2024 NARR RAILROAD CONFERENCE

"2024 -Case Law Updates"

THE NATIONAL ASSOCIATION OF RAILROAD REFEREES

ABOUT NARR

The aims and purposes of the National Association of Railroad Referees are (1) to promote mutual exchange of ideas and information among its members concerning items of mutual interest; (2) to communicate with the National Mediation Board and other appropriate agencies, groups and organizations to offer aid and assistance as is deemed appropriate for the promotion of railroad arbitration; (3) to be available to the National Mediation Board and other appropriate agencies, groups and organizations to offer comments upon various suggestions and requests as they may solicit same; (4) to obtain and distribute to the membership information and documentation of interest to the professional pursuits of the members; (5) to engage in educational pursuits as may be appropriate; and (6) to take other action to promote the interests of railroad arbitration as deemed appropriate by the Association to achieve the aims and purposes of the Association.

DISCLAIMER

The views expressed by panelists in this webcast are not necessarily those of the National Association of Railroad Referees. NARR assumes no responsibility for the content and materials presented by the speakers.

SPEAKERS

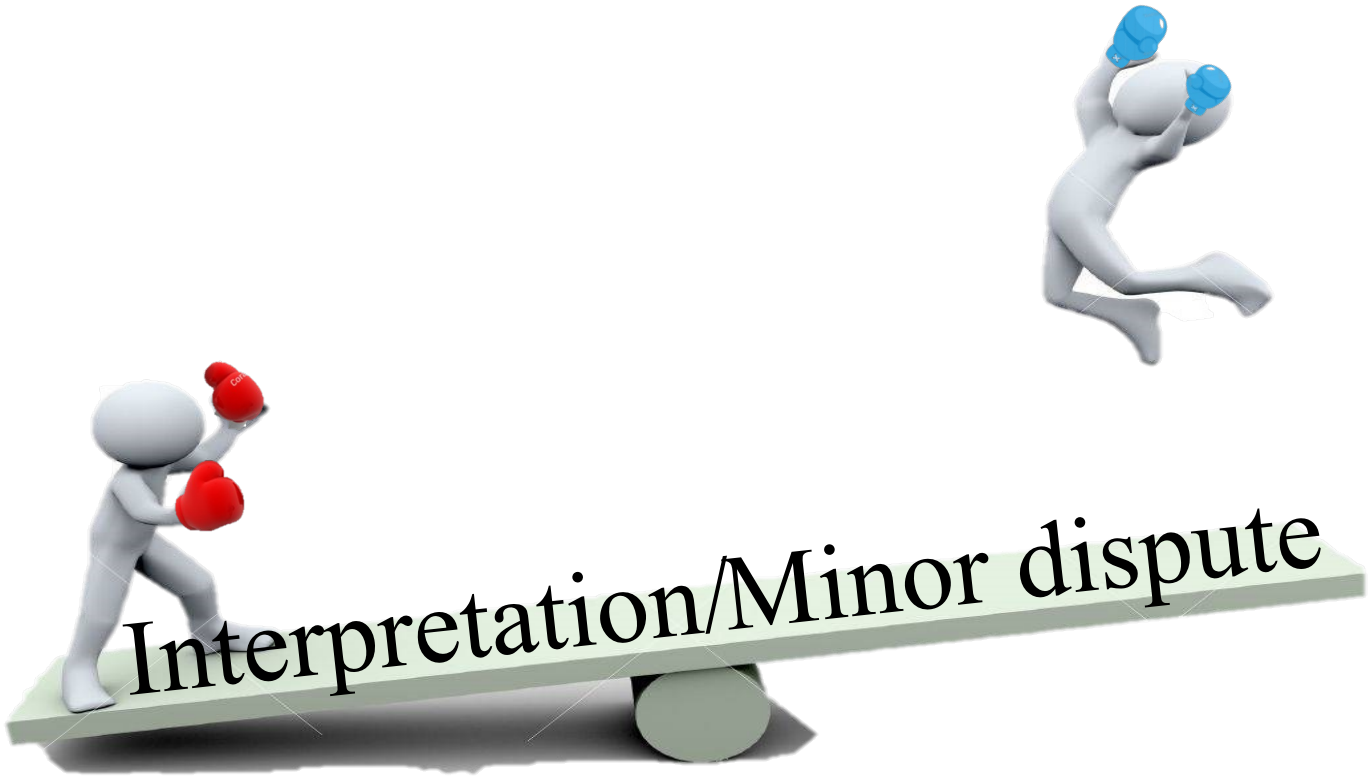
MODERATOR REFEREE DEANDRA ROACHÉ

CLIFFORD GODINER, ESQ.

