NATIONAL ACADEMY OF ARBITRATORS

RAILROAD ARBITRATION AND MEMBERSHIP POLICY

A Report to President Picher
and the
Board of Governors
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Submitted by the Special Committee

Gil Vernon, Chair
Margery Gootnick
Herbert Marx
Roberta Golick
Barry Simon
Margaret R. Brogan

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EXECUTIVE SUMMARY

The status quo membership policy and practice, except for a limited category, does not allow arbitration decisions in the railroad industry to count toward the threshold that entitles an applicant broader consideration and evaluation as to whether her application contains sufficient evidence of "substantial and current experience so as to reflect general acceptability." With the NDC amendments to the bylaws in June of 2008 and the associated changes in membership policy which allows limited credit toward the threshold for consideration of certain workplace dispute decisions, there is good reason to change our policy as to railroad decisions and to now treat them in the same new, but limited workplace decision category. We recommend the following be adopted as Board policy:

> "Each certificate of appointment to a Section 3 tribunal (NRAB, SBA, or PLB) under the Railway Labor Act issued by the National Mediation Board (indicating it was based on a selection by the parties or "partisan members") accompanied by one issued and adopted award will be considered as one countable "workplace" dispute resolution decision under the January 18, 2007, resolution of the Board of Governors."

I. THE COMMITTEE'S CHARGE

During the discussions in committees, among members in general, and at the Board of Governor's level in 2005 and 2006 about the broad ranging proposals now commonly referred to as "NDC" (New Directions Committee), the subject of railroad arbitration decisions in the membership process and policy surfaced. Because of the specialized nature of arbitration in the railroad industry, this topic was referred to a special committee. Members of this specific committee were selected on the basis of their experience in membership policy and/or experience in the industry.

While not precisely framed, the question before the Committee relates to the intersection of Membership Policy and arbitration in the railroad industry. Some might say the question is whether "railroad" decisions should "count" toward membership. While such a shorthand assessment of our Committee's function and status of our current policy in this regard is convenient, it potentially reflects a misunderstanding of our NAA membership policy and more particularly its operation. There is a general misconception among some NAA members that "railroad" decisions are not considered in membership decisions. Even among those who understand that railroad decisions play a role in membership decisions, there are varying opinions as to how railroad awards should be accounted for.

Generally, railroad decisions do not count toward the "threshold" number that needs to be met to be considered for membership.[1] However, if an applicant achieves consideration status or in other words meets the threshold to be considered, railroad decisions can be taken as additional evidence of "general acceptability", which is the ultimate standard or test for membership. This additional evidence is currently referred to as "added weight" or "added weight cases." Added weight cases can be important because meeting the threshold for consideration does not mean a candidate meets the test for admission: general acceptability.

Thus, the question before us is more focused than "should railroad decisions count toward membership." It is more precisely "should railroad decisions count toward the threshold, i.e. in determining whether the applicant numerically has enough cases to be considered" or put another way should railroad cases count toward determining whether the candidate has a sufficient number of cases to warrant further examination as to whether their entire case load demonstrates or satisfies the base criterion of "general acceptability".

[1] There are some types of arbitration decisions in the railroad industry which do count toward the threshold. However, the typical decision--which represents the vast majority of the universe of railroad decisions--do not. This distinction will be explained later.

II. THE STATUS QUO - MEMBERSHIP POLICY

Where membership policy should go can only be determined if we understand where we are.

A. The Standard

The basic standard for determining if membership should be conferred upon an applicant is whether she or he has "substantial and current experience as an impartial neutral arbitrator of labor management disputes, so as to reflect general acceptability to the parties". The full text is found in Article VI Section 1 paragraph 1 of the bylaws:

> In considering applications for membership, the National Academy of Arbitrators will apply the following standards: (1) the applicant should be of good moral character, as demonstrated by adherence to sound ethical standards in professional activities. (2) The applicant should have substantial and current experience as an impartial neutral arbitrator of labor-management disputes, so as to reflect general acceptability by the parties. (3) As an alternative to (2), the applicant with limited but current experience in arbitration should have attained general recognition through scholarly publication or other activities as an important authority on labor-management relations.

