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Chapter 5

THE ACADEMY AND THE RAILROAD INDUSTRY

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Introduction

Railroads were the first national industry and the first unionized [1] industry. As railroads expanded and evolved, they became the most important industry in the economy and were the subject of special governmental regulation to ensure reasonable rates and reliable service. Railroads were also the subject of the first comprehensive federal laws governing employee and labor relations. Relations between labor organizations and railroad management were frequently contentious. Strikes and lockouts became recurrent threats to the national economy. The government sought ways to minimize disruptions that might result from such labor-management strife. Thus, the dispute resolution process plays a particularly important role in the industry. Technological change in the industry and the development of alternative forms of transportation have changed, but not completely loosened, the regulatory structures.

Industry Overview

In 1945 at the end of World War II, railroads employed three million workers [2] and moved most freight and passengers. In the 75 years since, the industry has experienced continuous technological and operational change and has adapted to a very changed role in the overall transportation system. By 1999 freight railroads employed only 228,000 employees, but moved 1.4 trillion-ton miles, an increase in employee productivity from the industry's 1916 peak route mileage of approximately 24.5 times. Railroad industry productivity has continued to increase, while employment has continued to decline. While the percentage of represented employees has not declined, by the 2019-2020 national bargaining round, the industry had only 120,000 such employees. That number will almost certainly continue to decline, even as productivity continues to increase.

Technological and Operational Changes and Their Impact on Labor Relations and Employment

Railroads excel in long-haul movements of freight and have expanded or maintained significant shares of intermodal traffic, "just-in-time" manufacturing traffic, grain, coal, chemicals, and materials, and more

* The author acknowledges the assistance of arbitrators DeAndra Roaché and Richard Radek.
[1] Railroad unions began in 1863 as "Brotherhoods," and were essentially fraternal organizations. They evolved to resemble the modern labor union model by the mid-1870s, and played a major role in the Great Strike of 1877. Railroad unions are called "organizations" or "brotherhoods."
[2] U.S. Railroad Retirement Board, 23 *Monthly Rev.* No. 11 (Nov. 1962).

recently fracking supplies. To handle the increased demands, railroads have converted to high-performance diesel-electric locomotives, have shed or delegated to smaller carriers their less productive branch lines, and have consolidated duplicate routes and facilities. Single-car local deliveries have declined precipitously; the formerly ubiquitous boxcar has been replaced by intermodal shipping containers moved by rail from ports and transferred to truck trailers for final delivery. Bulk goods such as coal and grain frequently move in unit trains, which require less handling.

Railroads have consolidated traffic on a smaller number of main lines, producing ever increasing amounts of freight moved. The consolidation of smaller lines reduced the more than 65 large carriers in the 1960s to seven systems: Union Pacific and Burlington Northern Santa Fe in the West, Norfolk Southern and CSX in the South and East, and Canadian National, Canadian Pacific, and Kansas City Southern in the Midwest. Trains that once languished in rail yards awaiting switching and transfer to the next carrier now move long distances, virtually without delay other than necessary crew changes. The 1971 creation of Amtrak, a quasi-governmental corporation, allowed freight railroads[3] to escape most of their intercity passenger trains. The creation of regional transit authorities has transformed commuter rail service.

The industry's technological and operational changes[4] have resulted in reductions in the size of freight train crews in most cases from five to two, even as the power and speed of the locomotives they operate and the tonnage hauled have increased dramatically. Computers, communications technology, and automatic car identification have streamlined accounting procedures. Maintenance of way equipment and procedures have been mechanized and welded rail has replaced jointed rail, resulting in significant reductions in employment. Higher capacity and better utilization have decreased the size of the freight car fleet. Higher reliability by larger locomotives and locomotive leasing have resulted in smaller shop forces.[5] More recently, the adoption by many carriers of so-called Precision Scheduled Railroading (PSR), which structures railroad operations to emphasize point-to-point freight car movements on simplified routing networks, with fewer, longer trains operating on fixed schedules, has improved railroad financial and operating metrics, uses fewer freight cars and locomotives, and results in fewer workers being employed for a given level of traffic. Implementation of congressionally mandated Positive Train Control (PTC) has also affected railroad operations and intensified the discussion whether trains can be safely operated with a single crewmember in the cab. As indicated, the smaller numbers of railroad employees are not only far more productive than their predecessors but perform far more complex duties requiring greater training and responsibility in a closely regulated environment. Both equipment and rules are more sophisticated.

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[3] Railroads other than Amtrak, commuter rail authorities, and shortlines.

[4] For example, the conversion to diesel locomotives from steam eliminated the need for locomotive firemen. The development of integrated trackside defect and wheel and axle heat detectors eliminated the need for a caboose at the rear of trains and the crew members who formerly staffed it.

[5] For an understanding of how the industry operates, *see* John H. Armstrong, *The Railroad; What It Is, What It Does* (5th ed. 2008).

Accommodation of Changes through Collective Bargaining

For more than nine decades, the freight railroads have conducted collective bargaining negotiations on a national, multiemployer, multiunion basis. The National Carriers' Conference Committee (NCCC) of the National Railway Labor Conference (NRLC) represents most of its members in national (multi-employer) negotiations with the twelve major rail labor organizations. Labor had a similar umbrella organization, the Rail Labor Executives Association (RLEA), that performed similar representation and coordination functions. The erosion of national bargaining and other factors resulted in RLEA's demise, replaced by shifting ad hoc union coalitions. The bargaining process has been remarkably successful in reaching contract settlements without crippling labor strikes or lockouts. In fact, over the past 30 years, there have been only two days of service disruption arising from rail industry bargaining; the most recent was in 1992. The technological and operational changes described have affected the terms and conditions of employment that the parties have implemented through the collective bargaining process. When bilateral bargaining, mediation, and interest arbitration procedures have been unsuccessful, Presidential Emergency Boards (PEBs) have been used as a last resort.

The process has resulted in pay and benefits packages for rail employees that are among the best of all industrial jobs in the United States, as well as a profitable, stable industry. Indeed, the elimination of firemen, the relaxation of craft work rules, the elimination of cabooses, the change from mileage-based compensation for operating employees, evolution of health and welfare benefits, employee scheduling and rest, and initial forays into single-person crews and unmanned automated locomotives have all been achieved through the dispute resolution process. Other changes in terms and conditions of employment, such as drug testing and certification requirements, have been imposed by federal law and regulation.

