BROTHERHOOD OF RAILROAD TRAINMEN	:	
	:	
and	:	Opinion and Award
	:	
BOSTON AND MAINE CORP.	:	

OPINION AND AWARD ON THE JURISDICTION OF
PUBLIC LAW BOARD No. 87

Pursuant to Public Law 89-456 the Brotherhood of Railroad Trainmen, on February 13, 1967, requested the establishment of a Special Board of Adjustment to hear a docket of listed cases arising on the Boston and Maine Railroad. The Organization and Carrier were unable to agree on questions relating to the jurisdiction and establishment of the proposed board, which became known as Public Law Board No. 87. In accordance with the statute the undersigned was designated as the Procedural Neutral Member on August 14, 1967.

The Procedural Neutral met with J.L. Scanlan, representing the Organization, and W.J. Ahearne, representing the Carrier, on October 31 and November 1, 1967, and January 4 and 5, 1968. Each was afforded full opportunity to canvas all issues concerning the jurisdiction and establishment of the Board. Each also submitted a brief on the jurisdiction.

The determinations of the Procedural Neutral are being incorporated in an agreement establishing Public Law Board No. 87. None requires elaboration in a written opinion except the jurisdictional issues that the Carrier raised concerning Claims T-8566-A, T-8728, T-8730, T-8770, and T-8918.

CLAIM T-8566-A

Claim T-8566-A is a typical third party claim in the sense that it results from work being assigned to employees represented by other labor organizations, which work BRT claims should have been assigned to an employee in the classification it represents.

man at the Billerica shop was used on his day of rest to throw hand-thrown cross-over switches when a single track operation was in effect. BRT took the position that this was work belonging to the craft or class of trainmen. B&M argued that the use of an employee from the Telegraphers craft was correct. Manifestly both organizations, and both crafts or classes of employees, have an interest in the dispute. A ruling that bound only one would leave the carrier vulnerable to the other.

Prior to the decision of the Supreme Court of the United States in Transportation-Communication Employees Union v. Union Pacific R. Co., 385 U.S. 157, the practice of the National Railroad Adjustment Board in work assignment disputes was to rule upon the claim of each organization without regard to the merits of the claim of the other. A Public Law Board could perform this function: and therefore, prior to the T-CEU case, the propriety of having a Public Law Board decide these cases instead of NRAB would have been beyond question.

In T-CEU, however, the Supreme Court held that NRAB has both the power and the duty to render decisions binding both crafts and organizations in work assignment disputes. The carrier, the Court held, has a right to such a determination. If a Public Law Board can render an equally effective decision in a third party case, there is no reason that Public Law Board No. 87 should not hear these particular cases. But if a Public Law Board cannot render a decision binding all parties, then it should not consider the claims at all. A partial decision would be a throw-back to the old procedure which the Supreme Court held to be contrary to the interests of the carrier, the employees, and the public.

The critical question, then, is whether Public Law Board No. 87 can render a fair and binding decision conclusive of the rights of both parties to these work assignment disputes. In our opinion, although the question is debatable, a Public Law Board lacks that power, and therefore should leave such questions to NRAB.

in the legislative history, to show that Congress intended to answer the question one way or the other. The legislative history set forth in the opinion of Mr. J. Keith Mann for Public Law Board No. 1 does not support his statement that it indicates "that members of Congress assumed these disputes would arise and be dealt with by special adjustment boards." The passage he quotes looks only to excluding such cases, and he himself reads it as not dealing with the assignment of work. The fact is that the congressional committees and others interested in Public Law 89-456 could not anticipate the T-CEU decision, and therefore made no provision for the problem.

The essence of the Public Law Boards is that they will be set up--not by statute as NRAB--but by agreement between an individual carrier and the one organization representing a craft or class of employees, to resolve disputes between them. Apart from statute, a carrier and a single organization cannot set up a tribunal with power to adjudicate the rights of third parties. Edwards v. Capital Airlines, 176 F. 2d 755, cert. denied, 338 U.S. 885. It is most unlikely that Congress intended to give two parties such extraordinary power to set up a tribunal binding a third.

The decisive point, however, is that the composition and procedure of a Public Law Board are cast in a form that would make it unfair for the board to rule upon third party interests. The members of a Public Law Board are named by the carrier and the single organization; unless they disagree as to the award, no neutral will be appointed. If the board has jurisdiction, the two can bind the third party despite the conflict of interest.

