NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 581

(PROCEDURAL)

PARTIES TO THE DISPUTE:	)	
	)	
UNITED TRANSPORTATION UNION(S)	)	OPINION
	)	
and	)	AND
	)	
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY	)	A W A R D

A hearing of Public Law Board No. 581 (Procedural), established under the Provisions of the Railway Labor Act by the National Mediation Board was held in the offices of the Carrier at Denver, Colorado, on November 5, 1970. Each party presented written submissions and each argued its position orally. Subsequently, on March 16, 1971, the Board convened again at the Carrier's offices in Denver, Colorado, to consider and deal with the disputes and/or issues submitted to it for handling.

NATURE OF CASE

On April 24, 1969, Public Law Board No. 379 was established on this property. Commencing May 23, 1969, PLB No. 379, without a neutral sitting as a member thereof, rendered awards in a substantial number of cases submitted to it. By October 14, 1969, some cases still remained before PLB No. 379, and a neutral member had been appointed. The Board with the neutral member had not, as of that date,

sat to determine any matters, and no awards had been issued by said PLB No. 379 with the neutral member.

On October 14, 1969, the Organization wrote to the Carrier requesting a meeting to reach agreement upon the establishment of a Public Law Board, and expressing the Organization's desire to have the Board hear a list of cases submitted as "Attachment A". None of the cases listed with the October 14 request was on the list of cases assigned to Public Law Board 379, then still in existence.

The Carrier noted in its reply that the request appeared to be untimely and premature, due to the then existing Board, but agreed to meet to discuss the request. A number of meetings were held, during which various cases set out in "Attachment A" to the October 14 request were settled, and the matter of the request discussed. The Carrier's position was constantly one of denying the timeliness of the request, based upon the pre-existing Public Law Board 379.

Ultimately, the Organization made another request for a Public Law Board, dated April 1, 1970, which request included those cases originally set out in the October 14, 1969 request not already settled by conferences on the property. The Carrier replied that the request was accepted, and that it constituted an abandonment of the October 14, 1969 request.

The Organization, by letter dated May 7, 1970, requested the National Mediation Board to appoint a procedural neutral member to determine the issues necessary to enter into an

agreement for the creation of the Board. They also designated the employee member of such Board. NMB Form 5 was submitted, asking for the appointment of the neutral member under Paragraph 1207.1(b) of the NMB Rules. The Carrier, by letter dated May 27, 1970, replied to the NMB taking the position that no Board existed to have a neutral sit with.

On July 20, 1970, the NMB designated the application of the Organization of May 7, 1970 as Public Law Board No. 581, and appointed Harold M. Gilden as Procedural Neutral to sit with the Board. By letter dated August 18, 1970, the Organization requested from the Carrier the name of the Carrier member for PLB No. 581. No reply was received.

A meeting of PLB No. 581, with the Procedural Neutral in attendance, was held as scheduled on November 5, 1970. The Carrier declined to meet as a party to the Board, but J. W. Lovett, Director of Personnel, filed a Special Appearance and attended the meeting as a Carrier representative. Submissions from both parties were filed and discussed.

At said meeting, by letter dated November 5, 1970, and in person, Mr. Lovett, on behalf of the Carrier, held to the position that the Board did not legally exist. He argued that a Carrier member of PLB 581 had not as yet been designated that the Organization had abandoned its October 14, 1969 request by serving its April 10, 1970 request for a Public Law Board; and finally that there is no dispute properly before the NMB to be resolved by a Procedural Neutral.

On even date, the Organization filed a request with the NMB for the appointment of the Carrier member of PLB 581 in accordance with Rule 1207.1(a). Pursuant thereto, the NMB appointed J. W. Lovett as Carrier member by letter of December 7, 1970.

ISSUES PRESENTED

(1) Did the Organization's request, dated October 14, 1969 for the establishment of a Public Law Board fail to comply with the requirements of the time limit rule (Article 31(g)) of the existing Schedule Agreement?

(2) Was the Organization precluded from serving a notice on the Carrier on October 14, 1969 for the establishment of a Public Law Board under the Railway Labor Act, pursuant to Section 3, Second, as amended by Public Law 89-456?

(3) If the answers to the above questions are "NO" the Procedural Neutral will prepare an agreement setting forth the procedures under which the Merits Board will function.

CONTENTIONS

The Carrier says that PLB No. 581 does not legally exist, and that no action can be taken by the Procedural Neutral appointed to sit with a non-existent Board; that when a duly constituted Board is sitting, or about to sit on a property, then any other request for a Board is premature and untimely; that for this reason the Carrier declined to enter into an agreement creating another Board, and did not appoint a Carrier member; that without the two Partisan members, a

Board could not exist, and the time limit on all cases continued to run towards the one-year limitation; that the Organization acted as if no Board existed, by continuing to settle cases, and ultimately, by requesting a Board in the proper time, and adding to the cases to be heard, all those from the original untimely request, which had not previously been settled; that another ground exists for the conclusion that Board 581 does not exist in that the Organization failed to comply with the clear requirements of the NMB Rules, specifically 1207.1(a) which states that the party requesting a Board may notify the NMB of the failure of the other party to appoint a Partisan member; that such notification, with the request for the NMB to appoint the Partisan member, precedes the establishing of the Board itself; that here the Organization asked for the appointment of a Procedural Neutral without first asking for the appointment of the necessary second Partisan party; that when the Organization finally did so request the Partisan appointment, the Neutral member had already been selected, and this act thus also became a nullity; that during these proceedings, the time limits continued to run; that any case which reached its one-year point can no longer be referred to any Board, although any other case is still viable.

