CHAPTER V

ARBITRATION BY THE NATIONAL RAILROAD ADJUSTMENT BOARD

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Historical Background

It is a commonplace that the striking growth of unionism and collective bargaining during the last two decades in the United States has been paralleled by the inclusion, in the overwhelming majority of union-management agreements in a great variety of industries, of orderly procedures for the settlement of grievances and of disputes over the interpretation, application, and meaning of provisions of the agreements, including terminal arbitration of unsettled disputes by neutral persons.

What is often not so well known are the facts that (1) the railroad industry was one of the pioneers in developing methods for the determination of this class of labor controversy; (2) whereas in almost all non-railroad industries the machinery of dispute settlement is confined to particular companies or localities or both, the presently effective arbitration system on railroads is for the most part both industry-wide and national in scope; (3) this system is the only American one created by federal statute and administered under government auspices; and (4) it is the only program that at its inception was desired by one of the parties (labor) and not by the other (management).

It is noteworthy that the Board we're talking about today was not, in the statute creating it, called an "arbitration" Board. It was christened an "adjustment" Board. And this, it seems to me, as it

has seemed to most of the others [1] who have studied and written about the Board's forerunners, history, and operations, constitutes not only a reflection of the chain of events leading up to its conception but also an expression of the hopes attending its birth. I mean that the "parents" who were mainly responsible for the statutory creation of the Board in 1934 hoped and doubtless believed that the Board would grow up to live chiefly as a collective bargaining agency (i.e., would serve as an extension and a continuation of the bargaining process) rather than as a real arbitration tribunal of last resort. That this hope has not been fulfilled for many years is one of the things that makes our experience with the Board so interesting.

What evidence is there that this hope burned brightly in 1934? It is to be found, first, in statements made by the labor and government sponsors of the legislation; and second, in the history of labor relations and government intervention therein in the industry. An example of the first exists in the statement given to the Attorney General's Committee on Administrative Procedure in 1939 by the labor members of the Board. Thus,

> It is our very definite conclusion based upon the history of the law that the Adjustment Board . . . should operate as a continuation of the conference room method employed upon the various properties where men and management "talk things through," argue the meaning of rules, discuss the application in effect under those rules, and finally attempt to reach an equitable "adjustment" based upon our practical knowledge of how things are done "back home."

[1] Lloyd K. Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," *Yale Law Journal,* 46 (1937), 567; William H. Spencer, *The National Railroad Adjustment Board,* University of Chicago Studies in Business Administration, Vol. VIII, No. 3 (1938); *Administrative Procedure in Government Agencies,* Senate Document No. 10, 77th Congress, 1st Session, Part 4; Howard S. Kaltenborn, *Governmental Adjustment of Labor Disputes* (The Foundation Press, 1943), Ch. III; Herbert R. Northrup and Mark L. Kahn, "Railroad Grievance Machinery; A Critical Analysis," *Industrial and Labor Relations Review,* 5 (April, July, 1952), 365-382, 540-559; Joseph Lazar, *Due Process on the Railroads,* (Institute of Industrial Relations, University of California, Los Angeles, 1953); Wayne L. McNaughton and Joseph Lazar, *Industrial Relations and the Government* (McGraw-Hill Book Co., 1954), Ch. VII.

As to the historical evidence, there is time here for only a brief summary. Before the first World War, when unionization was for the most part effective only in the train operation crafts, these organizations had succeeded in getting a number of carriers to agree to the establishment of system-wide adjustment boards for the settlement of grievances and disputes over the application of agreements. These boards were wholly bipartisan, i.e., had no provisions for the settlement of deadlocked cases by neutral persons, but apparently there were very few if any deadlocks.

During the first World War, when the federal government controlled the railroads under a Director General, the unionization of railroad employees increased greatly. The Director General made national agreements with most of the "organizations" (as they are known in the industry) and approved the creation of three bipartisan boards of adjustment, organized along system lines, with the privilege of referring deadlocked cases to him for final settlement. It does not appear that many cases were so referred; i.e., almost all were settled directly between the parties' representatives. But whereas the labor people were pleased with the set-up because the administration was a friendly one (having agreed to many working rules, pay increases, and hours conditions which, entirely apart from the adjustment board program, represented sizeable gains for the employees and established the principle of industry-wide bargaining), the carriers were unhappy with it for the same reasons.

After the War, railroad labor tried and failed to obtain a continuance of government operation and control. Then came the Transportation Act of 1920, which created the Railroad Labor Board, a tripartite agency empowered to resolve not only unsettled disputes between organizations and carriers over the terms of new agreements but also cases involving grievances and contract interpretation deadlocked on the bipartisan Boards of Labor Adjustment which the Act stated that the parties *might* establish. With the exception of four regional boards established for the train service organizations, very few bipartisan adjustment boards came into existence. Those

that did function disposed of numerous cases, but many other cases were deadlocked, and the Railroad Labor Board, particularly because of its many other duties, came to be swamped in a huge backlog of unresolved disputes.

For this and other important reasons both sides became very dissatisfied with the Act and the Board and pressed for new legislation. The Congress complied, and passed the Railway Labor Act of 1926, which stated that boards of adjustment "*shall* be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees" (italics mine). Here was a statute requiring the adjustment-board extension of collective bargaining. But two main circumstances operated to foil the requirement:

First, under the political climate of those times the carriers and the organizations were far from seeing eye to eye on the desirability of free unionism and collective bargaining for employees in non-train-service occupations. (The depression of 1921, followed by the bitter and unsuccessful shopmen's strike of 1922 and by the successful efforts of many carriers to set up company unions, had caused a substantial loss in the organization strength of unions in these fields for some time before the Act of 1926 was passed.) Second, the Act failed to specify the form and scope in which the adjustment boards should be organized—local, regional, or national; and craft-wide, or more inclusive. The parties were often unable to agree on these matters.