The neutral may also be picked by agreement of the partisan members and, even after a neutral is named, the partisan members may join and outvote him. Such a procedure is well-suited to resolving differences between the two parties who set up the tribunal and choose its members, including partisan members, but

an adverse claimant.

These objections were recognized by Mr. J. Keith Mann in the opinion of Public Law Board No. 1:

> Even if the third party has full right to appear and be heard, the fact that the only members of the board represent participants in the case robs the proceeding of objectivity and renders it void ...

Mr. Mann then went on to rule that the difficulty could be got over if the carrier and organization agreed that the Public Law Board should hear third party cases, but that it should decide them only with the concurrence of the neutral member. But the change removes only a small part of the unfairness. The organization that joined in setting up the board would have had the advantage of having participated in framing the basic agreement, perhaps of helping to choose any neutral member, and ultimately of taking part in all executive sessions of the board and thus submitting final arguments outside the presence of the opposing party just as the decision is rendered. These would be very real, and very unfair, advantages. Mr. Mann's example illustrates them vividly. Mr. Mann points out that a jury in a courtroom proceeding cannot fairly be composed of the relatives of one party. The unfairness is not cured by putting a single impartial person on the jury and requiring his concurrence in the decision. When the jury retired to deliberate, the impartial person would be hearing all the arguments and feel all the pressure of one party's family, but the other party would be denied a like opportunity. No court would uphold such a verdict.

In any event, even if Mr. Mann's opinion is correct, the Southern Pacific ruling is distinguishable from the present case. There, the carrier agreed to submit the third party cases and to provide for decision by the neutral member. Here, B&M refuses to enter into such an agreement.

It may be argued that a proceeding before NRAB suffers from the same deficiencies as I attribute to a Public Law Board in a

only partial, are nonetheless important.

First, the danger that one organization will be represented on the tribunal while the other is unrepresented does not arise in all cases. Often a case will come before a division on which both parties are represented or neither.

Second, the chance that selfish interests will influence the outcome is considerably diluted by the number of members on each division and the extent of their removal from the controversy.

Whether the NRAB procedure is fair or unfair in work assignment controversies is not for us to decide. In either event it is a good deal more impartial than referring such a claim to a Public Law Board, which is established by agreement between the carrier and only one of the contesting organizations, and on which only one of the contesting organizations is represented.

The apparently inconsistent action on Claim 8566 is not a binding precedent because it was taken before there was time to consider fully the implications of the T-CEU case.

The exclusion of this case from the docket of Public Law Board No. 87 would not leave the employees without a remedy. The claim can still go to NRAB. The only function of a Public Law Board is to save time. The time to be saved is not enough to offset the risk that the decision would not be the kind of final disposition required by the T-CEU case because it could not fairly be held binding upon the rival organization.

Accordingly, the procedural award will be that Public Law Board No. 87 should not consider Claim T-8566-A.

CLAIM T-8770

Claim T-8770 raises the question whether Yard Helper L.V. Clark is entitled to one day's pay at time and a half the regular rate, plus dead-heading, because he was not called to cover a Yard Helper's vacancy on the 3:00 p.m. switcher at Worcester, Massachusetts. A decision on the merits of the claim will involve consideration of the various agreements between BRT and B&M,

various addenda and supplements.

Claim T-8770 has already been submitted to a Disputes Committee under the basic May 25, 1951 agreement. BRT denies the Committee's jurisdiction, and the case is awaiting disposition.

B&M contends that under these circumstances Public Law Board No. 87 should not be given jurisdiction over Claim T-8770. The gist of B&M's argument is that, when the parties have established a specially qualified tribunal to which they agree that claims arising under the agreement "shall" be referred, then another tribunal ought not to intervene.

BRT's argument is that the Disputes Committee cannot hear the claim for two reasons.

First, BRT argues that Article 14 of the May 25, 1951 agreement does not apply to disputes arising on the B&M because it is not mentioned in the Memorandum Agreement of February 15, 1952 (T-79), applying the basic May 25, 1951 agreement to the property. A serious objection to the argument, which may or may not be conclusive, is that T-79 purports, on its face, to set forth only the local modifications agreed to be made in the basic agreement, leaving all the rest of the basic agreement applicable to the property.

Second, BRT points out that Article 14 gives the Disputes Committee jurisdiction over only --

> disputes arising between the parties to this agreement in connection with the revision of individual agreements so as to make them conform to this agreement ...

Since Claim T-8770 is not of that character, BRT concludes that the Disputes Committee has no jurisdiction.