B. The Threshold for Consideration

The second paragraph Article VI, Section 1 introduces the idea of a threshold for consideration:

> The Academy shall adopt, maintain and publish a policy on membership which shall set forth a threshold number of countable cases for consideration of an application. Meeting such threshold does not guarantee admission or that an applicant has satisfied the criterion of general acceptability. (Added by Amendment May 26, 2007)

The threshold should not be confused with the basic standard. For example, an applicant may meet or even greatly exceed the threshold for countable cases but may not, in the judgment of the Committee demonstrate “general acceptability”. General acceptability is not a numerical standard; although the number of cases decided is important evidence of general acceptability.

The policy as to “countable cases” when this committee started its task indicated that a decision is countable for threshold purposes if it meets the following criteria:

> To be "countable," cases generally should satisfy the following requirements:
>
> The arbitrator was selected by the parties and paid by the parties;
>
> The arbitrator conducted a full evidentiary hearing which included the examination and cross-examination of witnesses.
>
> The parties expressed no limitations upon the length or depth of the arbitrator's written decision;
>
> The arbitrator issued a written award and opinion with supporting rationale fully laid out. A decision in which the arbitrator presented an oral, abbreviated or condensed explanation of the rationale supporting it does not count toward admission;
>
> The award must be final and binding upon the parties. Fact-finding and other advisory opinions do not count towards admission.
>
> There are many types of expedited cases, some of which may count toward Academy admission, and others which do not. A case that is designed by the parties as expedited but that is expected to and does meet each and every requirement stated above will count towards Academy admission. For instance, a case that is labeled expedited solely because the arbitrator is constrained to issue a speedy decision will count towards admission. Most expedited cases that do not count are excluded because they fail to satisfy the full evidentiary hearing and/or the full-blown decision requirements.

With the passage of the NDC resolution in Ottawa, the policy was amended as set forth in Article VI (the last sentence):

> "The policy on membership may provide that awards in cases involving workplace disputes other than labor-management disputes shall be counted toward the threshold requirement, provided that any change in the number of such awards beyond that provided in the resolution of the Board of Governors dated January 18, 2007 has been approved by the membership at an annual meeting."

The operative January 18, 2007 resolution of the Board of Governors reads as follows:

> "**RESOLUTION OF THE NAA BOARD OF GOVERNORS CONCERNING IMPLEMENTATION OF THE NEW DIRECTIONS INITIATIVE, UNANIMOUSLY ADOPTED JANUARY 18, 2007**
>
> Should the Membership of the National Academy of Arbitrators approve the New Directions Committee resolution, or an amended version of the resolution as the case may be, and any necessary changes in the Constitution and/or By-Laws, the Board of Governors establishes the following numerical threshold for Membership Committee review of applications:
>
> The Membership Committee shall apply, as a threshold for considering an application for membership, a minimum of five years of experience as an arbitrator, and 60 written decisions in a time period not to exceed six years, at least 40 of which must be countable labor-management arbitration awards. In addition to the labor-management arbitration awards, up to 20 decisions in the field of workplace disputes resolution (including, for example, advisory arbitration, fact-finding, and teacher tenure and civil service cases under statutes or rules closely analogous to traditional arbitration) shall be countable in accordance with the standards established by the Membership Committee. No more than 10 countable workplace disputes resolution decisions shall involve employment arbitration pursuant to an individual contract, handbook, or other agreement between an employer and an employee who is not represented by a labor organization.

C. Added Weight Cases

While an arbitration decision may not be "countable" for threshold purposes, the Committee has the discretion--if the threshold for consideration is met--to consider it as evidence of general acceptability. As already noted these are referred to as "added weight" cases. For example, an applicant may meet the threshold of countable cases but for a number of reasons the Committee might believe the countable cases by themselves don't demonstrate general acceptability. One reason might be a concern over lack of diversity among the Parties involved in the applicant's countable-toward-the-threshold cases. The Committee has the discretion to look at the added weight cases which might involve a host of other different parties/industries for evidence of diversity/general acceptability. The membership committee could also consider added weight cases together with countable cases to conclude an applicant has demonstrated general acceptability in the event they do not believe the countable cases alone don't meet that test[2].