In almost all cases, railroad employees continue to be employed and to be represented by labor organizations, which remain generally organized by "crafts," that is, by types of work. Each craft guards its jurisdiction.[6] However, as a result of changes in technology and operations, some crafts and classes of employees have disappeared or been merged into other crafts represented by other consolidated labor organizations. For instance, trainmen are now able to perform any duties formerly performed by firemen and hostlers. Machinists are able to perform some items of electrical work in connection with a particular mechanical repair or installation task. Employees of carriers consolidating or abandoning duplicative lines or unprofitable branches have generally been beneficiaries of negotiated labor protective provisions (LPPs) required as conditions of approval of the transaction.[7]

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[6] The assignment or reassignment of work to crafts in the face of such changes resulted in large numbers of jurisdictional disputes over work, called "scope" claims, named after the contract rules that provided for jurisdiction. Scope claims are processed in the same manner as other rules cases. *See infra* discussion. Such claims have evolved as crafts have merged. Craft lines have rationalized and relaxed in the face of new technology and through negotiations.

[7] *See infra* discussion.

Railway Labor Act

Railroad industry labor relations are governed by the Railway Labor Act (RLA),[8] a unique federal statute jointly developed by railroad management and labor organizations and, as so written, adopted by Congress in 1926. A series of labor strikes and lockouts beginning in the 1880s had resulted in several attempts to achieve labor-management stability through legislation. Each attempt failed for various reasons. In 1922 the shop crafts had initiated a protracted national strike that created great disruption to commerce, ending only with the use of force by several state governors and the Harding Administration. In the aftermath of the strike, it became apparent to many that a comprehensive legislative solution was needed to stabilize the industry's labor-management relations. The culmination of the parties' efforts was the enactment of the RLA. The purpose of the law is to protect and balance the interests of management and labor, while minimizing the likelihood of interruptions in commerce that might result from strikes or lockouts.

The provisions of the RLA applicable to railroads have remained basically unchanged since 1934. The Act has been amended to include airlines[9] and commuter railroads, and to create public law boards (PLBs) and special boards of adjustment (SBAs).[10] Both labor and management have resisted efforts to change the law in other ways, notwithstanding ongoing criticism of its structure and operation.[11]

Under the RLA, employees have the right to form and join labor organizations, whose independence is protected. Carriers have the obligation to recognize and bargain with the organizations, and to reach agreements with them. The RLA as written did not provide for compulsory, binding resolution of employee grievances. This fundamental weakness was remedied by the 1934 amendments to the Act, which created the National Railroad Adjustment Board (NRAB) to adjudicate claims (grievances).[12] Organizations and individual employees have the right to grieve claimed violations of existing agreements and to have their claims adjusted. Arbitration decisions under the RLA are final and binding, with very limited grounds for judicial review.[13]

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[8] 45 U.S.C. § 151 *et seq.* (2018). A history of the RLA through 1976 is *The Railway Labor Act at Fifty* (Charles Rehmus ed. 1976). For an overview of the Act and its operation, *see* ABA Section of Labor and Employment Law, *The Railway Labor Act* (2012); Frank N. Wilner, *Understanding the Railway Labor Act* (2009).

[9] *See infra* ch. 6, Joshua Javits, "NAA's Role in Airline Labor-Management Relations."

[10] These special boards are commonly called "public law boards" after Public Law 89-456 that amended the RLA (45 U.S.C. § 153 Second) to create them. They supplement the National Railroad Adjustment Board.

[11] *See, e.g., The Dunlop Commission on the Future of Worker-Management Relations: Final Report* (Dec. 1, 1994) (hereinafter Dunlop Commission); Frank N. Wilner, *RLA and the Dilemma of Labor Relations* (1991).

[12] These amendments created the National Railroad Adjustment Board (NRAB), 45 U.S.C. § 153 First, to resolve grievances (minor disputes) between railroads and their employees.

[13] Judicial review of awards of the NRAB, PLBs, and SBAs are provided in paragraphs (p), (q), and (r) of § 153 First of the RLA.

National Mediation Board: Structure and Function

The National Mediation Board (NMB) is the independent agency of the Executive Branch of the Federal Government that administers the RLA. [14] It is comprised of three members, whose nominations are for staggered three-year terms, continuing after expiration until replaced. NMB members are proposed by the President of the United States and confirmed by the United States Senate. Members have generally been professionals in railroad industry dispute resolution, either as management or labor advocates or as neutrals. NAA members Robert Harris, Joshua Javits, and Helen Witt have served as NMB members during the last 25 years.

The NMB oversees RLA section 6 (major) disputes [15] by monitoring the industry and its collective bargaining and by providing mediation by a cadre of in-house mediators and, on occasion, by Board members themselves. It makes recommendations for appointments to Presidential Emergency Boards (PEBs) and provides logistical support for PEBs once selected. The NMB also administers RLA section 3 (minor) disputes). Claims involve either employee discipline or contract interpretation ("rules") issues arising from the interpretation or application of existing agreements. The RLA lacks unfair labor practice provisions. Disputes which would be resolved administratively as ULPs under the National Labor Relations Act must be heard as section 3 disputes, or in court.

The premise of the Act is that minor disputes will be adjusted through "on-property" handling, which is the functional equivalent of grievance steps. However, if claims are not resolved on the property, a party may appeal the dispute to arbitration. The NRAB is the default adjudicatory body provided by the RLA. It is divided into divisions and hears disputes involving multiple carriers and organizations. Bipartite panels are designated to hear disputes. If the panel deadlocks – which it almost always does – the dispute is referred for arbitration using neutral arbitrators ("referees"), who sit as ad hoc members of the NRAB for purposes of breaking the deadlock. Neutrals are selected by NRAB divisions from the roster of neutrals maintained by the NMB, which appoints and pays them. Referees are generally appointed to hear multiple cases at a time ("dockets").

The original plan of the RLA was to resolve minor disputes on a national basis in recognition of the national structure of contracts, and to develop uniform interpretations of contract language and disciplinary standards. The thinking was that disputes regarding national agreements should be interpreted and resolved on a uniform national basis, with ever declining numbers of unresolved issues. Virtually no disputes were resolved in that manner, which led to the enactment of a provision that added neutrals.

In 1970, in response to the large case backlog at the NRAB, Congress amended section 3 to allow establishment of single-carrier single-organization boards of arbitration to adjust minor disputes. These tribunals

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[14] For a description of the history and operation of the NMB, *see* Charles M. Rehmus, *The National Mediation Board at 50* (1984).

[15] The classifications of disputes as "major" and "minor" do not appear in the Act but have been adopted to describe disputes and the procedures that apply to them. Minor disputes involve grievances concerning the interpretation and application of existing contract terms and conditions. Major disputes involve the negotiation of new or amended agreements and the changes to terms and conditions that result.

are called public law boards (PLBs) or special boards of adjustment (SBAs) and are also administered by the NMB. They constitute alternative forums to resolve section 3 disputes and may be elected by individual carriers and organizations. PLBs and SBAs are created by written agreement of the parties and approved by the NMB. They give those parties more control over the priority and scheduling of cases and the selection of neutrals to hear them. The parties agree on a neutral or panel of neutrals to handle disputes assigned to each board.

