

Carrier File: 76-00-0005
Organization File: 400-446-10
NMB Code: 0106

BEFORE

PUBLIC LAW BOARD NO. 6041

CASE NO. ~~54~~ 56

AWARD NO. _____

CARRIER'S SUBMISSION

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

V.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM

The Organization states its claim as follows:

"Request that R. J. Wallace be paid conductor extra board guarantee October and November 1998 account not allowed to exercise trainmen's seniority while decertified."

APR 26 1998

BLE U.P. SOUTHERN GCA

1246-2

CARRIER'S STATEMENT OF FACTS

BNSF RR, hereinafter referred to as the Carrier, hired R. J. Wallace, hereinafter referred to as the Claimant, as an engineer on June 2, 1979. The Claimant worked as the engineer on Train No. S-FRSCHI13-13 on August 14, 1998. At Winslow Yard, Winslow, Arizona, an intermediate point, the Claimant failed to comply with signal displaying stop indication thereby violating Rules 1.1, 1.1.1, 1.1.2, 1.4, 1.6(1) & (2), 1.47, and 9.12 of General Code of Operating Rules and Rule 9.1.15 of System Special Instructions. The Carrier notified the Claimant that his engineer certificate was revoked for a twelve-month period from August 15, 1998 through August 15, 1999.¹ The 12-month suspension was reduced to a 6-month suspension.

The Claimant signed a waiver dated September 11, 1998², accepting a Level S 30-day suspension to commence on August 16, 1998. The Claimant was also required to participate in a retraining program at the Training Center in Overland Park, Kansas. The Claimant was reinstated to service on September 14, 1998, but was not allowed to work as an engineer without his license.

On September 21, 1998³, BLE Local Chairman Lynch notified Superintendent Konecny that "We had discussed the possibility of Bob marking up to the ground at the end of his suspension. However this possibility has been precluded by Labor Relations and Crew Management as per the attached E MAIL. I wanted to provide you with notice that the Brotherhood of Locomotive Engineers disagrees with Labor Relations on this matter." The attached E MAIL dated September 16, 1998 reads in part: "Per Labor Relations, if Mr. Wallace could hold an engineer's position then he cannot be marked up to the ground."

On October 12, 1998, BLE General Chairman Mullen wrote Mr. Fleps, Vice President Labor Relations, BNSF RR, requesting that: "By copy of this letter we are requesting that Mr. Wallace be immediately returned to service of the Carrier and be allowed to mark up as trainman service as provided for by PLB Number 5683, Case Number 38, Award Number 24, UTU file number C-1984, Carrier file number ctg 93-08-31d."⁴

¹ Revocation notice; exhibit No. 1

² Claimant's waiver; exhibit No. 2

³ Local Chairman's September 21, 1998 letter; exhibit No. 3

⁴ BLE October 12, 1998 letter, exhibit No. 4

It must be noted that neither of these documents requested pay for time lost but merely requested that the Claimant be permitted to mark up for service as a trainman. In fact, the letters were notification of disagreement on the proper application of a UTU Agreement and an award interpreting that UTU Agreement.

The Carrier received no claims from the Claimant or BLE until November 30, 1998, when the Claimant submitted special claim CR3832 requesting payment of extra board guarantee from October 1, 1998 to October 30, 1998 account as per faxed Level S conditional suspension. "I should have been permitted to mark up and exercise my ground seniority at 00:01 on Sept. 14, 1998. Due to FRA 49 CFR Part 240 I have my locomotive engineer license revocation for a minimum of 6 month this prevents me from marking up and holding an engineer position. My job of choice if Board 7 Winslow Cond. Extra Board."