[2] These simple examples are not to be taken as implied rules to be observed by future membership committees. The discretion of the committee can only be appropriately applied in the context of any particular membership application which by their nature are multi-faceted, present unique combinations of factors, and involve considerations beyond simple numbers.

The membership application in use when this committee started its job extended the opportunity to the applicant to list these cases in Section 8(b)[3]. That section appears as follows:

> Only "countable" cases should be listed in Section 8(a). Although an issued decision might not be "countable" for purposes of the threshold and is not given the same weight as a countable case, such decisions are also considered a relevant factor. Fact Finding, Expedited Awards and Advisories should be listed in Section 8(b), "Added Weight Cases".
>
> In addition, effective in 2002, the NAA started to consider certain employment cases under the "Added Weight" Section. Qualifying cases are those where the Arbitrator is jointly selected and issues a final and binding award with accompanying rationale in disputes of the following kind:
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> > Cases involving the application of statutory protections to employees, provided that the procedures followed were consistent with the requirements of the Due Process Protocol of 1995 and the Academy Guidelines of May 1997. See the NAA website for these documents.
> >
> > Cases involving the interpretation and enforcement of individual contracts of employment negotiated by an employer with an employee holding a job that is not covered by any law authorizing collective bargaining.
> >
> > Cases arising under an employer-promulgated policy or procedure, applicable to employees holding jobs that are covered by a law authorizing collective bargaining, provided that the procedures followed afforded the employee due process rights equivalent to those contained in the Due Process Protocol of 1995 and the Academy Guidelines of May 1997.

D. Current Status of Railroad Cases

In short, under current policy, some kinds of railroad decisions count toward the threshold and some do not, thereby falling into the added weight/additional evidence category. In sum, "privately funded" railroad

[3] As of November 2008, the application has been revised so as to grant an applicant the opportunity to reflect their traditional "countable labor management decisions" in Section 8(a) and "countable workplace dispute decisions" in Section 8(b). Separate worksheets for applicants to list those cases are provided. The revised application is attached to this report.

decisions count toward the threshold and all other railroad decisions are added weight cases. To understand the current policy and to consider whether and how the policy might change requires an understanding of the multiplicity of arbitration forums utilized by the Parties and the wide variety of different evidentiary arrangements, selection/appointment procedures, issues and payment arrangements.

III. THE LANDSCAPE OF RAILROAD ARBITRATION DECISIONS

A. Cases Under Section 3 of the Railway Labor Act

1. Types of Boards

(a) The National Railroad Adjustment Board

Section 3 of the Railway Labor Act of 1934 provides grievances could be "appealed" to the National Railroad Adjustment Board (NRAB) for "adjustment" which is synonymous with arbitration in that decisions are ultimately made by a third party neutral by way of written decision. The Board is tripartite in nature and theoretically partisan members of the Board are free to issue a final and binding decision by majority vote. But, it is extremely rare and most cases are "deadlocked" by a tie vote. Cases are then grouped together in a docket.

The third division is the most active generating about 2/3 of the overall NRAB docket in a year. The third division dockets typically average 20 cases. A docket might include cases from multiple railroads and unions or conversely a single carrier or union or any combination. Sometimes a docket involves multiple case numbers (each case has a unique case number and award number which are typically not the same) but the same issue, although this is a rarer occurrence than it used to be. At the end of fiscal year 2007 there were approximately 2600 cases docketed at the NRAB. Since the inception of the NRAB tens of thousands of awards have been issued by the four Divisions. Academy members have been among the many referees who have participated in awards on the NRAB and other RLA tribunals.

Once a docket is established the Partisan members of the Board endeavor to jointly select a single neutral "referee" for all the cases on that particular docket. In

short, one selection by the parties most likely will result in twenty separate decisions.[4]

If the parties cannot agree, one is appointed by the National Mediation Board (NMB). The latter instance is rare. In such an instance the assignment of the referee to a docket does not necessarily mean the referee is acceptable to the parties. The parties have no choice but to accept the NMB's appointment.