The NMB works with railroad industry stakeholders who provide information, assessments, and recommendations. In 2009 the NMB formed a successor group to continue the work begun by the original Dunlop Commission. The Dunlop II Group provides feedback on agency performance, industry trends, worker-management relations, and other information vital to the NMB mission. The NMB has also established a Section 3 Committee to discuss minor dispute initiatives, and it sponsors an Arbitration Forum to obtain feedback from users of the section 3 process. This group includes representatives of rail labor and management as well as a representative from the arbitration community.

The NMB administers a roster of neutrals who serve in railroad dispute resolution.[16] All section 3 neutrals must be listed on the NMB roster to be eligible for selection to hear section 3 minor dispute cases. The NMB does not make arbitrator selections or send out lists of neutrals except in rare circumstances. Those selections are left to the parties, either directly or from panels provided. Neutrals so selected serve as government contractors and are subject to NMB pay rates, procedures, scheduling, and federal government travel regulations. Placement on the NMB's roster of arbitrators is for one fiscal year. Retention on the roster is not automatic; arbitrators are annually required to submit an application for retention.

The NMB pays the fees and travel expenses of the arbitrators. Each fiscal year the NMB awaits budgetary approval from Congress and usually operates by continuing resolution from the previous fiscal year's budget until approval of the new budget is received. Performance of section 3 work is subject to the availability of government funds and NMB approval. Railroad arbitrators are issued an official work order to hear and render decisions on cases for which they have been selected. Work orders generally expire at the end of each fiscal year. Prior to receiving compensation or reimbursements, arbitrators are required to register with the government's System for Award Management (SAM). Requests to perform compensable service must be authorized through the NMB's online Arbitrators Work Space system and submitted to the Office of Arbitration Services. Hearings must be conducted within 120 days of the date of arbitrator assignment. Once the cases have been heard, the arbitrator must render the awards within 90 days of the hearing unless otherwise mutually agreed by the parties.

The NMB, parties, neutrals, and the section 3 groups have worked diligently and successfully to reduce the large backlogs of cases that have periodically developed. As this is written, there is no appreciable backlog of

[16] Although the airline industry is also governed by the RLA and is overseen by the NMB, the arbitration process, including neutral selection, is entirely separate.

section 3 cases.[17] Increased government funding has played a major role in backlog reduction.

There have been efforts through the years to reform, streamline, or restructure the section 3 arbitration process. These efforts have included introduction of additional types of alternative dispute resolution, *e.g.*, grievance mediation, pilot or lead case designation, parties-pay arbitration, and expedited boards, to NMB-required filing fees for grievance arbitration cases to outright elimination of the section 3 process. These initiatives have met with limited success. The use of grievance mediation has increased, in large part because of the NMB's encouragement, and because claims backlogs can be reduced by the technique. However, claims referred to mediation seldom include serious discipline cases, such as long suspensions or dismissals. While management decries the volume of cases filed and has generally favored ending government-paid arbitration, rail labor has opposed any effort to chip away at the publicly funded section 3 structure. It argues that it agreed, at the time the RLA was negotiated, to limit labor's ability to exercise economic power (strikes) in exchange for publicly funded arbitration of minor disputes. If public funding for the process were reduced or eliminated, the organizations would lose the benefit of the bargain. That opposition notwithstanding, some limited numbers of section 3 disputes are handled by parties with private funding before so-called "parties pay" boards of arbitration. Such boards may be used for disputes of particular importance or disputes in need of prompt resolution.

The selection of cases to be arbitrated, the tribunals to which cases are assigned, and the relative priorities of different boards are matters of intense debate. There have been instances where designations of cases as lead or "pilot" claims cannot be agreed to for political reasons, or to avoid liability for many claims at once, or to give up the "second bite at the apple" that multiple identical or similar cases may afford.[18] Unlike the vast majority of negotiated dispute resolution processes outside the railroad industry, section 3 provides individual claimants the right to handle their own cases up to and including arbitration (before the NRAB).

Railroad industry arbitration awards have not been readily available in the past to anyone other than practitioners, who generally include in their submissions awards favorable to their positions. The NMB Knowledge Store, a research tool located on the NMB's Website, is a free archive available to practitioners, neutrals, and to the public. It contains over 100,000 documents in a searchable format, including section 3 arbitration awards (coded by subject), interest and special arbitration awards, PEB reports and recommendations, and collective bargaining agreements.[19] That availability notwithstanding, independent research by neutrals handling cases is neither expected nor appropriate.

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[17] The NMB reported at the September 2018 meeting of the National Association of Railroad Referees (NARR) that the fiscal year ended with the funding of every case on the section 3 waiting list.

[18] One Class 1 LR officer once said that if there were 400 identical claims, he had 400 opportunities to win!

[19] NMB FY 2021 Congressional Budget Submission at 45.

Neutral Compensation

Neutrals who handle RLA section 3 cases do so as government contractors. This reduces the cost of arbitration to the parties but subjects the dispute resolution process to the vicissitudes of government bureaucracy and funding. For instance, referee travel to hearing locations is often restricted or prohibited for budgetary reasons. Cases assigned to referees and ready for hearing and decision sometimes languish for months because the NMB does not have the funds to allocate for them. Then, when funding becomes available, many cases are funded at once and the parties and neutrals are swamped by the resulting work.[20]

Federal funding for the NMB's activities, and by extension funding for the section 3 process, has been largely stagnant for many years. In 1974 referees were paid a fee of $220 per day. That amount was increased to $300 dollars in the early 1990s. Until recently that level of compensation remained fixed. In 2009 that daily rate, adjusted for inflation, would have been just over $700.[21] Currently the NMB compensates neutrals on a case (time) average equal to approximately two days at the former ($300) per diem rate. The case compensation covers all services in connection with the award, including research and writing. The irregularity and unpredictability of NMB funding (unapproved federal budgets, continuing resolutions allocating partial funding, and general budget reductions) pose challenges to agency operations and its ability to process rail arbitration cases.

Some NAA members accept section 3 assignments, but the administrative complications and low rates of compensation discourage such participation, as do the industry's unique nomenclature and rules, and the appellate nature of the process, as discussed below.

Neutral Development, Utilization, and Training

Rail industry neutrals have always been a mix of industry professionals and those who come in from outside, including from the Academy. Getting established as a railroad arbitrator is difficult for those not from the industry, due to its unique procedures, customs, terminology, contract language, and work practices. The labor relations environment is highly charged and minor disputes can be of great importance and sensitivity. Some cases are extremely technical and the on-property records, prehearing submissions, and presentations vary widely in quality. The tripartite process allows for blistering dissents, and both parties make use of blacklists of arbitrators who issue awards that displease them. There has been a high turnover of neutrals and high wash-out rates among those who seek to become railroad arbitrators.

