

THE NATIONAL RAILROAD ADJUSTMENT BOARD: A UNIQUE ADMINISTRATIVE AGENCY

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THE National Railroad Adjustment Board, created in 1934 by amendment to the Railway Labor Act¹ of 1926, is, so far as I know, the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts. The contracts with which the Board deals are between carriers and labor organizations, governing rates of pay and working conditions. The Board has no other functions; it is exclusively a quasi-judicial body. Its importance may be realized from the fact that between December 3, 1934, when the first hearings began, and June 30, 1936, the Board received a total of 4,023 cases, held formal hearings in 2,122, and handed down written opinions in 1,616.²

The extent of the Board's work may seem surprising, but it must be kept in mind that there are over 3,000 separate agreements between labor organizations and the 859 carriers covered by the Railway Labor Act,³ and that, with few exceptions, these agreements consist of thousands of words defining in language frequently loose, jobs, duties, seniority rights, hours, normal and overtime wage rates, vacations, discipline procedure, and a multitude of other details which constantly give rise to questions of interpretation, and to claims by employees that particular provisions have not been correctly applied. These claims are for the most part settled by negotiation between union representatives and carrier officials; those which are not generally find their way to the Board. The Board's cases

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1. 48 STAT. 926, 1185, 45 U. S. C. §§ 151, 153 (1934), amending 44 STAT. 577, (1926).

2. FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD INCLUDING THE REPORT OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, FOR THE FISCAL YEAR ENDED JUNE 30, 1935, at 43-58; SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, 1936, at 39-46.

3. FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op cit. supra* note 2, at 33. The term "carrier" includes switching, terminal, express and Pullman Companies. 48 STAT. 926, 45 U. S. C. § 151 (1934).

thus consist of concrete claims like those presented to any court of law; and, like a court, the Board will not act upon moot cases or hypothetical questions.

The Board is necessarily a large one. It consists of 36 members, half selected by the carriers and half by the standard railroad unions.⁴ It is divided into four divisions, each dealing with separate classes of service, and each constituting in effect a separate board.⁵ When a division deadlocks in a particular case, which frequently occurs because of the bi-partisan membership, a neutral referee is appointed "to sit with the division as a member thereof and make an award."⁶ If the division cannot agree upon a suitable person to act as referee, the selection is made⁷ by another federal agency (the National Mediation Board, a three-man, impartial board whose principal functions are to mediate between carriers and unions in disputes which are non-justiciable in nature⁸). Having served as a referee in close to a hundred cases, with the first and third divisions, it occurred to me that an account of this most unusual of Boards might have some significance for students of administrative law, labor law and government. Such an account would not be intelligible without an explanation of how the Board came to be, and without describing briefly the structure of labor relations in the railroad world.

ORIGIN OF THE BOARD

The railroad world is like a state within a state. Its population of some three million, if we include the families of workers,⁹ has its own customs

4. 48 STAT. 1189, First, (a-g), 45 U. S. C. § 153, First, (a-g) (1934), providing in substance the carriers and the "national labor organizations" shall, respectively, prescribe the rules under which their representatives are to be selected. If either fails to make the selections they are to be made by the National Mediation Board (see *infra* note 8). There are elaborate provisions for investigating and arbitrating, in case of dispute, the eligibility of a national labor organization to participate in the selections. Each member is compensated "by the party or parties he is to represent."

5. 48 STAT. 1189, First (h), 45 U. S. C. § 153, First (h) (1934). Division No. 1 has jurisdiction over train and yard service; No. 2, over shop-craft employees; No. 3, over station, tower and telegraph employees, signalmen, clerks, freight handlers, express, station and store employees, maintenance-of-way workers, and sleeping-car conductors, porters, maids, and dining-car employees; No. 4, marine employees and miscellaneous. The first three divisions consist of 10 members each, 5 designated by the carriers and 5 by the unions; the fourth consists of 6 members similarly designated.

6. 48 STAT. 1189, First (1), 45 U. S. C. § 153, First (1) (1934).

7. *Ibid.*

8. Created along with the National Railroad Adjustment Board in 1934, by 48 STAT. 1193, 45 U. S. C. § 154 (1934). It took the place of the old United States Board of Mediation created by the Act of 1926 (see *supra* note 1). Its members are appointed by the President for three-year terms and its headquarters are in Washington.

9. The actual number of employees on the Class 1 railroads is slightly over one million. See, for the recent statistics, UNEMPLOYMENT COMPENSATION FOR TRANSPORTA-

and its own vocabulary,¹⁰ and lives according to rules of its own making. It is struggling to sustain a public debt of some twelve billion dollars, to satisfy the holders of some ten billions of stock,¹¹ and to meet the competition of rival principalities who carry by water, air, pipeline and highway.¹² This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established. The development of that law, culminating with the creation of the National Railroad Adjustment Board, may be divided roughly into three stages.

The first stage was one of rudimentary governmental intervention, beginning with the establishment of the Interstate Commerce Commission in 1887¹³ and stretching down to the World War. During those thirty years there was a gradual development of arbitration machinery and of governmental mediation.¹⁴ Union organization had not advanced very far except in the train and engine service and among the telegraphers. The unions of these crafts were in the main recognized by the carriers, and written agreements were entered into with them on most of the roads. But by contrast, even as late as 1916 less than 30% of the re-

TION EMPLOYEES, REPORT BY THE SECTION OF LABOR RELATIONS, FEDERAL CO-ORDINATOR OF TRANSPORTATION (March, 1936), transmitted by the Interstate Commerce Commission [as required by the Emergency Railroad Transportation Act of 1933, 48 STAT. 216, 49 U. S. C. §263 (1934)] to the President, the President of the Senate and the Speaker of the House. "Railroad employees of the nation, with their families and dependents, constitute a population equal to that of the larger states of the union . . . There is no hard and fast line of demarcation between railroad labor and management. Thousands of railroad men over the country, by reason of their positions, are labor one minute and management the next. All management has come from the ranks of labor of one sort or another. All leaders of railroad labor have come from the ranks of labor." M. W. Clement (President of the Pennsylvania R. R.), *Management's Four-Fold Task* (1936) 101 RAILWAY AGE 517.

10. The following bulletin was issued by a superintendent of the Southern Pacific Ry. in San Jose, Cal., on Dec. 20, 1928: "All Yardmasters: Effective date, all yardmen in cannon-ball service bringing drags in yard from outside points will bleed and cut own cars."

11. 49TH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION (1935), 4, 89.

12. See REPORT OF THE FEDERAL CO-ORDINATOR OF TRANSPORTATION (1934), H. R. Doc. No. 89 74th Cong., 1st Sess., p. 3. In addition, the railroads have had to face a great reduction in one of their chief sources of traffic—coal—due to the growing use of fuel oil, natural gas and water-generated electric power. *Id.* at 3. See also MOULTON AND ASSOCIATES, THE AMERICAN TRANSPORTATION PROBLEM (1933) Parts V, VI, VII.

13. 24 STAT. 379 (1887).

14. For the general history of this legislation see FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 6, 59-61; BERNHEIM AND VAN DOREN, LABOR AND THE GOVERNMENT (1935) 172-176; WOLF, THE RAILROAD LABOR BOARD (1927) 6-10; 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 11-70; NATIONAL LABOR RELATIONS BOARD, DIVISION OF ECONOMIC RESEARCH, GOVERNMENTAL PROTECTION OF LABOR'S RIGHT TO ORGANIZE (1936) 47-49.

maining employees in railroad service belonged to unions and these unions were generally not recognized and had very few agreements with the employers.¹⁵

The second period, that of governmental control during the war, brought about momentous changes whose influences are still felt. The government gave full recognition to the unions, as a result of which the memberships of those which had been weakest multiplied rapidly. By 1920 about 90% of the train and engine service employees were organized and about three-quarters of those in the other classes.¹⁶

The war period, however, resulted in more than membership gains for the unions. The Director General entered into national agreements with most of the unions and established the eight-hour day as the standard for all crafts, with punitive overtime; abolished piece-work in the shops; defined and classified jobs and duties; standardized working conditions and rates of pay (which were substantially increased); extended the seniority principle to all crafts; provided for hearings and review in discipline cases; and in general revised working conditions to the satisfaction of the employees.¹⁷ Furthermore, three bipartisan boards of adjustment were set up¹⁸ to pass upon the application and interpretation of the rules set up by the Director General. These boards, each of which was national in scope and dealt with a particular class of employees, were singularly successful. They disposed of 3,289 cases with virtually no deadlocks.¹⁹ Thus for the first time in history, railroad employees were thoroughly organized under an employer who gave them sympathetic recognition and nation-wide rules built around the cherished principles of seniority, reasonable hours, security against arbitrary dis-

15. See WOLMAN, *THE GROWTH OF AMERICAN TRADE UNIONS* (1924) 49, 54; WOLF, *op. cit. supra* note 14, at 5, 58, 59.

16. *Ibid.*

17. The Director General's original order (General Order No. 27) dealing with wages, hours and working conditions, was in 8 articles; it was issued May 25, 1918, and was supplemented from time to time by numerous additional articles, and by interpretations of articles. The bulk of this material was published by the Government in U. S. RAILROAD ADMINISTRATION, *DIRECTOR GENERAL OF RAILROAD'S GENERAL ORDER NO. 27 WITH SUPPLEMENTS, ADDENDA, AMENDMENTS AND INTERPRETATIONS TO JUNE 30, 1919* (1919). Thereafter each interpretation, addendum, amendment and supplement was separately printed. See, for accounts of this period, ANNUAL REPORT OF W. D. HINES, *DIRECTOR GENERAL OF RAILROADS, 1919, DIVISION OF LABOR*; WOLF, *op. cit. supra* note 14, at 14-64; 1 SHEARFMAN, *op. cit. supra* note 14, at 153-160; *FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, supra* note 2, at 62, 63; MOULTON, *op. cit. supra*, note 12, at 373-376.