In either event (selection by the parties or by the NMB) every neutral is issued a formal certificate of appointment (in letter form) which typically indicates whether the neutral was selected by the parties or appointed by the Board[5]. In either event, the fees and expenses of the neutral are paid for by the NMB. The per diem is set by the NMB.

Multiple cases are heard in a single day which is made possible in large part by the fact that the hearing does not involve a de novo hearing but is appellate in

[4] "Referee" and "Neutral" are statutory terms. They are synonymous with "Arbitrator" and used interchangeably in this report.

[5] A sample is attached as appendix A.

nature. Thus, the argument which is in the form of a submission or brief is based on the written record of evidence that the parties developed during the grievance procedure prior to the appeal to arbitration.

At the NRAB the individual railroad, individual union and the individual grievant has the opportunity for a hearing in front of the neutral to supplement their written submissions (which consist of a statement of fact, their position and documents exchanged between the Parties during the grievance procedure.) Usually the right to appear is waived and thus there is no appearance by the direct parties. Instead the case is orally argued by the tripartite members of the Board (one carrier member and one union member along with the referee.) Each partisan Board member may choose to provide the referee with a supplemental brief usually heavy on citation of Board precedent. More detail will follow about the appellate nature of other arbitration forums under Section 3 of the Railway Labor Act.

(b) Special Boards of Adjustment (SBA)

These Boards's function like the NRAB but the main administration of the Board is handled directly by the Parties rather than the NMB. SBA's are established by agreement of the parties. Some SBA's have been in existence for many years. Some come and go. Some have single neutrals. Some have a panel of neutrals, but only one neutral participates in any single decision. Typically, but not exclusively, the neutral's fees and expenses are also paid by the National Mediation Board at the set per diem.

(c) Public Law Boards

Either party (usually the union) can unilaterally appeal cases to, and have established, a Public Law Board or "PLB". These Boards take their name from the public law that established this forum in 1966. PLBs are sequentially numbered. Just as a point of interest, the number of PLBs established since 1966 exceeds 7200. However, only a fraction of that are open and active. Nationally, there are currently 3995 (approximately)

cases listed on PLB dockets awaiting adjudication. In fiscal year 2007 some 2500 PLB decisions were issued by neutrals.

As is true with SBAs a PLB may be of long standing nature, but the referees' tenure does not necessarily correspond to the life of the Board. The original referee might be agreed upon for a set number of cases and then be replaced. The referee may survive for a number of sessions or sets of cases of the Board. A PLB might be established for one case or a hundred. New cases might be added later after the initial session of the Board.

Thus, the referee might issue any number of decisions but it is extremely difficult to tell if the parties made one single acceptability decision to invest the neutral with jurisdiction over multiple cases, or several or many acceptability decisions for a similar number of cases.

(d) Parties Pay Boards (Privately Funded)

The Parties have the option of agreeing to pay the neutral's fees and expenses for the arbitration of any dispute. This is a relatively rare occurrence and usually happens in one of two circumstances. First, occasionally the Parties on a national basis seek a resolution of an issue flowing from national bargaining.

The other circumstance that the parties usually pay the arbitrator's fee and expenses for are in "protection" cases. Often mergers, acquisitions and coordination are conditioned voluntarily or by regulatory requirement upon the negotiation of provisions that protect affected workers in the event of displacement or dismissal in connection with such transactions. Sometimes arbitration is used to set the terms of these protection provisions and sometimes there are disputes over their meaning and application.

These are generally complex cases and most usually are privately funded. However, this isn't always the case. They also essentially are de novo proceedings.

> This arbitration is generally under the aegis of the Surface Transportation Board, the successor agency of the ICC (Interstate Commerce Commission) rather than the NMB. These cases aren't typically eligible for NMB funding.