Thompson Coburn, LLP

KEVIN BRODAR, ESQ.
General Counsel for Smart-TD and ATDA

Is an Interpretation The New "Minor Dispute"?



Review of Awards Are Extremely Limited

"Narrowest known to Law"

Diamond v. Terminal Ry. Alabama St. Docks, 421 F.2d 228, 233 (5th Cir. 1970)

Union Pac. R. Co. v. Sheehan, 439 U.S. 89, 91 (1978)

Three and only three bases for review

“A central premise of the sanctity of the arbitration process ... is that arbitration [is] to provide ... relatively fast, inexpensive, and certain resolutions to workplace disputes”

“serial ... relitigation” of “arbitrations of back pay awards, runs precisely counter to those principles”

Pittsburgh Metro Area Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 938 F. Supp. 2d 555, 563 (W.D. Pa. 2013)

Awards Can Be Enforced

Section 153 First(p)

If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States. . . a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises.

Pursuant to 45 U.S.C. § 153 First, courts Can Do One of Three Things:

1) Affirm
2) Set aside in whole or in part
3) Remand

Courts Cannot Interpret Awards

United Transp. Union v. Union R. Co., 2014 WL 1612670 (W.D. PA 2014)

Employee dismissed. Claim progressed up to arbitration
Claim: To be made whole for all time lost.

NRAB: Carrier failed to prove charges. Return employee to service with seniority unimpaired and pay for all time lost in accordance with terms of parties agreement.

Railroad: Reinstates employee, but declined to pay back wages arguing it was entitled to deduct outside earnings.

Union: filed Petition to Enforce and railroad filed Motion to Dismiss or Remand.

Motion to Dismiss – Court lacks jurisdiction because question is a "minor dispute" which court lacks jurisdiction.

Court Rationale:

(1) Court has jurisdiction, not a "minor dispute."
Arguable interpretation of award is not an interpretation of CBA.

(2) Waiver – failed to raise issue before panel – Issue waived.
Newkirk v. CNW, 1996 164376 (ND IL 1996)

> Railroad cannot later inject a self-generated ambiguity or uncertainty into an award where it bypassed opportunity to raise it before the Board.

***Int'l Ass'n of Sheet Metal, Air, Rail & Transportation Workers, Transportation Div. v. Union Pac. R.R. Co.*, 2021 WL 2853437 (N.D. Ill. July 8, 2021)**

Three employees terminated with various offenses

NRAB returns them to work "make whole consistent with parties agreement requested.

All three declined reinstatement, UPRR terminated all three under Rule 96

Union filed Petition to Enforce on lost wages.

UPRR filed Motion to Dismiss

(1)lack of jurisdiction asserting that interpretation of CBA regarding Rule 96.

(2) Ambiguous award

“**Minor Dispute” Argument**

Court Rejects “minor dispute” argument stating UPRR’s reading of subject matter jurisdiction is too narrow. Union raises question under federal law, thus court has subject matter jurisdiction.

Ambiguity Argument

Under Seventh Circuit law, "[i]f the award and order are so vague and indefinite that they cannot reasonably be enforced, then we should remand the matter to the Board clarification." *Bhd. R. Carmen,* 658 F.Supp. At 138; see also *Bhd. Of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.,* 500 F.3d 591, 592 (7th Cir. 2007). The Seventh Circuit has suggested that remand is a preferable option to 'put[ing] the parties to the expense of starting from scratch with a new arbitration by a new panel. *Bhd. Of Locomotive Eng'rs & Trainmen,* 500 F.3d at 592.

Importantly, "[a]n award does not become so vague and indefinite as to be unenforceable simply because a party can argue that a portion of it may be unclear or ambiguous. *Bhd. R. Carmen,* 658 F.Supp. At 139. "The court can and should resolve any issues of lack of clarity or ambiguity unless those issues implicate an area which is within the special expertise of the Board, such as an interpretation of the collective bargaining agreement or the actual merits of the claim." *Id.*

Bhd. of Locomotive Engineers & Trainmen, Gen. Comm. of Adjustment, Cent. Region v. Union Pac. R. Co., 822 F. Supp. 2d 793 (N.D. Ill. 2011)

In 2001, employee dismissed, and union files claim and processes to arbitration.[1] Case eventually remanded back to NRAB, who ordered claimant reinstated "per the railroad's usual and customary procedures" with pay for time lost, within 30 days. 62 days later railroad send letter to known wrong address, terminated claimant a "second" time for failure to maintain current address.

