PUBLIC LAW BOARD 6721

In the Matter of the Arbitration Between:
**BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY**

and

NMB Case No. 4
**Claim of D. S. Mumford 48-Minute Daily Allowance for Reduced Week**

**UNITED TRANSPORTATION UNION**

**STATEMENT OF CLAIM:** Claim on behalf of Conductor D. S. Mumford for payment of Code 86, reduced workweek.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on July 2, 2004, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

Claimant was first employed by Carrier on January 3, 1995, and on May 15, 2003, was assigned as Conductor to Train No. R-SWE0034-15I, a road switcher, on duty at Phoenix, Arizona, along with a brakeman. A December 16, 1984, Memorandum of Agreement (Car. Ex. 2; Org. Ex. 2) states, in pertinent part:

> If the Carrier elects to assign . . . road switcher service less than the minimum number of days per week prescribed by the current rules, the following will apply:
>
> . . .
>
> (2) When an assignment is reduced below the minimum number of days required by the present rule, six (6), fifty percent (50%) of the day saved because of reducing the assignment below the current minimum of six (6) day, exclusive of overtime, arbitraries or special allowances, will be divided by the number of days the job is assigned under this Agreement. An allowance in this amount will then be paid to the conductor and brakemen (extra or regular) for each day worked in addition to all other earnings. The allowance does not become a part of the basic rate, and will not be used in computing overtime, special allowances, arbitraries, etc.

Article IV, Section 5, of the October 31, 1985, National Agreement(Car. Ex. 3) states as follows:

> (a) Duplicate time payments, including arbitraries and special allowances that are expressed in time or miles or fixed amounts of money, shall not apply to employees whose seniority in train or engine service is established after the date of this Agreement.
>
> (b) Duplicate time payments, including arbitraries and special allowances that are expressed in time or miles or fixed amounts of money, not eliminated by this Agreement shall not be subject to general, cost-of-living or other forms of wage increases.

Claimant filed a claim for a CA Code 86, a 48-minute daily allowance, account being assigned to a 5-day road switcher. The Carrier declined the claim as without basis; the Organization appealed the denial and, as the claim was not resolved on the property, it was presented due as a result of the Carrier to this Board for resolution.

**POSITIONS OF THE PARTIES: The Organization** argues that Claimant is seeking a negotiated penalty payment reducing the workweek, not a duplicate time payment or arbitrary as claimed by the Carrier. It contends that, when the Parties agreed to allow the Carrier to reduce the workweek in 1984, they agreed to compensate employees for some of the lost earnings and that compensation was a penalty. It maintains, based on the language of the 1984 Memorandum of Agreement, that this penalty does not affect overtime and, therefore, cannot be a duplicate time payment, and since it does not affect arbitraries, therefore, cannot be an arbitrary.

The Organization further argues that Article VII, Section 1, of the National Agreement, states that "Carriers with road switcher (or similar operations) . . . agreements in effect prior to the date of this Agreement that do not have the right to reduce six or seven-day assignments to not less than five, . . . shall have that right." It contends that this language does not apply to the instant case since the Santa Fe Coast Lines Committee of the Organization gave that right to the Carrier in 1984.

The Organization argues that the Carrier's action violated the Agreement and requires that the claim be sustained.

**The Carrier** argues that the Claimant is not entitled to the requested payment because it constitutes a "duplicate time payment." It contends that Section 2 of the 1984 Memorandum of

Agreement gave the Carrier the right to reduce six- or seven-day roadswitcher service assignments to five-day assignments with an allowance that would not become a part of the basic rate or used to compute special allowances.

BNSF points out that, in any case, since Claimant was hired on January 3, 1995, the allowance does not apply to Claimant, because Article IV, Section 5, of the 1985 National Agreement states that duplicate time payments do not apply to employees whose seniority is established after October 31, 1985, the date of the Agreement. It points out that the Compensation Systems' "Duplicate Time Payment" Matrix (Car. Ex. 4) categorized the payment of Code 86 (reducing six- and seven-day assignments) as a duplicate time payment and ceased payment of that allowance to post-1985 employees.

The Carrier acknowledges that Claimant may be entitled to penalty payments that might arise as a result of being required to perform duties outside the parameters of his regular assignment and to employees who established seniority prior to October 31, 1985. Citing authority, however, it maintains that, in the instant case, the allowance is a "twofold" or "double" payment designed to allow it to reduce a six-day assignment to five days, and that Claimant was not obligated to perform any work in violation of any agreement, which would generate a "penalty." It also contends that allowances payable to employees who are already properly on duty and under pay, fall under the definition of duplicate time payments and are not payable to employees, such as Claimant, with seniority established after October 31, 1985.

The Carrier urges that the claim be denied as without merit.

**DISCUSSION AND ANALYSIS:** Upon the whole of the record and in consideration of the arguments, the Board is persuaded by the Carrier and concludes that the case should be denied as without merit. The Award so reflects.

Prior to the 1984 Memorandum of Agreement between the Parties, the operation of roadswitchers was a six-day assignment. The 1984 Memorandum of Agreement authorized the Carrier to reduce six-day roadswitcher assignments to five days; in exchange, the Carrier agreed to pay the conductor and brakemen an "allowance" of 50% of the day saved as a result, divided by the number of days the job is assigned. The Carrier did, in fact, utilize its authority to reduce roadswitcher assignments to five days.

In the 1985 Agreement, however, the Parties agreed to exclude from the 1984 allowance "employees whose seniority in train or engine service is established after the date of this Agreement."

It is undisputed that Claimant was first employed by Carrier on January 3, 1995, and is, therefore, not entitled to the benefit of the 1984 allowance.

The Organization's assertion that Claimant is seeking a "penalty" for reducing the workweek, and not a duplicate time payment, is without merit. There is a clear distinction between penalty payments and duplicate time payments. In general, a penalty payment is provided for a service performed in violation of a rule or outside assignment. Such is not the case here. No service has been performed in return for a penalty payment. Furthermore, the 1984 Memorandum of Agreement specifically refers to the payment as an "allowance" - a payment - for reducing the assignment from six days to five days in addition to all other payments. Allowances are clearly duplicate time payments. The 1985 National Agreement excludes post-85 employees, such as Claimant, from receipt of "duplicate time payments, including arbitraries and special allowances that are expressed in time or miles or fixed amounts of money . . ." Since the instant claim clearly seeks what is a duplicate time payment and not a penalty, it is excluded.

**AWARD:** The Organization failed to prove that the Carrier's action violated the applicable Agreements. The claim is denied.

Dated this 14th day of September, 2004.

M. David Vaughn, Neutral Member

Gene L. Shire, Carrier Member

R. L. Marceau, Employee Member

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