The Carrier declined the claim "Entire claim declined acct. could have held an engr. And was suspended as such."⁵

The Claimant submitted another special claim CR3835 also dated November 30, 1998 requesting conductor extra board guarantee for November 1, 1998 through November 30, 1998. The Carrier declined the claim "Entire claim declined acct. could have held as an engr. And was suspended as such."⁶

On December 14, 1998, Local Chairman Lynch appealed the claims account the Claimant was not allowed to mark up for service as trainman while his engineer certificate was revoked.⁷

The Carrier declined the appeal on December 17, 1998.⁸

The BLE General Committee appealed that decision on February 9, 2000 again citing PLB 5663 Award 24 in support of their claim.⁹

The Carrier declined the appeal and explained that the cited award did not support the claims for various reasons.¹⁰

⁵ Claimant's special claim 3832 and decline; exhibit No. 5

⁶ Claimant's special claim 3835 and decline; exhibit No. 6

⁷ Local Chairman appeal; exhibit No. 7

⁸ Carrier decline; exhibit No. 8

⁹ BLE appeal; exhibit No. 9

¹⁰ Carrier decline; exhibit No. 10

The Parties discussed these claims in conference but could not resolve them. The BLE Committee wrote the Carrier on July 12, 2002 setting out their final position and responding to the Carrier's position stated in conference.¹¹

The Carrier responded on July 16, 2002 again explaining that the cited award did not apply and reiterated that the claims were not timely filed and were barred from further handling.¹²

The Parties were unable to resolve these claims and they are before this Board for final resolution.

POSITION OF CARRIER

I will show that:

1. The BLE did not file this claim in a timely manner.
2. The BLE failed to cite an applicable rule in support of their claim.
3. A UTU Agreement cannot change or amend a BLE rule or agreement.
4. PLB 5663 Award No. 24 does not support this claim.

Did the BLE file this claim in a timely manner?

The answer is no.

BLE Article 43 reads in part:

“(a) All claims or grievances must be presented in writing by or on behalf of the employes involved to the officer of the Company authorized to receive same within 90 days from the date of the occurrence on which the claim or grievance is based.”

¹¹ BLE final position; exhibit No. 11

¹² Carrier July 16, 2002 letter; exhibit No. 12

Article 43 was amended in 1973 in part:

© All claims must be presented in writing by or on behalf of the employee involved to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim is based. ...”¹³

The Claimant signed a waiver accepting a 30-day suspension from August 16, 1998 through September 14, 1998. The Claimant attempted to mark up in train service on September 15, 1998 but the Carrier restricted him from doing so. Therefore, any claim for seniority restriction must be filed within 60 days from that date in accordance with Article 31, as amended. The Claimant filed his first claim for lost wages on November 30, 1998, more than 60 days after the date of occurrence.

The BLE will probably argue that this is a continuing claim and the request for lost wages can be submitted at any time. That simply is not the case. It is well settled that a continuing claim is one where a violation occurs on several dates rather than a single event. In this case, the Claimant was told that he could not mark up and work as a trainman and nothing changed thereafter. Referee Fletcher explained the concept”

“A threshold issue involved in this matter is a timeliness argument raised by Carrier. The three claims all involve displacements. The first occurred on May 15, 1990, the second on June 4, 1990, and the third on June 25, 1990. The Organization filed its initial claim on each of the three displacements on September 10, 1990, which Carrier contends is beyond the sixty day time limit provided in Rule 47. The Organization maintains that these are continuing claims which may be filed at any time.

It is the Board’s view that the three claims involved in this docket do not satisfy the test for a continuing claim. Each of the three are based on a single event, a displacement. It is the displacement which the Organization contends was in violation of its Agreement. The Rule requires that claims be filed within sixty days of the date of occurrence. The three claims involved in this docket were not filed within sixty days of the occurrence. They are barred by the language of Rule 47. (See Third Division Awards 14131, 12984, 14450, 29353 and 27327.)”¹⁴

The Carrier requests that the three claims be dismissed because they were not timely filed under Article 43, as amended, without consideration of the merits.