The parties have recognized the need for a steady supply of new arbitrators and have been increasingly proactive in identifying potential arbitrators and providing them with training and opportunities. They have

[20] The NMB established time limits for the handling and writing of section 3 cases. This was done to discourage the parties' practice of "parking" cases (filing but not pursuing them), and to discourage the practice of some neutrals to "sit" on cases for long periods, in the worst examples, three to five years.

[21] Statistics presented in a panel report at the September 2009 annual meeting of the NARR (unpublished).

started to provide joint training for prospective or new neutrals and to provide opportunities to hear and decide cases. In the past ten years or so, the NMB and parties have made efforts to find and train female and minority arbitrators. In 2015 the NMB sponsored the Arbitrator Utilization Program, a course aimed at providing training and education to current or prospective labor arbitrators with minimal experience in the railroad industry. The NAA provided instructors for the program. The training program was well received in the industry and brought together experienced railroad referees, rail carriers, and rail labor organizations to develop and implement the training. Many of the arbitrators who participated in the training have subsequently been selected for railroad cases.[22]

Railroad Industry Dispute Resolution Processes

Section 3 Discipline Cases

Section 3 requires that railroad employees subject to discipline receive a fair and impartial hearing. That said, discipline originates with a notice to the employee to attend an investigatory hearing, which is held before a carrier official sitting as the investigating officer. The officer conducts the hearing, receives testimony and documents, asks questions, and hears arguments. The carrier officers conducting the hearings are generally line managers who hear cases only part-time and the quality and objectivity of hearings varies widely. The employee is represented by a local officer of the organization. The quality of advocacy varies. In the hearing, the carrier and organization present witnesses and documents. The hearing officer makes evidentiary rulings and credibility determinations. A transcript of the hearing of witness testimony is prepared. Hearings before partisan and generally untrained officers usually turn out as would be expected. The carrier makes a determination based on the hearing record as to what rules were violated, whether to discipline, and how severe a penalty to assess. Some carriers allow employees to accept discipline and receive a reduced or "record" (no loss of pay) suspension, but the offer and acceptance of such reduced penalties generally rests with the carrier. The efficacy of the investigation and discipline process is low.

If the organization (or an individual claimant) is not satisfied with the discipline assessed, it can submit an. appeal to the carrier. If the parties are unable to resolve the dispute on the property, the organization (or claimant) can invoke arbitration, ordinarily to the NRAB or to a PLB with jurisdiction. All claims by unrepresented employees are docketed with the NRAB. Arbitration proceedings in the industry are, with only certain minor exceptions, appellate in nature. The arbitration proceeding usually takes place before a tripartite board consisting of a single neutral and one partisan arbitrator appointed by each party. The party-appointed arbitrators do not, as a practical matter, give up their advocate roles, but do help to safeguard the process. The parties submit advance written briefs to the tribunal based on the on-property record. No new evidence or argument may be considered. Precedent requires that credibility determinations made by the carrier-appointed hearing officers are to be credited. Only the most blatant instances

[22] *NMB Press Release,* April 1, 2020.

of partiality by the on-property hearing officer constitute grounds to overturn the discipline.

The burden of proving cause for discipline rests with the carrier but the quantum of proof required is "substantial credible evidence considered on the record as a whole." "Substantial evidence" is defined as evidence on which the trier of fact could reasonably base a decision, even if a de novo determination by a different tribunal might have had a different result.[23] In other words, the carrier need not prove cause for discipline by even a preponderance of the evidence. The process produces rough justice at best.

Since 1991 the Federal Railroad Administration (FRA) has required railroads to certify to the agency that their locomotive engineers have the necessary training, skills, and operating rule knowledge to perform their jobs competently.[24] In 2011 the FRA required railroads to certify their conductors in much the same manner.[25] Along with the certification requirements, FRA created a process whereby railroads must suspend or disqualify certified employees for violating certain types of operating rules.[26] Railroads may also initiate disciplinary action based on the conduct, thereby creating two parallel proceedings involving the same offense and usually based upon the same company-level hearing record. The interrelationship of these two separate proceedings can be problematic for arbitrators hearing railroad discipline cases.[27]

Rules (Contract Interpretation) Cases

Claims of contract violations (termed in the industry "rules cases," a "rule" in this context being a provision of a governing agreement) are also presented in arbitration on a written record. However, such cases do not include an on-property investigatory hearing. A claim of a rules violation is initiated by a written protest submitted to the carrier. The claim may be supported by documentation such as agreements, prior awards, and settlements, by affidavits, and by other evidence. The carrier responds in similar fashion. Denials place assertions in dispute. Specific authorities in support of an assertion trump general and conclusory denials. Evidence is produced and exchanged in the forms of affidavits, prior correspondence, precedential settlements, and so on. On the basis of the exchange, the parties attempt to resolve the dispute. If those efforts are not successful, the record, consisting of all the assertions and documents produced and arguments made as the claim progressed, is presented to the arbitration tribunal for

[23] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (applying § 10(3) of the National Labor Relations Act).

[24] 49 CFR Part 240.

[25] 49 CFR Part 242.

[26] A multi-stage appeal process, including a due process hearing pursuant to the Rules of Civil Procedure. is provided in 49 CFR § 240.401 *et seq*.

[27] It is possible in these cases, especially with respect to contractual due process issues, that an arbitrator could come to a different decision from the FRA. For instance, the FRA does not consider some procedural defects, such as contractual time limits, if it concludes public policy is not served by considering them. It is also possible in such cases that a favorable award in a discipline case must take into account in fashioning a just cause remedy a concurrent decertification period imposed by the FRA, during which the employee is prohibited from working in a certified position on the railroad. For a comprehensive explanation of this issue, *see* John La Rocco & Richard Radek, "The Dilemma of Locomotive Engineer Certification Vis-à-vis Contractual Due Process in Discipline Cases," 40 *Transp. L.J.* 81 (2013).

consideration. Again, no new evidence or argument may be considered in such cases. The burden of proving a rules violation rests with the organization, which must establish the violation by a preponderance of the evidence.

Labor Protective Provision Arbitrations

The Surface Transportation Board (STB) is an independent federal agency charged with the economic regulation of the freight railroads. It succeeded the Interstate Commerce Commission. The STB maintains economic oversight of the industry's business dealings and has jurisdiction over railroad mergers, takeovers, coordination, and abandonments. Historically, regulatory approval for operational changes resulting from such actions by or between railroads has been required. Such regulatory approvals have historically been subject to agreements between involved carriers and organizations representing affected employees to provide them various types of job protections from consequences of the transaction. Disputes involving the application of these labor protective provisions (LPPs) are made subject to arbitration. The neutrals in such disputes serve as STB delegees. They are selected and paid by the parties, not as part of the section 3 minor disputes process.