18. By orders 13, 29 and 53 of the Director General.

19. The statistics are collected and analyzed in WOLF, *op. cit. supra* note 14, at 54. In addition to the 3,289 cases disposed of, 464 cases were filed but withdrawn. Of the cases not withdrawn, 1,799 were decided in favor of the carriers, and 1,369 in favor of the employees, while 121 were compromised.

charge, and straight rather than piece-rate payment; and who, in addition, provided a joint machinery for the application and interpretation of these rules. It is no wonder that when the period of post-war re-adjustment began the employees struggled, though in vain, against the return of the roads to private ownership.²⁰

The readjustment was accomplished with great difficulty and not without violence. The times were disturbed. There was a great deal of industrial unrest, serious strikes occurring in 1919 in the steel, coal and other industries.²¹ A rank and file strike of switchman, opposed by the union leadership, occurred in the spring of 1920 and spread to various parts of the country.²² There was much talk of prohibiting strikes by law. It was in this atmosphere, which on the economic side was accompanied by violent price fluctuations, that the railroad managements had to deflate the war-time peak of employment and to seek lower wage levels.²³ In view of all the difficulties, it was inevitable that the shopmen's strike of 1922, the first and only nation-wide strike of railroad employees, should have taken place. It is significant that the other crafts did not join with the shopmen, and that the difficulties which all the crafts had to face were surmounted by peaceful methods.²⁴

Many of the gains achieved by the unions during the war period were lost within a few years. The national agreements with their standardized and employee-favoring rules were abolished, and separate agreements had to be negotiated with each carrier, craft by craft. In this process many of the rules which the carriers regarded as needlessly restrictive and uneconomic were done away with.²⁵ Furthermore, after the shopmen's strike, some roads refused to recognize or deal with the unions outside of the train and engine service brotherhoods, while others, led

20. The railroad unions in 1919 and 1920 strongly backed the "Plumb Plan" for government ownership. See WOLF, *op. cit. supra* note 14, at 59; BERNHEIM AND VAN DOREN, *op. cit. supra* note 14 at 178; PERLMAN AND TAFT, *HISTORY OF LABOR IN THE UNITED STATES, 1896-1932: VOLUME IV, LABOR MOVEMENTS (1935)* 403.

21. PERLMAN AND TAFT, *op. cit. supra* note 20, at 435-488; WOLF, *op. cit. supra* note 14, at 85.

22. WOLF, *op. cit. supra* note 14, 102-106; PERLMAN AND TAFT, *op. cit. supra* note 20, 452-456.

23. Between 1920 and 1922 the number of employees on the Class I railroads were reduced from 2,022,832 to 1,659,513. UNEMPLOYMENT COMPENSATION FOR TRANSPORTATION EMPLOYEES, *op. cit. supra* note 9, at 35. Through the medium of the U. S. Railroad Labor Board (*infra*, note 30) wage reductions were obtained in 1921 and 1922, and some of the roads evaded established rates by "contracting out" shop work. WOLF, *op. cit. supra* note 14, at 214-238.

24. For the history of this strike, see WOLF, *op. cit. supra* note 14, at 239-263; PERLMAN AND TAFT, *op. cit. supra* note 20, at 515-524.

25. For the abrogation of the agreements as of July, 1921, by decision No. 119 of the U. S. Railroad Labor Board, and the aftermath, see WOLF, *op. cit. supra* note 14, at 167-200.

by the Pennsylvania,²⁶ set up so-called system associations or company unions²⁷ and entered into agreements with them.

The war-time adjustment boards were swept away and except for some scattering system boards²⁸ and three regional boards²⁹ set up by agreement between the train and engine brotherhoods and certain carriers, the only agency for interpreting and applying the existing rules and working agreements was the United States Railroad Labor Board, created by the Transportation Act of 1920.³⁰ Unfortunately this board, which consisted of three public representatives, three carrier representatives and three labor representatives,³¹ was not well designed for work of a judicial character. For, Congress had charged the board also with the quasi-legislative functions of making rules and passing upon demands for higher or lower wage rates;³² and the exercise of these functions, although they were advisory only, aroused tremendous animosities, split the membership of the board, and destroyed that atmosphere of calm and impartiality which is requisite for effective judicial work.³³

Moreover, the board was without power under the law to carry out any of its awards or mandates, and while it succeeded during its six years of life in disposing of over thirteen thousand disputes,³⁴ there was much complaint that its decisions were in many cases openly violated.

26. See WOLF, *op. cit. supra* note 14, at 296-326; PERLMAN AND TAFT, *op. cit. supra* note 20, at 517, 518.

27. In 147 out of 214 of the largest roads there were, in 1933, so-called company unions in effect for a portion of the service, nearly all of them established in this post-war period. BROWN AND ASSOCIATES, RAILWAY LABOR SURVEY (Social Science Research Council, Division of Industry and Trade, 1933) 41. On July 1, 1935, there were in effect, on all carriers, 2,222 agreements with national labor organizations and 718 with "system associations". FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 33. But "gradually the representation of the employees on most of the railroads is being taken over by the national labor organizations. The system associations are disappearing and the unorganized employees are voting for representation by the national labor organizations." SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 9.

28. The Pennsylvania Railroad Company in 1921, for example, set up a system board covering the train and engine service. WOLF, *op. cit. supra* note 14, at 273.

29. In September, October and November, 1921, Eastern, Western, and South-eastern Boards of Adjustment were successively created. WOLF, *op. cit. supra* note 14, at 274.

30. 41 STAT. 470 (1920), 45 U. S. C. § 135 (1934).

31. *Ibid.*

32. 41 STAT. 470 (1920), 45 U. S. C. § 139 (1934).

33. See WOLF, *op. cit. supra* note 14, at 360-383, 387-393.

34. 14,145 disputes were referred to the Board between April 16, 1920, the date of its organization, and May 12, 1926, after which no more cases were received. 13,690 of these cases were decided. 7,950 of the disputes were of a more or less general nature involving wage adjustments and revisions of working rules. The statistics are collected in WOLF, *op. cit. supra* note 14, at 330.

The public representatives (and especially the Chairman) were regarded as prejudiced in favor of the carriers and their immediate action on the outbreak of the shopmen's strike in outlawing the strikers and forfeiting their seniority rights was thought to be in strange contrast with the procrastination of the board in dealing with the Pennsylvania Railroad Company's sponsorship of company unions and refusal to deal with outside labor organizations.

While labor became bitterly critical of the board, the railroads on their part grew lukewarm in supporting it. Especially after certain wage increases which the board granted in 1924, the carriers preferred to negotiate wages directly with their employees.³⁵ Notwithstanding the troubled relations of the unions and the railroads, they succeeded in 1926 in agreeing upon a bill³⁶ to take the place of the Transportation Act of 1920 and to set up new machinery of adjustment in place of the United States Railroad Labor Board. And the fact that the bill passed Congress practically in the form agreed upon was of immense significance. It evidenced the rapid growth in union strength since the beginning of the war and the ability of the numerous crafts to act together as a unit in negotiations with the carriers upon a national basis. It evidenced also a growing rapprochement between labor and management and a greater recognition by the latter of the wisdom of acting jointly with the former.

The Act of 1926,³⁷ in abolishing the United States Railroad Labor Board, junked the idea of a national board attempting (though without power) to act as a combined court and legislature, and went back to the simpler principles of mediation and arbitration which had been worked out before the war. The Act of 1926 simply took these principles and the experience back of them, and elaborated the machinery a little. The arbitration law, though still not made compulsory, was greatly improved and a full-time board of mediation was set up.³⁸ This board was to have no quasi-judicial or legislative functions; it was simply to bring together the parties to a dispute and try to get them to settle, failing which they would be encouraged to resort to arbitration. If all else failed, the law provided—and this was a new feature—that an emergency board of investigation should be appointed by the President to investigate and report on the dispute, no changes to occur in the meantime.³⁹

35. See note 33, *supra*, for the story of these attitudes. See also *FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD*, *op. cit. supra* note 2, at 64.

36. For its history, see WOLF, *op. cit. supra* note 14, at 407-416.

37. *Supra* note 1.

38. 44 STAT. 579, 580 (1926).

