IN THE MATTER OF PROCEDURAL ARBITRATION

BETWEEN

BURLINGTON NORTHERN SANTA FE RAILWAY (BNSF)

AND

AMERICAN TRAIN DISPATCHERS ASSOCIATION (ATDA)

PUBLIC LAW BOARD CASE NO. 7234

ISSUE AS FRAMED BY PARTIES

1) *"Whether, on the facts presented here, BNSF is entitled to have the merits-neutral appointed unilaterally by the National Mediation Board?"*
2) *"If so, what should be the remedy?"*

ARBITRATOR: J. E. (Jim) NASH

APPEARANCES:

For Burlington Northern Santa Fe Railway (BNSF)
Robert S. Karov – Assistant Vice President, Labor Relations
David Pryor, Sen. Gen. Atty. Burlington Northern Santa Fe Railway (BNSF)

For American Train Dispatchers Association (ATDA)
Paul E. Ayers – Vice President

Pertinent Exhibits, Provisions of the Agreement, and Railway Labor Act

45 U. S. C. Section 153 Second; Carrier's exhibits No's 28, 29, and 30; paragraph (4) of proposed Public Law Board Agreement; Organization's Exhibits No's 8, 10, 13, 14, and 16; Railway Labor Act, Section 3, Second;

Background and Procedural History

By letter dated January 16, 2008, and addressed to Third Division - National Railroad Adjustment Board (NRAB), the American Train Dispatchers Association (ATDA),

hereinafter, referred to as the Organization, pulled down a pending dispute identified as Docket **TD-39660**, NRAB Case **No. 06-3-460**. Letter advised that Organization chose to pull down Case **No. 06-3-460** from the NRAB and place it on a newly established PLB as provided in Section 3, Second of Railway Labor Act.

By letter dated January 16, 2008, Organization, likewise, advised the Burlington Northern Santa Fe Railway (BNSF), hereinafter, referred to as the Carrier, that it pulled down Docket **TD-39660**, NRAB Case **No. 06-3-460** from the NRAB and placed it on a newly established PLB.

On January 17, 2008, Carrier signed and mailed a proposed agreement to Organization; proposed agreement accepted Organization's proposal to leave, unchanged, the prior practice of selecting merits Neutral from a strike list submitted to parties by the National Mediation Board (NMB).

On March 6, 2008, Carrier mailed letter to Organization, acknowledging Organization's right to pull down a pending dispute from the NRAB and to place that dispute on a newly established PLB. Carrier maintained, however, that since parties had already agreed on a Neutral to hear the dispute at the NRAB; and since the Neutral had, likely, invested time and effort in becoming conversant with the facts, the same Neutral should be assigned to hear the dispute at a the PLB. Carrier suggested that assigning the same Neutral would support the combined efforts of Rail Labor, Management, and the NMB in their attempts to ensure the most efficient and productive use of Section 3 Funds.

On March 20, 2008, Organization acknowledged receipt of Carrier's letter dated March 6, 2008, and pointed out that the decision to select a Neutral to hear a merits dispute at the NRAB is made by different officers; and there was no participation or mutual agreement between NRAB players, and the players chosen to participate in cases to be heard by a PLB.

On April 8, 2008, Carrier mailed Organization a letter articulating the remaining dispute in terms of an impasse on whether to proceed with selecting a Neutral to resolve a long standing merits dispute. Carrier contended that the perceived impasse triggered the NMB's authority to appoint, unilaterally, a merits Neutral to resolve that dispute. Carrier cited 45 U.S.C. Section 153, Second of the Railway Labor Act as its authoritative support.

On May 7, 2008, the NMB denied Carrier's request to appoint, unilaterally, a Neutral to resolve a merits dispute, pointing out that the provision of the Railway Labor Act cited governs appointment of procedural Neutrals – not merits Neutrals, as Carrier, originally, believed.

By letter of June 30, 2008, Carrier requested the NMB to appoint a Neutral to resolve the procedural dispute on whether Carrier is permitted to have a merits Neutral appointed, unilaterally, to a PLB.

On July 31, 2008, the NMB mailed letter to Carrier, with copy to Organization, notifying that J. E. (Jim) Nash, Arbitrator, Inc. had been appointed as the procedural Neutral to **PLB No. 7234** to resolve the dispute on whether the Carrier is entitled to have the NMB, unilaterally, appoint a merits Neutral to a PLB.