Major (Bargaining) Disputes

The procedures for resolution of bargaining disputes are provided for in section 6 of the RLA. Disputes concerning bargaining are termed "major disputes." The parties are obligated to bargain with respect to the terms and conditions of employment. The statutory purpose of section 6 is to avoid interruptions of commerce by providing successive mechanisms to encourage resolution of disputes and by making strikes and lockouts difficult. Unlike other collective bargaining processes that generally produce agreements expiring at the end of defined periods of time, RLA agreements do not expire but become "amendable" after a period of time agreed between the parties in the agreement. New agreement terms are layered over prior agreements, including those negotiated between predecessor parties, that continue in force and effect until modified or rescinded. When an agreement becomes amendable, the parties can initiate bargaining by filing or exchanging "Section 6 Notices." These notices list the contractual changes the parties are seeking.

The freight rail industry's labor negotiations have been conducted on a national, multiemployer basis, coordinated through the National Carriers' Conference Committee (NCCC) of the National Railway Labor Conference (NRLC). The employees are represented by 12 major rail organizations, which had been coordinated through the Railway Labor Executives Association (RLEA) and, more recently, in smaller, shifting coalitions. Major carriers and organizations have engaged in multiemployer multi-organization "rounds" or cycles of bargaining; on a national basis, a process called "national handling." The parties bargain separately but in a coordinated fashion on a craft basis, with a goal of reaching one or more national agreements that are then used as a pattern for organizations representing other crafts and classes. Sometimes a carrier or organization (or

several) will break away and negotiate separately. Carriers and organizations also negotiate system or local agreements, both during bargaining rounds and separately, in the form of side agreements. The jockeying for position can produce unintended consequences. In the 2020 bargaining round, the NCCC was denied the right to represent all carriers in a single arbitration case on the important issue of crew consist and forced separate carrier-by-carrier arbitration.

The bargaining structure described above prevailed for decades. More recently, owing in large part to the parade of mergers drastically reducing the number of carriers, the effect of newer technologies, the decline of passenger trains, the creation of Amtrak, and mergers of rail labor organizations, to name only a few, "national" handling has been reduced from its former scope and importance and sometimes involves only one or two carriers or only some of the labor organizations and sometimes only a single issue. The (very large) remaining carriers (and their represented employees) have found advantages in making "system" agreements tailored to that carrier's business and service characteristics. Examples of this approach can be seen in the Canadian National's "hourly-rated" agreements with its operating crafts, and the profit-sharing or productivity incentive agreements on Norfolk Southern. Amtrak has entirely revamped the passenger service working rules and pay provisions of the former Class I passenger service agreements. As a general matter, the approximately 80 smaller carriers adopt the terms. The last vestiges of national bargaining are pay rates – which are handled nationally unless one of the large carriers reaches agreement, in which case the NCCC has adopted the agreed rate – and "health and welfare," which includes issues of medical, dental, vision, and hospitalization benefits. There may never be a return to broader national handling because the interests of the parties have become too dissimilar.

The parties to negotiations may pursue direct bargaining, without the participation of outsiders, for as long as it as mutually beneficial. Direct bargaining concludes when the parties reach agreement, either side unequivocally terminates negotiations, a party requests mediation under the auspices of the NMB, or the agency proffers mediation. At such time as negotiations enter into the mediation phase, NMB assumes control of the schedule, location, and format of negotiations. The NMB's goal is to facilitate a mutually acceptable agreement by the parties, using its "best efforts."

The rights of labor organizations to strike and carriers to lock out over bargaining disputes are restricted by the RLA. Bargaining that is not successful is followed by mediation by the NMB. Economic action (strikes and lockouts) is not allowed during bargaining and is only available after the NMB releases the parties from mediation and the statutory cooling-off periods are exhausted. There is no prescribed timeline for the mediation process. While a party or parties can request that the NMB release them from mediation, the NMB has no obligation to do so. The courts have upheld NMB's effective total control over the decision whether and when – if at all,

even after years of negotiations and mediation – to release the parties.[28] NMB mediators use control over that release to extract bargaining concessions, particularly from the party most seeking release. Indeed, negotiations may languish for years without release. As time passes circumstances change and pressures build on one or both parties. If sufficient pressure builds, the parties may reach agreement. Resolution validates the process, the purpose of which is, as indicated, to avoid interruptions to commerce that would otherwise occur.

When the NMB determines that a collective-bargaining dispute cannot be resolved in mediation, the agency proffers interest arbitration to the parties. Either labor or management may refuse the offer and, after a 30-day cooling-off period, engage in a strike, implement new contract terms, or engage in other types of economic self-help, unless a Presidential Emergency Board (PEB) is established. The parties are also free at any time during their bargaining to agree to binding arbitration.[29] If both parties agree, the arbitration board's award will be final and binding. There are advantages to the parties in arbitration.[30] The willingness of the parties to use interest arbitration may be increasing. In 2014 national bargaining commenced between the national freight railroads and the various rail organizations. By late 2017, most of the unions had settled, creating what was arguably a national pattern of settlement. Several of the unions, however, did not reach agreement or the agreements were not ratified. Four unions ultimately submitted their disputes to final and binding arbitration, resulting in three arbitration board decisions, issued by Gilbert Vernon (BMWED and SMART-Mechanical), Joshua Javits (IBEW), and Charlotte Gold (IAM). Each board found and applied the pattern contract terms. Arbitration can be a useful mechanism to resolve negotiations in which ratification has failed or is threatened, as arbitration awards generally do not require ratification to be effective.

Throughout the negotiation process prescribed by the RLA, there are up to three cooling-off periods. These 30-day windows provide additional time for parties to reach an agreement before disruptive "self-help" tactics are permitted. If the NMB determines, pursuant to section 10 of the Act,[31] that the bargaining dispute threatens to interrupt interstate commerce to a degree that will deprive any section of the country of essential transportation service, it will notify the President of the United States. He can then choose to appoint a PEB to investigate and report on the dispute. When faced with

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[28] Interminable delays are not inevitable. *See, e.g.,* Carmen R. Parcelli & N. Skelly Harper, "Major Disputes under the Railway Labor Act: How to Expedite the Act's 'Almost Interminable' Negotiation Process" (paper at ABA's Sixth Annual Section of Labor and Employment Law Conference in Atlanta in 2012).

[29] In the 2016 round of negotiations by way of example, the railroads and the Brotherhood of Maintenance Way Employees (BMWE) and the Sheet Metal, Air, Rail and Transportation Workers (SMART – Mechanical) reached agreement on all issues except for health care. They resolved that issue through arbitration.

