PUBLIC LAW BOARD 6721

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

and

UNITED TRANSPORTATION UNION

NMB Case No. 11
Claim of A.A. Leon and W.R. Schwietzer
Basic Day's Pay for Work not in Connection with with Their Assignment

STATEMENT OF CLAIM: On April 7, 2004, the claimants [A. A. Leon and W. R. Schwietzer] were required to couple air hose between the locomotive consist to a cut of cars, double over this cut of cars, couple the last air hose for the road crew, and then perform an air test for Q-SBDCH16-07. Once this service was performed a road crew departed the terminal with said train.

FINDINGS OF THE BOARD: The Board finds that Carrier and Organization are, respectively, Carrier and Organization, and Claimant Employees 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.

The Board makes the following Additional Findings:

A second shift yard service (Y-SB201) was established at the terminal located in San Bernardino, California. A primary function of this assignment is to switch cars and ready trains for movement.

On April 7, 2004, Claimants reported on duty at 15:01 hours for their assignment as yardmen on Y-SB201. They were responsible for building train Q-SBDCH16-07. Claimants were required by Management to take locomotives from the round house and couple them with air to a cut of cars on Track 225. The locomotive consist was used to set the cars on Track 225 over onto Track 212 where another coupling with air was made with the cars on that track. Claimants hung and tested the End of Train Device (ETD) and completed an air test, as Management instructed. The work was completed prior to 22:30 hours. Upon completion of this

work, a road service crew, which was called to report at 22:30 hours, took responsibility for the outbound train and its departure.

Rule 13 of the Governing Agreement provides, in part, that Yardmen will not be required to couple or uncouple air hoses without additional compensation except for specified exceptions, nor will they required to couple air hoses for road crews.

Article VIII, Section 3 of the October 31, 1984 National Agreement reads:

> Section 3 - Incidental Work
>
> (a) Road and yard employees in ground service and qualified engineer service employees may perform the following items of work in connection with their own assignments without additional compensation:

Article VIII, Section 3 contains no specific penalty provision for violation of its requirements.

> * * *
>
> (6) Bleed cars to be handled
> (7) Make walking and rear-end air tests
>
> * * *

A Memorandum of Agreement dated December 31, 1994. The Agreement provides in part:

> IT IS AGREED:
>
> * * * when a yardman with a ground service seniority date prior to January 1, 1995, is a member of a ground service yard crew that handles one or more ETDs/ETMS during a tour of duty, that employee will be paid one hour at the appropriate rate of pay. When a roadman with a ground service seniority date prior to January 1, 1995, is a member of a ground service road crew that handles one or more ETDs/ETMs during a tour of duty at any

> one or more of the locations listed on Attachment A, he will be paid one hour at the appropriate rate of pay. These payments will be made on a without prejudice basis. Payroll records indicate Claimant Leon received one hour's pay in addition to his regular pay for being required to handle an ETD during his assignment pursuant to the 1994 Agreement. Claimant Schwietzer did not receive additional pay for the ETD work under the 1994 Agreement since his seniority was subsequent to January 1, 1995.

In due course, a penalty claim was presented on the basis that the Claimants were instructed to perform work on an outbound train which was not in connection with their own assignment. The claim stated in its entirety:

> Claim one basic [day] account required by ATM and Trainmaster to use the road power for the Q-SBDCH16-07 BNSF 736-893-722 to couple the engines of the road power consist and make the air hose coupling on Track #225 and the double over to Track #212 and make the last air hose coupling between the two tracks for the road crew. The west car in Track #225 was (DTTX 727126) and the east car in Track #225 was (TTEX 161110) this is in direct violation of Article 13 of the Coastlines Switchmen's Agreement. Second we were required to make an initial terminal air brake test, and this was done for the road crew not in connection with this yard crew's assignment. Once we were done with the air test the road crew departed with this train. We at no time advanced, moved or switched this train after the air test was completed. This is in violation of Article VIII Section 3 of the October 31, 1985 National Agreement. (Org. Ex. 1, p.1)

Carrier declined the claim as without merit; the Organization appealed the denial, but without resolution; 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 coupling air hoses between the locomotives and cars, doubling over a cut of cars, coupling the last air hose and performing an air test was work improperly assigned to Claimants. It contends the Claimants were directed by Management to perform work which was not in connection with their own yard assignment in violation of Article 13 of the schedule agreement and Article VIII, Section 3 (a) of the October 31, 1985 National Agreement.

The Organization points to the phrase, "…in connection with their own assignment" from Article VIII, Section 3 of the 1985 National Agreement to argue that, since the work performed by the Claimants belonged to the outbound road crew, the Carrier's assignment of the work to the year crew was improper. It argues this was the road crew's work because the Claimants used the road crew's locomotive consist and that the train was immediately turned over to the road crew after the air test was performed by the Claimants.

During the oral presentation, the Organization contended that the changes in the Federal Railroad Administration's regulation attributed to Carrier's use of yard crews to relieve the road crews of the initial terminal air test for outbound trains. It argued further that the air test was not performed by Claimants for any reason other than to expedite train movement and not as part of their own assignment.

Precedent cited by the Organization includes Case Nos. 14 and 25 of Public Law Board 6390, Case No. 12 of Public Law Board 3691, Case No. 738 of Special Board of Adjustment 910, Case No. 38 of Public Law Board 5392 and First Division Award No. 24856.

The Organization argues Carrier's action violated the cited agreements and that Claimants are due a basic day's pay each. It requests the claim be sustained.