¹³ Article 43, as amended; exhibit No. 13

¹⁴ Third Division Award No. 29870; exhibit No. 14

recognizes that these restrictions/privileges apply to trainmen and not to engineers. The Board, after carefully scrutinizing the impressive record of this case, could find no provision whatsoever in the controlling June 1, 1996 BLE Agreement (or its retained portions from preceding agreements) restricting Carrier relative to assigning engineers in reduced-crew yard service. On this point, the Board is obviously affirming the Carrier's argument that Article 17, relied upon by the Organization, carrier with it neither an express nor implied restriction to that end."¹⁶

The BLE is attempting to cite a UTU Agreement to support their claim. In this case, the BLE cited a UTU Agreement because the BLE Agreements preclude the Claimant from working in demoted status while junior engineers are working as engineers.

"Rule 19

SENIORITY AND PROMOTION

Eligibility for Service As Engineer

(g) Firemen having successfully passed qualifying examinations shall be eligible as engineers. Promotion and the establishment of a date of seniority as engineer, as provided herein, shall date from the first service as engineer, when called for such service, provided there are no demoted engineers back firing. No demoted engineer will be permitted to hold a run as fireman on any seniority district while a junior engineer is working on the engineers' extra list of holding a regular assignment as engineer on such seniority district, except as provided in paragraph (j), Rule 20."¹⁷

Rule 20(j)¹⁸ references reducing extra board but the principle is upheld that a senior engineer is not permitted to mark up as fireman while junior engineers are working as engineer. Rule 21(j) is another example showing that an engineer must exhaust his engineer seniority before marking up as a fireman.

"Time Limit for making Displacement

(j) An engineer losing his assignment through no fault or action of his own, or who is displaced or cut off the extra board must exercise his seniority rights within the following time limits, failing to do so, will be required to displace the

¹⁶ PLB 6171 Award No. 28; exhibit No. 16

¹⁷ BLE Rule 19; exhibit No. 17

¹⁸ BLE Rule 20; exhibit No. 18

used to fill the vacancies in question under the provisions of that agreement and the claimant was not mishandled.”²¹

The above citation made it clear that only the duly authorized representative of a craft may negotiate an agreement on behalf of that craft. This BLE Committee is the only authorized representative of engineers working under the former ATSF BKE Agreements. BNSF RR could not legally negotiate an agreement with the UTU to modify the provision precluding engineers from working in demoted status while junior engineers are working as engineers on that district or location. Referee Arthur T. Van Wart rendered the next decision reaffirming the lines of authority. He wrote:

“A definitive decisional beacon as to the proper representational role of the disputants is found in the November 14, 1942 holdings by the Ninth Circuit Court of Appeals in *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Lines of Southern Pacific Co. V. Southern Pacific Co.*, representational and mileage regulation disputed.

* * * * *

That ruling, says in effect, that the authorized representatives may lawfully agree on matters which are confined solely to the entrance into, working in, and the separation from the craft or class for which certified or recognized to represent.

Stated differently, the duly authorized representatives of a Carrier and of a craft or class of employees, here the BLE, may enter into an agreement which confers a right, here a non-exercise of seniority, upon a covered employee, here an engineer. That represents a proper and valid agreement.”²²

The two awards make it clear that the UTU cannot negotiate an agreement to modify any rule applicable to engineers. And, the Carrier cannot legally do so. Conversely, BLE cannot progress a valid claim based upon BNSF’s compliance with an agreement involving groundmen. The UTU 1985 National Agreement provided that engineers would be given a trainman seniority date but it did not change any rule applicable to engineers while working in the engineer craft.