Even on those boards that were created (there were some 300, chiefly system in scope and involving mainly the operating crafts), large numbers of deadlocked cases began to accumulate. "Extended" collective bargaining on most of these boards was not very effective, perhaps mainly because of the cleavage in attitudes on the issue of widespread, inclusive collective bargaining in the industry. In the absence of a two-sided will to agree, unsettled cases had nowhere to go. So railroad labor decided to enlist the aid of a now friendly government. The result, over carrier opposition (an opposition born of fear of having to recognize national independent unions and of

having local rules and practice yield to national interpretations), was the amendments of 1934 to the Railway Labor Act.

The amended statute did three main things of significance for grievance settlement on the railroads. First, it greatly strengthened and added to the provisions of the Act of 1926 that dealt with the encouragement of independent unionism and free collective bargaining. Second, it created a Railroad Adjustment Board that was national in scope and that, while making possible an extension of collective bargaining, included final decisions on deadlocked cases by neutral referees. Third, it spelled out in considerable detail the basic organization and procedures for adjustment of this kind of railroad labor dispute. Few loose ends were left lying around.

Adjustment Provisions of the Act of 1934

Section 3 of the amended Railway Labor Act is the one establishing the National Railroad Adjustment Board. The main provisions of this Section may be summarized as follows:

(1) The Board, to be set up in Chicago, was to be composed of 18 representatives of national labor organizations and 18 representatives of carriers, organized in four Divisions—the First Division, of five labor and five carrier representatives, having jurisdiction over disputes involving train and yard service employees; the Second Division, similarly composed, having jurisdiction over disputes involving shop employees; the Third Division, again of ten members, having jurisdiction over disputes involving sleeping car conductors and other sleeping and dining car employees, train dispatchers, telegraphers, clerks and freight and express handlers, signalmen, and maintenance-of-way employees; and the Fourth Division, composed of three labor and three carrier representatives, having jurisdiction over disputes involving carrier employees engaged in water transportation, plus all other employees (such as guards) not covered by the jurisdiction of the other three Divisions.

(2) The carrier and labor representatives were to be selected and compensated by the railroads and the organizations under their own

respective procedures, with no carrier or organization being permitted more than one representative on any Division. In case of failure by carriers or organizations to appoint representatives the vacancies were to be filled by the National Mediation Board created by the Act.

(3) Disputes arising out of grievances or out of differences over the interpretation and application of collective bargaining agreements were to be handled on carrier properties under the usual steps of grievance procedures. Disputes not settled in this manner *might* be referred by either party or by both to an appropriate Division of the Board, with full statement of facts and supporting data.

(4) Parties in a given dispute might be heard by a Division in person or by chosen counsel or other representative.

(5) A Division must "give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted" to it.

(6) Any Division was authorized to designate two or more of its members to hear and make findings on a dispute.

(7) Any Division could settle a dispute (make an award) by majority vote.

(8) In case of deadlock between labor and carrier representatives in respect to a dispute before a Division, the two groups were to select a neutral person as referee to sit with the Division as member thereof to make an award. If the groups failed to agree on such person, they were to notify the Mediation Board, which then was to appoint the referee, fixing and paying his compensation.

(9) Awards were to be in writing and were to be final and binding on both parties except in so far as they contained money awards.

(10) If an award favored the employee petitioner, the Division was to direct an order to the carrier involved requiring it to make the award effective, including any provision for the payment of money to the employee(s).

(11) If a carrier failed to comply with such order within a specified time limit, the petitioner might within two years institute enforcement proceedings in an appropriate federal District Court.

(12) Any Division was empowered to establish regional adjustment boards to act in its stead and in accordance with its procedures and rules. Referees were to be used thereon, where needed, as on the Division itself.

(13) Nothing in the Act was to prevent a carrier or group thereof and an organization or group thereof from mutually agreeing to create directly a system, group, or regional board of adjustment for the purpose of settling grievances and contract interpretation disputes.

(14) The Board was required to adopt rules and procedures for its operation.

(15) Each Division was to select a chairman, vice-chairman, and secretary, with the first two offices alternating annually between the labor and carrier groups.

Experience Under the Act [2]

1. Organization and Personnel of the Board

The Adjustment Board was and is organized as provided by the Congress. Although not specifically required to do so, the Board as a whole has each year elected a chairman and vice-chairman; a labor member serves as chairman and a carrier member as vice-chairman one year, and the next year a carrier member is chairman and a labor member vice-chairman.

The Board as a whole meets with reasonable frequency and regularity—about once a month. It deals with procedural and personnel matters common to all the Divisions. A single administrative officer, responsible to the Mediation Board in Washington, handles the usual government personnel and space matters for the Adjustment Board's clerical and other employees.

The Divisions are the really important organizational units in the Board. Each has a chairman and vice-chairman from among the

[2] Limitations of time and space prevent me from dealing with the important topic of enforcement of awards. For an adequate treatment of this subject, see the second of the Northrup-Kahn articles cited above.

carrier and labor members; and here again these offices alternate respectively between the two groups each year. Each Division has an executive secretary who is not a Division member and is compensated by the government; the secretary handles the Division's space, personnel, and equipment matters, and in general keeps its machinery operating.

The carrier and labor members of a Division are men with long experience in railroad labor relations. The labor members are usually vice-presidents in their organizations. The carrier members have usually come from relatively high positions in the operating hierarchies of their roads.