The Organization says that the request for a Public Law Board was properly made at the time, and that the intention of the Public Law was thwarted by the adamant and improper

action of the Carrier in refusing to sign an agreement establishing the Board; that the Carrier member of the Public Law Board has always been named at the meeting to establish an agreement, and the fact that none was named in this case was typical of the practice on this property; that while meetings continue to be held, and cases settled, this was strictly standard procedure, and in line with the intent of the Public Law creating the Public Law Board; that the time limits obviously were tolled with the sending of the request by the Organization on October 14, 1969; that any other construction of the law would give the recalcitrant party the ability to prevent the processing of cases; that there is no provision in law nor rules which prevents two or more Boards from sitting at the same time on the same property; that the contentions of the Carrier that PLB No. 379 had not yet begun to meet in October 1969, was false, for the two-man Board had rendered awards as early as May 23, 1969; that Public Law Board No. 379 was many months into its agenda when the Organization filed its request for another Board in October 1969; that the Public Law requires that the party noticed make an agreement with the notifying party within thrity days of such notice being served; that the Carrier failed in this primary duty, and cannot thereafter take advantage of its own wrongdoing.

DISCUSSION

The facts are clear, but the conclusions drawn are irreconcilable. The Carrier's contentions are based upon the alleged illegality of having two concurrent Public Law Boards on the same property at the same time. While unusual, if not unique, the situation must be shown to be improper before the initial refusal of the Carrier can be justified.

The Carrier alleged that the existing Board (PLB No. 379) had not yet met. By the precise terms of Rule 1207.1(a), the designee, and the member appointed by the other party, constitute the Board. Thus, the neutral member is an addition to the Board, but the Board exists and acts prior to and without a Neutral member. Accordingly, Board No. 379 was well along on its life at the time of the October 1969 request of the Organization for another Board.

The instant Board (PLB No. 581) was not directed by Carrier to any statutory prohibition against multiple Boards, nor to any rule prohibiting them. The only objection to multiple Boards clearly set out was that of the Carrier, and that is not adequate to justify the Carrier's refusal to sign an agreement creating the Board. The language of Public Law 89-456 (80 Stat. 208) does not make the creation of the Public Law Board voluntary. It states that an agreement shall be made. In this case, it was not. The failure, or refusal, was not based upon any proper ground, and was thus solely the failure of the Carrier, and an unexcused failure.

By its letter of October 14, 1969, the action of the Organization in requesting the Board, constituted in the words of Public Law Board No. 251, "The institution of proceedings before a tribunal having jurisdiction thereof for purposes of stopping the running of any time limits on said claim or disputes."

Further, the custom on this property was for the appointment of the Carrier member at the time of preparing the agreement. In this case, that point was never reached, and the Organization presumed with some justification, that the same man who was always appointed, was, or would be, the Partisan member. The Carrier's action frustrated this established practice but the Carrier cannot now be heard to claim negligence on the part of the Organization for not knowing of the Carrier's changed procedure. The Organization's dilemma was not inadvertence, nor even lack of diligence, but was due to the Carrier's shortcomings in attempting to avoid an obligation laid upon it by Public Law 89-456. The Carrier may not benefit from its own impropriety.

Directly bearing on the significant principles dealt with here are the following excerpts from the decision dated June 6, 1969 of Paul D. Hanlon, Procedural Neutral Member of Public Law Board No. 251:

> "****It is the position of the Organization that its letter of August 8, 1968, requesting the establishment of a Special Board of Adjustment pursuant to Public Law 89-456 and attaching thereto a list of the claims to be presented, constituted the commencement of proceedings before a tribunal having jurisdiction.

It is the position of the Carrier that proceedings were not and could not be instituted before a Public Law Board prior to the establishment of said Board by Agreement with the Carrier. Thus, it is contended the time limit expired on August 26, 1968, prior to the time when this Public Law Board was established.

To anyone with the slightest familiarity with Public Law 89-456 and its legislative history, it must be immediately obvious that the position of the Carrier on this issue is directly at odds with the basic purpose of the Act. The intent of the Act was to expedite the handling of claims such as those presented here.

The detailed mechanics set forth for dragging a reluctant or unwilling party to a hearing before a Public Law Board make it crystal clear that neither party is intended to have any opportunity to frustrate the prompt establishment of such a Board. ****but to accept the theory that the time limit on claims can be allowed to run out during the interval between request for a Public Law Board and the formal establishment thereof would invite strategic delaying tactics and would place in the hands of all Carriers a roll of red tape with an invitation that it be wound around the machinery of Public Law 89-456 in complete mockery of the intent of the drafters."

In this instance the conclusion is inescapable that Public Law Board No. 581 is presently legally and properly established, and all cases which were referred to it in "Attachment A" of the Organization's letter of October 14, 1969, and not subsequently settled, are properly before it.

AWARD

That Public Law Board No. 581 was, and is, properly established, and that all cases, not previously settled, which were referred to it by the Organization's letter of

October 14, 1969 are properly before it. An Agreement setting forth the procedures under which the Merits Board will function is attached hereto.

Harold M. Gilden
Procedural Neutral Member

L. A. Combs
Organization Member

J. W. Lovett
Carrier Member

Denver, Colorado
April 8, 1971