B&M replies that, as a matter of practice, Article 14 has often been construed by the Disputes Committee to cover claims like T-8870. The precedents in the rulings of Special Adjustment Boards vary. Sometimes they have taken jurisdiction. On other occasions they have referred the matter to the Disputes Committee. In view of the diversity, the decisions do not constitute persuasive precedents for either view.

upon the disputed jurisdiction of the Disputes Committee. Public Law 89-456, 89 Stat. 208, provides that the cases to be considered by a special board of adjustment "shall be defined in the agreement establishing it." The procedural neutral is empowered to resolve disputes over the terms to be included in the agreement. Accordingly, there is no lack of power to make consideration of a claim contingent upon the action of another tribunal.*

As a general rule, a Public Law Board ought not to hear cases within the jurisdiction of a special disputes committee. Such disputes committees are established because of special expertise in applying a particular agreement, the need for uniformity, and like considerations. One of their purposes is to take cases out of the National Adjustment Board, for which Public Law Boards are a substitute. If the Disputes Committee under Article 14 of the May 25, 1951 agreement has jurisdiction over Claim T-8770, Public Law Board No. 87 ought not to hear the controversy.

In the present case, there is dispute over the Disputes Committee's jurisdiction. That committee undoubtedly has power to make a binding ruling upon its own jurisdiction, United Steelworkers v. American Mfg. Co., 363 U.S. 574, and that question is now pending before it. The same considerations that require the courts to stand aside and let an arbitration tribunal make the ruling upon its own jurisdiction should cause other outsiders not to interfere. The same considerations that bar a Public Law Board from interfering on the merits also preclude its undertaking to rule upon the Disputes Committee's jurisdiction.** Furthermore, it could only promote confusion for this Board to attempt to decide the jurisdiction of the Disputes Committee. That tribunal would not be bound by the decision. If the two tribunals disagreed, the result would be for both to hear the same case, or for the claim to fall undecided by either.

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* In substance, such disposition is much the same as granting a continuance until the other tribunal has acted.

** These comments assume that the reference to the Disputes Committee is made in good faith.

T-8770, the claim should not be heard by Public Law Board No. 87.

If the Disputes Committee does not take jurisdiction over Claim T-8770, there is no basis for excluding it from the consideration of Public Law Board No. 87.

Accordingly, the procedural award is that the agreement setting up Public Law Board No. 87 shall contain the following provision:

> The Board shall have jurisdiction to consider Claim T-8770 if, but only if, jurisdiction to decide the merits is declined by the Disputes Committee before which the claim is now pending, during the life of the Board.

CLAIM T-8918

In Claim T-8918 R.A. Stagliano seeks to recover the amount of earnings upon the 2:59 p.m. Yardmaster's assignment in Mechanicville on June 4, 1966, on the ground that he should have been called rather than J.D. Murphy, who actually filled the position. The claim is presently before the Fourth Division of the National Adjustment Board, which has reserved the question of its jurisdiction.

B&M contends that Public Law Board No. 87 should not consider Claim T-8918 because it arises under the Yardmasters' Agreement. In support of this contention B&M has submitted copies of a letter addressed by the National Mediation Board to Charles Luna, President of the BRT, on July 5, 1967, declining to appoint a Public Law Board on the Southern Pacific to consider a group of claims pertaining to Yardmen working in a bargaining unit for which BRT was not the representative.

BRT makes two points in reply.

First, BRT says that the NMB letter relates only to setting up a board to hear a special group of yardmen's cases whereas Public Law Board No. 87 will hear a wide variety of claims. But the argument does not meet the real objection, which is to allowing an organization not the bargaining representative to present a case to a board made up of representatives designated by the carrier and itself, by-passing the rival organization that negoti-

unit. The result would be to promote jurisdictional rivalry, and to open the door to conflicting rulings. The House Committee that reported Public Law 89-456 expressed the intention to have such cases excluded from the jurisdiction of special boards of adjustment. See H. Rep. 1114, 89th Cong., 2d Sess., p. 14.

Second, BRT denies that Claim T-8918 is founded upon the Yardmasters' Agreement. It points out that its submission does not invoke the Yardmasters' Agreement, and that the carrier's submission also analyzes the case in terms of the Yardmen's Agreement. In fact, the carrier seems to be making two defenses: (i) that it complied with the Yardmen's Agreement; and (ii) that, in any event, the case is governed by the Yardmasters' Agreement, under which no money is due.

Stagliano is a rostered spare Yardmaster with seniority rights as a Yardmaster. Everyone agrees that he has rights to be called to work under the Yardmasters' Agreement in accordance with Rule 2-Seniority. In those matters Stagliano is represented by the Yardmasters and they could not appropriately be referred to a Public Law Board established at the request of BRT.