39. 44 STAT. 586 (1926). This provision, which is retained with slight changes in the existing law—48 STAT. 1197, 45 U. S. C. § 160 (1934)—has been little used. *FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD*, *op. cit. supra* note 2, at 30, 31; *SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD*, *op. cit. supra* note 2, at 20-22.

A period of calm began.⁴⁰ The Act worked perfectly both from the standpoint of most of the railroads and of their employees' except that from the latter's point of view, there were two defects. In the first place the machinery for adjudicating disputes arising under written agreements was still unsatisfactory. In abolishing the United States Railroad Labor Board, the Act of 1926 set up no substitute judicial machinery, but provided simply that national, regional, or local boards should be created by agreement between particular unions and particular carriers or groups of carriers.⁴¹ While pursuant to this method a good many boards were set up—some 300 in all—they were chiefly "system" boards (applying to a single carrier).⁴² In the minds of the union leaders, who favored the creation of national adjustment boards modelled on those of the war period, the system boards had a number of weaknesses.⁴³ Being bi-partisan in structure, with no provision for neutrals, there were frequently deadlocks which could not be resolved.⁴⁴ When cases were decided, the decisions could not always be enforced.⁴⁵ The same officials, both union and carrier, who could not agree in their disputes and brought them to the boards, also sat on the boards as members thereof, thus making agreement more difficult.⁴⁶ Furthermore, the local union officials who sat on the boards were not always as forceful as the national officers or as well acquainted with the history of the rules.⁴⁷ (By "rule" is meant any provision in an agreement between a union and a carrier governing working conditions, rates of pay, etc.). As one commentator has said: "A rule may appear entirely unreasonable to one unacquainted with its history. But one who knows will remember that the rule was traded for something else. One side does not grant concessions to the other, it sells them."⁴⁸ Finally, local boards would give conflicting interpretations to rules which were more or less standard throughout the country, with the result that the employees of one road would get better treatment

40. "Since the enactment of the Railway Labor Act in 1926 there has been an almost unbroken record of peaceful settlement of labor disputes on the railroads." FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 8.

41. 44 STAT. 578 (1926). The bill originally drafted by the unions provided definitely for the creation of four national boards of adjustment modelled on the war-time boards (*supra*, note 18), but in the compromises which led to agreement with the carriers upon the measure finally presented to Congress (*supra*, note 36) the above formula, requiring carrier consent to the setting up of boards, was substituted.

42. FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 37.

43. For the union attitudes see WOLF, *op. cit. supra* note 14, at 268-271.

44. FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 38.

45. *Ibid.*

46. BROWN AND ASSOCIATES, *op. cit. supra* note 27, at 29.

47. *Ibid.*

48. *Ibid.*

under a particular rule than the employees of another road under the same rule.⁴⁹ Thus confusion and dissatisfaction followed. For all these reasons the unions were anxious to return to a system of national adjustment boards such as had been in effect during the war.

The carriers on their part were satisfied with the system boards and opposed any greater centralization of function. Just as the machinery of the war period represented to the employees a model to be re-created as nearly as possible, so it represented to the carriers the worst of all possible arrangements. It meant that local needs, local practices, local understandings about the way the rules should be applied, and so on, would be brushed aside in favor of national pronouncements which would standardize interpretations at the expense of flexibility and local custom.⁵⁰ Undoubtedly a deeper reason for the carriers' opposition to national adjustment boards was that the creation of such boards would necessarily involve the recognition of many unions with which the carriers were not then dealing on their roads, and would also stimulate the growth of union membership since the relief afforded by national boards could not very well be obtained by employees who did not have union representatives to act for them.⁵¹ The nature of the adjustment board set-up was therefore a continuing matter of controversy.

The employees found the Act of 1926 deficient in one other respect. Many of the carriers were still openly or covertly discouraging their employees, apart from those in the train and engine service, from joining the standard unions, and were instead sponsoring system associations or company unions, participating more or less in the formation and operation of these associations and sometimes giving them financial assistance and other aid.⁵² The employees desired that these tactics be outlawed as well as a method by which the choice of the employees could be definitely established when the carriers challenged the representative capacity of the unions.

Both of these union objectives were realized in the 1934 amendments to the Railway Labor Act. These amendments made more definite the obligation of the carriers to refrain from interfering with or influencing their employees' choice of representatives, by specifying that such representatives included labor unions⁵³ and also by making it unlawful for carriers to use their funds in assisting company unions or to induce

49. WOLF, *op. cit. supra* note 14, at 270.

50. *Id.* at 268.

51. See note 46 *supra*.

52. See STATEMENT OF FEDERAL CO-ORDINATOR OF TRANSPORTATION, Dec. 8, 1933, at 5-7, summarizing the responses to questionnaires sent by him in Sept., 1933, to all railroads not dealing with the standard unions. See also BERNHEIM AND VAN DOREN, *op. cit. supra* note 14, at 187-189.

53. 48 STAT. 1185, 45 U. S. C. § 151 (1934).

employees to join or remain members of such unions.⁵⁴ Criminal penalties were attached to the violation of these provisions.⁵⁵

Moreover, the amendments created a new mediation board (the present National Mediation Board) in place of the old one and not only gave it the traditional functions of mediation but empowered it to conduct elections or to use other appropriate methods for ascertaining the choice of representatives by employees in cases where such choice was disputed.⁵⁶ The provisions of the Act of 1926, that the representatives selected by the majority of any craft or class should speak for all, were continued.⁵⁷

Lastly, the amendments set up the National Railroad Adjustment Board, with the judicial duties which have already been referred to. The mistake was not made, as in the case of the old United States Railroad Labor Board, of mixing with the judicial duties, the duty of passing upon disputes regarding wages and desired changes in agreements. Disputes of this latter sort come under the jurisdiction of the National Mediation Board, which endeavors to compose them and, failing that, to induce the parties to submit to arbitration.⁵⁸ If arbitration fails, the President may appoint an emergency board⁵⁹ to investigate and report as provided in the 1926 Act.

PROCEDURE

The National Railroad Adjustment Board is located in Chicago,⁶⁰ that being the most important railroad center in the country, and for carrier and union officials alike, the most convenient location. All cases presented to the Board originate in the field, generally in the form of a claim by an employee, or by several employees, for money. To take a concrete case:⁶¹ some employees are working in a signal repair shop of a carrier. They are being paid at rates lower than those prescribed in an agreement between the Brotherhood of Railroad Signalmen of America and the carrier; they want to be paid at the prescribed rates and also to collect the difference between what they have been paid and what they should have been paid.

54. 48 STAT. 1186, Fourth, 45 U. S. C. § 152, Fourth (1934).

55. *Id.* Tenth.

56. *Id.* Ninth. Generally in such cases a secret ballot is taken. Most of these elections have presented a choice between a standard union and a system association or "company union" and in the great majority of cases the former has been chosen by the men. For the statistics, see FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 15-19 and SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 7-10.

57. 48 STAT. 1186, Ninth, 45 U. S. C. § 152, Ninth (1934).

58. 48 STAT. 1195, Third, 45 U. S. C. § 155, Third (1934).

59. *Supra* note 39.

60. 48 STAT. 1189, First (r), 45 U. S. C. § 153, First (r) (1934).

61. Nat. R. R. Adj. Board, Third Div., Award 247, Docket SG-246 (1936).

The question at issue is whether the type of work they are doing is the type covered by the agreement between their Brotherhood and the carrier. This agreement governs the wage rates and working conditions of all men engaged in "the installation, maintenance, repairs and construction of signal apparatus and all other work recognized as signal work." The carrier asserts that the shop in question is in reality an experimental laboratory in which none of the work, or at best only an incidental portion of it, falls within the scope of the agreement. But the employees contend that the so-called "laboratory" work is only incidental, and even then is work generally performed on other carriers by signalmen classified and paid as signalmen in accordance with similar agreements between those carriers and the Brotherhood; and that in any event the bulk of the work is ordinary signalmen's work. Thus the claim turns upon questions of construction and fact.

The claim will normally be taken up by the local chairman of the union with the appropriate local railroad official. If disallowed, it will be considered by others in the respective hierarchies, the final discussion being between the general chairman of the union (the highest craft official of the union on the particular road) and the carrier's chief operating officer.⁶² If these two men, who between them settle or otherwise peacefully dispose of a multitude of claims each year, cannot reach an agreement, the general chairman may, and normally does, decide to take the case to the Board.

If the facts are not in dispute, the parties may make a joint submission to the Board.⁶³ In the case put, the parties disagree as to the quantity and nature of the particular operations being performed in the shop, and also as to the kind of work being carried on in similar shops on other roads. A joint submission, therefore, is not feasible (and this, unfortunately, is the situation in the majority of cases that reach the Board). The procedure⁶⁴ then is as follows:

The union serves written notice upon the appropriate Division of the Board (in this case the Third Division, which has jurisdiction of signalmen) of its intention to file an *ex parte* submission within 30 days. The notice must state the question involved and give a "brief description" of the dispute (the description is ordinarily exceedingly brief). The executive secretary of the Division thereupon sends the carrier a copy of the notice and requests that the carrier's submission be filed within the same

62. The Act provides that disputes, before they can be considered by the Board, must be "handled in the usual manner up to and including the chief operating officer of the carrier." 48 STAT. 1189, First (i), 45 U. S. C. § 153, First (i) (1934).