The Carrier maintains Claimants' basic assignment as yardmen, is to switch, build and make trains "road ready" at the San Bernardino terminal. All of the work performed by Claimants, argues the Carrier, was in connection with their own assignment on Y-SB201 to build train Q-SBDCH16-07 for departure. Carrier points out that no BNSF Carmen were employed at the facility. It contends the Claimants were not assigned to assist any other crew except as their own assignments included such assistance.

The Carrier argues that Article 13 cited by Organization was superseded by the subsequent 1985 and 1994 Agreements which amended Article 13. Carrier contends that, in order to properly test the ETD, it was imperative for the Claimants to couple all air hoses between the engines and the ETD, including the air hose between the cars doubled together. Likewise, Carrier insists the initial terminal air test on the train was a permissible assignment of work in Claimants' yard job.

According to the Carrier, the 1985 National Agreement and the 1994 Agreement allowed Management to require yard employees to perform the disputed work in connection with their own assignment, subject to the payment of one hours' additional compensation for employees with specified seniority. Carrier points out that Claimant Leon received an allowance of one hour for handling ETD's in addition to his other pay as specified in the 1994 Agreement and Claimant Schweitzer did not receive this allowance for ETD work because he is a post-January 1995 employee.

The Carrier argues that the Organization relies upon precedent which is faulty for two reasons: the cited awards either predated the 1985 National Agreement, or the air hose couplings in those cases were not made in connection with the performance of any other duties of the claimants therein.

In addition to Arbitration Board 419 to support its position, Carrier cites Award No. 7 of Public Law Board 6031, Award No. 1 of Public Law Board 5093, Award No. 16 of Public Law Board 5059 and Award No. 4 of Public Law Board 5019.

Finally, the Carrier asserts that the claim for a basic day's pay on behalf of Claimants for coupling the last air hose was made moot by Article VIII, Section 3(b)(6) of the 1985 National Agreement because it clearly provides that no additional compensation will be required for such work.

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

DISCUSSION AND ANALYSIS: Upon the whole of the record and in consideration of the arguments of the Parties, the Board finds that the Organization did not meet its burden of proof in this dispute to establish a violation of the applicable agreements. The Award so reflects.

This is an intra-craft claim about the performance of work which may be performed by either yard or road employees who are covered by the same agreements. The Board finds there is no evidence to suggest that the work at issue is exclusively assigned by agreement to either group of employees.

The record establishes that subsequent to adoption of Article 13 of the schedule agreement, the Parties negotiated flexibility of work between yard and road crews. All of the disputed work falls within the parameters of the Incidental Work provision of the 1985 National Agreement and the 1994 Agreement in respect to handling ETDs.

According to those agreements, the work at issue may be performed by either crew. The general scope or classification of work assignable to each crew (without compensation or, in connection with ETDs, with specified compensation) is defined by whether or not the items of work performed are in connection with their own assignments. If the work assigned to the crew is in connection with their assignment, with the exception of handling ETDs, it may be performed by the crew without additional compensation. Consequently, each case must be viewed in light of the particular circumstances surrounding the involved employees, crews and their assignments. While the awards cited by the Parties gave a general foundation for the dispute, none of the awards are directly on point with the fact patterns of the pending claim.

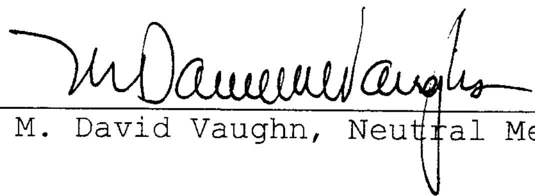
In the instant matter, Claimants reported for duty at 15:01 hours and received their work assignment to make ready train Q-SBDCH16-07. Neither carmen nor the crew of the outbound train were on duty at this time. No carmen were employed at San Bernardino and the road crew did not report for duty until 22:30 hours. The Board is persuaded that the road crew did not have and could not have had responsibility for the train until after the Claimants had completed their work, which included, the Board finds, testing the ETD and performing an airtest. Under these circumstances, concludes the Board, the Carrier was not restricted by the cited agreements from assigning the Claimants the tasks associated with building and preparing train Q-SBDCH16-07 for its departure. The Board is persuaded by Carrier's argument that all of the work was an incidental and necessary part of the Claimants' own yard assignment.

The locomotive consist obtained from the round house by the Claimants was used by them to perform switching work. The locomotive consist did not become the road crew's consist until that crew took responsibility for their train. Moreover, the Organization did not identify a contractual right of the road crew to perform the initial terminal air test. The fact that the Claimants ended their work assignment by performing an air test did not convey any right to that same work to the road crew. While initial terminal air tests may have once been performed by road crews pursuant to Federal Railroad Administration regulations, according to the Parties, that requirement no longer exists.

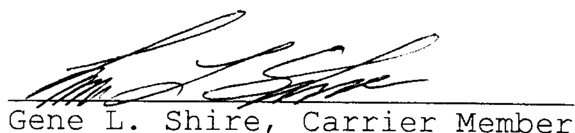
Missing from the record is the evidence to substantiate the Organization's position that any of part the disputed work belonged by agreement to the road crew rather than the Claimants. In work jurisdiction matters of this kind, the moving party bears the burden of proof to establish the merits of its claim. For the reasons stated herein, the Board holds that the insufficient evidence to establish that the work performed by the Claimants should have been performed by someone else and thereby the Organization has not satisfied its burden of proof.

AWARD: The Organization failed to prove that the Carrier's assignment of work without any further additional payments was in violation of its rights under the applicable agreements. The claim is denied.

Dated this 27th day of December, 2004.



M. David Vaughn, Neutral Member



Gene L. Shire, Carrier Member

R. L. Marceau, Employee Member