The members of both groups are intimately acquainted with the complexities and technicalities of railroading and of the rules in railroad labor agreements. As a rule they are skilled in argument. Many are rather intensely partisan; they act as if they conceive their roles to be those of advocates rather than of judges. The degree of partisanship and of emotional bitterness over perennial issues varies widely among the Divisions. It is highest on the First. On the Second, however, the labor and carrier members for the most part work together with friendliness and cooperativeness. The Third Division stands between these two extremes.

Partial evidence on these differences in partisanship may be found in the varying success with which the Divisions are able to agree on referees for their deadlocked cases. The First never comes to such agreement; its referees must always be appointed by the Mediation Board (a minor exception was the agreement on certain referees for the so-called "Supplemental Boards" of 1950-52). The Second, on the other hand, rarely fails to agree on its referees. The Third agrees roughly one-third of the time.[3]

It is hard for an observer to be certain why these differences in

[3] Curiously, this distinction among the Divisions does not hold in respect to agreeing on awards without referees. In recent years the First and Second have decided roughly one-fourth as many cases without referees as with them, while on the Third the non-referee decisions were less than one-tenth of the referee awards.

degree of partisanship exist. The feeling on the First Division may be due in part to the conditions, mentioned later on, that cause the First to receive a disproportionate share of the Board's cases. But in my judgment it is mainly attributable to personality differences; i.e., it is a human relations problem. If all the men on the First were as "sweet and reasonable" as some of them are, the relations among the members could be as friendly as they are on the Second. Indeed, in the light of the history of labor relations among the shopcrafts in the 'twenties, one might expect much more bitterness on the Second. But it hasn't worked out that way.

Over the years referees have become an increasingly important part of Board organization and personnel. Garrison and Spencer, writing in 1937, found that the Divisions were able to agree on decisions without referees in about two-thirds of their cases. The Attorney General's Committee on Administrative Procedure, writing in 1940, found the proportion of non-referee cases declining to one-half. During the last six years it has averaged only about one-fifth.

Most of the referees, whether agreed on by the Divisions or appointed by the Mediation Board, have had legal training and experience. My guess would be that the percentage is somewhat higher here than in non-railroad arbitration. Many of the referees, especially the ones most frequently used, are in fact active or retired judges from the Supreme Courts of midwestern states.

The fact that virtually none of the referees has been intimately acquainted with railroad operations has sometimes been cited as a substantial deficiency by carrier and labor members, particularly the former. To me this lack does not seem to be serious. Technical railroad knowledge by a referee would save time; Division members would need to do much less explaining to him. And this is not unimportant. But it would be very difficult to find unbiased men of railroad background acceptable to both sides. Moreover, the technical knowledge needed to do satisfactory work on the Board is not too hard to acquire. In any case, if intimate knowledge of an industry

were a general requirement for arbitrators today, not many could qualify.

The increasing use of referees for making awards, plus the fact that most of them have to be appointed by the National Mediation Board, makes it clear that *that* Board has become more and more a part of the N.R.A.B. organizational arrangements. It is no easy task to find a sufficient number of men who possess the requisite time, training, and objectivity and who can serve on an *ad hoc* basis. It may also be difficult sometimes for the Mediation Board to resist political pressure in making its appointments. And the fulfillment of its obligations is not made easier by the fact that sometimes competent referees of integrity have been "blacklisted" by organizations or carriers whose wrath has been incurred as a result of certain awards made by these referees. The Mediation Board tries, I believe, to resist such pressure. But given the political potency of the railroad organization and carriers, it is hard to disregard such representations entirely. About the best that can be done is to let such referees "cool off" for a year or so before re-appointing them.

The statistics cited above on the high proportion of referee to non-referee decisions speak for themselves in respect to the question of whether the Adjustment Board has become primarily an adjustment (negotiating) or an arbitration agency. It is certainly the latter now. Comment on the reasons for and the significance of this development is reserved for a concluding section of this paper.

2. Procedures and powers—The case history of a case

Most of the grievances and contract-application disputes continue to be settled directly by negotiation of the parties on "the properties" of the railroads. There has been some tendency for these settlements to follow the precedents set by N.R.A.B. decisions, where such precedents are fairly clear and applicable. Nonetheless, such precedents are not too greatly revered on the properties; the Divisions of the Board appear to get many "repeater" cases because one or the other of the parties, or both, hope to get a favorable decision at the Board from some new or different referee.

What procedural road does a case follow when it is filed with an appropriate Division? Our answer to this question can conveniently be divided into two parts: (1) What happens when the Division considers the case without a referee; and (2) what happens when a referee is required to sit with the Division as a member thereof. Our answer must also to some extent distinguish among the Divisions.

a. Cases before referees participate—In the first place, who may get his case considered by a Division? The language of the amended Railway Labor Act in Section 3, First, (i) suggests that any employee having such a dispute with a carrier may file his claim with the appropriate Division and have it duly considered on the merits, regardless of whether he is a member of and represented by a labor organization. But until recently (i.e., until about five years ago on the First Division, about two years ago on the Second, and about three years ago on the Third) a non-union employee was unable to have his case dealt with because, although the carrier representatives were willing (if not eager) to do so, the labor members were not. The issue was then deadlocked; and such deadlocks were not before about 1950 submitted to referees. However, after court decisions favoring the hearing of such cases, the Mediation Board appointed referees for this purpose. And following their decisions to hear these cases, the Board has done so.