[30] As the Brotherhood of Maintenance of Way Employees Division of the Teamsters Union (BMWED) explained to its members in 2018, such mechanism "… avoid[s] the uncertainty that would encompass a [PEB] and possible Congressional intervention. … using binding arbitration allows our unions to have input in the process (arbitration selection, questions presented and presentation of evidence and argument that a PEB would not have afforded us)." 127 *BMWED Journal,* Jan.-Mar. 2018.

[31] 45 U.S.C. § 160 (2018).

stoppage threats in major freight rail bargaining, the President typically does so. Unlike the Taft-Hartley Act,[32] the RLA does not prohibit PEBs from making recommendations to resolve the dispute.

Issues vary between bargaining rounds and from carrier to carrier and craft to craft. However, major issues consistently raised in bargaining and before PEBs have been compensation, scheduling, crew size, work rules, and health insurance. Several PEBs have been appointed to address commuter rail bargaining impasses. Over the past 15 years, there have been 11 PEBs involving seven different labor disputes. Additionally, four disputes led to the formation of second PEBs in accordance with the section 9a process applicable to commuter rails.

PEBs are generally comprised of labor relations neutrals – frequently NAA Members[33] – who investigate the dispute, undertake informal settlement efforts, and issue a report and recommendations to the President of the United States. When a PEB is appointed, hearings are scheduled and conducted. Positions are received and informal meetings are held, including discussions to attempt to resolve or narrow the dispute. The statute allows 30 days, start to finish, for completion of the PEB process and submission of the board's report and recommendations. Status-quo conditions must be maintained throughout the period that the PEB is impaneled and for 30 days following the PEB report to the President. The report that emerges is a combination of award and mediated effort, sometimes incorporating off-record concessions by the parties. The PEB process may resolve the dispute, or otherwise bring the parties closer to resolution.

Following the issuance of the PEB's report, negotiations enter a final 30-day cooling-off period under the RLA. The parties may accept the PEB's recommendations as terms of settlement, thereby ending the dispute. If no agreement is reached, and there is no intervention by Congress, the parties are free to engage in self-help 30 days after the PEB report to the President. If PEB settlement efforts are unsuccessful, its report is not accepted by the parties to resolve the bargaining dispute, or the parties do not resolve the dispute during the final cooling-off period, the parties may, in theory, take economic action in the form of strikes or lockouts. Since the enactment of the RLA, most national freight rail negotiations have been resolved without any service interruptions. However, in rare instances when the parties have not reached an agreement before exhaustion of the RLA dispute-resolution process, Congress has stepped in to prevent or terminate service disruptions. Past congressional measures have included additional cooling-off periods to continue negotiations, implementation of PEB recommendations, and compelled arbitration.

Section 9a of the RLA[34] provides special, multi-step emergency board procedures for unresolved disputes affecting employees on publicly

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[32] 29 U.S.C. § 176 (2018).

[33] Over the past 25 years, the following NAA members have served on one or more PEBs: Richard I. Bloch, Scott E. Buchheit, Shyam Das, Barbara C. Deinhardt, Gladys Gershenfeld, Roberta Golick, Robert O. Harris, William P. Hobgood, Ira Jaffe, Joshua Javits, Richard Kasher, Ann S. Kenis, Herbert L. Marx, Jr., Donna R. McLean, Richard Mittenthal, Elizabeth Neumeier, Robert M. O'Brien, Nancy Peace, Robert E. Peterson, Lois A. Rappaport, George S. Roukis, Josef P. Sirefman, David P. Twomey, Rolf Valtin, M. David Vaughn, Gilbert Vernon, Bonnie Siber Weinstock, Elizabeth C. Wesman, Helen Witt, Arnold Zack, and Barbara Zausner.

[34] 45 U.S.C. §159(a) (2018).

funded and operated commuter railroads. When bilateral bargaining does not resolve the dispute, NMB may intervene to provide mediation. When mediation is exhausted, the parties to the dispute or the governor of any state where the railroad operates may request that the President establish a PEB. The President is required to establish such a board if requested. If no settlement is reached within 60 days following the creation of the PEB, the NMB is required to conduct a public hearing on the dispute. If there is no settlement within 120 days after the creation of the PEB, any party or the governor of any affected state may request a second, final-offer PEB. No self-help is permitted pending the exhaustion of these emergency procedures.

Pattern Bargaining

In analyzing disputes, both interest arbitrators and PEBs look for and apply terms from so-called "pattern" agreements that became accepted comparators relatively early under the RLA. Under the "pattern" analysis deference is accorded to the settlements reached between other labor organizations or other carriers. When a pattern is determined to exist, it will be influential if not determinative in the analysis and recommendations of the tribunal. However, significant settlements may be reached in the same round of negotiations that might not be accepted as a "pattern" but may still be considered and may influence the analysis and recommendations of PEBs.

By the mid-1950s pattern bargaining, along with other factors, was credited with the decrease in the labor disputes going to PEBs and in the reduction in strikes. The principle was so accepted before PEB 116 in 1957 that testimony as to the importance of the pattern was not even challenged. Today pattern bargaining addresses industry-wide bargaining with multiple labor organizations, as well as bargaining between one carrier and its multiple labor organizations. Patterns may also be found within industry sectors, such as commuter rail operations, which may include commuter rail operations that are part of larger mass transit authorities with non-RLA operating units.

Two different pattern agreements exist: internal, which pertain to agreements between one carrier and one or some of its labor organizations, and external patterns, which pertain to agreements between other carriers and their labor organizations. Patterns developed on other carriers may be considered informative but might not be controlling on the settlements of a different carrier. In such cases there generally is deference to an "internal pattern" of a particular carrier. However, there is at least one instance where an external pattern was deemed appropriate when there was an internal pattern. When there is no internal pattern, the asserted external pattern may still not be controlling. The facts of the specific cases as well as the bargaining history are extremely important in the analysis.

Although the early rationale for patterns focused on settlements involving large percentages of the represented employees that had settled, significant settlements representing smaller percentages of employees, when there is no determination of a pattern, may be taken into consideration by a PEB when circumstances are deemed appropriate. To this effect are PEBs 220, 221, 222, 228, 229, 230, 234, 243, 244, and 248. Even when there is a determination of a pattern by a PEB, in limited instances exceptions have been made when supported by compelling arguments that warranted altering the pattern's application for those seeking such an exception. PEBs 204, 225,

231, 237, 242, and 246. A recurring and dominant factor in support of patterns is the destabilizing effect of not applying patterns. PEBs 116, 220, 222, 242, and 243. In a larger sense, the threat of having a bargaining dispute subsumed and a pattern from other carriers or organizations imposed can motivate parties to resolve their disputes on their own terms.

