the Claim is barred as

it was not presented in the first instance to the Regional Manager prior to the appeal to the Manager - Labor Relations. Rule 14(a) states that all claims "must be presented in writing... to the officer of the Carrier authorized to receive same..." In the Claim at bar, the Carrier asserts this Board must handle the dispute under Section 3, First (i) of the Railway Labor Act "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes..." The Carrier argues that as this did not occur, the Claim is barred.

The Organization has argued ex parte that the Board recognize it responded to the Claim initially made and withdrawn by the chief operating officer, the Manager - Labor Relations. The Organization notes that the Regional Manager had no knowledge or involvement in this dispute and there was no prejudice to the Carrier by its actions. The Organization further points out that its Claim to both the Manager - Labor Relations and the Vice President - Human Resources states that "if the Carrier denies this grievance and claim, the Carrier treat its denial... as being the last step in the claims resolution process on the property..." As such, the Organization argues that the Claim should not be considered procedurally barred.

Agreement Rule 14(a) and Sections (1) and (2) enunciate an appeal process that this Board must reaffirm. The parties negotiated authorized officers to receive appeals and the evidence of record must demonstrate Rule compliance. However, the appeal process of Agreement Rule 14(a) does not envision and was not written to be applicable to the instant Claim. There is no language within Rule 14(a) that in any manner shows direct applicability to the highly unusual circumstances before us.

In this instant Claim, the parties have both indicated that the background and central precipitating action flowed from the Carrier's Manager - Labor Relations. This is not a simple time claim or disciplinary action where Rule 14 must direct the parties toward orderly resolution through local Carrier officers who would be most involved and knowledgeable at the source of the dispute.

After full consideration of all of the arguments and Awards presented, the Board finds the Claim was not procedurally flawed when first appealed to the Manager - Labor Relations. There is no record as to the "usual manner" of handling the type of dispute herein before us. The most knowledgeable and involved Carrier officer was the chief operating officer. There is no evidence in this record that local Carrier officers were knowledgeable or capable of resolving this dispute. Third Division Award No. 5074 is to the point on this Board's view:

> Another ... reason why the Board is not impressed, with exceptions taken to the handling of the claim on the property, is the showing made in the record that this grievance is predicated on action of the Chief Personnel Officer and no good reason appears why the claim should have originated at a lower level. Under such circumstances the Board cannot allow hypertechnical contentions or strained construction of contract terms to obstruct the processes for expeditious settlement of disputes.

The Carrier also argues by letter dated April 3, 1991 that the Claim does not comply with the appropriate provisions of the Agreement. Specifically, Rule 14(a) states in pertinent part that:

> All claims or grievances must be presented in writing by or on behalf of the employe involved,...

The Carrier argued in its letter supra, that the Claim is barred in that it fails to name appropriate employees. Further, the Carrier argues ex parte that blanket Claims on behalf of "the Organization and the employees we represent" are vague and improper.

The Board has fully considered this issue, the on-property record and the Awards to which the Carrier directs our attention (First Division Award No. 19913, Second Division Award No. 5783, Third Division Award Nos. 16675, 18640 and Fourth Division Award No. 1439). The Board finds this Claim emerged from the on-property

record as specific, clear and valid. Unlike the Awards referenced by the Carrier there was no doubt on property as to whom the Claimants were and this was made more explicit by the Organization's list presented in Conference. The Carrier's response of August 28, 1991 to the list of employees indicates a clear awareness of the employees alleged to have been effected by the Carrier's action.

The Carrier has also asked this Board to dismiss this Claim on the grounds that the Claim cites no specific Rule violation and that it is moot. The Carrier first argues that the Claim at bar lists no Rule of the Agreement that the Carrier is alleged to have violated. The Carrier argues by letter dated April 3, 1991 that the Claim is improper in that:

> You have not cited any rule, practice or agreement which has been allegedly violated in the instant dispute. The burden is not upon the Carrier to show that its action is authorized by some provision of the Agreement. Rather, the burden is upon your Organization to show that the action taken by the Carrier violated some part of the Agreement.

The Carrier maintains that as no Rule is cited, the Claim is procedurally defective. As also stated in its letter of April 3, 1991:

> Furthermore, the minor dispute between the parties has been rendered moot by Santa Fe's voluntary dismissal of its complaint as well as its joint agreement with all defendant unions including your Organization to dissolve the TRO.

The Carrier argues that the instant Claim asks this Board to rule on two inadmissible issues. The Carrier argues that the Board is being asked to render a decision on employees who suffered no loss and in behalf of unknown employees who might hypothetically have to face picketing in the future. The Carrier directs our attention to court decisions as well as numerous National Railroad Adjustment Board Awards (Third Division Award Nos. 20746, 18033, 14806, 14409, 12336,

Second Division Award 3670). It argues that this Board lacks authority to consider issues already resolved and to make awards lacking Rule support which are applicable to future hypothetical employees, rather than real claims.

This Board has fully reviewed all of the Organization's arguments on these further procedural issues. The Board is aware that the Organization neither finds the issue moot, nor the Rules unknown to the Carrier. To the Organization, the Claim was actionable at the time it occurred. It was not hypothetical, but real. The IBT strike action was not judged illegal during this dispute. In the instant case, the Organization argues before this Board that the employees were forced in violation of the Agreement to cross picket lines of the IBT and thereby were injured. That injury was not hypothetical and the Claim at bar constitutes a real Claim that is not moot.

