

EMPLOYEE'S EX PARTE SUBMISSION

PUBLIC LAW BOARD #6041

R. J. WALLACE

CASE NO. 56

Parties } Brotherhood of Locomotive Engineers
General Committee Of Adjustment
The BNSF Railway Company
Santa Fe Committee

To The } vs

Dispute } Burlington Northern Santa Fe Railway
Company

STATEMENT OF CLAIM

Claim for Coast Lines Engineer M. C. Griffin for all time lost while being withheld from service for the BNSF Railway Company while being denied the right to exercise Trainmen's seniority due to decertification following the agreed upon thirty (30) day suspension beginning September 13, 1998 ending on February 12, 1999.

Organization File Number640-40-120 (400-446-10)

Carrier File Number7600-0005 DEF

STATEMENT
OF

FACTS:

Engineer R. J. Wallace, hereinafter referred to as the Claimant was originally hired by the former Atchison, Topeka and Santa Fe Railway Company in June of 1979 into the ranks of a brakeman/conductor. Claimant was then selected to enter into locomotive engineers training later being promoted in accordance with all applicable schedule rules.

On the morning of August 15, 1998, Claimant was called as the engineer on Train S-FRSCHI113-13A in interdivisional service between Winslow, Arizona and Belen, New Mexico. Upon departing Winslow at approximately 5:45 a.m. Claimant got by a signal displaying a "STOP" indication at milepost 284.8. Claimant and his conductor were relieved from service and required to submit to a drug and alcohol screen as required by federal regulations.

Following the incident Claimant and his representative requested a meeting with local supervision in an attempt to settle the amount of discipline the Carrier was going to require for this rule violation. Claimant agreed to a Level S, thirty-day suspension that was to begin on August 16, 1998 ending on September 14, 1998. After expiration of the agreed upon thirty (30) day suspension Claimant tried to exercise his trainmen's seniority. He was then notified that he would not be allowed to exercise his seniority as a trainmen or an engineer for a period of at least six (6) months. These facts were confirmed by Claimant's representative when he notified Superintendent of Operations Konecny in a letter that was faxed on September 21, 1998, which also included the e-mail to all concerned, (**BLE Exhibit # 1**). Another confirmation was a notification of certificate revocation

showing that the dates of revocation would begin on August 15, 1998 and ending on August 15, 1999, **(BLE Exhibit # 2)**.

Failure of the Carrier to abide by the agreed upon thirty (30) day suspension required Claimant's local union representative to contact the General Chairman's office by telephone with a request for assistance in allowing the Claimant to exercise his trainmen's seniority. In a letter dated October 12, 1998, **(BLE Exhibit # 3)**, addressed to Mr. John J. Fleps, Vice-President of Labor Relations for the Carrier with a request for his assistance in immediately having the Claimant released to service as a trainmen in accordance with Public Law Board Number 5663, Case No. 38, Award No. 24, **(BLE Exhibit # 4)**.

Following the Carrier's refusal to abide by the agreement reached between the Claimant, his representative, and the local Carrier officer in settling the signal violation, Claimant began to submit time claims, **(BLE Exhibit # 5)**, asking to be made whole during this time period where the Carrier refused to allow the exercise of his trainmen's seniority.

Further correspondence resulted when Claimant's local union representative sent another e-mail dated December 14, 1998, **(BLE Exhibit # 6)**, to Mr. G. J. Konecny, Superintendent of Operations at Winslow, Arizona, who was the Carrier Officer involved with making the offer to the Claimant to settle the discipline case with a thirty (30) day suspension. Claimant's representative explained all the problems the Claimant was experiencing while trying to exercise his trainmen's seniority and requested his assistance.

Claimant received a letter dated December 17, 1998, (**BLE Exhibit # 7**), informing him that he would not be allowed to exercise his seniority as an engineer for a period of one (1) year unless he was willing to participate in some remedial training as outlined by the FRA, which if he successfully completed this training his engineer's certification would be reinstated after the expiration of six (6) months.

Time claims submitted by the Claimant for make whole payments were discussed and denied by the Carrier during informal claims conference. In a letter dated February 8, 2000, (**BLE Exhibit # 8**), addressed to Mr. Milton H. Siegele, Jr., the Organization restated it's position by quoting excerpts from Public Law Board Number 5663, and requested the necessary instructions be given to the Carrier' Timekeeping Department to expedite payment for all time Claimant was not allowed to exercise his trainmen's seniority.