[1]Due process issue at Supreme Court *Union Pac. R. Co. v. Bhd. Of Locomotive Engineers & Trainmen Gen. Comm. Of Adjustment, Cent. Region,* 558 U.S. 67, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009).)

Union files petition to enforce.

UPRR filed motion to dismiss asserting second termination is a new dispute (minor) which court has no jurisdiction.

Alternatively, argues that the award is ambiguous

Court Rationale: [A]mbiguities manufactured by a party seeking to use them to invalidate an award are not a ground for a court's refusal to enforce an award. *Bhd. Of Loco. Eng'rs and Trainmen,* 500 F.3d at 593 (7th Cir. 2007).

Additionally, courts have recognized that [t]he Board, in fashioning relief, often sets out a general principle of relief and lets the parties, or the court if necessary, apply it, filling in the details. An award is not unenforceable merely because it requires such application." *Bhd. Ry. Carmen of US and Can., AFL-CIO, CLC v. Belt Ry. Co. of Chi.* 688 F.Supp. 136, 139 (N.D. Ill. 1987). Reinstatement award in particular impose "an obligation on the employer of good faith compliance with the intent and spirit of the award, rathe than grudging attempts to limit relief to a minimum. *Id.*

Remedy Disputes: For Courts or Arbitrators?

Cliff Godiner
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
314-552-6433
cgodiner@thompsoncoburn.com

Copyright © 2024 Thompson Coburn LLP

Typical Fact Pattern

- Employee is ordered reinstated with "back pay," "lost time," or some similar phrase
- Dispute then arises about whether outside earnings offset is permitted

What's the Statute Say?

- Section 3, First (i) makes NRAB awards "final and binding"
- Section 3, Second says any two members of a PLB can make an award, which shall be "final and binding"
- But Section 3, First (m) says that "In case a dispute arises involving an interpretation of the award, the division of the board upon request of either party shall interpret the award in the light of the dispute."

Typical Fact Pattern

- Union sues to enforce award, claiming lack of offset means none was intended
- RR argues award is unclear and arbitrator should issue interpretation
- Award fails to answer question explicitly

Current State of the Law

A Giant Mess!!!

Major-Minor Test Applies

- *Brotherhood of Maint. of Way Employes v. Burlington N.R.R. Co.* (7th Cir. 1994):
  - "disagreements about the meaning of an award amount to disagreements about the meaning of the underlying collective bargaining agreement."
  - "Such award-interpretation disagreements are minor disputes, and the federal courts have no jurisdiction to resolve them."
  - Thus, the issue is whether the party seeking interpretation has a non-frivolous argument to support its interpretation of the award.

Other Courts Agree

- *BRS v. BNSF Ry. Co.* (E.D. Mo. Sept. 22, 2021) Applying major-minor test and concluding that disagreement regarding backpay owed under award must be remanded to arbitrator for interpretation.
- *BMWE v. Union Pac. R.R. Co.* (D. Neb. Feb. 7, 2020) Applying major-minor test and remanding case to arbitrator where parties disagreed about calculation of remedy under award.
- *BLET v. Union Pac. R.R. Co.* (W.D. Wisc. Feb. 15, 2012). Award that required payment of "time lost in accordance with the parties' System Discipline Rule" raises minor dispute.

More Courts Remanding Cases

- *Order of R.R. Conductors & Brakemen v. Erie Lackawanna R.R. Co.* (N.D. Ohio 1969) ("payment for time lost" remanded to the arbitrator to determine if outside earnings offset was proper).
- *BMWED v. BNSF Ry. Co.* (N.D. Ill. June 11, 2012) (claimant to be "made whole for any and all losses incurred"; award arguably allows outside earnings offset).
- *BRS v. Chicago, M., St. P.&P.R. Co.* (N.D. Ill. 1968) (award stating only "claim sustained" required interpretation to determine whether outside earnings offset was intended).

My Responses

- If no offset is mentioned, why would one be intended?
  - Can't you ask the same question in reverse? Isn't an offset standard?
  - Why not ask the arbitrator? What are you afraid of?
- Carrier gamesmanship? "An infinite regress looms."
  - Not in my cases. Distinct questions presented and always answered.

