Resolving Craft-Based Disputes

Work practices and procedures in the railroad industry are a function of federal rail safety regulations, collective bargaining agreements, time-tested experience, and the industry's craft-based structure. This panel of expert advocates will delve into the unique characteristics of craft distinctions within the railroad industry, exploring how job classifications, work jurisdiction, regulatory mandates, and historical practices influence grievance outcomes. Panelists will enlighten referees on how to weigh these factors in resolving disputes that come before them for arbitral resolution.

National Association of Railroad Referees

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Moderator: Referee Thomas Pontolillo

Shop crafts

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Allison Parker (TCU/IAM)

MW/Signal Crafts

Scott Goodspeed (NS)

John Schlismann (BMWED)

Operating Crafts

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Organization By Craft: Key Dates

- 1863 — Brotherhood of the Footboard (BLE) is founded
- 1875 — first written CBA (BLE and NYC)
- 1877 — Great Railroad Strike, widespread civil unrest, use of federal troops
- 1883 — last Big 4 op craft union founded; Sen. hearing on 1877, no report; House Labor Comm. recommends vol. arb. w/o role for federal gov't.
- 1887 — Interstate Commerce Act brings safety/economic regulation
- 1888 — CB&Q strike fails; Arbitration Act of 1888 (voluntary arbitration (never used) or Presidential commission investigation)
- 1893 — Safety Appliance Act (automatic couplers and power brakes)
- 1894 — Pullman Strike and Boycott; strike-breaking by injunction and use of federal troops over objection of Illinois Governor Altgeld

Organization By Craft: Key Dates (cont'd)

- 1898 — Erdman Act (voluntary arbitration, but no more investigatory option; routes for mediation and conciliation, but only for operating crafts) … railroads uniformly refused to mediate for first 8 years
- 1901 — BRS founded; all but two RLA "national in scope" unions exist
- 1908 — SCOTUS overturns Erdman Act yellow dog contract ban
- 1912 — RYA founded
- 1913 — Newlands Act (Board of Mediation and Conciliation created, w/mediation jurisdiction expanded to include interpretation disputes)
- 1915 — unions refuse to mediate/arbitrate demand for 8-hour day
- 1916 — Congress passes Adamson Act to avert a strike

Organization By Craft: Key Dates (cont'd)

- 1917 — federal government assumes control over railroad industry as part of WW I war effort; discrimination for union membership outlawed; numerous system and national agreements entered into; national adjustment boards created to adjudicate grievances; ATDA founded
- 1920 — Transportation Act returned industry to private ownership, with U.S. Railroad Labor Board having mediatory/arbitral jurisdiction
- 1922 — 12% wage cut for shop crafts and non-ops by RLB triggered strike by shop crafts and BMWE; PRR-led movement to displace shop craft unions with company unions; SCOTUS emasculated RLB by refusing to enforce order to carriers to cease and desist dealing with company unions; strike broken by National Guard and injunction
- 1926 — Railway Labor Act becomes law adopting the then-current structure

Takeaways From This History

- Work rules in effect at the time the RLA was enacted were largely those that originated in / reflected operations during the last quarter of the 19th Century, as modified and nationalized during WW I.
- Maintenance of *status quo* and agreements in perpetuity have meant that significant and/or technology-driven changes to work rules usually require PEB recommendations, and often are enacted only when imposed by Congress.
- This method of fundamentally changing work rules has two significant shortcomings:
    1. Governing language in dispute frequently is drafted by someone other than the parties and does not reflect a meeting of the minds.
    2. Gaps in coverage and language tend to be filled via arbitration rather than negotiation.

Shop Crafts Organizing History

- International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America (1880)
- Brotherhood Railway Carmen of America (1888) (today a Division of TCU)
- International Association of Machinists (1888)
- Sheet Metal Workers' International Association (1888)
- International Brotherhood of Blacksmiths, Drop Forgers and Helpers (1889)
- International Brotherhood of Electrical Workers (1891)
- International Brotherhood of Firemen and Oilers (1898) (today NCFO/SEIU)

Shop Crafts – Incidental Work Rule History

- 1969 — PEB 176 (NRLC and IAM/SMWIA/IBEW/IBB) recommended parties bargain an agreement that "will afford greater flexibility in the use of mechanics." PEB 176 at 12. December TA ratified by IAM/IBEW/IBB, but rejected by SMWIA. In April 1970, Congress imposed the rejected TA on SMWIA to halt a strike. Pub. L. 91-226.
- 1991 — PEB 219 recommends expanded IWR (imposed Pub. L. 102-29) to:
  1. cover all Shop Craft employees, including the back shops;
  2. defined "incidental" work as "involv[ing] the removal and replacing or the disconnecting and connecting of parts and appliances such as wires, piping, covers, shielding and other appurtenances from of near the main work assignment in order to accomplish that assignment, and shall include simple tasks that require neither special training nor special tools"; and
  3. permits simple tasks to be assigned to any Shop Craft employee capable of performing them for up to two hours per shift.