Suppose the employee is a member of some union but the union is not one of the standard railroad organizations, e.g., a local of the United Steelworkers. Can he get his claim considered through representation by such union? Section 3, First, (a) confines the labor-union membership of the Board to 18 national labor organizations, and under the administration of the Act these have always been "standard" railroad unions. Consequently the labor members of the First, Second, and Third Divisions have not been anxious to entertain such cases. But in recent years, largely for the same reasons as those mentioned in respect to individual non-union employees, the Divisions have come to consider claims from such employees.

Second, suppose there is no disagreement about receiving and

docketing a case. There are two kinds of submissions: joint, and ex parte. In the former the submission begins with a statement of the claim. Then normally comes a mutually agreed on statement of facts, followed by statements of "position" by the petitioner or his representative and by the carrier. These statements combine evidence, citation of relied-on rules (contract provisions), and argument.

If the parties cannot agree on a joint submission, then either one (usually the employee or his organization) may file an ex parte submission with the appropriate Division's executive secretary. Most of the submissions on all Divisions are ex parte. As to what happens thereafter, the procedure differs somewhat among the Divisions. On the First (since 1949) a copy of the employee submission (which begins with a brief statement of the claim and then presents the employee version of the facts, followed again by a fairly extended statement of position) must be furnished to the carrier, who then has thirty days to file an answering submission. The organization or employee may then file one rebuttal. There is no sur-rebuttal from the carrier.

On the Second and Third Divisions the petitioning party serves notice to the executive secretary, with copy to the other party, of intention to file a submission within thirty days. Both parties then file their submissions at about the same time. Under this procedure the carrier writes its submission on the basis of what the facts and the position of the petitioner were when the case was argued on the property; the carrier is in the dark as to the actual content of the petitioner's submission. The Second Division normally allows one rebuttal from each side; these are normally briefs presented at the time of oral hearing (see below). The Third Division not only allows written rebuttals but puts no limit on the number of sur-rebuttals.

All Divisions are united in their insistence that in rebuttals and oral hearings no new facts or evidence shall be presented that was not contained in the original submissions.

Oral hearings before the Divisions are permitted as a matter of

right, subsequent to the original submissions, if requested by either party. However, they are much more common on the Second and Third Divisions than on the First, where, because of the huge backlog of cases (not only at the Division but also at "home"), parties are in effect discouraged from being heard. (Even after the parties have asked for and been scheduled for hearings, they often cancel their appearances.)

At the hearings, argument may be oral or, on the Second and Third Divisions, in the form of briefs which are read by the parties' representatives. No transcript or record of oral argument is kept. The Act does not empower the Board to subpoena witnesses or require the submission of any particular kind of evidence.

We have seen that notice to the other chief party of intent to file submission and to ask for hearing is required under the procedures of all Divisions. What about notice to other parties, individual employees or other unions, who may be involved in a case? [4] Section 3, First, (j) of the Act requires "due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted . . ." But until 1940 all Divisions deadlocked on whether such notice of hearing should be given to third parties. In that year the Second signified its intention to give such notice and generally did so thereafter (sometimes only with the assistance of referees), except that, in cases where other unions were involved, it ceased giving such notice in 1954, pending final court determination of the issue in a case involving the Third Division. The Third began giving notice to individual employees only in 1954. The First Division, although sometimes deadlocking on the question of whether third party employees or organizations were actually involved in particular cases, has been sending such notice for a number of years.

[4] An example of a case involving individual employees as third parties would be one in which a petitioning employee through his union claimed violation of seniority rules by a carrier. An example of a case involving another union as third party would be one in which a petitioning organization claimed violation of its "scope rule" by the carrier in favor of some other organization, either one of the "standard" organizations or some other union like the United Railway Operating Crafts.

b. Cases in which referees participate—After a Division reaches a deadlock in a batch of cases, say thirty to forty, it notifies the Mediation Board in Washington. If the Division has agreed on a referee, it so tells the Board, who then gives the referee an official government appointment. If the Division deadlocks on a referee, the Mediation Board, after notification to this effect, appoints a referee.

When the referee arrives at his Division office, he is given a cut of the cases assigned to him, say six. He studies each case file (the First Division doesn't let him take the files to his residence for homework, but the other Divisions do), and when he thinks he has familiarized himself with the basic issues and contentions—or when he confesses to himself that he is hopelessly confused—, he notifies the executive secretary of the Division. Thereupon several things may happen, depending on the Division. The First is too busy to permit hearings before the referee by the parties to the cases. The secretary arranges an audience with the labor and carrier members, normally the full Division. At this session, which may endure for several days, the cases are taken up in order. In a given case the labor member of the organization representing the petitioning employee presents argument for a sustaining award. Then the carrier member representing the respondent railroad argues for a denial. Reprints of previous awards, decided with and without referees, and having varying degrees of relevance to the issues at hand, are showered on the referee by both sides. Sometimes the findings therein are read to him verbatim, in whole or in part, possibly out of a not too ill-founded suspicion that he will never have the time to do it all himself. There are often rebuttal and sur-rebuttal arguments. Sometimes, but not usually, other labor and/or carrier members participate, depending on whether the issue is considered vital and common to all of them.

After the argument on the entire cut of cases has subsided, the referee limps back to his office, puts on his coat, turns out the light, closes the door, dives into an elevator, grabs a couple of lungfuls of fresh air, and makes a bee-line for the nearest bar. The next morning, refreshed and without hangover (if he has had the sense to

drink good stuff), he returns and plunges into a re-study of the piles of material on each case, which include, I forgot to say, briefs given him before the audience, along with the case files, by the labor and carrier members who were to argue the case before him.