A Practical Problem

- These issues are not addressed in any detail in arbitration – RRs argue the discharge should be upheld; the union argues it should be overturned.
- In many cases, neither the RR nor the organization knows what's happened to the employee.
  - Example: Disabled for part of back pay period.
  - Example: Enlisted in armed forces during back pay period.

Please Help

- Awards should clearly express desired remedy
  - Always address outside earnings offset.
  - Avoid ambiguous terms such as “pay for lost time” or “full backpay.”
  - Never say claim sustained.

Non-Statutory Review of RLA Arbitration Awards

Cliff Godiner
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
314-552-6433
cgodiner@thompsoncoburn.com

Copyright © 2024 Thompson Coburn LLP

Statutory Grounds For Review

- Board violates the RLA
- Board acts outside of its jurisdiction
- Board engages in fraud or corruption

Is that really it?

Sheehan v. Union Pacific (S. Ct. 1978):

- "Only upon one or more of these bases may a court set aside an order of the Adjustment Board."
- "We have time and again emphasized that this statutory language means just what it says."

Not so fast!!!

Courts have created two other non-statutory grounds of review:

- Awards that violate public policy
- Board violations of due process

Basic Public Policy Doctrine

- Supreme Court has found that non-RLA arbitration awards can be set aside if against public policy.
- Rationale: an arbitration award is a CBA interpretation, that is, it expresses what the parties agreed to.
- For centuries, British and US courts have held invalid contracts that violate public policy.
  - Contracts to buy and sell illegal items.

But It's Really Narrow

- *Eastern Associated Coal Corp. v. United Mine Workers of Am.* (S. Ct. 2000).
  - Over course of 18 months, truck driver failed two DOT-required drug tests. Arbitrator orders reinstatement without back pay based on:
    - 17 years of service.
    - Employee explained relapse due to personal/family issue.
  - Supreme Court upheld award – agreement to reinstate would not be illegal.
    - Nothing in DOT drug testing regulations requires termination of someone who tests positive.
    - Federal drug testing laws emphasize both discipline and rehabilitation of drug users.

RLA Application

- *Continental Airlines v. ALPA* (5th Cir. 2009).
  - Pilot voluntarily sought assistance for alcoholism. Then failed a test and entered into a last chance agreement stating that another positive test would result in dismissal.
  - Refused to take later test; claimed he had not received results of test from a month earlier.
  - RLA arbitration board found:
    - Pilot knowingly refused to test; refusal was understandable, if not entirely rational.
    - Nothing in LCA required dismissal for refusal to test.
    - Pilot should be reinstated without back pay and required to participate in EAP for two years.

Continental Airlines v. ALPA

- Continental's public policy arguments have mixed success:
  - Reinstatement does not violate public policy – nothing in FAA regulations required discharge.
  - Requirement that employee be in EAP for two years does violate public policy; only SAP can decide this issue.

49 C.F.R. § 40.297

"[N]o one (e.g., an employer, employee, a managed-care provider, any service agent) may change in any way the SAP's evaluation or recommendations for assistance. For example, ***a third party is not permitted to make more or less stringent a SAP's recommendation by changing the SAP's evaluation or seeking another SAP's evaluation***"

What about this one? 49 C.F.R. § 40.149(c)

You [the MRO] are the only person permitted to change a verified test result, such as a verified positive test result or a determination that an individual has refused to test because of adulteration or substitution. This is because, as the MRO, you have the sole authority under this part to make medical determinations leading to a verified test (e.g., a determination that there was or was not a legitimate medical explanation for a laboratory test result). For example, ***an arbitrator is not permitted to overturn the medical judgment of the MRO that the employee failed to present a legitimate medical explanation for a positive, adulterated, or substituted test result of his or her specimen***.

Union Pac. v. ARASA (5th Cir. 2020)

- Employee on LCA tests positive for methamphetamines.
- Claims positive test caused by medications.
- MRO rejects claim as medically impossible and certifies positive result.
- Arbitrator disagrees, concluding likely false positive and ordering reinstatement without back pay.

Union Pac. v. ARASA

- District Court sets aside award:
  - Regulation specifically says that arbitrator can't change MRO determination. Award therefore violates public policy.
- Fifth Circuit Reverses:
  - Regulation only applies to status under federal drug regulations.
  - Arbitrator can overturn MRO for disciplinary purposes, even if results are inconsistent.

