PUBLIC LAW BOARD 6721

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

and

NMB Case No. 3
Claim of D. S. Elkins Overtime for Being Used Off Assignment

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Yardman D. S. Elkins for payment of time and one-half account used off assignment on April 6, 2002.

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.

On April 6, 2002, Claimant, a Yardman, was called to work assignment YBAR1031 06 A. Based upon his regular assignment (YBAR106), April 6 was Claimant's rest day. Claimant did not have five straight-time starts during the previous work week in his regular assignment. Article 3(b) of the 1956 Agreement (Car. Ex. 2) states, in pertinent part, as follows:

> Employees worked more than five straight time eight-hour shifts in yard service in a work week shall be paid one and one-half times the basic straight time rate for such excess work except: [exceptions not relevant]

Article 4(b) of the 1956 Agreement (Car. Exs. 2-3; Org. Ex. 2) states as follows:

> All regular or regular relief assignments for yard service employees shall be for a work week of forty hours, five (5) consecutive calendar days of not less than eight (8) consecutive hours per day, with two (2) days off in each seven (7), except as otherwise provided in this agreement.

> The term "work week" for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work, and for extra or unassigned employees shall mean a period of seven consecutive days starting Monday.
>
> The days off will begin at the conclusion of the last shift of a yardman's regular assignment prior to the assigned rest days and will end at the starting time of the first shift on his assignment on the first day of the work week.

Article 6(b) of the 1989 Crew Consist Agreement (Car. Ex. 4; Org. Ex. 3) states as follows:

> Helper Vacancies
>
> When the extra board is exhausted, a temporary helper vacancy will be filled in the following sequence:
>
> 1. Senior available assigned yardman with request on file;
> 2. Senior available reserve employee with request on file;
> 3. Junior available assigned yardman.
>
> Yardmen used off their assignment will be paid the time and one-half rate.

Side Letter No. 8 to the 1991 Crew Consist Agreement (Car. Ex. 5; Org. Ex. 3) modified Article 6(b) of the 1989 Crew Consist Agreement as follows:

> Helper Vacancies
>
> When the extra board is exhausted, a temporary helper vacancy will be filled in the following sequence:
>
> 1. Senior available assigned yardman with request on file;
> 2. Junior available assigned yardman;
> 3. First out employee on the supplemental guaranteed extra board;
> 4. Senior available reserve employee with request on file.
>
> Yardmen used off their assignments will be paid the time and one-half rate.

Claimant filed a claim for overtime pay at the rate of time and one-half for his work on April 6th because, the claim asserted, he was used off his regular assignment. 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 to this Board for resolution.

POSITIONS OF THE PARTIES: The Organization argues that Claimant is entitled to overtime pay because he was used off his assignment on April 6th. It contends that all of the agreements, including that of Claimant, clearly state that a Yardman's assignment is a seven-day assignment, consisting of five consecutive work shifts and two consecutive rest days.

UTU maintains that, since Yardmen are assigned to a specific job and that job has two specific days assigned as rest days, Claimant must be deemed to have been used off his regular assignment on April 6th and should be so compensated. The Organization also argues that all of the agreements contain language that requires the Carrier to pay time and one-half to Yardmen, such as Claimant, when they are used off their assignment.

Finally, the Organization argues that the fact that Claimant is assigned to work one assignment (Y BAR106) and was working a different assignment (Y BAR1031 06 A) whose job assignment numbers were different proves that he was being used off of his assignment and therefore, that he is entitled to time and one-half pay.

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

The Carrier argues that the claim is without merit because, when an employee elects to work on a rest day, that employee is not off assignment, but is simply working on an assigned day off.

BNSF contends that Claimant worked a five-day assignment and had two days off, and could only be considered to be used off of that assignment on one of the five assigned days. Carrier notes that the Parties stipulated that Claimant did not have five straight-time starts immediately prior to working on April 6, 2002. It asserts that it is illogical to conclude that a railroad would knowingly allow employees to work for time and one-half on their rest days without requiring them first to fulfill the "five straight-time starts" obligation contained in the Five Day Work Week Agreement.

The Carrier further argues that the Organization's contention that the 1989 Crew Consist Agreement and Side Letter No. 8 to the 1991 Crew Consist Agreement require that Claimant receive overtime payments depends upon whether a Yardman used on a rest day is being used "off their assignment." It maintains that, under Article 4(b), by which a regularly assigned employee's work week commences on the first scheduled work day and ends on the last scheduled work day, it is clear that the assignment is considered to be the days that an employee is scheduled to work and does not include the rest days.