Neutral and partisan members of **PLB No. 7234** conferred and agreed to convene on November 19, 2008.

On November 19, 2008, **PLB No. 7234** convened and adjourned. Prior to oral arguments, partisan parties agreed to frame the issue as follows:

1) *"Whether, on the facts presented here, BNSF is entitled to have the merits-neutral appointed unilaterally by the National Mediation Board?"*
2) *"If so, what should be the remedy?"*

Position of Carrier

At the outset, Carrier acknowledged on page two, third paragraph of its submission that it offered the Organization a proposed agreement stating *"...the Neutral would be selected by strike list if a person acceptable to the parties could not be selected by mutual agreement."* Carrier took the position that since Organization responded to its proposal with a counterproposal, the counterproposal nullified the original. "And," Carrier maintained, *"it is black-letter hornbook law that a counteroffer effectively negates the original offer."* For that reason, according to Carrier, no agreement exists between the parties. *"Moreover,"* it continued, *"emails and other correspondence between the parties established that there was never any agreement reached concerning Board terms and conditions."*

Carrier made the additional argument that since no agreement exists for selecting a merits Neutral, both the Railway Labor Act, and the NMB rules require the NMB to appoint, unilaterally, the merits Neutral. Carrier made a distinction between the words

"appointment" and "selection." It emphasized that the word "appointment" is used to describe how the NMB settles on a Neutral in the absence of an agreement; and the word "selection" expresses the manner by which the parties reach a mutual agreement. Carrier goes on to say that *"Of course, the parties are always free to craft in any way they see fit the "selection" method for determining a merits Neutral if they do so by mutual agreement."* In support of its position, Carrier cited 45 U.S.C, Section 153, Second.

Both in its written submission as well as in its oral presentation, Carrier went to some length to persuade this Board to assign great weight to the parties' intent before interpreting the meaning of the contract. According to Carrier, the intent was, clearly, to select the Neutral already assigned to the NRAB, and that Organization's removal of the merits dispute from the NRAB and placement on a PLB was not suggestive of any dissatisfaction or an objection to the Neutral already selected for the NRAB.

Position of Organization

Organization contends that in Carrier's letter of April 8, 2008, Carrier conceded all amendments in the proposed agreement except the language in paragraph (4) having to do with whether parties will select a merits Neutral from a strike list provided by the NMB. Organization feels strongly that since paragraph (4) was the only issue to be resolved, what was left of the April 8, 2008, proposed agreement remained intact – subsequent counterproposals, and the absence of Carrier's signature, notwithstanding.

In further support of its position that an agreement between parties does, in fact, exist, Organization asked this Board to consider the way in which parties have customarily and historically chosen merits Neutrals to serve on PLB's of this type. In its written submission, Organization offered several exhibits as illustrations of merits Neutrals having been selected via a strike list emanating from the NMB. During oral presentations to this Board, Organization testified – and Carrier confirmed – that parties have employed no other technique for selecting a merits Neutral for this kind of dispute for a PLB.

Organization does not oppose Carrier's assertion that great weight should be assigned to the parties' intent in the resolution of this dispute; it feels, strongly, however, that parties' intent is most salient in correspondence from Carrier dated January 17, 2008, in which Carrier is in agreement to select merits Neutral from strike list. ***See Organization's Exhibit No. 3***

Opinion of the Board

The Board has read and analyzed the evidence; thoughtfully considered the positions advanced by both parties; and has allowed the record to speak.

The Board will, first, address Carrier's argument that because parties were unable to agree on an amended proposal for selecting a merits Neutral, parties reached an impasse, and no agreement, now, exists. Since parties are in a deadlock – according to Carrier – both the NMB, by rule, as well as the Railway Labor Act require unilateral appointment of a merits Neutral. The Board notes that rule support cited for that argument is inapplicable. We agree, however, that since the parties did not agree to the amended proposal, it has no legal affect. Parties, must, therefore, revert to prior status and abide by rule in effect at that time.

Regarding Carrier's acknowledgement that "*...the parties are always free to craft in any way they see fit the "selection" method for determining a merits Neutral if they do so by mutual agreement*", in the Board's view, such an agreement may be found in the form of parties' custom and practice. As we understand that agreement, selecting a merits Neutral from a strike list of seven (7) qualified Arbitrators eliminates the possibility of a deadlock if parties pursue the process to completion. Where past practice provides for the use of a strike list, Carrier cannot short circuit the process by refusing to utilize the strike list, then, reasonably, argue the parties have reached an impasse.