B. The Appellate Nature of Railroad Arbitration

For decades the NRAB was the most heavily relied on type of forum. It was established in 1934 and over time it took on a solidly appellate character[6]. This relates principally to: (1) the wording of Section 3 first (i) of the RLA; (2) the nature of discipline procedures; (3) the fact that early referees were state supreme court justices and simply; (4) the nature of the system.

Section 3 first (i) of the RLA states that unresolved claims or grievances may be "appealed to the NRAB for adjustment". Railroad labor agreements do not have typical "just cause" clauses. Instead the contracts typically state instead that no employee shall be discharged or disciplined without a "fair hearing" or "investigation". This dates back to rules implemented by the government (the Director General)

[6] Arbitration in the railroad industry celebrates its 75th anniversary this year.

when it seized control of railroads during World War I. This procedure involved a specific set of charges and a hearing presided over by a carrier official who heard witnesses and then rendered a decision based on a verbatim transcript.

In the early days of the NRAB it wasn't completely clear what standard would be applied. To the extent there was doubt about the intent of the act or the appropriate model the die was clearly cast by the 1940's. The National Mediation Board had been facing criticism over its appointments of referees. Thereafter, for nearly ten years, referees of the Board were most often sitting or retired state supreme court judges.

The appellate role was perfectly natural for these referees. The system was also centralized (the RLA designated Chicago as the headquarters of the NRAB) whereas railroads and their workers were far flung. There was a record of evidence already developed by the carrier hearing officer during the pre-disciplinary investigation.

It ultimately became clear and it is still true today for all the forums, arbitration is appellate in nature. This is most apparent in

discipline cases[7]. The arbitrator or referee does not conduct a de novo trial. There are no fact witnesses. The record of evidence is contained in the transcript of the investigation. The Arbitrator's function is: (1) rule on challenges as to whether the carrier/employee hearing officer conducted a fair hearing; (2) to determine whether there is "substantial evidence" in the investigation record to support the hearing officer's findings as to guilt, credibility, resolution of evidentiary conflicts and his findings as to the weight afforded the evidence, and; (3) whether the penalty is arbitrary, capricious or wholly unreasonable.

Concerning contract interpretation cases these are not practically speaking appellate in nature. While there isn't a de novo hearing the parties are free to present any written evidence it wants with the only caveat being that this evidence be a matter of record, have been exchanged and addressed by the parties prior to the appeal to arbitration. If bargaining history is critical because the contracts are almost exclusively negotiated on a national basis, the case might be arbitrated nationally on a private pay basis.

[7] The case law on this point is enormous and was largely developed in the early days of the Board. The hearing officer must be a seeker of fact, not a prosecutor. There must be a precise charge. He must allow the accused to ask questions and present evidence.

To the extent there might be other disputes in evidence in contract interpretation cases, speaking from our direct experience, it is rare the arbitrator feels handcuffed.

IV. THE APPLICATION OF THE CURRENT POLICY TO RAILROAD CASES

In summary, privately funded railroad cases are relatively rare but "count" toward the threshold.

Typical railroad arbitration that is paid for by government does not "count" toward the threshold but once the threshold for consideration is met, they are taken as evidence of "general acceptability" which is the ultimate standard.

The typical railroad case has historically not been counted toward the threshold for consideration for one or both of the following reasons:

(1) The neutral isn't paid for by the parties.

(2) The arbitrator doesn't conduct a full hearing with examination and cross examination of the witness.

V THE CASE FOR CHANGE

Even prior to the passage of the NDC Resolution (and the associated amendment of Article VI) in Ottawa in June of 2008, which made operative the January 18, 2007, policy expanding the type of neutral labor-

management activity that would be counted toward the threshold for membership, the academy's stance toward the role of railroad decisions in the membership process was not unanimous among our members, particularly some who are experienced in this industry. Of course, varying views do not invalidate a policy. The policy which counted privately funded railroad cases toward the threshold, but treated other decisions as added weight (or evidence of general acceptability) was a product of meaningful consideration and continuing reflection. It was appropriate and has served us well.