While various rationales are given to support patterns, a frequent explanation has been based on the "combined judgments" of the union and management officials that formed the pattern settlement. PEB 116. When the settlements advanced as a pattern include settlements established by awards, or other third-party determinations, and not by voluntary agreements, the settlements may not be characterized as patterns, but may nevertheless be given substantial weight in the PEB's recommendations. PEBs 220, 222, 228, 229, 230, and 234. While greater weight may be given to internal patterns over external patterns, exceptions have been made to an internal pattern and an external pattern applied in some cases. PEB 225. In assessing the application of patterns to commuter rail operations, a PEB's determination that relatively large non-rail agreements are included as a component part of an overall transit authority's economic pattern has been an element of the recommendations, PEBs 231, 237, 240, and 246, even when that position is not asserted by the carrier. PEB 244.

Determination of Disputes as "Major" or "Minor"

The RLA provides, in section 3, for the adjustment of claims (minor disputes). Courts, frequently at the urging of management, prefer to classify disputes under section 3 of the Act, to be resolved in arbitration, rather than the cumbersome section 6 major dispute process, with its risk of work stoppages and economic disruptions. The analysis is easily seen in two signal Supreme Court decisions.

In *Chicago River*[35] the Trainmen were unsuccessful in resolving a group of grievances, and then notified the Carrier that if it did not move to resolve them, a strike would be called. The railroad petitioned the district court to issue a permanent injunction on the basis that the Union could not strike over grievances but had to progress them to the NRAB. The Supreme Court held that the resolution of minor disputes (grievances) was within the exclusive jurisdiction of the NRAB. Disputes then arose between the parties as to what particular grievances rose to the level of a change in working conditions, thereby triggering section 6 (major disputes). In *Conrail*[36] the Court had to decide whether the addition of a urinalysis screen for illicit drugs during a routine periodic or return-to-work physical examination constituted a change of working conditions, and thus a major dispute. The Court found the dispute was minor, stating:

> Where a carrier asserts a contractual right to take a contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Only if the employer's claims are

[35] Railroad Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30 (1957).
[36] Conrail v. RLEA, 491 U.S. 299 (1989).

frivolous or obviously insubstantial, the dispute is major. Such classification is ultimately decided in court.[37]

Thus the standard applied to the determination that a dispute is minor is extremely low. All that is necessary is an argument, not entirely frivolous, that the action is justified under the governing agreement. This standard has been applied by special boards of adjustment (SBAs) or public law boards (PLBs) to disputes involving the implementation of remote controlled locomotives supplanting locomotive engineers, the administration of indiscriminate or random drug and alcohol tests, craft-related pay differentials affected by crew size reduction agreements, and many other issues that, but for the "not entirely frivolous" standard, would seemingly constitute changes of working conditions, and therefore be classified as major disputes.[38] It is increasingly rare to encounter a dispute that cannot be found to be minor. That means that while most section 3 disputes are in fact minor, many disputes important to the parties and appropriate to the bargaining process are handled under section 3. Thus SBAs, PLBs, and the NRAB are tasked to decide issues with significant policy, economic, and practical effects.

In *Railroad Signalmen*[39] a district court found that a dispute was minor because Amtrak's decision to assign work in a specific building to nonunion employees was "arguably justified" by the collective bargaining agreement, divesting the court of jurisdiction over the case. The court concluded that the company's position was not a frivolous or insubstantial reading of the CBA, making the dispute minor and providing exclusive arbitral jurisdiction over the dispute.

In February 2020 a group of eight railroads asked a federal district court to require SMART-TD, which represents railroad conductors, to bargain over its proposals on crew consist. SMART-TD took the position that it would be inappropriate for crew consist issues to be handled nationally, and that a moratorium provision prevented new proposals on the subject of crew size. The court issued a permanent injunction enjoining SMART-TD from refusing to bargain over the railroads' proposals.[40] The railroads had sought a declaratory judgment and injunctive relief. The court noted that "injunctive relief here does not permit an immediate reduction of crew size, but merely compels SMART-TD to begin good-faith negotiating over crew size proposals."[41] Further, the court considered the parties' arguments concerning the moratorium language and found "the Railroads have met the 'relatively light burden' necessary to show that their interpretations of the CBAs are arguably justified such that the instant dispute is a minor one."[42] The Organization's appeal was pending as of this writing.

The distortion of the dispute resolution process in consequence of the low bar to classifying important bargaining issues as minor is illustrated by the dispute as to which craft would be assigned the work of operating

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[37] *Id.* at 307.
[38] *See, e.g.*, SBA 1141 (2002) (remote-control locomotive technology); SBA BLE v. UP (1993) (pay differentials); SBA 1058 Award 1 (1993) (engineers' seniority standing).
[39] R.R. Signalmen v. Nat'l R.R. Passenger Corp., 310 F. Supp. 3d 131 (D.D.C. 2018).
[40] BNSF Ry. v. SMART-TD, Civil Action No. 4:19-cv-00789-P (N.D. Tex. Feb. 11, 2020).
[41] *Id.* at 19.
[42] *Id.* at 15.

locomotives using remote-control devices. On September 26, 2001, six carriers (BNSF, Conrail, CSX, KCS, NS and UP) signed a letter of intent with the UTU stating that UTU-represented employees, *i.e.*, trainmen, would be assigned that work. Needless to say, the industry-wide implications of such an assignment were enormous. The Brotherhood of Locomotive Engineers (BLE), believing its engineers had exclusive jurisdiction over the work of operating locomotives, responded to the letter of intent by threatening to strike. The carriers petitioned the federal district court to enjoin the strike. On January 14, 2002, the court, relying upon the *Conrail v. RLEA* standard, ruled it would grant the injunction, stating:

> The court is not deciding whether the railroads' plan to implement the new technology is justified by its agreements with the BLE. The court is merely deciding whether the Railroads' argument that the parties' agreement justifies its plan is "not frivolous or obviously insubstantial."...
>
> This court stresses that it is in no way agreeing with the Railroads' interpretation of the collective bargaining agreements; in fact, it is arguable that locomotive engineers should have exclusive control over operation of the remote-control transmitters. However, the court need not make this determination. "The resolution of the case depends upon the interpretation of the agreement, and while we realize that the [Railroads'] actions might be in violation of that agreement, it is for the appropriate adjustment board, and not this court, to draw the boundaries of the practices allowed by the agreement."[43] [Citations omitted.]