63. 48 STAT. 1189, First (i), 45 U. S. C. § 153, First (i) (1934); NATIONAL RAILROAD ADJUSTMENT BOARD, ORGANIZATION AND CERTAIN RULES OF PROCEDURE, Circular No. 1 issued Oct. 10, 1934, "Form of Submission."

64. *Ibid.*

period of time. Within the 30 days, then, both parties will have filed "submissions."

That of the union corresponds to a combined complaint and a brief. It recites in narrative form the facts relied on by the union and the reasons—ethical, logical or technical—why the claim should be sustained. More often than not it contains descriptions of similar claims which have been presented to and allowed by the carrier in the past, and references to prior decisions of some other tribunal such as the United States Railroad Labor Board, or one of the post-war system or regional boards, or one of the national war-time adjustment boards. There may be numerous exhibits setting forth not only these precedents, but copies of letters, and even copies of affidavits or of signed statements (but not the originals). The submission is prepared and signed by the general chairman of the union; it is not verified and it is highly informal in style.

The carrier's submission is quite similar, consisting of a medley of factual allegations, arguments, and appeals to precedents. It is likewise signed but not verified and is written by a lay official and not a lawyer. Unlike an answer in an ordinary law suit, the carrier has had to frame and file its submission without having seen the union's submission. The carrier, of course, knows what the union is asking for, because the copy of the union's notice to the Division (which is all the carrier has received) sets it forth, and the carrier also knows what the shooting is about because its chief operating officer is familiar with the dispute. But the carrier does not always know the precise arguments the union will advance in its submission, or the past settlements and precedents which it will cite. So the carrier puts in all the arguments which occur to it at the moment, and cites settlements and precedents favorable to its view. Of course the carrier tries to anticipate what the union will say, but not always with complete success.

Thus the two documents often do not jibe. You do not have the union asserting something and the carrier either admitting or denying it, which would be of real assistance to the Division (and particularly to a referee, if one is later called in) in getting at the issues. Generally, the issues are not fully joined until the oral hearing before the Division, which is set as promptly as possible. The officials on both sides who come to the hearing (the unions are never, and the carriers almost never, represented by counsel at those hearings) generally bring with them rebuttal statements replying each to the other's submission. Frequently these rebuttals contain new statements of fact. But the evidentiary status of the rebuttal statements is a little obscure. The rules of the Board⁶⁵ provide that the parties are "charged with the duty and responsibility of including in their original written submission all known relevant, argu-

65. *Supra*, note 64.

mentative facts and documentary evidence." There is no formal provision in the rules for rebuttal statements; they are filed (if any are prepared) at the time of the hearing, and are regarded merely as summarizing the oral arguments. In some cases only one party files such a statement; in others neither does so. In arguments before me as referee with the First Division I was occasionally urged to disregard facts alleged in a rebuttal statement, on the theory that the record on which the case was to be decided consisted only of the original submissions. I do not recall any such argument by members of the Third Division. (I did not sit with the Second and Fourth Divisions, and since these Divisions are relatively inactive⁶⁶ their procedure will not be discussed in this article.)

In practice I gave as much weight to the rebuttal statements as to the original submissions, and I feel sure that the other referees did likewise. It must be kept in mind that a referee is not called in until after a case has been argued before a Division and has been deadlocked. Subsequently, when the referee sits, the case is reargued for his benefit by the members of the Division, pro and con (one of the labor members and one of the carrier members being primarily charged with the presentation of the case, the others joining in as they see fit). Save in exceptional cases the referee does not hear argument from the parties themselves. He therefore welcomes the rebuttal statements as evidence of what the parties actually said about each other's submissions. Occasionally, in the Division's oral re-hash of the case before the referee, he is told of some fact that one party or the other had alleged at the hearing which is not contained either in the original submissions or in the rebuttal statements. Where the fact seemed important, and both the labor and carrier members agreed that it had been alleged, I have given it some weight, especially where its truth was not disputed. There is no stenographic record of the hearing, no testimony at any point in the proceedings, and no attempt whatever to apply legal rules of evidence.

Fortunately, fewer cases than one would suppose turn upon contested issues of fact, for even in the majority of cases which consist of *ex parte* and not joint submissions, the really relevant facts are generally not in dispute, and the question is purely one of construction. But this is not universally true, and where the record discloses a substantial disagreement on the facts, the referee's task is not an easy one.

The entire Division, with rare exceptions, attends every hearing. Occasionally an oral hearing is not requested by either party, in which event

66. From December 3, 1934, when the first hearings began, to June 30, 1936, the Second Division decided only 63 cases, of which only 11 required a referee, and the Fourth Division only 6, with no deadlocks. FIRST AND SECOND ANNUAL REPORTS OF THE NATIONAL MEDIATION BOARD, *loc. cit. supra* note 2.

the Division decides the case on the basis of the original submission. But in most instances a hearing is held, and it may consume anywhere from an hour or two to a day. The First and Third Divisions are almost constantly engaged either in hearings or in presenting cases to referees. The cases are arranged, heard and decided in batches coming up from a particular carrier and a particular union; those which involve the same point and the same rule of an agreement are grouped together so that the decision of one will control the decision of the others.

After hearings have been concluded, the Division proceeds as expeditiously as possible to decide the cases. Each Division being bi-partisan, and the members of each group tending almost always to vote the same way, the unanimous vote of a Division is generally necessary to decide a case. In the decision of cases each Division acts in effect as a separate board; the precedents established by one are not controlling on another. The Board as such is a unit only in fiscal matters and in adopting formal rules of procedure.

When a case is deadlocked it is set aside, and when a sufficient number have accumulated—anywhere from twenty to fifty or more—a referee is called in to decide them. The Act provides that the Division shall select the referee, but that if it is unable to do so, the National Mediation Board shall make the appointment.⁶⁷ In only one instance,⁶⁸ at least up to the close of the last fiscal year, has a Division been able to agree upon a referee.

When a referee is called in to sit with a Division he is given the dockets of the deadlocked cases, consisting of the submissions, the rebuttal statements (if any) and the formal correspondence with the Division. He studies a group of dockets and then sits with the entire Division, generally in a day-long session. The procedure in each case is the same. A labor member of the Division argues the salient points as he sees them. A carrier member replies. In the Third Division each of these two gives the referee a typewritten brief of his argument. In the First Division, which is greatly pressed for time, this practice is not followed. The referee then asks all the questions which occur to him, different members joining in the discussion; and the session lasts as long as the referee feels it necessary. If, later on, when he is preparing his decision, he wishes further argument on a particular point, he may re-open the matter at a subsequent session or (generally) discuss the case informally with the two members primarily in charge of it. Thus the referee, when he is sitting with the Division, is really in the position of a judge with five able advocates on one side and five on the other. The labor members are all vice-presidents of national or inter-

67. 48 STAT. 1189, First (1), 45 U. S. C. § 153, First (1) (1934).

68. FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 39.

national unions, men up from the railroad ranks with long practical experience; the carrier members, for the most part, are men who have had to do with employees' claims back on the roads.

Occasionally a carrier asks the privilege of arguing its case orally before a referee. Permission to do this has been granted by the Third Division in several cases, in one of which I was acting as referee. Necessarily the union, in such a case, will wish to argue also, and delays are inevitable in fixing a time when the representatives of both sides can be present. Experience has also shown that the arguments before the referee will be longer, and by no means more illuminating, when the parties themselves appear than when the Division members alone present the cases to the referee. In the latter event he can, by questioning, get more rapidly to the point; when the parties appear in person (the carrier generally having counsel to supplement the officials) and have come long distances to make their formal arguments, courtesy prevents the referee from shutting off irrelevancies. The labor members of the First Division, whose dockets are over-crowded, have, however, consistently refused the request of carriers to be heard in this fashion before referees, and I understand that in only one instance did a referee, troubled by due process considerations, consent on his own responsibility to hear the arguments. In that instance the members did not attend. I do not think that this refusal to hear the carrier denies due process, for the carrier members of the Division are in substance the paid agents-at-large for all the railroads; and having heard the parties and being soaked in the record, they will impress the referee with the carrier's position quite as forcefully as any officials or lawyers could do.

OPINIONS AND AWARDS

When the referee has heard all the argument he can absorb, he retires, and attempts to reach his conclusions. Generally this necessitates going through the entire record of each case from beginning to end, and reading and comparing the various precedents which have been cited in the submissions and by individual members of the Division. In one case on which I sat some forty prior awards of the Third Division were cited by the two sides, and to understand the full meaning of some of these awards, I had to go back to the dockets and study the original submissions and other papers in the files. Often the arguments before me consisted almost entirely of debates about the meaning and applicability of particular precedents.