After coming to his conclusions, with rationalizations, on a given case, the referee drafts in longhand a set of findings and a statement of an award. This done, he again notifies the executive secretary, who again dates the referee up with the Division. The quailing referee tiptoes timorously into the chambers and, with a determination to conceal his perturbation, reads his first award in as gravelly a voice as he can summon. After this feat in elocution, he looks around hopefully for the labor or carrier member, as the case may be, to move adoption of the award. His hope is ordinarily fulfilled. But sometimes he displeases both sides, whereupon the case is lifted from him, to await disposition by some later, more clever referee. It should be noted that in this session the First Division members do not usually argue with the referee or each other about the proposed award. Every one has shot his wad; it is now do or die. After each case of the group has suffered one fate or another, the referee leaves the room. Then he gets the next cut of his cases, probably only after another session at the aforementioned bar.

On the First Division in the earlier years it used to be that the referee's (and Division's) findings followed a standard legal form, with only a brief sentence or paragraph dealing with the case at hand, followed by the award statement, "Claim sustained" or "Claim denied" or some combination of the two. There was little that a subsequent referee could learn about the thinking of the instant referee in reaching his conclusions. This brevity was probably due in part to the large size of the case load and in part, doubtless, to the desire to avoid arousing arguments. In any event, in recent years most referees on the First have abandoned this practice and have been writing what amounts to opinions.

On the Second Division the Procedure before referees differs in at least three important respects from that just described. For one thing

there are fairly numerous hearings of the parties before referees, with oral argument but without official recording thereof. At such hearings the referee as well as Division members may ask questions. Whether there is a referee hearing or not, the procedure is about the same when before the whole Division the referee, after study of the group of cases, hears argument thereon from the members involved. (It may be noted that, while not lacking force, such argument is almost always conducted in a good-tempered manner.) But after hearing argument and drafting his awards (with opinions) the referee does not take them into the Division for oral reading by him. The drafts are duplicated and distributed to members for study prior to the referee's re-appearance before the Division. Then, at such re-appearance the proposed awards are read orally by the Division's executive secretary; and the members may, if they wish (and they often do), argue with the referee about them in an effort to get him to change his mind. Sometimes new argument is introduced for this purpose, one member at least seeming to take good-humored delight in disordering the referee's logical composure thereby. After this second round of contention the referee may decide to modify his decision; usually he does not. He almost never reverses himself. The hazards of doing so are obvious.

The Division usually votes after this second round of argument. On the Second, unlike the First, the vote is not always six to five (including the referee), with labor and management voting in solid blocs. Not infrequently the vote goes seven to four, eight to three, nine to two, or ten to one. And once in a while it is even unanimous, the labor or carrier representative involved conceding (within the Board family only, of course) that he had a poor case.

In respect to hearings of the parties before a referee, the Third Division stands midway between the First and the Second; it has some—but not so many as the Second. At such hearings the procedure is about the same as on the Second, except that representation by outside counsel is allowed.

With or without such hearings, there is one noteworthy procedural

difference in handling cases before the referee drafts his awards (which here are definitely accompanied by rather lengthy opinions): Argument by Division members before the referee is not before the full Division. It is only by the two members involved in the particular case. The labor and the carrier member each come armed with a written brief, which is read to the referee. After this reading comes further, less formal detailed argument, plus answers to the referee's questions, if any. After argument the referee drafts his awards, whereupon the procedure is about the same as on the Second, with possibly less argument by Division members after they convene as a full Division with the referee to vote. On this Division the vote is rarely anything but six to five.

We come now to the matter of dissenting opinions. If one side or the other thinks the referee's award and opinion is exceptionally odoriferous or is definitely contrary to their long-held position on a vital and contentious issue, it may well decide to write a dissent. And then the other side may decide to answer with a supporting opinion. The labor members claim, with what appears to be justification in fact, that the carrier members started the business of dissent writing, at least on the First Division. In any case in recent years the labor members have not been too reluctant to employ this method of battering a referee's self-esteem. Occasionally, but not often, the referee writes a reply in order to regain said self-love.

The temper of dissents, as might be expected, varies among the Divisions. On the Second the dissents tend usually to stick impersonally to the issues of the case. On the First, however, allopathic doses of personal vitriol, directed at the referee as well as at the opposition, have occasionally accompanied reasoned argument. The Third Division is more like the Second in this respect.

Sometimes disgruntled parties petition a Division for re-hearing and reconsideration. I know of no case in which such request has been granted.

3. The Nature of Cases and Awards

What are the cases about? What issues have they presented? How

have the issues been resolved? Are the Divisions on top of their jobs?

a. Substance of cases—There is space here for only the barest mention of the issues submitted to the Adjustment Board and to referees. Lloyd Garrison in 1937 wrote that the "variety" was "endless"; and Dean Spencer, at about the same time wrote that "they range as widely as the rules of the collective agreements which govern wages, hours, and basic working conditions."

It is possible to bring this variety within workable scope by grouping the issues in categories. *First,* there are of course discharge and other discipline cases. The rules applied by referees on these cases are about the same as they are in non-railroad industry and are still about the same as those articulated by Garrison in his early awards, namely that (1) in general the Board in such cases will not presume to substitute its judgment for that of management unless the organization succeeds in establishing on the record that management's action was arbitrary, capricious, unfair, and an abuse of discretion; and (2) in cases of contradictory, conflicting evidence the referee will not attempt to weigh or reconcile same but will rule for management if the latter's action was based on substantial evidence and was not unfair as mentioned above. It is worth noting in addition that, since most railroad agreements specify a hearing for an accused employee and since a transcript of this hearing is made part of the case file record, most referees refuse to consider any evidence not contained in this original transcript when they decide whether the accused employee had a fair hearing and whether or not he was guilty.