The fundamental membership policy landscape changed significantly in Ottawa. Within a limit of 20, the policy now counts toward the threshold decisions in the broad field of workplace dispute resolution that had previously not had threshold status, but had been considered only as matters of "added weight" or additional evidence of general acceptability once the threshold was otherwise met.

The simple matter is that with this change, reasonableness compels that typical railroad decisions, while substantially different than traditional arbitration, be viewed in the same light as other workplace dispute resolution mechanisms. This is particularly appropriate since typical railroad decisions involve attributes even more closely aligned with traditional arbitration than

some of the new countable categories, such as advisory arbitration and fact finding. These latter dispute resolution activities do not involve final and binding decisions. Section 3 railroad arbitration decisions are not only final and binding by law, but they involve the interpretation and application of collective bargaining agreements.

While we recommend, as a general matter, moving typical railroad decisions from the added weight category to the countable workplace dispute resolution category, we do not recommend that these decisions count toward the category of 40 traditional arbitration decisions. There still remain significant differences that continue to justify a continued differential treatment.

Even more challenging than the basic policy question, i.e. whether to count typical railroad decisions as part of the workplace dispute category, is the question of how to count them.

It would not be appropriate to count them on a one-for-one basis. The reason for this is that arbitrators are often selected for more than one case at a time. For instance, a railroad neutral might have been selected for a public law board with ten cases to be heard in one sitting and issue ten decisions.

However, there was only one acceptability decision made by one set of parties that happened to--because the unique structure of railroad

arbitration--generate ten decisions. This can hardly, in any reasonable sense, be equated, for instance, to an applicant who was selected ten separate times to issue ten different fact finding reports.

This latter example reflects ten separate acceptability decisions by the parties generating ten decisions by the arbitrator whereas the railroad example represents one acceptability decision by the parties resulting in ten decisions by the arbitrator. It is important, of course, to account for this distinction because--and it should not be lost sight of--the basic membership standard is "general acceptability" and current acceptability by the parties is what we are trying to gauge.[8]

There is also the matter of verification. It seems elementary but there is some utility in recognizing that the membership committee is entitled to request and have an applicant verify the cases she or he is claiming should count toward the threshold.

There are some Section 3 Boards that are continuing in nature. The arbitrator might issue ten decisions and the parties finding them acceptable might add more cases later, thus, reflecting a second acceptability decision.

[8] It might be argued that the railroad system, which can generate multiple cases based on one acceptability decision isn't any different from a permanent panel in traditional arbitration where multiple cases are generated. However, in the later cases they are usually heard one at a time and the parties jointly or separately either formally or informally have the option not to use an arbitrator a second or third or next time following an unacceptable decision. In the railroad circumstances multiple cases are heard in one day and the referee is certified by the NMB for all those cases. Once heard, the parties can't separate the arbitrator from that multiple of decisions.

However, at this time the available verification particularly as to timing is scant. There also remains the problem of some parties sometimes listing to Boards multiple cases involving only one issue.

For these reasons we recommend that each separate certificate of appointment of a neutral referee to a Section 3 tribunal issued by the National Mediation Board, in combination with a final single decision, regardless of how many decisions the Board might ultimately generate, be counted as <u>one</u> workplace dispute resolution decision under the January 18, 2007, Board of Governors resolution.[9]

It should be clear that the practice under the prior policy of counting toward threshold privately funded protection cases remains undisturbed. The only comment necessary here is that given their nature, these decisions should not be considered workplace dispute decisions, but counted as they have been as traditional labor-management decisions under the minimum of '40' category.

[9] While it is not necessary to make it part of the formal policy and while the committee has discretion as to the mechanics, the date of a fully executed award should be controlling as to date dependant questions in the application process.

VI TEXT OF RECOMMENDED POLICY LANGUAGE

"Each certificate of appointment to a Section 3 tribunal (NRAB, SBA, or PLB) under the Railway Labor Act issued by the National Mediation Board (indicating it was based on a selection by the parties or "partisan members") accompanied by one issued and adopted award will be considered as one countable "workplace" dispute resolution decision under the January 18, 2007, resolution of the Board of Governors."