Others Have Tried & Failed

- *Knopp v. BLET/CSX* (N.D. Ohio 2023) – Employee fired for social media post; no public policy prohibits termination since 1st Amendment doesn't apply
- *Illinois Central v. BLET* (E.D La. 2020) – Employee reinstated after using racial slur; nothing in law prohibits such a result.

Due Process Review

- Can a NRAB award be overturned for violation of the Fifth Amendment's Due Process Clause?
- Applies to government takings, and NRAB has been held to be a governmental body.
- Massive circuit split on issue:
  - 3rd, 6th, 10th, and 11th Circuits says not available.
  - 2nd, 5th, 7th, 8th, and 9th Circuits disagree.

Union Pacific v. BLET

- 5 engineers were disciplined.
- After highest carrier officer denied claims, BLET filed Notices of Intent.
- Before hearing, Carrier member raises lack of proof of final conferencing under § 2, Second.
- NRAB refuses BLET's request to supplement record and dismisses claims.

Union Pacific v. BLET

- Seventh Circuit vacates awards:
  - Recognizes due process review.
  - Awards violated due process clause by imposing a "new rule" requiring BLET to include evidence of conferencing in its submission.

Union Pacific v. BLET

- Supreme Court agrees to consider whether due process review exists.
- But ultimate decision does not even address the issue – Court concludes that the RLA does not require final conferencing before arbitration.
- Awards therefore set aside because NRAB failed to exercise its jurisdiction.

Arguments For and Against

- Arguments Against:
  - Sheehan reversed 10th Cir. decision overturning award on due process grounds, holding that the 3 statutory grounds mean what they say.
  - Congress added Section 3, First (p)(q) in 1966, in response to cases imposing due process review, and did not include due process on the list of items.
- Argument For:
  - Regardless of what the statute says, the Constitution applies

My Take

- Congress has provided for what process is due.
  - Section 3, First (j) requires due notice to all parties of hearings and allows them to attend and argue.
- We should avoid legal doctrines about "fairness."

Courts Do Not Have Jurisdiction to Vacate RLA Awards on Due Process Grounds

Stallings v. Burlington N. Santa Fe Ry., 210 F. Supp. 3d 1270 (D.N.M. 2016)

Kinross v. Utah Ry. Co., 362 F.3d 658 (10th Cir. 2004)

The Court of Appeals, Senior Circuit Judge, held that district court did not have jurisdiction under the Railway Labor Act to vacate the decision of the Special Board of Adjustment on due process grounds.

Goff v. Dakota, Minnesota & E. R.R. Corp., 276 F.3d 992 (8th Cir. 2002)

Under the RLA provisions governing Board hearings, due process requires that: (1) the Board be presented with a "full statement of the facts and all supporting data bearing upon the disputes," First (i); and (2) the "[p]arties may be heard either in person, by counsel, or by other representatives ... and the ... Board shall give due notice of all hearings to the employee." First (j)

The United States District Court for the District of South , reversed and remanded Board's decision, finding that railroad committed fraud and denied employee due process. Railroad appealed. The Court of Appeals, Circuit Judge, held that: (1) evidence was insufficient to support finding that Board member engaged in fraud during arbitration hearing, and (2) employee's due process rights were not violated by failure of transcript of employee's postsuspension hearing to disclose fact that postsuspension hearing was recessed for 10 minutes.

Public Policy Review of RLA Awards

Union Pac. R. Co. v. United Transp. Union, 3 F.3d 255 (8th Cir. 1993)

Railroad sought judicial review of arbitration award that reinstated employee who tested positive for drug use.

Union Pac. R. Co. v. United Transp. Union, 23 F.3d 1397 (8th Cir. 1994)

Employee dismissed for positive test. Board reinstates conditioned on entering the EAP program. UPRR sue to overturn award asserting that Board exceeded jurisdiction and that the award violated public policy. Board did not exceed jurisdiction. Remand to the Dist. Court to make determination as to public policy in light of *Madison*.

ATSF v. UTU 175 F.3d 355 (5th Cir. 1999)

Employee reinstated with back pay after board found MRO had not investigated effect of medications No need to reach public policy issue since the Board found the test was invalid.

United Transp. Union v. Union Pac. R. Co., 116 F.3d 430 (9th Cir. 1997)

"To vacate an arbitration award on public policy grounds, the court must find (1) "an explicit, well-defined policy" and (2) that the policy "is one that specifically militates against the relief ordered by the arbitrator." *United Food & Commercial Workers Int'l Union v. Foster Poultry,* 74 F.3d 169, 174 (9th Cir.1995) (quotations omitted)