Another noteworthy matter in such cases (on the First Division only) is the question of deducting earnings in outside employment from back pay in cases where the referee orders reinstatement of a discharged employee. Inasmuch as some of these cases may be five or more years old,[5] with the employee at work in other jobs during almost the whole period, the amounts of back pay are often very

[5] It should be noted that in recent years the First has given priority to discipline cases involving claims for reinstatement. Such cases are now usually decided within six to eight months from date of docketing.

large, and the issue is hotly contested. The contract rule involved usually prescribes reinstatement "with pay for time lost." The carrier members cite numerous court and N.L.R.B. decisions in which such deduction is authorized. The labor members argue that past practice on the property always interpreted the rule as precluding deduction. The carrier members reply that, if ever true, the labor contention does not hold since the time when the Adjustment Board set-up caused such long delays. Most referees have agreed with labor on this issue. I am among the minority, formerly led by the late Grady Lewis, which rules with the carriers.

Incidentally, this deduction-of-outside-earnings issue sometimes leads to the rather absurd situation in which, even though the award on the merits goes against the carriers, they may vote in favor of it if it contains a forthright opinion in favor of allowing such deduction.

A *second* class of cases involves claims for time lost because the carriers allegedly violated the agreements' seniority rules or because they were said to have used "extra" employees out of their rotating positions on the call boards. Decisions in these cases are based on principles not unique to railroading: (1) ascertainment of relevant facts, and (2) interpretation of agreement rules as applied to these facts.

In a *third* category are cases containing claims for time lost because the carriers were alleged to have used the wrong *classes* or *sub-classes* of employees (as contrasted with the wrong *individual* employees in the second kind of case mentioned above). On the Third Division these cases usually involve the interpretation and application of so-called "scope rules" to relevant facts. For the classes of employees covered by the jurisdiction of the First Division, there are no scope rules as such. But there is a tremendous amount of practice and precedent dealing with distinctions between what is properly yard work and what is properly road work; between what properly does and what does not constitute switching; between what properly does and what does not constitute hostler work; and among straight-

away, short turnaround, lap-back, side-trip, and work-train kinds of service. These are usually tough and complicated cases. An interesting element is that either or both of two employees or groups may file time claims out of the same alleged violation: (1) the employee(s) who believes he was wrongfully deprived of the work; (2) the employee(s) who says he was wrongfully made to do the work. The carrier may be liable to both employees for one or more full basic days of pay.

A *fourth* kind of case, found in all Divisions except the First (which deals with different working rules), has to do with the application and interpretation of the agreements' rules on the forty-hour week, which was introduced in September, 1949, following the compromise recommendations made thereon by the Leiserson emergency board. In the rules movement that led to the creation of that board the non-operating organizations, faced with declining employment among their memberships, advocated a strict 40-hour week (i.e., a prohibition of work beyond this amount for regularly scheduled employees) in order to get more jobs created, e.g., the use of "extra" men and the establishment of relief assignments for the two off-days of the regular men. The emergency board members (who later became a voluntary arbitration board to write the new rules giving effect to their recommendations), while wishing to bring the work-hours of these employees into line with those prevailing in non-railroad industry, were impressed also by the carriers' need to maintain their cost-wise competitive position and their operating flexibility, and so wrote rules directed toward this dual objective.

The claims in this fourth category of cases allege violations of these "new" hours when in respect to the scheduled off-days of regular employees the carriers fail to do one of three things to man such employees' positions: (1) establish regularly scheduled relief shifts; (2) use men off the extra boards; or (3) use the regular incumbents at overtime rates of pay. Usually the carriers do choose one of these alternatives. But occasionally they combine the work of two or more positions in one man because the operating situation requires it or

because none of the alternatives appears convenient or possible. In such cases the carriers contend that the organizations are trying to get by back-door interpretation what they failed to obtain directly from the emergency board.

Fifth come claims for reinstatement of previously injured employees who after having signed some sort of waiver and received a large money settlement from the carrier directly or after having obtained damages in court action, recover from their injuries and seek re-employment with the carrier. Back pay is not usually demanded. In these cases most referees decline to uphold the claims.

Sixth and last, some claims challenge carriers' rights to abolish jobs under various circumstances, including technological improvements. These claims normally do not fare well in the absence of specific controlling rules.

b. Principles of settlement. Precedent—The following questions naturally arise. Out of the many thousands of decisions in all these classes of cases (and of miscellaneous ones not categorized above) has a common law of labor relations developed for the railroad industry, a set of authoritative answers for day-to-day questions in the employee-employer relationship? Are the Divisions and the referees agreed on the weight and validity of precedent? Are there well-defined and recognized principles for deciding the cases?

I wish I could answer these questions with an unqualified affirmative. But I'm afraid I can't. On the other hand, the answer is also not an unreserved "no." But on balance I think it fair to say that in this industry after all these years there is today probably rather less of a recognized common law than in our courts or in the labor relations of most other industries. (I am quite willing to admit that this conclusion might be different if I knew other industries more intimately.)

Save for those that were mentioned in our discussion of types of cases, there is no time here for considering principles that some or most referees have found applicable thereto. One or two very general principles, however, *should* be mentioned: Both sides agree—and

tell the referee emphatically when he first arrives—that considerations of equity for either party must be strictly eschewed. A legalistic approach is the only one. The language of the agreement is the thing to look at. If this language is obscure or ambiguous, then you find what evidence you can of the parties' intent, as revealed by their discussions when they wrote the language or by their mutually agreed-on practice since they wrote it.

