PUBLIC LAW BOARD 6721

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

and

NMB Case No. 8
Claim of R. J. Freiler and K. L. Haring Basic Day for Not Allowed Meal Period

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim one basic day at respective Local Freight rate for Conductor R.J. Freiler and Brakeman K.L. Haring on time slip #XG7556 in addition to all other earnings on January 16, 2003 account not being allowed a meal period during the entire tour of duty.

FINDINGS OF THE BOARD: The Board finds that 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. Claimants were 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.

Carrier established a local freight service assignment which reports at Kaiser, California and works to Barstow, California. This assignment reports at 5:00 a.m. and must depart Kaiser no later than 12:00 p.m. to avoid the conflicting Metra commuter service which operates on the same territory. There could be a delay of approximately three hours if the Kaiser Local were not to depart ahead of the commuter service. Desiring to maintain expeditious operations at Kaiser and to ensure the crew members have food to eat, the Carrier issued a General Order suggesting that the crew members assigned to the Kaiser Local pack and carry their meals. There is no consistent practice of the crew members going without a meal period.

On January 16, 2003, Claimants Freiler and Haring were assigned to the Kaiser Local. They started at 5:00 a.m. and worked the maximum twelve hours allowed by the Federal Hours of Service law. They were not accorded a meal period on that date.

Insofar as the record indicates, Claimants would not have been precluded from eating their lunch while working.

In due course, a penalty claim was presented on the basis that the Claimants were not allowed a meal period at Kaiser after a reasonable length of time on duty. The claim stated:

> *Claim 100 miles local rate of pay acct not allowed to go eat after a reasonable length of time on duty. This is a standing order by Sup of Ops Hansen. Crew will not be allowed to go eat at Kaiser and must carry a lunch. This is a violation of Art 45, page 151 of the Trainmen's Agreement.*

Article 45 (EATING RULE) of the governing Agreement which is cited in the claim reads in pertinent part:

> *Crews on freight trains will be allowed opportunity to eat after having been on duty a reasonable length of time, or when it is known that they would be on duty for an unreasonable length of time before arriving at another convenient eating point. In such cases it will be expected that information will be given dispatcher as far in advance as possible so that stopping for meals will not unnecessarily interfere with, or delay other trains, and, in such instances meals will be taken by crew as a unit as expeditiously and promptly as practicable, it being the desire to avoid all unnecessary delay to trains (Exception: See Article 2[p] Section IV [b].)*
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> *In so far as possible, crews will be notified in advance of any work to be done in sufficient time so that they may make arrangements to eat, thereby giving the crew an opportunity to inform the dispatcher of their desire to eat as required in the first paragraph of this article.*

Effective December 16, 1984, the Parties agreed to the following:

Any rules presently in effect concerning road crews eating en route are amended to include the following:

When a pool freight crew is on duty in excess of eight hours and has not stopped to eat en route, each crew member will be allowed $5.00, which allowance will not be subject to any wage increases and/or cost of living adjustments. It is understood if any member of the crew requests to stop the train en route to eat, and the request is granted the allowance provided herein will not be applicable.

Note: The foregoing is not applicable to pool crews c'ting through Los Angeles.

The Carrier declined the claim as without merit; the Organization appealed the denial and, as the dispute was not resolved on the property, it was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Organization argues that train crews have historically been allowed to eat en route and asserts that the Carrier's refusal to allow a meal period at Kaiser was in violation of the Agreement.

The Organization points out that Article 45 of the schedule agreement was supplemented by the December 16, 1984 Agreement to provide that unassigned pool freight crews will be allowed a $5.00 allowance in lieu of time to eat if on duty longer than eight hours. It acknowledges that a meal allowance in lieu of a meal period has been negotiated for interdivisional and unassigned pool freight assignments but asserts that the original provision of Article 45 was not changed for local freight service assignments and remains intact.

Because Claimants were assigned to local freight service, not interdivision or unassigned pool freight service, the Organization insists the original provisions of Article 45 apply in respect to their meal period. They were entitled to a meal period after being on duty "a reasonable length of time" on the claimed date, it maintains. The Organization asserts that it was a violation of that provision for the employees to be on duty for twelve hours and thirty minutes without a meal period.

The Organization maintains that, as a result of the violation, a penalty payment must be awarded. The Organization relies on three sustaining awards: Award No. 518 of Public Law Board 912 and Award Nos. 1 and 18 of Public Law Board No. 3146.

The Organization argues that Carrier's action denying the Local crew a meal period violated the schedule agreement and requires that an eight hour penalty should be allowed. It urges that the claim be sustained.

The Carrier argues that the Organization failed to meet its burden to establish that the Carrier's action constituted a violation of the agreement.