Finally, in addressing the position advanced by Carrier on the weight the Board should assign to "intent," we observed that this dispute was transferred properly from the NRAB to a PLB with concurrence of both parties, and full knowledge that the players on both sides, then, would be different, as would the procedural requirements for selecting a merits Neutral. Based on the evidence offered for our consideration, it is not as apparent to us as to the Carrier that parties intended to use the same Neutral for the PLB as selected for the NRAB.

Moving, now, to the contentions of the Organization, it argued, vehemently, both in its briefs as well as in its oral presentation to this Board, that the amended proposal must be adopted – with or without Carrier's signature – with parties taking the unresolved issue to procedural arbitration. That is true, according to Organization, because it shows not only the parties' intent, but, also, because Carrier should not be allowed to nullify the amended proposal in its entirety after acknowledging that a single issue remained unresolved: whether to use a strike list for selecting a merits Neutral (formalized, later, as

"Whether, on the facts presented here, BNSF is entitled to have the merits-neutral appointed unilaterally by the National Mediation Board?")

Having read the numerous proposals and counterproposals, we are, now, in a somewhat better position to understand why Organization would have advanced its arguments as it did on parties' intent, and the validity of the amended proposal – without Carrier's signature. Nevertheless, we are unable to agree with Organization's analysis or conclusion on that point! We concur with Carrier that a counterproposal signifies non concurrence; and, in so doing, nullifies the original proposal. It is elementary that no amended proposal may be effected unless parties have a meeting of minds on amendments. Until that happens, parties to this dispute are prisoners in the procedural house both parties constructed, and in which they must cohabitate until they reach an accord in some future pact.

Organization assumed an unyielding, but persuasive, position on the import of custom and prior practice. Organization pointed out – and Carrier agreed – that parties customarily, and historically, have used the strike list in selecting a merits Neutral for a PLB. During oral presentations, both parties were unable to recall a single instance of having used another method. Organization feels, strongly, that the strike list method should remain in full effect until parties reach an alternative agreement.

While we reject Organization's arguments that the proposed amendment should be adopted because it shows the parties' intent, or because Carrier should not be allowed to nullify the entire proposed amendment after yielding on all but a single issue, the Board does find credence in its argument than an agreement does exist by virtue of custom and prior practice.

It is well accepted that history, and custom serve the vital need for industrial stability. That is, particularly, true in the railroad industry. In order to rise to the dignity of equality to a contractual right or duty binding on both parties, prior practice cannot be established based on an incidental, wooly, "one time" occurrence. It must be an unequivocal, established practice, accepted by both parties, ripened by consistency and repetitiveness over a reasonable period, and unchanged during contract negotiations.

In light of the evidence revealed throughout this arbitration hearing – to include mutual acknowledgement of exclusive use of the strike list method for selecting merits Neutrals – and the manner in which other tribunals have looked upon similar evidence, it seems to this Board that the reasonable view is to regard the method of selecting a merits Neutral to be part of an existing, collective bargaining contract, established via custom and prior practice.

In our opinion – for reasons stated above – Carrier violated the procedural agreement established through custom and prior practice.

In answering question number one (1) of the issues as framed by the parties,

"Whether, on the facts presented here, BNSF is entitled to have the merits-neutral appointed unilaterally by the National Mediation Board?"

we respond in the negative.

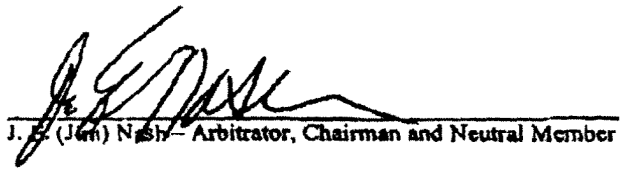
Having responded in the negative to the first question, the second question:

"If so, what should be the remedy?"

need not be addressed.

Award

This dispute is resolved in favor of Organization. The PLB Agreement shall provide that if the parties are unable to agree on the selection of a Merits Neutral, the parties shall select the Merits Neutral from a strike list of 7 arbitrators provided by the National Mediation Board.



J. E. (Jim) Nash – Arbitrator, Chairman and Neutral Member

Issued - 12/02/2008