Actually this legalistic principle is often not too helpful. The agreement's language *is* often ambiguous; the issues were too controversial when they were negotiated to permit the parties to use words of precise, explicit meaning. Then there is often little compelling evidence in the record on what the parties meant or on what their past practice has been. Consequently equity often creeps in through this rear entrance. The bias of the referee becomes important here.

In addition to the precedent of past practice, others may be noted: (1) previous awards by the same Division on the same or similar issues; (2) previous awards by other Divisions on similar issues; (3) awards by system or regional boards operating from 1910 to 1934; (4) interpretations of relevant, similar rules by the Director General during World War I; and (5) decisions by the Railroad Labor Board during the 1920's.

Garrison's writing in 1937 implies that precedent was important then and that there was an emerging body of dispute-settlement principles. Lazar, writing in 1953 and confining himself to the determination of discipline cases on the First Division, came to the same conclusion. I would give only qualified approval to these views. I think that on all Divisions there are generally accepted principles for the adjudication of discipline cases. On the First Division too, the distinctions between road work and yard work and between other classes of operating service are pretty generally observed. Yet even here there is more disagreement than might be expected. There is certainly no uniformity of approach to certain other classes of cases such as those involving the application of the forty-hour week.

This conclusion is buttressed by the number of "repeater" cases

and by the fact that Garrison himself in 1937 and the National Mediation Board a dozen years later raised the question of whether a permanent panel of referees should not replace the present *ad hoc* system so that there could be greater familiarity with railroad problems and custom and much more uniformity of approach to and settlement of cases.

In this connection it is interesting to note that, whereas Spencer in 1937 found that more than two-thirds of the Board's decisions sustained employee's claims in whole or in part (more than half in whole), the situation is reversed today. Although definitive over-all statistics are not available, some samples suggest that the proportion now may be as high as three to one against labor.

It may also be observed that, because the Act specifies no disbarment of stale claims, most referees are disinclined to rule for dismissal thereof.

c. Some statistics—Now let us look at a few statistics. From 1934, when the Adjustment Board first began to function, to the end of fiscal year 1953-1954, there were 42,061 cases docketed by all four Divisions. Of this total, 32,107 cases were docketed by the First Division, 1,852 by the Second, 7,094 by the Third, and 1,008 by the Fourth. During the twenty-year span, in the Board as a whole 38,788 cases were disposed of, and the balance of 3,273 cases remained as a backlog at the end of June, 1954. The disposal of the 38,788 cases breaks down like this: cases withdrawn, 14,086; cases decided without referee, 10,162; and cases deadlocked and decided with referees, 14,540.

From the administrative standpoint, the backlog is a very important item. (All of us remember how on the National War Labor Board in 1942-1943 a perfectly good policy for settling inter-plant inequity issues on an individual dispute-case basis had to yield to the bracket system because the original policy was not practical from the administrative standpoint for large masses of "voluntary" cases; it led to the growth of a huge national backlog that threatened to break down the whole wage stabilization machinery.)

Like the case load itself, most of the backlog has always been on the First Division. At the end of June, 1954, of the Board's total backlog of 3,273 cases, 2,798 of these (85 per cent) were on the First, 58 (2 per cent) on the Second, 403 (12 per cent) on the Third, and 24 (1 per cent) on the Fourth. Yet the organizations represented on the First Division include only about 22 per cent of all railroad employees, whereas 28 per cent are represented on the Second, 46 per cent on the Third, and 4 per cent on the Fourth.

It should also be noted that the percentage of backlog cases to total received is much higher on the First Division than on any other.

The First Division's backlog at the end of June, 1954, was smaller than it had been since 1949 and showed a decline of more than 30 per cent from 1952, the postwar peak, which then represented an arrearage of more than four years of work at the prevailing rate of deciding cases. This decrease by 1954 did not occur because the Division began settling more cases. It was the direct result of the National Mediation Board's decision in 1952-'53 to promote the creation of special tripartite boards of adjustment on individual railroads for one or more labor organizations. By the end of fiscal '54, about 80 of these boards had been set up. As a result, large blocks of cases were transferred from the First Division to the special boards; and to these tribunals also went new cases on these railroads that otherwise would have found their way to the First.[6]

This seems like an appropriate place to mention a situation that has worried people for a number of years, namely the tendency of some operating organizations to call or threaten a strike in order to obtain settlement of grievances, some of which are old, rather than submit the cases for adjudication by the Adjustment Board. While technically such stoppages may not be "wildcat strikes" under the

[6] A previous effort to reduce the First's backlog failed. In 1949 the Mediation Board induced the carriers and the four train service organizations to agree to establish two so-called "supplemental boards," with the provision that either side could terminate the arrangement on ninety days' notice. At the end of 1952 the organizations, dissatisfied with the quality of decisions emanating from these boards, served such notice, and the boards went out of existence in March, 1953.

Railway Labor Act,[7] because the Act says "may" rather than "must" in respect to the submission of such disputes to the Board, they certainly are in conflict with the intent and spirit of the statute. There have been about ten of these for which the Mediation Board has had to have emergency boards created under Section 10 of the Act. (An emergency board is supposed to deal only with unsettled disputes over the negotiation of new wage rates, hours, and working conditions.) These boards have condemned such strikes and usually refused to deal with the merits of the grievances. But they agreed that delays both on the properties and on the First Division were a fundamental cause of such strikes.