The Organization further argues on property and before this Board that the Carrier was fully aware from the first grievance presented of the exact nature of the violation. As clearly stated in its letter dated October 19, 1990, the Organization charged that "the Carrier improperly deprived its employees... of their statutory and contractual right to honor picket lines..." The Rules it herein alleges were violated by the Carrier requires restatement by the Board as follows:

> for Section 2 Eighth of the Railway Labor Act provides that the protections given by Section 2 Fourth of the Act, guaranteeing employes an absolute right to refuse to report for work in response to <u>any</u> peaceful call for such aid by other employes, "are made a part of the contract of employment between the Carrier and each employe." (emphasis in original)

The Organization argues that there has been no procedural violation in that the Carrier had clearly violated Section 2 Fourth and Eighth of the Railway Labor Act which was and is an accepted provision of the Agreement.

This Board has reviewed these procedural issues and finds the

following. Our review of the contractual Agreement bargained between the Organization and Carrier finds no Rule explicitly negotiated between the parties herein before us. The Organization must demonstrate from the on-property record that the parties were in conflict over a particular Rule which the Carrier is alleged to have violated. This the Organization has failed to do as their exists no negotiated Rule. The Organization has therefore directed our attention to the Railway Labor Act. Additionally, both parties have referred extensively to recent federal case law and history in support of their respective positions.

This Board has turned to the cited judicial authority fully recognizing its importance and our appellate function. We do not sit in place of a court of law or in the proper capacity to interpret the Railway Labor Act. On the other hand the decision of the United States Court of Appeals for the Fourth Circuit in Richmond, Fredricksburg & Potomac R.R. v. Transportation Communications International Union, No. 92-1007, 1992 U.S. App. LEXIS 19008 (Fourth Circuit. August 17, 1992) found no error in an arbitrator's review and use of judicial authority.

Section 152 Fourth of the Railway Labor Act is entitled "Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden." While we might ignore the language of Section 152 Fourth, Section 152 Eighth regarding "Notices of manner of settlement of disputes; posting" states in reference to Section 152 Fourth that:

> The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

As such, Section 152 Fourth is incorporated into "each employees's contract of employment." Elgin, Joliet & Eastern R. Co. v. Burley, 325 U.S. 711, 732 No. 27 (1945).

The Board has fully reviewed all of the federal case law and arbitral authority on respecting strikes, crossing picket lines and secondary boycotts. After thorough review we must conclude that this instant case does not permit a resolution of the serious issue herein before us. This instant case must be dismissed for resolution in another forum. Under these instant circumstances, we conclude the following.

First, there exists no negotiated language in the Agreement that has been cited by the Organization or that can be shown violated by the Carrier in these instant circumstances. Second, in the absence of an expressed provision the Board has reviewed the Carrier's Section 6 Notice and the Organization's depositions and statements of probative evidence which were rebutted by the Carrier as to past practice. This Board cannot draw from such evidence past practice conclusive enough to establish convincing proof that the parties have now come to count on the rights herein disputed. Lacking expressed language or clear and demonstrable past practice we have been called upon to settle the dispute on implied contract provisions. Third, in meeting its burden the Organization has utilized the Railway Labor Act which it argues gives explicit support. We find no language in Section 152 Fourth or Eighth of the Railway Labor Act on strikes, picket lines and the like. Nor do we find anything in that Section supra, which gives this Board the authority to decide this issue or contains language referring to any analogous construct as herein, whereby IBT picket lines were drawn up against Piggyback.

For the above stated reasons, this Board does not find appropriate jurisdiction and support for the Claim at bar. This Board is forced to dismiss the Claim as no Rule of the Agreement has been specified or can be found to have been violated. The numerous Rules cited by the Carrier in support of its TRO are not alleged by the Organization to have been violated herein, and are therefore beyond our scope. The Organization's basic arguments that the Carrier violated its good faith dealing and its many arguments advancing the well settled rights of employees to cross picket

lines, do not stem from explicit negotiated Rules within the Agreement before us. This Board recognizes the importance to which respecting the picket lines of trade unionists must be given by the Organization. We find no Rule of the Agreement that obligates, prohibits or addresses the rights of the employees to cross picket lines as herein disputed with regards to the Organization's Claim and the Carrier's pursuit of a TRO. We are not within our jurisdiction to base an Award upon our interpretation of either the Organization's or Carrier's statutory rights under the Railway Labor Act. The jurisdiction of this Board lies only to the Rules negotiated as a part of the collective bargaining Agreement. There is a procedural flaw in that there is no Agreement Rule before us.

Accordingly, the Claim is dismissed on procedural grounds without reaching the merits. The Board holds that the Organization has failed to cite a specific Rule violation within the Agreement to which the Carrier is alleged to have violated.

AWARD:

Claim is dismissed without reaching a resolution of the merits of either parties stated Question at Issue.

Marty E. Zusman
Marty E. Zusman, Chairman
Neutral Member

Mr. John O'B. Clarke, Jr.
Employee Member

L L Broxterman
Mr. L. L. Broxterman
Carrier Member

Date: 6/6/94