Shop Crafts – PLB 5479, Award 2 (Fletcher 1994)

- One of several awards by this Board that provided the first detailed historical analysis and interpretation of the imposed PEB 219 recommendations.
- Primary holdings in this IAM claim against NS that the Carrier improperly used two Carmen-Painters to change the filters in the paint spray booth at a heavy locomotive repair facility, which took 55 minutes to complete:
  1. third-party notices were sent to all Shop Craft unions in order to comply with TCEU v. UPRR, 385 U.S. 157 (1966);
  2. the Board found a system-wide practice of this work being exclusively performed by Machinists because (a) the Scope Rule reserved "all other work generally recognized as machinists' work", (b) the record established that Machinists perform this work at this facility, and (c) this is the only location where locomotives were painted; however,
  3. in denying the Claim, the Board rejected the Organizations' arguments that "simple tasks" could only be assigned out-of-craft when they were an incidental part of a work task assignable to that craft *(i.e.*, removing/replacing and disconnecting/reconnecting).

Shop Crafts – Other Germane Awards

- Second Division Award 13244 (Muessig 1998) … Carmen claim for Carrier assignment of Boilermaker to cut/splice bottom of rear locomotive cab door, repair hinges and reapply the door, which tasks, including welding, have always been exclusive to Carmen at the facility … Carrier responded that the work was a "simple task" that took <2 hours to complete … Claim sustained on the grounds that:
  1. in order for a task to be considered "simple", (i) the work must be unadulterated, unblended and uncomplicated, (ii) the work must not require the use of any special tool, (iii) the work must not require any special training, and (iv) craft workers. other than laborers. must be capable of easily and efficiently completing the work with satisfactory results (citing PLB No. 3139, Award 142); and
  2. welding and the specific repair tasks that were assigned are not "simple tasks" because they require special training and special tools, adopting precedent holding (PLB No. 5479, Award 8) that—even if other crafts can weld within their own classification—such work cannot be reassigned across crafts under the IWR.

Shop Crafts – Other Germane Awards

- Second Division Award 13385 (Suntrup 1999) … Carmen claim for Carrier assignment of Boilermaker to install locomotive cab doors / door thresholds, and window/floor trim, which took entire shift to complete … Carrier countered work took about 2 hours and was permissibly assigned under the incidental work / simple task rule … Claim sustained because assignment of work was contrary to practice and task length evidence was for another date.
- Second Division Award 13414 (Newman 1999) … Carmen claim that Carrier assignment of Boilermaker to remove/replace locomotive cab awning, using an oxygen/acetylene torch outfit and an electric arc welder was improper because Scope Rule expressly reserves this work for Carmen … Carrier argued the work was a simple task, which took 1:40 to complete … Claim sustained because (1) Organization proved disputed work is properly reserved to Carmen, and (2) this type of welding is not a simple task, as established by Second Division precedent (Awards 13244, 13246, 13250).

MOW and Signal Crafts Organizing History

- Brotherhood of Maintenance of Way Employes (1887) (today Brotherhood of Maintenance of Way Employes Division – International Brotherhood of Teamsters)
- Brotherhood of Railroad Signalmen of America (1901)

Subcontracting MOW and Signal Work

- Subcontracting disputes typically center around sufficient workforce size and time to do the work, as well as the availability of specialized equipment and/or skills.
- Also — since 1996 (per the recommendation of PEB 229) — with Article XV New York Dock protection when subcontracting exceeds a defined level.
- Key issues:
  1. Is the disputed work customarily, traditionally and historically performed by the bargaining unit making the claim?
  2. Was the notice of intent to subcontract adequate?
  3. What does the history or practice of prior subcontracting of the disputed work show?
- These are among the most fact-driven cases you will encounter.