Why has the First Division had such a disproportionate backlog of unsettled cases? I know of no thorough-going study and analysis of this situation that has been made and published since E. J. Connors reported to President Truman on the conditions prevailing on the First in 1945.[8] This report cited (1) the fact that, in train and engine service, working condition rules are a more significant factor in determining compensation than in any other class of railroad employment if not in industry generally (thus provoking serious controversies over rules interpretation under modern conditions); (2) the failure of the First Division to build up an enduring body of clear precedent for various kinds of cases; (3) the unwillingness of the Division's members (particularly the carrier representatives) to decide new cases on the basis of those precedents that did seem to exist; and (4) the attitudes of management and labor on the western railroads, from which a highly disproportionate number of cases originate.

To these four conditions I would add some others. Let us start "back on the properties." There we find too much of a bitter power struggle, too little of a mutual problem-solving approach. Among

[7] They are not wildcats under the collective bargaining contracts. These are not for term and do not contain the usual no-strike clauses.

[8] See *Report of E. J. Connors to President Harry S. Truman on Conditions in the First Division, N.A.R.B.*, August 31, 1945. Released by National Mediation Board in January, 1947.

the carriers' problems are competition from other kinds of transport, working rules not well adapted to modern railroad technology and operation, and the carriers' position as public utilities. Among railroad labor's problems are declining employment and working membership resulting from the above-mentioned competition and technological changes. Both sides in a relatively declining industry are fighting every inch of the way for separate survival and security, seldom recognizing that the main problem is what Bakke called mutual survival ten years ago. A new kind of leadership on both sides is required.

Fundamental, of course, is the fact that the industry *is* a public utility—and so is not compelled or able to work out its problems without government intervention. It is easy to say that most cases should never come to the Adjustment Board, should be settled at home. But can we expect human beings to accept this responsibility if either or both think or hope they can get a better break at the Board than by compromise on the property? I do not think it is impossible, but there is no use minimizing the difficulty. A new spirit must prevail; and you just don't pull it out of a hat. So long as labor thinks it can get, through a referee's decision, what amounts to a new protective rule or an extension of an old one, or so long as railroad management believes that in the same way it can ease its agony of having to operate under outmoded restrictions, this spirit will not develop. Too many railroad people on both sides seem to behave on the assumption that, like death and Texas, there will always be deadlocked grievances.

What is needed, it seems to me, is something like this: You've got to begin with basics. I don't think you can or should throw government out of the picture. The nature of the industry, I'm afraid, makes this for us a given datum. But if the progressive leaders on both sides could be brought together, perhaps under Mediation Board leadership, to discuss their problems without publicity, and in the absence of any wage-rules movement by the organizations, it might be possible, with proper education down into the ranks, to work out

a modernized system of working rules for each craft that would not only provide reasonable protection for railroad employees but also reasonable flexibility and freedom for railroad management. (Maybe the Congress itself, in one way or another, would have to take the initiative in order to get things started.)

This step seems to me to be fundamental. Once the will to do it had been created, it could and would be done. After that the rest would not be too hard. By "the rest" I mean at least three main things: (1) After the revised rules had been negotiated, the carriers and the organizations, recognizing that there will always be differences over rules interpretations, should establish a screening and settlement system on each railroad which would (a) eliminate submission to the Adjustment Board of any case where the weight of evidence clearly points to *lack* of rule violation; and (b) adjust most of the other cases by conference on the property. Some cases would of course get through this screen and come to the Board. (2) Simultaneously, both sides, moved by the new spirit, should bring some new faces on to the Adjustment Board, replacing those few who may have a reputation and record for being bad-tempered and contentious by men possessing younger, more congenial sets of glands. (3) A moratorium on referees, of say 90 days, could then be established. The Division's new personnel with full railroad experience and having a sense of public responsibility as well as a desire to conciliate, would pretty well know which existing cases were really valid and which had no business being there. These men ought to be able to settle 90 per cent of these old cases without referees. Then they could concentrate, sometimes with referees, on the relatively small number of new cases that would arrive.

The procedural kinks and the other faults suggested in this paper are of relatively small moment even today. They could be resolved without difficulty under the new conditions. We would then have an Adjustment Board worthy of the best sense of those words, nothing perfect of course, but a group of cooperative men striving for unattainable perfection and happy to achieve a solid grade of B.

So you hardboiled cynics may well think I'm too idealistic. And besides, I may seem to be trying to talk arbitrators out of some of the work guaranteed by their Scope Rule. As to the latter, I don't care. As to the first, you really *know* I'm not. We have plenty of evidence in this country of success in working out the kind of labor relations I have envisaged for the railroad industry. I see no actually valid reason why that industry cannot be moved off dead center.

Discussion—

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You know, I have frequently speculated somewhat about the proper approach of one who is to comment on a paper or discuss it. At a recent conference on arbitration at the University of Michigan, a Chicago labor lawyer was scheduled to make some comments on or discuss a speech by Ralph Seward. Well, he was tied up by some strike and couldn't get there to hear the speech, so he talked the next morning at breakfast and he said there was available to him a tape recording of the speech but he declined to listen to it because he wanted to approach the matter without prejudice.

I sort of thought that that was the perfect approach for an arbitrator to undertake, so consequently, while I had to be here and listen to Mr. Daugherty's paper, I am not completely unprejudiced, but I am attempting to be as unprejudiced as possible and as brief as possible.

There are just a few things I would like to say about the difference between arbitration, as it is conducted by the National Railroad Adjustment Board, and what we would normally find in other industries and other fields.

In the first place, normally a board of arbitration, even though tri-partite, sits in session and listens to evidence and arguments from the parties and then arrives at a decision. However, we are all familiar with some situations in which they have what they call appeal