PUBLIC LAW BOARD 6721

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

and

NMB Case No. 2
Claim of J. A. Powell Basic Day for Trading Trains

THE UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim for a basic day on behalf of Conductor J. A. Powell account required to trade trains between Bakersfield and Barstow on June 29, 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 June 29, 2002, Claimant, an employee in the conductor craft, was called in unassigned pooled freight service to work between Bakersfield and Barstow, California. Claimant was assigned Train Q RICCHI 1 28A (Richmond to Chicago) and took this train to Silt station, about 7½ miles short of Barstow. Claimant was then directed to leave his assigned train and take Train B RICLAC3 26A (Richmond to Los Angeles) from the siding at Silt and operate it to Barstow, which he did. The practice is referred to as "trading trains".

It is undisputed that the runs at issue were not interdivisional. It is also undisputed that there is no agreement provision providing for the trading of trains, although other run-through agreements prohibit or limit the Carrier's authority to trade trains.

Claimant filed a claim for a basic day because he was required to trade trains. 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 a basic day's pay because trading trains in other than interdivisional service violates the Coastlines Agreement. It maintains that the Parties have negotiated or arbitrated the majority of the runs on the Coastlines and that, on every interdivisional run, trading trains has been addressed in one way or another. It contends that, since Claimant's run is not interdivisional, and since there is no agreement language concerning trading trains in other than interdivisional service, trading trains in other than interdivisional service violates the agreement.

The Organization points out further argues that a number of run-through agreements have addressed trading trains, including the Riverbank agreement (Org. Ex. 2), which prohibits trading trains in either direction; the San Bernardino agreement (Org. Ex. 3), which prohibits trading trains in opposite directions; the Seligman agreement (Org. Ex. 4), which permits trading trains in the same direction for a monetary penalty payment; the Gallup agreement (Org. Ex. 5), which prohibits trading trains in opposite directions; and the Needles-Bakersfield agreement (Org. Ex. 6), which permits trading trains within the pool in the same direction.

As to the Carrier's position that, if the right to do something is not prohibited by the agreement, it is assumed to be permissible, the Organization argues that, if a particular practice is not written into the agreement, then it is written out and cannot properly be required. It contends that the Board should use the interpretive doctrine of *inclusio unuis est exclusio alterius* ("the inclusion of one is the exclusion of the other"). The Organization contends that, since the Carrier did not address the need to trade trains for more than 50 years, and when it did it only addressed trading trains in interdivisional run through service, the Carrier should be prohibited from being able to trade trains in other than interdivisional service. It maintains that, since trading trains has been addressed in every case except for those in other than interdivisional service, the Carrier does not have the ability to trade trains in other than interdivisional service.

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 basis because there is no agreement provision restricting its managerial right to manage its business as necessary and there is no prohibition to trading trains.

The Carrier asserts that the Parties, through Paragraph (B) of the agreement establishing this Public Law Board, gave the Board jurisdiction over claims arising "out of the interpretation of agreements governing rates of pay, rules or working conditions." It argues that the Organization has not provided an agreement subject to interpretation, but instead, has referred to interdivisional service agreements governing other operations and has asked for an equitable resolution to their claim that is based on another agreement involving a different set of employees (Engineers), Organization (Brotherhood of Locomotive Engineers) and rule. Citing authority, it contends that boards of arbitration are obligated to interpret agreements, not to determine equity or dispense their own version of industrial justice. It maintains that this Board must first find that there is an agreement to interpret and, in this case, there is none.

As to the Organization's suggestion that, if the right to do something is not written into the agreement then it is written out and cannot be done, the Carrier argues, citing authority, that it has the right to manage its business as it desires, restricted only by the provisions of applicable agreements [and law]. It contends that, absent a specific agreement to the contrary, it has the right to exercise its basic managerial functions and responsibilities and it is the Organization's burden to show that it has surrendered or limited that right.

With regard to the proposed remedy, the Carrier notes that the two awards alluded to by the Organization, involve a provision of the Engineers' Agreement that only provides for one hour's pay for trading trains, while the Organization, in the instant case, has proposed a full day's pay.

Finally, the Carrier 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.

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 must be denied. The Award so reflects.

Of the Carrier's assertion that resolution by the Board of the claim at issue is not proper because there is no provision to interpret, the Board is not persuaded. The Board notes, at the outset, that the governing Agreement reserves to Management the rights not specifically relinquished or restricted. The claim clearly places at issue the scope of that right and the restriction, if any, on that right, based on the silence of the remainder of the Agreement, as well as the inferences, if any, to be drawn based on those other agreements.

As indicated, no agreement language directly applicable to the claim has been presented for this Board. The only language which has been presented by the Organization pertaining to trading trains is found in run-through agreements involving service points other than those geographically relevant to the instant case.

The Board holds that such a claim involves the interpretation of the governing Agreement and is within the Board's jurisdiction.

With regard to the Organization's argument that, if a matter is not written into the agreement, then it is deemed to be "written out" and cannot be done, the Board notes that the Organization presented no evidence that demonstrates that the Parties engaged in the kind of comprehensive negotiations that consciously precluded any management action that was not specifically permissible. In the absence of such clear intent by the Parties, the Organization contends that the Board should use the interpretive doctrine of *inclusio unuis est exclusio alterius* and that, since the Parties *have* negotiated run-through agreements that permit trading trains *only* in interdivisional service, the Carrier must be prohibited from trading trains in other than interdivisional service.

The Board is not persuaded that the doctrine of including some things implies the exclusion of others is applicable in the instant case. First, the Board notes that this doctrine normally involves statutory construction and the interpretation of legislative intent, *i.e.*, where the enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. The instant case, of course, involves neither statutory language nor even a list enumerating exclusions within an agreement, but merely the fact that the Parties, involving certain other routes, have negotiated *some* language that covers *some* situations that have *some* similarities.

Second, the Board notes that the cited run-through agreements themselves are inconsistent with each other. The Riverbank agreement, for instance, prohibits intradivisional crews from trading trains altogether. The San Bernardino and Gallup agreements only specifically prohibit interdivisional crews from trading trains in opposite directions. The Needles to Bakersfield agreement specifically permits trading trains in the same direction while the Seligman agreement specifically permits trading trains in the same direction with a penalty payment of $13.00 per crew member. These different provisions provide no clear direction for the resolution of this dispute.

Third, even if the Board were otherwise disposed to adopt the doctrine of *inclusio unuis est exclusio alterius*, it is unclear what remedy would flow from such a conclusion. The Seligman run-through agreement would bring about a $13.00 penalty. The claim in the instant dispute, however, is for a full basic day. And the authority alluded to, but not specifically cited, by the Organization (*BLE and BNSF,* PLB 6171, Case No. 6 [Fletcher, Arb.] [Car. Ex. 11]) provided a remedy of one hour's pay.

There is no provision in the governing Agreement which prohibits the Carrier's trading trains. The mere fact that the Parties have negotiated agreements to cover trading trains for some runs is not sufficient proof to establish a binding agreement. The fact that those other agreements are different from each other makes such a task even more difficult. This Board will not presume to know how the Parties might have drafted some, as yet unwritten, provision.

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

Dated this 26th day of August, 2004.

M. David Vaughn, Neutral Member

Gene L. Shire, Carrier Member

R. L. Marceau, Employee Member