One of Mr. Siegele's staff responded to this Committee's letter of February 8, 2000, with a letter dated January 7, 2000, (**BLE Exhibit # 9**). This Committee is unable to explain the time differential, or the mind reading capabilities of the Carrier's Labor Relations Department, but they denied the Organization's request for payment in its entirety.

This Committee notified the Carrier in a letter dated March 31, 2000, (**BLE Exhibit # 10**), that their decision was unacceptable and requested a conference to discuss the Claimant's case as soon a date could be arranged.

The Carrier finally became aware of the incorrect date they had used in their denial to this Committee and issued a corrected date in a letter dated April 12, 2000, **(BLE Exhibit # 11)**.

Formal discipline conference between the parties was held and failing to arrive at an equitable solution brings this case before this Honorable Board for final adjudication.

A final effort to settle this case prior to submitting for adjudication was conducted on Thursday July 11, 2002. The Carrier expressed a new direction they intended to take supporting their position. This Committee expressed our concern and disbelief at the Carrier's change of position. After verbally expressing our concerns this Committee also notified the Carrier in writing in a letter dated July 12, 2002, **(BLE Exhibit # 12)**. The Carrier responded in a letter dated July 16, 2002, **(BLE Exhibit # 13)**, expressing their surprise that the Organization would argue against our own agreements.

Failing to reach a resolution between the parties has forced the submission of this case to this Honorable Board for final adjudication.

This case has been handled in accordance with all applicable schedule rules and agreements.

POSITION

OF THE

ORGANIZATION:

This case evolved due to the Carrier's unwillingness to abide by not only a verbal agreement, but also after completion of

the thirty (30) day suspension agreed to by the signed waiver, **(BLE Exhibit # 1)**, they still refused to allow the Claimant to exercise his trainmen's seniority.

Claimant and his representative met with local Carrier Officer G. J. Konency, Superintendent of Operations at Winslow, Arizona following the incident in question. Claimant admitted that he had gotten by the signal-displaying stop at milepost 284.8 when departing. After discussion by the parties an offer was made by the Carrier that the Claimant would be issued a thirty (30) day suspension during which time he would be required to complete some remedial training. After completion of the suspension period and required remedial training Claimant would be allowed to exercise his seniority.

After complying with the conditions of the Claimant's waiver, he tried to exercise his trainmen's seniority and mark up. A member of Crew Management then notified claimant that he would not be allowed to mark up for a period of six months. Claimant contacted his union representative and requested help in rectifying this apparent misunderstanding of the agreed upon terms of Claimant's suspension. Claimant's representative tried to intervene on behalf of the Claimant with Crew Management and was informed of the same six-month suspension period. Claimant immediately wrote a letter to Mr. Konecny and included all e-mail correspondence, **(BLE Exhibit # 1)**. Claimant's representative referred to a previous case that had been presented from another portion of this property at a board of arbitration dealing with the exercise of trainmen's seniority while the engineer's federal certificate was suspended according to FRA Regulations. Point in fact being at Public Law Board Number 5663, Case No. 38, Neutral Member H. Raymond Cluster issued Award Number 24, **(BLE Exhibit # 4)**, which states in part:

“In the Board’s view, the governing rule is not Engineer’s Rule 27 (A), but XIII, Section 3 (3) of the 1985 National Agreement. As to that rule, Carrier argues Claimant was not “unable” to hold an engineer’s assignment; rather he was able to hold such an assignment, but was unable to work only due to certificate revocation.” The FRA requirement for engineer certification did not come into effect until after the 1985 National Agreement; therefore, Article XIII, 3 (3) was not referring to inability to hold an engineer’s position due to certificate revocation.

The Organization contends that Claimant’s situation falls within the specific language of Article XIII, 3 (3). Claimant, because he had no certificate, was unable to hold an engineer’s assignment; therefore, he could exercise his trainmen’s seniority. In effect, the FRA regulation that Claimant could not work as an engineer without a certificate, set aside Claimant’s engineer seniority for the thirty-day decertification period.”

This award is directly on point with the instant case before this board. Claimant after serving the agreed upon thirty-day suspension should have been allowed to exercise his trainmen’s seniority.

Claimant’s case is directly on point to a similar case that was settled by this Honorable Board under Public Law Board Number 6171, Award Number 46, (BLE Exhibit # 18), dealing with an engineer that was wrongfully withheld from service when the Carrier attempted to use the FRA decertification process to discipline the engineer. This is exactly the same issue. If the Carrier’s intention was to discipline this Claimant for an extended period of time, the suspension should have reflected that period of time.