The Carrier asserts that this is especially so, since the same rule distinguishes between regularly assigned employees and extra board employees, whose assignment is seven days per week. It argues that, in order for an employee to be used off of an assignment so as to entitle him to overtime compensation, the employee must miss an assigned working shift due to the Carrier directing him to work elsewhere, and that an employee on a rest day is not on an assignment. Further, it argues that, pursuant to the Agreement, the only time an employee may claim the premium rate for working on a rest day is when that employee has already worked five straight-time eight-hour shifts. It contends that such an interpretation would encourage employees to lay off, that is, miss straight-time shifts during their five-day work week, in order to collect the premium rate for working on his rest days.

The Carrier further argues, citing authority, that local and on-property agreements (such as Side Letter No. 8) cannot eliminate or modify provisions of a National Agreement unless the Parties clearly and specifically state such intent. It contends that, had the Parties, in either 1989 or 1991, intended to eliminate the "five straight-time starts" requirement for payment of the premium rate on rest days, that intention would have to be expressly stated in their local agreements, which did not happen.

The Carrier further argues that the Organization has failed to carry the requisite burden of proof and has failed to identify any rule or provision specifically supporting its position.

Finally, the Carrier points to the definition of Code 89 (UO-Used Off) as follows:

> Time and half for working off employee's regular assignment. Must be regular assigned and working on an assignment other than the one the employee holds. Not applicable when working on rest days. [Car. Ex. 9]

It contends that the Code UO has never been applied to employees working on their rest day and that the Organization had numerous opportunities to challenge the Carrier's long-standing practice of declining claims for overtime on rest days unless the employee qualified for such payment under the 40-hour work week. It contends, therefore, that this the definition represents and memorialize past practice which must be recognized.

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 of the Parties, the Board is persuaded that the claim should be denied.

Article 4(b) of the 1956 Agreement, cited by both Parties in support of their respective conclusions, supports the Carrier's position that Claimant is assigned a position that has a work week of "forty hours" worked in "five (5) consecutive calendar days" (paragraph 1), which begins "on the first day on which the assignment is bulletined to work" (paragraph 2) and ends "at the conclusion of the last shift" of his "regular assignment prior to the assigned rest days" (paragraph 3). The language of the Agreement is clear and unambiguous: Claimant is assigned to work five days and has two days of rest that are *not* part of his assignment. Therefore, when Claimant accepted an assignment on one of his rest days, he was not being used "off his [regular] assignment" during the days of that assignment but, rather, was working on a day when he was not assigned.

It is a well-established principle of contract interpretation that, where the language used is clear and unambiguous, the plain meaning of the language must be applied. To interpret the provision in accordance with the Organization's argument would result in the contractual distinction between "regularly assigned employees" (whose assignments begin on the first day on which the assignment is bulletined to work and end at the conclusion of the last shift prior to their assigned rest days) and "extra or unassigned employees" (who work "seven consecutive days") having no meaning. This the Board does not believe to have been the intent of the Parties.

Furthermore, holds the Board, since it is undisputed that Claimant did not have five straight-time starts during the previous work week in his regular assignment, he is not entitled to time and one-half pay. Article 3(b) of the Agreement, taken from the Five Day Work Week Agreement of 1951, states that employees who are "worked more than five straight time eight-hour shifts in yard service in a work week shall be paid one and one-half times the

basic straight time rate. . ." That provision requires that employees be paid for hours *worked*, as distinguished from hours *paid* (which would include leave).

The record is clear that Claimant did not *work* the required "five straight time eight-hour shifts" and is not entitled to overtime pay for hours worked on a rest day, whether on his regular assignment or on some other assignment.

The Board does not reach the Carrier's contention that overtime payments, resulting from the use of Code UO, have *never* applied to employees working on their rest day unless the employee qualified for such payment under the 40-hour work week. However, the Board notes that the Carrier admits (Submission, p. 10) that it has, since 1989, "declined *most if not all* UO claims filed by employees who work on their rest day but do not qualify for overtime account they did not work five straight time starts in the previous work week." It was the burden of the Carrier asserting a past practice to prove it. The Carrier cannot successfully maintain that there exists a past practice where the record does not establish consistent enforcement of practice.

AWARD: The Organization failed to meet its burden of proof. 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