PUBLIC LAW BOARD NO. 4901

AWARD NO. 193

CASE NO. 193

PARTIES TO
THE DISPUTE: United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained

STATEMENT OF CLAIM:

> "Request in behalf of Northern California Division Conductor P. W. Johannis for the removal of the Level 1 – Formal reprimand, the one (1) year probation period, the alleged violation of Rules 1.3.1, 1.6 Conduct, 1.15 Duty-Reporting or Absence, and 1.16 Subject to Call, of the General Code of Operating Rules Fourth Edition, effective April 2, 2000, and Northern California Division Superintendent's Notice No. 120, in effect May 19, 1999 Item No. 1, from the Claimant's personal record and that the Claimant be paid for all time lost for being required to attend the Formal Investigation conducted on February 27, 2001."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The operative facts are not in dispute. Claimant held an assignment on the Freight Conductor's Extra Board at Richmond, California. On January 16, 2001, Claimant was rested and available for assignment. He was called at 7:06 p.m. to protect a road freight vacancy. Although he questioned the propriety of the assignment (he suggested that it should go to a Calwa conductor ahead of him), Claimant accepted the assignment.

The Carrier permits employees to access the status of the board with their home computers. Claimant did so to see if the assignment was out of order. Carrier's crew clerk called back to cancel the assignment at 9:31 p.m. while Claimant was reviewing the status of the board with his computer.

Claimant's review showed no other possible road freight vacancies that might require protection before the following morning. He, therefore, went to the store and did not take his cell phone or pager with him. At 10:25 p.m., Carrier's crew caller attempted to reach Claimant to protect a yard Helper assignment at the Richmond yard. Claimant did not respond to the attempted call. As a result, Claimant was charged with violations of rules related to a missed call.

At the time of the disciplinary action, Claimant had not quite four years of service. His prior work record was clear.

The Carrier maintains that the instant dispute is a disciplinary matter and not one of

Agreement interpretation. The Organization, to the contrary, maintains that the language of the Agreement invalidates the discipline. The Organization also raised procedural objections about the conduct of the hearing and the absence of material witnesses.

We agree that the Carrier's action must be viewed from a disciplinary perspective. It was disciplinary action that triggered the Claim.

It is axiomatic that the Carrier shoulders the burden of proof in disciplinary matters. Its evidence must establish both a proper basis for taking disciplinary action and the reasonableness of the penalty assessed. Therefore, the pivotal issue in this dispute is whether Claimant had any responsibility to be available to protect the yard Helper vacancy. In the Organization's view, Claimant was only obligated to protect road freight conductor vacancies.

To justify the taking of disciplinary action, the Carrier must establish a proper basis for concluding that Claimant violated applicable rules by properly linking rule or Agreement language with Claimant's conduct. On this record, the Carrier has failed to do so.

Carrier's sole witness had no first-hand knowledge of the evidence. The only basis provided by the Carrier for finding misconduct was this witness' *personal opinion* that Side Letter No. 8 required Claimant to be available to protect the vacant yard assignment. The record does not show the witness to have been either a negotiator or signatory to Side Letter No. 8. Nor did the record establish that the witness had any expertise whatsoever in interpreting Agreement language negotiated by others.

Carrier's witness acknowledged that Side Letter No. 8 modified Article 6(b) of the parties' 1989 Memorandum of Agreement. In Item No. 3, Side Letter No. 8 provided that the third step of the calling sequence to fill yard vacancies would be:

3. First out employee on the supplemental guaranteed extra board;

In expressing his personal opinion that Claimant's Freight Conductor Extra Board was a supplemental guaranteed extra board within the meaning of Side Letter No. 8, the witness also acknowledged that the language was susceptible to several different interpretations.

Supplemental guaranteed extra boards are governed by Article VI, Section 13 (a) through (f). Carrier's witness conceded that those provisions do not refer to the Freight Conductors' Extra Board in any way.

Moreover, it is undisputed that Claimant's assignment on the Freight Conductors' Extra Board is governed by Article 20 (i) of the parties' Agreement and not by Article VI, Section 13. Carrier's witness also acknowledged that Article 20 (i) said nothing about protecting yard vacancies.

Carrier's witness was also asked to review Article 10 (m) which deals with the need for yardmen to protect emergency service or temporarily increased work. Again he acknowledged that the language says nothing about the use of Freight Conductors' Extra Board employees to fill yardman vacancies.

The Organization also introduced Article 20 (f)(5). This provision explicitly provides that Foreman vacancies at Gallup, New Mexico will be filled from the conductor's extra board there as the second step of the sequence. However, Carrier's witness acknowledged that the language made no reference to its applicability at Richmond, California. This Agreement language raises the

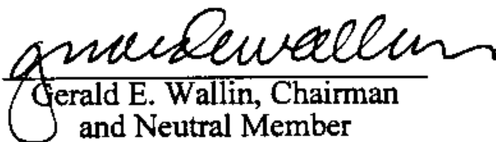
applicability of the interpretive doctrine known as *inclusio unius est exclusio alterius.* The Latin phrase means that the inclusion of one is the exclusion of another. In this dispute, the doctrine strongly suggests that the Conductors' Freight Extra Board will not be used to fill yard vacancies at locations other than Gallup.

The final consideration is the impact of Claimant's past acceptance of yard assignments while on-call on the Freight Conductors' Extra Board. The mere fact that Claimant may have done so on numerous past occasions is not sufficient proof of the elements necessary to establish a binding, but unwritten, Agreement provision between these parties by past practice.

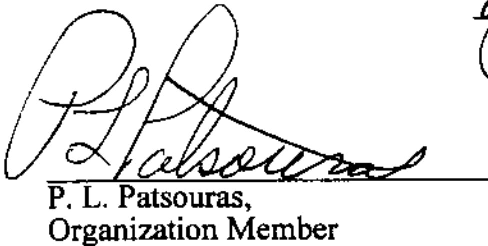
Absent the proper proof of a binding past practice, the rights and responsibilities of employees assigned to extra boards are products of collective bargaining negotiations; they do not exist except to the extent they are established and defined by those negotiations. On this record, the Carrier's evidence fails to establish that Claimant had a collectively bargained responsibility to be available on call to protect the yard vacancy in question. Given this failure to satisfy the burden of proof, the record provides no proper basis for upholding the discipline.

AWARD:

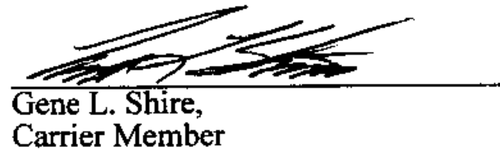
The Claim is sustained.



Gerald E. Wallin, Chairman
and Neutral Member



P. L. Patsouras,
Organization Member



Gene L. Shire,
Carrier Member

DATED: May 8, 2003