The several classes of precedents, and their approximate order of importance are: 1. A previous award by the same Division before which the case is pending; 2. In the case of a rule originally promulgated by the Director General during the war, his own published interpretation

of that rule;⁶⁹ 3. A previous award by another Division of the Board; 4. A previous award in some similar controversy between the parties, handed down by some one of the system or regional boards which were set up in the '20's;⁷⁰ 5. Decisions of the United States Railroad Labor Board.⁷¹ (In the First Division the labor members refuse to attach any importance to these decisions, whether they are favorable or not, on the ground that the Board was a biased body; and unions and carriers alike cite the decisions much more infrequently than in the Third Division where, as will be explained, fewer precedents of other sorts are available); 6. Decisions of system or regional boards in controversies not between the parties but involving the same, or almost the same, rule as the one in controversy. This order of importance is not a fixed one and has not consciously been adopted by the Board, but I think it expresses fairly accurately the prevailing instincts of the members.

A final type of precedent should be mentioned, though it cannot be assigned any order of importance with even approximate accuracy. That is local custom—the way the particular rule in dispute has been interpreted in practice on the carrier. If this practice has been sufficiently evidenced (as by exchange of letters) and has been sufficiently defined and repeated to constitute in effect an agreed-upon interpretation, it ought to be controlling. But such instances are relatively rare. More typical are cases where a rule has been applied a certain way in handling some particular claim, or in handling several claims at intervals, but there is no evidence that the parties intended to agree upon a binding interpretation for the future. Frequently the carrier, in conceding a claim, or the union, in abandoning one, will state that the action is taken "without prejudice" to future claims of a similar nature. Sometimes this formula is so regularly used as to mean nothing; in other cases it has a real significance as indicating that the particular concession was made to help the settlement of other pending matters, or to get rid of a claim that had become a nuisance, or for some similar reason having nothing to do with the merits. In still other cases practices may occur which are inconsistent with the apparent meaning of a rule, but there is no other evidence of the interpretation placed on it, and the practices in question may be sporadic and casual, or constant and well-recognized.

These variations in the kinds of local practice make difficult problems for the Board, and especially for referees who, lacking practical rail-

69. These interpretations, published as described in note 17, *supra*, resulted from questions by carriers or unions as to the meaning of this or that rule, and the answers of the Director General. The interpretations have a certain titular quaintness: one is referred, for example, to "Interpretation No. 4 to Addendum No. 2 to Supplement No. 4 to General Order 27: Question and Decision by the Director General."

70. *Supra* notes 28, 29, 42.

71. *Supra* note 30.

road experience, cannot easily evaluate their importance. In general the carriers have been more insistent on the Board's observing local practices than have the unions, for two reasons. In the first place, the practices have more often been contrary to, than consistent with, the interpretations now sought by the unions from the Board—partly because the unions naturally wish to expand the rules in favorable directions, even in the teeth of contrary practices, and partly because, prior to the establishment of the Board, carriers here and there persisted, over the protest of the unions, in disregarding the fairly evident meaning of particular rules and now wish to cite these practices as evidence of what was understood. In the second place, the unions desire a uniform national interpretation of those rules which are more or less standard on all carriers, so that the employees of one carrier may not fare worse than those of another under the same, or nearly the same, rule. To get this uniformity it is necessary to disregard varying local practices.

The referees have pretty much, I think, accepted the desirability of a uniform interpretation of standard rules, and have disregarded local practices except where they amounted to an agreed-upon interpretation, or where they shed some light on a rule never previously construed. Such has been my own approach. In non-deadlocked cases, the Divisions, anxious to arrive at a conclusion, have been more apt to rely on local practices as the basis of their decisions than have the referees.

In these various ways the Divisions are busy building up their own common law, and it is curious to note how seriously their lay members treat the precedents and with what skill they are able to urge that this case should be distinguished or that analogy applied. It is interesting also to note that the "equities," save in the relatively rare "grievance" cases, of discipline or refusal to promote,⁷² are not, in theory at least, considered. All the members agree that the question in every case (save the ones just mentioned) is what the contract means, and this question must be answered as a cold-blooded matter of construction, however inequitable the outcome. That a referee, or a Division without a referee, should reach a manifestly unfair result in a particular case by strict application of the rules and precedents is considered far better than to do equity by glossing over or reading exceptions into the rules or by disregarding clear precedents.

I have received the distinct impression that laymen in a judicial position are quite as eager as lawyers in pursuing, and quite as contentious in dissecting, the available precedents; and that precedents are thus magnified not because of any notion of the social desirability of certainty

72. The Act provides that the Board shall have jurisdiction of disputes "growing out of grievances or out of the interpretation or application of agreements." 48 STAT. 1189, First (i), 45 U. S. C. § 153, First (i) (1934).

but because they are a godsend to men harrassed by the necessity of making up their minds in close cases and of justifying their decisions when made. I have concluded also that lay judges are fully as hard-boiled as ordinary judges in cleaving to the result, however harsh, which precedent or the letter of the contract dictates, and are equally loath to commit themselves upon moot or hypothetical questions.

There is a sharp difference between the First and Third Divisions in the forms of their decisions. The substance of each decision (after the claim has been stated in a sentence or two) consists of findings and an award. The following findings and award⁷³ show the practice adopted by the First Division.

"FINDINGS.—The First Division of the Adjustment Board, upon the whole record, and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The evidence indicates that the movements made did not constitute switching under Article I-R.

AWARD

"Claim denied."

It will be noted that, except for the purely jurisdictional recitals, the findings consist of a single sentence ("The evidence indicates that the movements made did not constitute switching under Article I-R") which constitutes the nub of the whole decision. Rarely does this central finding consist of more than a sentence or two. To a lay reader the sentence quoted above is meaningless. In order that it may be more intelligible the findings in their printed form are preceded by the employees' statement of facts taken from their submission, and a statement of their position (likewise extracted from the submission), followed by the management's statement of facts and a statement of its position derived similarly from its submission. From these rival statements it is easy to determine what the controversy is about, but it is not easy to determine from the laconic findings the real basis upon which the decision was reached.

In the Third Division, by contrast, the rival statements of employees and management are entirely omitted and the findings themselves, after the jurisdictional recitals, set forth concisely but intelligibly the facts

73. Nat. R. R. Adj. Board, First Div., Award 156, Docket 274 (1935).

of what occurred and the method of reasoning by which the Division has arrived at its award.

These striking differences are due to several factors. The First Division is overburdened with cases⁷⁴ and under great time pressure, and the form of its decisions is the least time-consuming which can be devised. So little is really said in the controlling sentence or two that internal debates over phraseology are reduced to a minimum. But the Third Division is abreast of its work⁷⁵ and can afford the time to prepare findings which actually tell the story of what happened and of what was in the Division's mind. Another explanation of the difference is that most of the unions whose cases go to the First Division, such as the four train and engine service brotherhoods, have had a much longer record of collective dealing with the carriers than the unions represented in the Third Division,⁷⁶ and precedents are much more numerous; the laconic style of the findings reflects the confidence of the Division in what it is doing. The Third Division is engaged to a far greater extent in making its own precedents and therefore its instinct is to explain itself more fully. Finally, the brotherhoods represented in the First Division, unlike (with some exceptions) those in the Third, were represented on the post-war regional and system boards, and these boards, some of whose labor members now sit on the First Division, adopted exactly the same form of award, consisting of the rival contentions and a crisp sentence or two of conclusion, as that which quite naturally was taken over by the First Division.

The forms of the decisions in each Division are substantially the same in cases decided by referees as in those not deadlocked. In the First Division, for example, all that the referee does after he has finally made up his mind is to inform the Division whether he has decided to deny or sustain the claim, at the same time suggesting a sentence or two for the crucial part of the findings (the rest of the findings being a matter of routine form as described above—so routine and automatic that the referee has nothing to do with its preparation). If he permits his impulse for self-expression to carry him beyond a sentence or two he will, with rare exceptions, precipitate a controversy between the losing mem-

74. Up to June 30, 1936, 2,884 cases had been docketed (of which 167 were later withdrawn) and 1,398 had been heard. SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 41. The feat of hearing 1,398 cases in about 19 months—an average of about 73 a month—is remarkable. Some of the cases, however, turn upon the same question and are between the same parties so that the hearing of one suffices for all.

75. In the fiscal year 1936, 200 cases were docketed, and there were 179 hearings and 214 awards (covering some cases heard in the previous fiscal year). SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2 at 44.

76. See note 5, *supra*, for the jurisdiction of the several Divisions.

bers, who wish to confine the findings to the narrowest compass, and the winning members, who welcome any expansive implications in the proposed language. Sometimes, of course, the language does not suit the winning side because it is felt to be unduly restricted or to base the decision on the wrong ground. But generally the pressure is to confine, rather than enlarge, the scope of the findings. Since the referee is only one member of the Division, so that one side or the other must vote with him to make a binding award, he cannot insist upon his own predilections in the matter of form at the expense of alienating both sides.