Subsequently, as directed by the court, SBA 1141 was established. Arbitrator Gil Vernon was selected to chair the board. UTU requested and was granted party status. After hearings, the board ruled in favor of the carriers and the UTU.[44] Rather than see the remote-control device as a set of controls by which an employee operated a locomotive, the board accepted the carriers' argument that the remote control device merely sent radio commands to the locomotive where microprocessors actually controlled the locomotive.[45] And while the BLE argued that existing rules included control of locomotives within the scope of engineers' duties, the board noted that the BLE had jurisdictional rights to remote control operations of locomotives. It reasoned, if the Organization believed it already had the right to the work, the Organization would not have sought to bargain for it. Thus BLE, in the arbitrator's view, did not have exclusive jurisdiction of the remote-control operations, leaving the carriers free to assign it to trainmen. The case is illustrative of the propensity of the courts to direct virtually every dispute, including those with significant industry-wide impact, to section 3

[43] BNSF Ry. v. BLE, 2002 WL 47963 (N.D. Il. Jan. 14, 2002).
[44] SBA 1141 (2003), http://etnsplace.com/758/stuff/sba1141.htm.
[45] This point of view was not shared by the Federal Railroad Administration, as made evident by its inclusion of remote-control operators under the federal regulations applicable to locomotive engineers (49 CFR Part 240).

arbitration, and in so doing to avoid potential interruptions of interstate commerce.

National Academy of Arbitrators and Its Members

Academy members serve as members of the NMB, members of PEBs, and as neutrals in railroad industry disputes. Academy members also provide training and mentoring to new arbitrators, both independently and through NMB and party-sponsored training. In recent years, the NAA has included railroad industry-specific topics on its annual meeting and fall educational conference programs.

The Academy's recognition of railroad industry awards as counting toward membership has evolved over time. Prior to 2009 the Academy's general membership policy and practice did not allow arbitration decisions in the railroad industry to be included in the evaluation whether an application demonstrates "substantial and current experience so as to reflect general acceptability." The thinking was that railroad industry cases are small in scope and appellate in nature and did not equate to experience in conducting hearings and assessing evidence and credibility. A number of Academy members, including Gil Vernon, Herbert Marx, and Barry Simon, sought to have the Academy credit railroad cases toward membership.

Following the report of the Academy's New Directions Committee, the June 2008 amendments to the bylaws and the associated changes in NAA's membership policy, which allowed limited credit toward the threshold for consideration of certain workplace dispute decisions, the Academy established a Special Committee on Railroad Arbitration and Membership Policy. The committee was chaired by Gil Vernon and included Simon and Marx, as well as Margery Gootnick, Roberta Golick, and Margaret R. Brogan. Based on the committee's report, the Academy's policy as to railroad decisions was changed. The Academy now treats those cases in the new but limited workplace decision category. Board policy was changed to consider each certificate of appointment to a section 3 tribunal (NRAB, SBA, or PLB) issued by the National Mediation Board (indicating it was based on a selection by the parties or "partisan members"), as well as LPP (labor protective provisions) and "parties pay" cases, when accompanied by an issued and adopted award, count as a workplace dispute resolution decision.

National Association of Railroad Referees

Based on perceived unmet need and in part as a result of the Academy's earlier policies with respect to railroad industry arbitration and minimal railroad-specific program topics, an industry-specific professional organization, the National Association of Railroad Referees (NARR), was founded in 1991. The NARR holds a conference every September in Chicago that is attended by railroad management and labor representatives, NMB members and staff, and railroad arbitrators. The annual conference provides referees with education and professional development. The NARR's first seven presidents[46] and many of its members have been NAA members.

[46] NARR presidents have been:

Future of Dispute Resolution in the Railroad Industry

The future of dispute resolution in the railroad industry looks like a continuation of past and present issues and trends. Issues in bargaining have been predictable. By way of example, the major elements of the SMART-TD's 2019 section 6 notices include pay increases, allowances and adjustments, paid sick leave, pay for training, scheduling adjustments to increase rest and improve quality of life, and enhanced health and welfare benefits. In short, labor's bargaining demands are conventional and predictable, a continuation and improvement of the terms and conditions of employment for its existing work force and protection for the jobs and duties threatened by technological and operational changes.

Management seeks more significant changes in basic terms and conditions of employment. These include a change in crew consists to have only a single person in the cab of locomotives, with the present second crew member – the conductor – converted to a ground job.[47] Carriers also seek work rules changes to give railroads greater flexibility in subcontracting in non-core areas, to reform "provisions that restrict management discretion over the assignment of work," and to allow management greater "flexibility over which crafts and employees may perform work, when such work may be assigned and performed, and the duration such work may be performed." Railroad management wants, in addition, to relax arbitrary geographical limits on work performed by train crews, allowing for greater flexibility to timely deploy teams to critical projects and curtailing furlough protections. Management further seeks to consolidate multiple legacy railroad contracts within the same workgroup, reducing methods of payment calculation, and accelerating when certain operational changes may be implemented. Finally, management would like to change health and welfare benefits to reduce costs through plan design changes and increases in employee premium sharing, copay, and deductibles.

In addition to ongoing competitive and economic pressures, current bargaining issues are driven by the industry's desire to take full advantage of the billions of dollars in investment in Positive Train Control (PTC), which it contends make single member operating crews safe. Crew size and work rule changes are also proposed by carriers to realize the full benefits of precision scheduled railroading that has resulted in fewer workers being employed for a given level of traffic.

Collective bargaining is a flexible process. Its application in the railroad industry, using the RLA dispute resolution structure, is time tested. While the issues described are difficult, the process has been made easier by a leaner, more profitable industry and ever-increasing employee productivity.

1991 – 1994: Joseph A. Sickles, NAA Member
1995 – 1998: Herbert L. Marx, Jr., NAA Member
1998 – 2000: M. David Vaughn, NAA Member
2000 – 2004: Francis X. Quinn, NAA Member
2004 – 2006: M. David Vaughn, NAA Member
2006 – 2010: Barry E. Simon, NAA Member
2010 – 2014: Elizabeth C. Wesman, NAA Member
2014 – 2016: Joshua M. Javits, NAA Member
2018 – 2020: Joseph Cassidy

[47] Information provided by the National Railway Labor Conference.

It is unlikely there will be any significant changes to the RLA provisions applicable to the railroad industry or to the parties' utilization of its dispute resolution processes. If anything, the parties more recently have been addressing their issues in bargaining, with less reliance on the PEB process.

Labor has demonstrated no interest in giving up publicly funded grievance arbitration. Carriers favor the major dispute processes, as compared with other possible alternatives. That process, while protracted, virtually eliminates the use of strikes and lockouts. Arbitration is available when bargaining does not resolve the dispute.

The benefit to the public has been and will continue to be stability, with no interruption of rail transportation services, and the benefit to the rail industry and its employees is sustainability. No pressure for legislative change is likely. While no one in the industry would assert that the system approaches perfection, no one has been able to devise an alternative acceptable to all stakeholders to replace it. If adequate and reliable funding is provided, the RLA dispute resolution process, including the significant role played by Academy members and other neutrals, works well enough to continue.