UTU President Hardin explained to UTU Chairperson Lankford that the UTU 1985 Agreement, Article XIII, could not change any BLE rule or agreement:

²¹ PLB 188 Award No. 4, *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Burlington & Quincy Railroad Co.*, Hanlon (1968); exhibit No. 20

²² PLB 4818 Award No. 6, *Brotherhood of Locomotive Engineers and Norfolk and Western Railway Company*, Van Wart (1991); exhibit No. 21

“Section 3 – Retention of Seniority

- (1) Subject to the carrier’s legal obligations, when selecting new applicants for engine service, opportunity shall first be given to employees in train and yard service on the basis of their relative seniority standing, fitness and other qualifications being equal. Transfer of engineers from one seniority district to another on the same railroad system will not be violative of this provision.
- (2) Any person who is selected for engine service and does not have seniority as trainman will acquire seniority as trainman upon entering engine service, subject to paragraph (3) hereof.
- (3) An employee who has 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. However, such employee shall be permitted to exercise such rights only in the event he or she is unable to hold any position or assignment in engine service as engineer, fireman on a designated position in passenger service, hostler or hostler helper.”²⁵

The Claimant established his engineer date in 1979 so Section 3 cited above does not apply to the Claimant.

Does the 2001 Ebb and Flow Agreement impact these 1998 claims?

The answer is no.

The BLE argued that “This Committee is quite aware that we don’t encounter this problem any more. The Carrier finally recognized and accepted the Cluster Award in the “EBB and FLOW AGREEMENT”. This agreement allows engineers and trainmen alike to exercise their seniority in either craft without exhausting any seniority. The implementation of this agreement still does not alter the fact that prior to this agreement this Carrier allowed decertified engineers to exercise their trainmen’s seniority. Except, in the case of these two individuals, the Carrier refused to allow them the same benefit of established previous practice.” The BLE is wrong. An employee who flows back to train service must still remain available to protect engine service in accordance with the BLE Collective Bargaining Agreements. And, the Claimants are not the only employees that were not allowed to work in train service when their engineer certificate was suspended. It must be noted that the BLE rules vary from one property

²⁵ UTU 1985 National Agreement, Article XIII, Section 3; exhibit No. 24

to another but the Carrier also admits that there has been a mixed application of situations where engineers lose their FRA certificate. That in no way makes these claims valid. In fact, there is no established practice for guidance.

It must be noted that these claims are dated 1998 and the Ebb and Flow Agreement is dated 2001. Clearly, the Ebb and Flow Agreement cannot support claims that predate that agreement by three years.

The Carrier, UTU and BLE made a tri-party agreement to allow engineers, with ground service seniority, to flow back to the ground under very specific circumstances. They were allowed to do so when they received an exercise of seniority or bid a bulletined vacancy but they must remain available to be set up as engineers. In other words, there were some restrictions contained within the Ebb and Flow Agreement²⁶. It also provided that engineers must keep themselves available for force assignment under the BLE Collective Bargaining Agreement.

The BLE is also incorrect in their statement that the Ebb and Flow Agreement came from PLB 5663 Award No. 24. The BLE knows better. The BLE 1996 Agreements, Article VI provides that:

“Upon written request of the organization’s authorized representative(s), the carrier shall meet to discuss establishment of a procedure under which any employee who holds train service seniority and is holding a regularly assigned position as a locomotive engineer may exercise his train service seniority rights. Any such procedures that are established shall be on an individual railroad basis and shall be in accordance with the guidelines set forth in Section 2.”²⁷

The UTU and BLE notified the Carrier that they desired to establish a flowback arrangement on the former ATSF Properties. The Carrier complied with those requests and negotiated an agreement accordingly. It is clear that the Ebb and Flow Agreement did not resolve this issue because the employees must still remain available to protect engine service and that is not possible if they cannot work as an engineer due to decertification.

Based on the above, the BLE’s argument that the Ebb and Flow Agreement somehow supports their claim in this case is misplaced.

²⁶ Flowback Agreement; exhibit No. 25

²⁷ 1996 National Agreement; exhibit No. 26

CONCLUSION

The Carrier has established that:

1. The claim was not timely filed in accordance with BLE Article 31, as amended.
2. The BLE failed to cite a BLE rule in support of their claims.
3. A UTU Agreement cannot change or amend a BLE Rule or Agreement.
4. PLB 5663 Award No. 24 does not support these claims.

For these reasons, the Carrier requests that these claims be denied and urges the Board to do so.

Respectfully submitted,
For THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Roger A. Bolden