In the Third Division, as in the First, the referees compose their findings in the form adopted by the Division for non-deadlocked cases. This means that in the Third Division each referee is required to make specific findings of fact and to write a full explanation of the basis of the award. He is expected to discuss the rival contentions of the parties and the precedents cited to him by both sides; and the findings, except for the jurisdictional recitals, read and look exactly like a judicial opinion. Naturally when the findings are presented to the Division for a vote there is apt to be more extended argument about their form and phraseology than occurs in the First Division.

THE SUBSTANCE OF THE CASES

I cannot possibly, within the confines of this article, attempt to classify and describe the various types of cases which come before the Board. Out of an almost endless variety, however, I shall select for brief comment a few of the frequently recurring types, not for the purpose of attempting a rounded description of the Board's work, but rather to suggest the subtle mixture of human, economic and legal problems which inhere in most of the cases.

Questions of discipline or refusal to promote (constituting "grievances") are reviewable by the Board but fortunately are not frequently presented.⁷⁷ The tendency of the Board in these cases has quite properly been to uphold the management unless it acted arbitrarily or in bad faith. For example, a telegrapher was dismissed by a carrier on the ground that he had negligently quoted an incorrect rate to an inquiring shipper, who proceeded as a consequence to ship by another road. Some months later he was offered reinstatement. His claim for wages lost between the time of his dismissal (which he claimed was unjustified) and his reinstatement was dismissed.⁷⁸ Another telegrapher was denied the right to fill a vacant position which his seniority entitled him to fill,

77. Out of 394 awards by the First Division in the fiscal year 1934-35, only 15 involved grievances. FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 49-51.

78. Nat. R. R. Adj. Board, Third Div., Award 232 (1936).

on the ground that a physical defect rendered his service in that position unsafe. He was offered a less desirable position where he would not have to cross tracks in connection with his duties, and the management's action was upheld by the Board.⁷⁹ In another case a carpenter was denied the position of foreman, which his seniority entitled him to fill, on the ground of inefficiency. It was shown, however, that he had served as a relief foreman upon five different occasions over a period of six years, without complaint by the carrier, and the Board ruled that he should have been given the position and reimbursed for loss of the additional pay which he would have received.⁸⁰

Questions turning upon the meaning of certain types of designated service frequently arise. An agreement, for example, provides additional pay for engine men when engaged in "snow plow service." The definition of "snow plow service" in the agreement is vague, and a case arises in which three engines are used to push a stalled train during a blizzard. Are they engaged in snow-plow service?⁸¹ On all the roads "hostlers" are employed to service and handle engines at particular points (taking them from the main track to the round-house, equipping them with oil and water, etc.); but the exact scope of the duties has never been clearly defined, and therefore the Board receives a great many cases requiring it to determine whether work of this sort or that constitutes hostling.⁸² Similarly, an agreement provides that work-trains in yards shall be manned by certain engine crews. A carrier uses a "clam shell" (a self-propelled steam shovel running on tracks) to do certain work in and about the yard, and the question is whether the work is clam shell work or work-train work, for if it is the latter, then a particular engine crew should have been used, and although not used should be paid.⁸³ Firemen and engine men engaged in "short turn-around service" are compensated in a certain way; what constitutes "short turn-around service" and under what circumstances is the particular rule applicable?⁸⁴ And so forth and so on.

The depression, with its strain upon the finances of the roads, induced them to take severe measures of economy. Many of the fruits of these measures have come and are still coming before the scrutiny of the Board. Employees claim, for example, that positions were abolished in

79. *Id.*, Award 235 (1936).

80. *Id.*, Award 214 (1936).

81. Nat. R. R. Adj. Board, First Div., Award 1480 (1936).

82. See, for example, *id.*, Awards 1454, 1477, 1491, 1450, 1451, 1452, 1453, 1454 (1936).

83. See *id.*, Award 1497 (1936). In this case, in which as in the others cited in notes 78-82 *supra*, 84-88 *infra* (except as otherwise indicated) I served as referee, the carrier members filed a dissenting opinion.

84. See *id.*, Award 1456 (1936).

name though not in fact for the sake of reclassification at lower rates; that alleged guarantees of so many days a week or so many hours a day were violated; that employees in one classification were being required to perform additional duties properly belonging to men of another classification; and so on.

For example, an agreement between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and a certain carrier provided that "callers" in freight stations should be paid a certain rate and "truckers" another. Both callers and truckers had various duties to perform in connection with the unloading, sorting, marking, trucking (by hand) and trans-shipment of freight. The carrier abolished the position of caller; the employees affected exercised their seniority by displacing junior men employed as truckers, and later claimed that they were still in fact performing the duties of callers and should be compensated retroactively at the callers' rate. The Board decided that the position of caller had been abolished only in name, that the men were performing substantially the same duties as before the change and were entitled to compensation as though the change had not occurred.⁸⁵

Another case more difficult to decide involved this question: when the work of a given employee's position has so fallen off that it is occupying only about 60% of his time, does the carrier violate its agreement with his union when it abolishes his position and divides the remainder of his work up among lower paid employees filling distinctly different positions from the one which was abolished? A rule of the agreement provided that "established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules." There was no dispute that if the complaining employee's job had consumed all or substantially all of his time, the carrier could not properly have abolished the position and assigned the duties to men with lower and different classifications. The question was whether the falling off of the work to 60% of the man's time was a change of substance justifying the abolition of the position, or a change of degree not justifying such action. The Board ultimately reached the decision, aided by an analagous prior ruling, that where a given position required the majority of a man's working time its duties could not be assigned to men with lower classifications.⁸⁶

These "depression cases," which are still coming before the Board, have been among the hardest to decide, and certainly the most important in the amounts of money involved and in the principles established. Here, for example, is a clause in an agreement which, according to the em-

85. Nat. R. R. Adj. Board, Third Div. Award 220 (1936).

86. *Id.*, Award 236 (1936).

ployees' view, promises them that all telephone work of a certain sort at particular points will be performed by telegraph operators and not by trainmen. At one of these points the work falls off so drastically as a result of operating changes and reduced traffic as to be negligible in quantity (though of regular daily occurrence). Is the carrier compelled by the particular language of the rule and the precedents established under it to maintain operators to do the work? Or, since they will be idle most of the time, can they not be dispensed with and the trainmen allowed to use the telephone upon the few daily occasions when that is necessary? The Board found against the carrier, construing the clause as a binding undertaking designed to protect a particular class of employees against displacement, and held that in the absence of any exception in the rule to cover cases involving very little work, the rule must be inflexibly applied.⁸⁷

In the train and engine service a sharp line is drawn between train and engine men engaged in yard work and those engaged in road work. It often happens that a yard crew will be sent out beyond the yard to do road service, where for some reason a road crew is not available for the job to be done. Sometimes also road crews upon arriving at their terminal are used to do switching in the yard—work which normally belongs to yardmen. The doctrine has been developed in a series of awards that (subject to certain exceptions which need not here be noted) when a yardman goes outside the yard and performs road service, he becomes, as it were, a roadman for the time being, since he is doing the work which marks a roadman; and therefore he is entitled to receive pay for that work as a roadman and not as a yardman. Since the normal agreement covering yardmen provides that they shall receive eight hours pay for a day's work, no matter how few hours they may actually be used, and since the normal roadmens' agreement contains a similar eight-hour guarantee, the yardman who on a given day is first used for a few hours in the yard and then is used outside the yard for half an hour or so is entitled to claim not only his full day's pay as a yardman, but also a full day's pay as a roadman. He gets two days pay though he worked only one. The converse doctrine obtains where the roadman is used to do a little yard work. He gets paid a day as a roadman and he also get paid a day as a yardman, though both his road work and his yard work combined consumed only one day or less than one day. The doctrine has been further developed that if a yardman's job is abolished and the remaining yard work is performed by a roadman, not only is the roadman entitled to two days pay for one day's work as already described, but the yardman whose job was abolished is entitled to claim

87. *Id.*, Award 244 (1936), with a vigorous dissenting opinion by the carrier members. Decided the same way, on the basis of this case, were Awards 245 and 246 (1936).

pay for each day on which the work which should have been his was given to the roadman.

From the point of view of the carriers, the doctrines just described⁸⁸ are not only bad law but uneconomical and unjustifiably burdensome. From the point of view of the employees, the maintenance of a sharp, clear line between yard and road work is essential to preserve the principle of seniority. The yardmen are in one seniority class and the roadmen in another. This means, for instance, that when a yardman's position becomes vacant by death or resignation, the senior yardman is entitled to bid it in, but no roadman will have any right at all to bid. Similarly when roadmen's jobs are to be filled, only roadmen may bid for them in the order of seniority, and yardmen are excluded. Now this is not a purely arbitrary scheme. On the contrary, train and engine men experienced only in yard work are not always competent to operate engines and trains on the road, where signals and various technical rules may not be familiar to them. Hence it is desirable that yardmen's positions shall be filled by yardmen and roadmen's positions by roadmen. But if you permit roadmen, whenever economy dictates, to do a little yard work, and yardmen to go out and do a little road work, you will be breaking down the distinctions between the two categories and destroying the whole basis of the two seniority systems.