Subcontracting MOW and Signal Work

- Case components:
  1. Is the Scope Rule general or specific? Is the Organization's *prima facie* burden to show that its members "customarily, traditionally and historically" perform the work, or that they "exclusively" perform it on a "system-wide" basis?
  2. Does the CBA permit contracting scope work under certain, specified circumstances, or is it silent on the subject? If the former, what are the circumstances? Is there an advance notice requirement? Is there a pre-subcontracting conference requirement? If the CBA includes a process, what are the parties' obligations to each other and to the process?
  3. When does the burden shift to the Carrier? Affirmative defenses include emergencies, specialized expertise/licenses/equipment, mixed practice, insufficient personnel/time to complete the work.
  4. Was/Were the Claimant(s) furloughed? Was/Were the Claimant(s) fully employed on the dates the subcontractor performed the challenged work?

Subcontracting MOW and Signal Work

- Noteworthy cases:
  1. PLB 6671, Award 4 (Meyers 2006) — non-exclusivity letter vis-à-vis other crafts irrelevant as to subcontracting rights/limitations … exclusivity test doesn't apply to disputes over contracting out, but rather to disputes between a carrier's different craft employees.
  2. PLB 7979, Award 9 (VanDagens 2022) — CBA had been expanded to include territory on which claim arose when it was acquired by another railroad four years earlier … the Organization's burden was to show that its members "historically and customarily" performed this work on the territory after the adoption of the acquiring Carrier's CBA.

Subcontracting MOW and Signal Work

- Noteworthy cases (cont'd):

3. Third Division Award 44993 (Bittel 2023) — analysis of prior holdings on notice sufficiency, focusing on "the ability of the Organization to meaningfully engage in a conference aimed toward reaching an understanding about the contracting in question" … ordered monetary awards to fully-employed Claimants because "the obligation of the Board to interpret and enforce the parties' Agreement is our preeminent function, and to allow contract violations to continue without consequence is an affront to that function."

4. PLB 6399, Award 61 (VanDagens 2024) — Carrier successfully proffered a "mixed practice" affirmative defense (*i.e.*, the disputed work was historically and customarily performed by MOW forces per Scope Rule **and** there also was a long history of it being contracted out).

Operating Crafts Organizing History

- Brotherhood of Locomotive Engineers and Trainmen (1863) (former Brotherhood of Locomotive Engineers, Brotherhood of the Footboard)
- SMART Transportation Division (former United Transportation Union):
  - Order of Railway Conductors of America (1868)
  - Brotherhood of Locomotive Firemen and Enginemen (1873) (former Brotherhood of Locomotive Firemen)
  - Brotherhood of Railroad Trainmen (1883)
  - Switchmen's Union of North America (1894)

TE&Y Incidental Work

- Disputes over the performance of "non-traditional" work by TE&Y employees typically arise from two sources:
  1. work performed by crafts that no longer are there to perform it (*e.g.*, elimination of jitney drivers to transport crewmembers, reduction in mechanical forces that performed certain equipment inspections); or
  2. work performed by TE&Y crew positions that have been eliminated as a result of the reduction in the size of crews from 5 to 2 since the 1960s.
- Implicated by both types of disputes are the Incidental Work Rules contained in the 1985 UTU National Agreement (as urged by PEB 208, citing PEB 177, Arbitration Board No. 282, PEB 154, the 1960 Presidential Railroad Commission), and the May 19, 1986 Award of Arbitration Board No. 458 imposed on the BLE.

Incidental EOT/HOT Placement and Removal

- PLB 4049, Award 17 (Vernon 1992) —
  - Crewmember claims for removing EOTs from their trains at an interchange point on a foreign carrier and returning them to the carrier's yard.
  - Are employees of the foreign carrier considered "other employees" for purposes of relieving train crews from the responsibility of handling EOTs?
  - No, citing Arb. Bd. 419, Supp. Awd. 6 finding "that the term 'other employes' did not nor cannot contemplate employees of foreign railroads over which the carrier has no control."
- PLB 5093, Award 11 (Euker 1992) —
  - Claim for penalty day for transporting/installing HOT (*i.e.*, Electrician's work).
  - Carrier countered that was no difference between an HOT and an EOT, the work was incidental, *de minimis*, and essential to Claimant's duties.
  - Finding in Award No. 1 that installation of an EOT was incidental, *de minimis*, and essential to Claimant's duties also applies to an HOT.