In this case Stagliano, who apparently has no basis for any claim under the Yardmasters' Agreement wishes to fall back upon Rule 3 of the Yardmen's Agreement claiming that it is applicable to him as a Yardman regardless of his status as a rostered Yardmaster with rights defined by the Yardmasters' Agreement.

It is not for us to rule on the merits of that claim. It is clear, however, that Stagliano as a rostered Yardmaster is in that capacity a member of the Yardmasters' craft or class. He cannot put that status on or off at will. Since the craft or class of Yardmasters, including spare Yardmasters, is represented by the Yardmasters' Union, it would give Public Law Board No. 87 "jurisdiction so broad as to invade the jurisdiction of another union," to provide that it should hear Stagliano's claim. The House Committee expressed the expectation that the procedural neutrals would "determine the jurisdiction of the board so as not to invade the established jurisdiction of another union." H. Rep. 1114, supra.

First Division of the NRAB. That case, however, did not deal with the rights of persons rostered as Yardmasters; rather, it dealt with the promotional opportunities of Yardmen who, up to that point, had had no standing as Yardmasters. Award 12335 dealt only with a Switchman' right, under the Switchmen's Agreement, to extra pay for doing work of a higher classification.

Accordingly, Claim T-8918 should not be referred to Public Law Board No. 87.

CLAIMS T-8728 and T-8730

These claims relate to the operation of trains between Mechanicville and Selkirk. There is joint service with the New York Central Railroad between these points in the sense that New York Central crews operate between Syracuse and Mechanicville and return while B&M crews operate between Mechanicville and Selkirk and return. On February 20, 1936 the B&M, the New York Central, and representatives of the four train service employees on both properties entered into an agreement which stipulates, among other provisions, that --

> The mileage made by N.Y.C. crews on B&M rails will be equalized by B&M crews in service between Mechanicville and Selkirk.

Claim T-8728 results from the fact that, on each of several days, B&M crews were turned at Rotterdam and sent back to Mechanicville instead of continuing to Selkirk and then returning. Claim T-8730 seeks one day's pay for Freight Conductor Garland and crew "account of his regular assignment running in inter-railroad service cancelled and two (2) New York Central crews being run in inter-railroad service between Mechanicville and Selkirk."

B&M argues that these cases should not go before Public Law Board No. 87 because other organizations are parties to the Selkirk agreement and will be affected by its interpretation.

The argument is unpersuasive. The mere fact that other organizations are parties to the agreement should not deprive BRT of the right to refer its claims to a Public Law Board. There is no hostility between the claim BRT is presenting and the claims of other employees. If BRT were saying that some of the work done by NYC crews should have gone to B&M, there would be a third party contest. But BRT disclaims any such argument. BRT says that the New York Central may run such trains as it pleases; and that whenever a NYC train is run, B&M must run a train (or pay the employees) regardless of whether there is work for them. BRT will have to stand or fall upon that argument, insofar as it relies upon the Selkirk agreement. The decision, therefore, cannot take any work from NYC employees or members of another organization. That being true, there is no unfairness in having the case decided by a board constituted by BRT and B&M. For the same reason, the problem raised by Claim T-8566-A is distinguishable.

It is possible that, if BRT prevails, B&M may be moved to set in motion a sequence of events that could have adverse consequences upon the NYC employees. We should not speculate upon that point, however. There will be no award taking anything from any other employees. The possible consequences at the end of a chain of practical events -- which may never eventuate -- is not enough to classify the case as a third party controversy.

The interpretation put upon the February 20, 1936 agreement may be of interest to the other parties, even though the BRT claim cannot injure them. If the Neutral Member is interested in their interpretation of the document or thinks they should be heard, the necessary notice can be given. In either event, the point is not jurisdictional and the absence of the other parties would neither impair the jurisdiction of Public Law

Board No. 87 nor detract from the validity of its award.

Accordingly, the award is that Public Law Board No. 87 shall have jurisdiction over Claims T-8728 and T-8730.

Archibald Cox, Procedural Neutral

W.J. Ahearne, Carrier Member

Dissents as to opinion of this Board in connection with Claims T-8728 and T-8730.

J.L. Scanlan, Organization Member

Dissents on Opinion and Award on the Jurisdiction of Public Law Board No. 87 as it relates to Claims T-8566-A, T-8770 and T-8918.

Boston, Massachusetts

January 22, 1968