For these reasons (upon which I do not presume to pass judgment) and no doubt also for the purpose of saving jobs, the unions have strenuously resisted the making of any exceptions to the doctrines described above. It will doubtless be difficult for the carriers to obtain, by revisions of the agreements, the desired leeway in shifting and abolishing jobs and positions, unless they are willing to make a retirement allowance or other equitable provision for employees displaced in the process. Technological developments (larger locomotives, longer runs, labor-saving devices)⁸⁹ as well as the effects of the depression, have cut savagely into the ranks of the employees, some 200,000 of whom lost their jobs from 1923 to 1929 and some 700,000 in the next four years, with not much re-employment since then.⁹⁰ It is not surprising that after this wholesale laying off of men the unions should cling to the letter of the rules, however uneconomical the result from the point of view of the employers. In

88. See Nat. R. R. Adj. Board, First Div. Awards 1508, 1509, 1510 (1936)—with dissenting opinions by the carrier members. The doctrine of these cases, in my view at least, was a continuation of that developed in First Div. Awards 429, 448, 449, 450, 451, 452, 466, 857, 1052, 1288, 1289, 1291, 1292, 1322—cases in which I did not sit, but only one of which was decided without a referee.

89. See REPORT OF THE FEDERAL CO-ORDINATOR OF TRANSPORTATION (1934), *op. cit. supra* note 12, at 34, 66, 85; BROWN AND ASSOCIATES, *op. cit. supra* note 27, at 119, 120.

90. In 1923 the average number of employees was 1,879,770; in 1929, 1,686,769; in 1933, 970,893. REPORT OF THE FEDERAL CO-ORDINATOR OF TRANSPORTATION (1934), *op. cit. supra* note 12, at 34.

the light of the recent agreement between the standard unions and the principal carriers, providing allowances for men thereafter displaced by consolidations, it is reasonable to expect that needed revisions of the working rules might be brought about if adequate provision were made for those who are bound, as a result of the revisions, to suffer at least temporarily.⁹¹

JUDICIAL REVIEW

The statute gives no right of appeal to either carriers or unions from an adverse decision of the Board. The Board has no powers of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance. This the union can do in two ways: first, by petitioning the appropriate United States District Court for an order enforcing the Board's award,⁹² pursuant to the procedure laid down by the statute; and secondly, by economic pressure. The first course has not been adopted. Out of 1,616 awards handed down by the four Divisions up to July 30, 1936,⁹³ of which considerably over half must have been in favor of the employees, not one was taken to court for an enforcement order, and the presumption is either that the carriers willingly complied in all these cases, or that, in some of the cases where the carriers did not at first comply, compliance was brought about by threatened strikes.⁹⁴

91. Effective June 18, 1936, an agreement was entered into between the 21 standard railway unions and the principal carriers providing dismissal allowances for employees affected by unifications of terminals, consolidations or mergers. For the text, see N. Y. Times, May 22, 1936, p. 1, col. 1. With this agreement as a precedent, its principle might well be extended to protect employees adversely affected by rule revisions. For data as to existing dismissal compensation plans see REPORT OF THE FEDERAL CO-ORDINATOR OF TRANSPORTATION (1934), *op. cit. supra* note 12, at 131-140.

92. 48 STAT. 1189, First (p), 45 U. S. C. § 153, First (p) (1934).

93. FIRST AND SECOND ANNUAL REPORTS OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 43-57 and 39-46 respectively.

94. FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 29, the Board stated that: "The act provides that if an award is not complied with the party in whose favor it is made may apply to a United States District Court for enforcement, and employees are freed of the costs of such action. In one case, however, a strike of 4,500 employees was threatened because the employees insisted that the carrier was obligated to obey the decision, and if any court action was to be taken the carrier should take the initiative in asking for a court order to set aside the award.

"In view of the threatened strike which would have seriously interrupted transportation service, the Board assumed jurisdiction on its own motion, not of the merits of the decisions of the Adjustment Board, but of the proper process of affirming or setting aside the awards. After 2 weeks of negotiations, an agreement was reached and the case amicably settled." In SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 34, the Board states that: "Some railroad managements have insisted that the awards of the Adjustment Board were not enforceable and therefore

The net result is that, with one exception,⁹⁵ no judicial review of the Board's capacity, procedure or decisions has been had, and none is likely to be had. Under these circumstances it is all the more important that the Board's procedure be placed upon the fairest possible basis; and as to this a few suggestions will presently be made.

EVALUATION OF THE BOARD'S WORK

In providing a medium for the peaceful decision of the multitude of disputes inevitably arising under contracts written by laymen and couched in the relatively loose language which so often results from the compromises of collective bargaining, the Board is performing an invaluable function. The history of the railroad industry seems to demonstrate that the establishment and maintenance of satisfactory relations between labor and management (given the essential prerequisites of trained, seasoned and intelligent labor leaders, patient and dispassionate managers, and a relative equilibrium of bargaining power) depend upon the following factors: (1) the frank recognition of the right of employees to organize and to select representatives of their own choosing to deal with management, whether these representatives be employees, non-employees, or labor unions as entities; (2) the frank acceptance of collective bargaining, which means the making of honest efforts to regularize by agreement wages, hours and working conditions; (3) the reduction of these agreements to writing; (4) the creation of machinery for facilitating the negotiation from time to time of desired changes in the terms of these agreements; and (5) the creation of additional and separate machinery for the quasi-judicial interpretation and enforcement of these agreements.

Over a stretch of fifty odd years these principles, through trial and error, and step by step, have been written into our railway legislation. They are not the final word; they have not solved all the problems; they have not been whole-heartedly accepted by all the carriers; and they

have declined to make them effective, suggesting to the labor organizations that they present the cases to the courts. Employees have taken the position that the court procedure given to them did not take away from them the right to strike in order to compel compliance with the awards of the Adjustment Board. We have heretofore called attention to one case where trustees of a railroad in bankruptcy took this position, with the result that the employees took a strike ballot and when the Mediation Board intervened the case was settled with the aid of the United States District Judge. The same procedure has been followed in several other instances always resulting in an ultimate settlement without a strike."

95. *Griffin v. Chicago Union Station Co.*, 13 F. Supp. 722 (N. D. Ill. 1936), where a switch-tender had been deprived of seniority rights without notice, by an order of the Board entered on the application of the union of which he was a member. The court held he had been deprived of property without due process of law.

may not survive the tensions which have been created by the diminished prosperity of the railroad industry and the mounting power of the unions. But they represent the sum of our wisdom and experience to date, and constitute the highest and most successful development in this country of governmentally guided industrial relations. They may be, and to a limited extent, have been developed in other industries by agreement rather than by legislation. Into their scheme the National Railroad Adjustment Board, though latest in evolution, fits logically and indispensably.

Clearly a national tribunal which can bring about a uniform interpretation of contract clauses prevailing in similar or identical form upon many different railroads, is preferable to a number of separate tribunals whose decisions would be bound to conflict. And clearly also, for the task of interpretation, a quasi-judicial tribunal developing its own common law is preferable to any arbitration body whose tendency is always to compromise and to regard each case as something unique.

The National Railroad Adjustment Board is rendering to the science of industrial relations and the peace of the country an incalculable service. The suggestions made for improving its procedure are not intended to belittle that service, or to call in question either the foundations upon which the Board has been built or its extraordinary usefulness.

SUGGESTED CHANGES

1. *Appointment of full-time referees.* The appointment of a separate referee for each batch of deadlocked cases has some disadvantages. With rarest exceptions, the referee, to be neutral, must be drawn from outside the railroad world. He comes to the Board with no practical experience of railroading. Its vocabulary, its customs are strange to him. He cannot catch the undertones of the cases, or weigh as surely as one bred to the trade the force of the rival contentions addressed to him. He cannot appreciate with any certainty the implications, for future cases, of the decisions he must render. He has no fellow-judges to consult with. Nearly every case comes up to him evenly balanced, strenuously fought, and freighted with importance not only to both sides but to all other carriers and unions for whom the decision will stand as a precedent. And his will be the final say, for he knows that there will be no review. Try as he will he is bound to make mistakes which a more experienced judge would not make. And these mistakes may be costly and wide-reaching in their effects. When he is through with the cases assigned to him, and has begun to gain some insight, he is not likely to be reappointed to the Division in which he sat, for he will probably be unwanted either by the labor members or the carrier members or both; and the National Mediation Board (which has to make the appointments since

the Divisions are not able to agree upon mutually satisfactory persons) quite properly will not appoint unwanted men. A referee of supreme capacity may overcome all these handicaps, but not the average referee, however painstaking and unbiased he may be.

Moreover the use of a series of changing referees is very time-consuming. Each new man must be broken in, must learn the ropes, at the expense of the Division he is assigned to. Each deadlocked case, which has already been argued before the Division and thrashed over by its members, must be re-presented and re-argued by them to him—an enormously wasteful process. The Third Division is now barely abreast of its calendar and the First Division is far behind.⁹⁶ It is hoped that the high percentage of deadlocked cases will abate as major precedents become established; and if this hope materializes the difficulties recounted above will become less serious. But while undoubtedly many of the decisions will settle mooted points and prevent further deadlocks, many will also breed additional deadlocks, for if an award, relating to a single carrier, is at variance with the practice on other carriers, the winning side will seek to establish the award in place of the practice, carrier by carrier, and this attempt will be fought all the way up to and through the particular Division, with the argument, in each case, that the practice must be regarded as controlling and that in any event the facts are distinguishable.