The Carrier asserts that the Organization is wrongly attempting to "pyramid" beneficial portions of the original Article 45 provisions on those contained in subsequent amendments to the article. It points out that "ALL" train crews were entitled to a meal period under the original Article 45. With the establishment of interdivisional service, the Parties agreed in 1972 to an allowance of $1.50 in lieu of a meal period. The Carrier insists that when the 1984 Agreement was adopted, the Parties replaced Article 45 in its entirety. The revision provided a $5.00 allowance in lieu of a meal period for any and all pool freight crews. The Carrier maintains that, by its silence, the amended rule does not provide a guaranteed meal period or any payment in lieu thereof to any road service crews outside of those in pool freight service, thereby excluding local, road switcher and work train crews.

The language of the 1984 Agreement is cited by Carrier which it contends is clear and unambiguous. The Carrier cites in support of its position Award No. 6 of Public Law Board 6190, wherein the Board agreed that the new meal en route rule superseded the previous rule and the new rule did not apply to local, road switcher and work trains. The Carrier argues that the Board should follow the principle of *stare decisis* and deny the claim.

The Carrier argues that the Organization failed to establish a violation occurred on the claimed date, even if it were assumed that the original provisions of Article 45 remained intact, since the rule applies to meal periods en route and does not allow the meal period before they depart their initial terminal at Kaiser. Carrier explained expeditious operations at Kaiser are necessary

in order to coordinate with the commuter service. Also, Claimants did not give advance notice of their desire to eat. Missing from the claim is any evidence as to when, if or to whom Claimants may have requested a meal period.

Finally, the Carrier points out that Article 45 contains no language to support the penalty payment of a basic day allowance. Carrier suggests that, if the claim were to be sustained, the only appropriate "in lieu of" remedy in place would be the $5.00 payment provided to pool freight crews. It contends with citing authority that the claimed remedy is excessive.

The Carrier maintains that there is no merit to the claim and urges that it be denied.

DISCUSSION AND ANALYSIS: Upon the whole of the record and after review of the argument of the Parties, the Board concludes that Claimants are not entitled to the compensation requested and that the claim must be denied.

The Organization's position that Article 45 [EATING RULE] of the schedule agreement was supplemented, not replaced, by the 1984 Agreement is supported by the language found in the preamble of the latter agreement. Article 45 was amended to include an additional provision of the 1984 Agreement which provide that, "[w]hen a pool freight crew is on duty in excess of eight hours and has not stopped to eat en route, each crew member will be allowed $5.00…."

The framers of the 1984 Agreement used the precise phrase "amended to include the following" to introduce additional language into Article 45. The clear intent was to amend the provisions of Article 45 rather than replacing the original provision in its entirety as suggested by the Carrier.

Award No. 6 of Public Law Board 6190 does not persuade the Board to the contrary. While the findings of Award No. 6 addressed similar circumstances concerning a meal period for employees assigned to local freight service, there was a difference in the language contained in the 1985 Agreement which completely changed the original provision of Article 34. By using the phrase, "Article 34 of the Conductor's and Trainmen's Agreement is amended to read," the language of the 1985 Agreement effectively eliminated the original language. That quoted language is significantly different than the one found in the

1984 Agreement. Because of this critical difference in agreement terms, the Board concludes that Award No. 6 of Public Law Board 6190 does not control the instant dispute. The Board is convinced that Claimants retained their conditional right to a meal period based upon their assignment to local freight service.

The Organization argued that Article 45 was violated when Claimants were not allowed to have a meal period at Kaiser, California before they started en route to Barstow, California. There is no language contained in Article 45 to support a meal period for a crew before its departure from the initial terminal. The Eating Rule is written for crews en route who need to stop for a meal period. The Parties acknowledged the "en route" intent in the preamble of the 1984 Agreement, *"Any rules presently in effect concerning road crews eating en route…."* The Board is persuaded that, while the crew is required to make arrangements with the dispatcher while en route for the stop, Claimants had no contractual right for a meal period at Kaiser prior to their departure.

Moreover, the fact that Claimants did not have a meal period on the claimed date is insufficient to find a violation of Article 45. The Board relies upon the findings of Award No. 2371 of Special Board of Adjustment 235 which outlined the conditional right of an employee to secure a meal period:

> *There is no requirement that the employees take advantage of their right to notify the dispatcher and take a meal period; there is no requirement that Carrier provide a meal period to any employee in the absence of a notification to the dispatcher that the employee wants one.*

Article 45 requires cooperation of the employees so that the stopping for meals will not unnecessarily interfere with, or delay, other trains. The record does not indicate that Claimants gave advance notice of their desire to eat. Missing from the record is any evidence as to when, if or to whom Claimants may have requested a meal period. Claimants' responsibility was not alleviated by the fact that Carrier issued a General Order suggesting that crew members on the Kaiser Local pack and carry their meals. It was unrefuted that expeditious operations at Kaiser were required in order to coordinate with the commuter service.

Because the Board is not persuaded that the Carrier's action violated the Agreement, it does not reach the issue of what would be an appropriate penalty had such a violation been established.

The record in this case fails to substantiate a violation of Article 45. The claim must be denied.

AWARD: 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