Following the implementation of engineer’s certification by the FRA, numerous questions as to the interpretation of the federal regulations has plagued a number of railroads. On June 19, 1991, CFR 49 Part 240.5 became part of the

Federal Register, (**BLE Exhibit # 14**), paragraph (d) and (e) addressed this particular situation that faced the Claimant. Part 240.5, paragraph (d) and (e) states:

- (d) **FRA does not intend by issuance of these regulations to preempt or otherwise alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.**
- (e) **Nothing in this part shall be construed to create an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.**

These two paragraphs created a dispute by all parties concerned as to the literal meaning and interpretation of these two paragraphs. Therefore, on April 9, 1993, the FRA made Interpretative Guidance part of the Federal Register, (**BLE Exhibit # 15**), which states:

Section 240.5: Effect of the Rule on Collective Bargaining Agreements

FRA has received multiple requests for clarification of 240.5 (e). The clarification requests primarily have involved issues whether an individual who loses authority to serve as a locomotive engineer because his or her certificate is suspended, revoked or denied is prevented from exercising his or her seniority to serve in some other capacity, typically as a trainman or conductor, for the railroad. Paragraph (e) simply reflects FRA's intent that loss of certification is not intended to create an eligibility or entitlement to employment in other service for the railroad. It does not prevent railroads from recognizing such an eligibility or entitlement or otherwise agreeing to allow a person to provide such service.

This interpretation leaves no room for a misunderstanding. The FRA has no authority or inclination to restrict the rights of a decertified engineer to exercise his trainmen's seniority.

The Claimant's rights to work as a Trainman (Conductor, Brakeman or Yardman) are plainly preserved by the first paragraph of Article XIII, Section 3 (3) of the October 31, 1985 National Agreement, **(BLE Exhibit # 16)**, which reads as follows:

- (3) An employee who established seniority as conductor (foreman), trainman (brakeman-yardman), hostler or hostler helper (but without seniority as a locomotive fireman) who is selected for engine service shall retain his seniority standing and all other rights in train and/or yard or hostling service."**

The Claimant in this case was fully qualified for service as a trainman and after completing the agreed upon thirty-day suspension was not under any further disciplinary measures. On a number of other occasions on this portion of the property this Carrier has allowed decertified engineers to exercise their trainmen's seniority. One notable example was Engineer R. J. Hardegree from Clovis, New Mexico. Engineer Hardegree was not only decertified under the FRA Regulations for a period of five (5) years for violation of passing a signal displaying stop, the Carrier also completely dismissed Engineer Hardegree from service with the Carrier. After Engineer Hardegree had been dismissed for approximately a year and a half the Carrier agreed to reinstate Engineer Hardegree to service and he was allowed to exercise his seniority as a trainman until he fulfilled the remainder of the FRA mandated revocation period for his engineers certificate. This is clearly shown by engineer Hardegree's personal record, **(BLE Exhibit # 17)**, which shows that he was dismissed from service on January 1, 1998, and reinstated as a

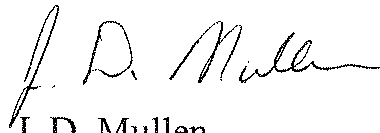
conductor on June 25, 1999. He worked as a conductor until his engineer's certification was reinstated on February 4, 2000 following the new FRA ruling of January 7, 2000.

This handling of the Claimant by the Carrier clearly shows that he was not given the same opportunity to work as a trainman that Engineer Hardegree was given and allowed to do. Due to the Carrier's handling of the Claimant by not allowing him to exercise his seniority as agreed to, forced the Claimant to submit claims for make whole payment, **(BLE Exhibit # 5)**, for all time lost after the agreed upon reinstatement date of September 14, 1998.

In essence, this brings this Committee to the conclusion that the Carrier made an agreement with the Claimant who signed a waiver agreeing to the terms as discussed and after expiration of the suspension period the Carrier refused to abide by the agreement. Refusing to allow the Claimant to exercise his trainmen's seniority as agreed is nothing more than the Carrier's violation of any agreement that was arrived at through the collective bargaining process.

Therefore, we are requesting that this Honorable Board find in favor of the Claimant by issuing a sustaining award instructing the Carrier to make the Claimant whole for all time lost following the agreed upon thirty (30) day suspension period, and expunge his personal record from any mention of the incident after the expiration of the thirty (30) day suspension.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. D. Mullen". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

J. D. Mullen
General Chairman
Brotherhood of Locomotive
Engineers