Furthermore, as revisions of agreements are made from time to time (and many of them are sadly in need of intelligent modernization) fresh problems will arise which cannot be decided by precedent; and even without revisions the variety of disputes which differ sufficiently on the facts from any previously decided, and which are daily arising, seem sufficient to negative the hope of a decline in the number of deadlocks.⁹⁷ Witness the infinite proliferation of contested cases under statutes drawn

96. *Supra* notes 74, 75. The First Division has been handicapped by having inherited 1,200 cases which at the time of its creation were pending before certain regional boards (the latter being then abolished). FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2 at 46.

97. A more optimistic view, which I trust may prevail, is taken by the National Mediation Board: "The controversies that have arisen because of the development of the compulsory adjudication of this type of disputes are rapidly bringing about the change in labor relations in the industry which it was hoped the law would accomplish, viz., an increasing tendency to settle controversies on the properties where they arise without any recourse to legal procedure. One very large system has developed a technique . . . As the National Railroad Adjustment Board's decisions establish precedents, it is anticipated that a similar technique will be developed on other railroad systems. We confidently expect that within a very short span of years controversies between men and managements can be settled on the roads with relatively few of them developing differences that will be necessary for the Adjustment Board to decide." SECOND ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD, *op. cit. supra* note 2, at 32, 35.

with far greater care than the agreements with which the Board must deal.

I suggest, as a possible way out, the appointment of three full-time salaried neutrals with staggered terms of office, and the elimination of temporary outside referees save in cases where a Division itself desired, and was able to agree upon, a particular man. One of the three might perform executive and opinion-drafting functions; another might sit regularly with the First Division in all cases, whether deadlocked or not, and another with the Third. (The Second and Fourth Divisions have so few cases that they need not here be considered). Each of these sitting referees would hear all cases coming before his Division. He would take no formal part in those which the Division could decide without his vote. Those which were deadlocked would not have to be re-argued for his benefit, for he would already have heard them; and this would save the Division a great deal of time now wasted. He would also have heard the parties, and this would remove any possible due process objections which may be raised under the present procedure. His two associates would be available for consultation, and all awards in deadlocked cases would be sifted and tested by three minds instead of one. All three referees, however inexperienced at first, would eventually become experts, and as such could dispatch their business with increasing expedition and accuracy.

One objection to this proposal is that if prejudiced men were appointed they could not easily be got rid of. The fear on the part of the unions of a repetition of the United States Railroad Labor Board set-up, with its allegedly biased public representatives, undoubtedly accounts for the origin of the present temporary referee system. Possibly the National Mediation Board, which now appoints the referees and has the confidence of both sides, might be given the power, after hearings, to remove any full-time referee found to be prejudiced. But apart from the danger of prejudice there would be the difficulty of getting competent men to serve full-time. They probably ought to be lawyers, and qualified lawyers are not easy to find for such positions, especially at the salaries which the government would be likely to prescribe. The present *per diem* allowances for referees, and the limited length of the service, are sufficient to attract men of standing.

These objections are weighty, but to my mind not conclusive. I think it would be better, for unions and carriers alike, to try a change along the lines suggested.

An alternative step, which would relieve the congestion of dockets but would not meet the other difficulties of the temporary referee system, would be for the First Division (and the Third if it falls behind) to establish a regional board to act in its place for such limited period as

might be necessary to clean up the dockets. The statute permits any Division to establish a regional board, or regional boards, each a replica of itself, with the same powers as the Division, and with identical provisions relating to referees, procedure, and judicial enforcement of awards.⁹⁸ But the carrier and labor members of a regional board must, under the statute, be designated under rules to be laid down by the respective carrier and labor members of the appointing Division. Hence unanimous consent by a Division would be necessary to establish a regional board, and it seems rather unlikely that such consent would be given, particularly since delays in decisions are of less concern to the carriers than to the unions.

2. *Fixing a time within which claims must be presented.* The statute contains no time-limit for the filing of claims with the Board. If a "dispute" exists, the dispute can be referred to the Board even though it may concern an alleged breach of contract that occurred years ago. At least a few awards have been made ordering the restoration of wages or the making of other payments over a period beginning as far as five or six years back, when the claims arose, and continuing down to date. Since, on the basis of some recent precedent, cases are sometimes decided against carriers in apparent disregard of previous local practices, and since in other cases rules not theretofore construed, but found now to have been violated, may in fact have been violated innocently, it seems unfair in such cases to penalize carriers retroactively.

On the other hand, there have undoubtedly been cases where the carrier, at a time when no tribunal was available for the protection of the contract rights of employees, flouted a clear rule with the deliberate purpose of saving money at the expense of employees. There is no reason why the carrier, in the absence of laches or estoppel, should not now be held accountable for this breach of contract, though it may have first occurred some years ago.

In view of these considerations, the statute might well be amended so as to lay down a fairly short time limit on claims, with authority in the Board to extend this limit in any case where the breach of contract was shown to have been deliberate.

3. *Procedural improvements.* Under the present rules, as I have said, the union and carrier submissions are prepared and filed independently of each other, and do not always jibe. I think that more intelligible records would be produced if the rules were modified so as to provide for service of the union's submission (with numbered paragraphs) upon the carrier; and a reasonable but fixed period within which the carrier must serve its answer on the union, replying to the allegations paragraph by paragraph. This procedure would join the issues more clearly and

98. 48 STAT. 1189, First (w), 45 U. S. C. § 153, First (w) (1934).

exactly than occurs under the present system. The union should have an opportunity, prior to the hearing, to reply in writing to any new matter in the carrier's answer. This procedure would take a little more time but the delay would not be serious.

A more fundamental question concerns the nature of the evidence upon which the Board must act. The submissions, and the rebuttal statements which are filed at the hearings, contain mere allegations of the facts. There is no testimony of record anywhere in the proceedings. And there have been but few cases where the employee-claimants and the minor officials with first-hand knowledge of the facts have appeared in person at the hearings. They are normally represented by their respective agents, who do all the talking.

Fortunately, as I have said, the cases which present nothing but an issue of fact are the exception rather than the rule, and are not nearly as important as the cases which turn upon the construction of a rule. For the cases involving construction become precedents, and may ultimately affect all the carriers and crafts concerned with similar rules, whereas the cases turning solely upon facts affect the immediate parties only and generally are of minor consequence. But whether the cases be important or not, those which must be decided on the facts ought to have records from which a reasonably clear conclusion could be drawn, and the records are not always of that sort. Moreover some at least of the important cases of construction involve questions of fact upon whose determination the construction itself will depend, and in these cases it is obviously desirable that the records be as full and clear as possible on the factual side. For example, cases which turn upon the meaning of a particular kind of service, or the duties of a particular class of employee, require a showing of past practices and careful descriptions of the different types of work or equipment which have to be considered and compared in arriving at a result. Generally what is needed in these cases, at least for referees without any background of railroading, are more details.

The problem of how to get more satisfactory records without overturning the whole procedure is most puzzling. Possibly each case might be referred to two members (one labor and one carrier member) of a particular Division sufficiently in advance of the hearing so that they might go through the submissions, and request from the parties such additional information as seemed to them desirable to clear up any doubts or conflicts. This additional information should be furnished in writing by both parties at the time of the hearing and made a part of the record. If full-time referees were appointed, as has been suggested, the pressure under which the First and Third Divisions are now working would be considerably relieved, so that methods might be

worked out for obtaining still further information in cases where, after the hearings were over, the facts were still in doubt. Finally, if full-time referees were appointed (but probably not otherwise) arrangements might be made for the taking of testimony in cases of exceptional importance and exceptional difficulty.

Beyond that it would not seem practical to go. The taking of testimony in every case would be almost out of the question, seeing that the cases arise and the witnesses are scattered all over the country, from the remotest settlements and desert areas to the largest cities. Those trained in the law may be shocked by the very idea of a quasi-judicial tribunal deciding rights upon a hearsay record without witnesses. They may be equally disturbed by some of the procedure and particularly by the absence of judicial review. Yet it is difficult to conceive of the Board's being able to discharge its functions under any set-up which would fit within these traditional legal concepts.

Yet the Board's functions are essential ones, and the point is that they are not exclusively, and perhaps not even primarily, functions of dispensing justice in the orthodox sense, for in the broadest view the Board is an instrument for making collective agreements work and survive. As such it is an indispensable factor in the frame-work of industrial relations in the railroad industry. Those who are concerned with administrative reform, and who are exploring the possibilities—which certainly should be explored—of creating special administrative courts of first instance and special administrative courts of review, would do well to ponder the very peculiar problems faced by the National Railroad Adjustment Board.