TE&Y Protection of Workers on/about Tracks

- "Flagging" claims can arise due to:
  - craft elimination, when other crafts (*e.g.*, B&B, Signal) no longer exist locally; or
  - crew reductions, when positions once held by TE&Y were eliminated due to reduced crew sizes.
- Arbitral evolution …
  1. PLB 3290, Awards 120-121 (Peterson 1987) — claims sustained notwithstanding that Carrier provided protection via Rule 93 Stop Orders.
  2. Carrier did not comply, triggering Organization enforcement suit in ND OH, resulting in Carrier counterclaim to vacate the awards, which the District Court did on the grounds that the PLB exceeded its jurisdiction by determining that flagging was needed.
  3. Organization appeal is unsuccessful. *See* UTU v. CSX Transportation, Inc., 902 F.2d 36 (6th Cir. 1990).
  4. PLB 3741, Award 162 (Warshaw undated) — claims denied because Rule 707 "train protection" was provided in lieu of flagging.

TE&Y Protection of Workers on/about Tracks

- Key factors the Arbitrator should consider …
  1. Is flagging required, or is train protection sufficient?
  2. When must the Arbitrator defer to managerial discretion?
  3. Does the evidentiary record establish that flagging was required?
  4. Do custom and/or practice play any role in this specific case?
  5. If the flagging used to be performed by now-eliminated positions or reduced crews, additional keys are:
     a) whether the work was exclusive to the former craft;
     b) whether it is "incidental" or "core" to the remaining crafts; and
     c) whether the agreement speaks to reassignment.
  6. While Train Orders / similar traffic control rules like Rules 93 and 707, *supra,* may manage protection without triggering CBA obligations, Arbitrators should evaluate whether the Carrier truly bypassed flagging or simply renamed it.

Pre-IWR Application of *De Minimis* Rule

- PLB 2114, (Quinn 1978) —
  - Dispute centered on whether operating electrical switches to cut-in/cut-out ATC systems in commuter rail cars could properly be assigned to trainmen.
  - Organization pointed primarily to purported practice involving other equipment on different portion of the railroad, contending work was outside scope of trainmen duties.
  - Carrier countered that the work merely involved the simple function of flipping a switch located in the center of a commuter car, which could be performed incidental to the movement of the employee's own train in "an infinitesimal amount of time".
  - Citing 9 First Division awards dating back to 1939, the Board found that the work was not outside the scope of the trainmen's craft work, was incidental to the movement of their train and an integral part of their assigned duties, and was *de minimis* work.

Limitations of *De Minimis* Rule

- First Division Award 20474 (Anrod 1964) —
  - Penalty claim for having to walk 1,500’ due to typo in job abolishment notice.
  - “The law of labor relations is firmly settled that a labor agreement, as an instrument of industrial and social peace, should be interpreted and applied broadly and liberally, not narrowly and technically, so as to accomplish its evident aim and purpose.”
  - “It follows that trivial deviations or those lacking in substance will generally be disregarded under the universally recognized *de minimis* rule in the interest of flexibility and workability. … Whether a specific violation of a labor agreement is so trivial as to be disregarded under the *de minimis* rule or whether it is substantial can be determined only on the basis of the facts underlying each case.”
- PLB 5916, Award 43 (Peterson 2001) —
  - The *de minimis* rule has “little or no application” “when it becomes apparent from the number of claims filed that … employees are allegedly being instructed to perform … work in violation of the agreement on a rather continual and extensive period of time.”

IWR in Connection with Own Assignment

- First Division Award 28454 (Darby 2016) —
  - Claim for testing ATC device on lead locomotive after delivering train to interchange point and reporting results thereof.
  - Analysis focused on
    - PLB 4081, Awd. 23 (Fredenberger 1992) (gathering work reports from engine consist after placing engines on tie-up track was work in connection with own assignment,
    - First Division Award (Benn 2006) (requiring inbound Engineers to turn engines is incidental work "in connection with [the engineer's] own assignment"), and
    - First Division Award 24856 (Malin 1997) (upon arrival at final terminal, Claimants required to perform various duties not in connection with their own assignment *(i.e.*, remove locomotive consist, then proceed to another location, then add or subtract locomotives from consist, then return to train, then attach consist for outbound train, then perform air test, then take another train on their assigned road trips.
  - Referee held that the *de minimis* task of performing a simple ATC inspection at end of duty tour more in line with arbitral precedent concluding that such work is "in connection with [the engineer's] own assignment."

Questions?

(LET’S HEAR IT FOR THE PANELISTS!)