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Carrier File: EFA 96-03-26AC

Case No. 2
Award No. 2

PUBLIC BOARD NO. 6038

PARTIES Brotherhood of Locomotive Engineers-BNSF/MRL

TO

DISPUTE Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM: "Claim on behalf of Engineer G. A. Bennett requesting payment of forty-five (45) minutes Initial Terminal Delay (ITD) at North Antelope Mine on December 24, 1995 account North Antelope Mine is the point where the service portion of the trip began."

FINDINGS: This Board, upon the whole record and all of the evidence, finds that the Employees and Carrier involved in this dispute are respectively Employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

DECISION AND DISCUSSION: In 1979 the Carrier and the Organization established an interdivisional pool with a home terminal of Gillette, Wyoming and an away-from-home terminal at Guernsey, Wyoming. Even though the pool agreement makes some reference to deadheading, an accepted practice already existed of having engineers go on duty under pay at Gillette and then being transported by van to intermediate locations (which were the various coal mines) where the engineer would take charge of his train and proceed south to Guernsey without deadhead pay. This practice was known as "transport-under-pay" (TUP). It was affirmed numerous times by Boards that TUP did not involve deadheading and that crews transported under pay were not entitled to separate deadhead payments.

In 1995 the first division of the National Road Railroad Adjustment Board (Referee Richter) issued Award 24393 involving the UTU and the BN sustaining a claim filed in 1991 for

initial terminal delay (ITD) at an intermediate point under the following circumstances: (1) the Claimant's regularly operated from Northtown to Staples, Minnesota, (2) they were called to deadhead in combined service to Becker where they took charge of a train at noon, and (3) their train didn't leave until 4:25 p.m. for Staples. The pertinent part of the award reads as follows:

> "The October 31, 1985 National Agreement changed the method in which employees were paid when they deadheaded. Article VI of the 1985 National Agreement had a savings clause giving each Carrier signatory to the Agreement the right to retain their deadheading rules. This record is void of any information that the Carrier exercised this right, therefore the October 31, 1985 Agreement is pertinent to this case.
>
> Question and Answer No. 8 to Article VI of the 1985 Agreement deals with the matter before this Board. That Q and A reads as follows:
>
> Q-8 In situations where the carrier chooses to combine deadheading with service, at what point does initial terminal delay begin?
>
> A-8 At the point and time the crew actually reports on duty for the service trip.
>
> The Question and Answer is clear and unambiguous. In this case, the time for initial terminal delay started tolling when the crew arrived at Becker were their service trip was to begin.
>
> The Claim will be sustained in accordance (sic) Rule 39(a) of the Schedule Agreement, which deducts the first 75 minutes of delay or 3 hours and 10 minutes."

Beginning in 1994 the BLE filed claims such as the instant one involving the Gillette-Guernsey pool. It should be noted, however, subsequent to Award 24393, that the Parties agreed when a pre-1985 employee is called to combine deadhead and service pursuant to Article VI of Arbitration Board No. 458, ITD is applicable at the intermediate point where the engineer takes charge of his train.

The dispute here relates to the Claimant's status. The Carrier claims the Claimant was not, as in Award 24393, called to deadhead in combined service. Instead, they claim he was

called to be transported under pay (TUP). The Carrier claims that the distinction between transport under pay and deadheading still exists post-1985 just as it did pre-1985. Therefore, from their perspective any board award pursuant to the 1985 National Deadhead Rule (Article VI) did not change their previous right to decide to deadhead a crew or transport under pay. They agree if they were to elect to deadhead the Claimant combined with service, ITD would apply after the waiting period at the initial terminal. However, they argue they have a third option and that is to call an employee to transport under pay. When this is done, as they claim it was here, no deadhead and no ITD applies consistent with the long-standing practice.

The Union argues first that as a factual matter the claim, according to the call slip, was called in combined deadhead and service. Second, and foremost, it is their position that TUP for ITD proposes, at intermediate points between the home and away-from-home terminals at which a crew takes charge of a train, did not survive the 1985 Agreement. This is because Article VI contained the following language:

> "This Article shall become effective July 1, 1986 except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representatives on or before such date. (Emphasis ours)"

They note that the Organization was never notified either prior to July 1, 1986, or at any time thereafter, that the Carrier intended to preserve its previous practices involving TUP on this property. They also vigorously argued that TUP and deadheading combined with service are the same because employees are both paid on a continuous mileage basis. Indeed, TUP was always an exception to the deadhead rule. The Organization contends all Awards relied on by the Carrier are distinguished because they are pre-1985 and or that they did not involve ITD.

Both Parties' positions are merely summarized above (for purposes of explaining the basic issue dividing the Parties). Their submissions and arguments were quite detailed including many case citations.

The critical and fundamental issue before the Board is this:

> "Did Article VI of Arbitration Award No. 458 change the existing practice with respect to TUP and ITD at intermediate points between Gillette and Guernsey?"

In the opinion of the Board, the answer is yes because: (1) TUP is, for practical and essential purposes, the same as the provisions of Section 1 of Article VI which provides for continuous miles when transported without an engineer operating his own train to a distant point to take charge of this train. And (2) because the Carrier did not elect to preserve the TUP practice and instead has enjoyed the relief and benefits of Article VI.

While Article VI is titled "Deadheading," for all practical purposes it is a transport-under-pay rule because that is one of the things (if not the principle thing) it provided for. It gave Carriers who did not have it through rule or practice the right to pay continuous miles instead of a deadhead plus service when transporting to an out-of-terminal point to take charge of a train. The intent, purpose and effect of Article VI cannot be limited to the simple idea of deadheading and cannot be reasonably divorced from the idea of moving or staging crews under continuous pay while not operating a train.

The Carrier wants three options for handling crews in this pool. They want to be able to transport under pay, to pay on a continuous basis by combining service and deadhead or to pay the deadhead separate from service. Article VI gave Carriers the later two options. Under Article VI the only way they could have retained TUP as distinct from Article VI -- and all that

came with it including ITD at intermediate points under Question and Answer no. 8 -- is to have made a choice. Article VI did not provide the opportunity for Carriers to have their cake and eat it too.

In this regard, it is noted the Carrier acknowledged it accepted Article VI so it would gain consistency among all its various properties that make up its consolidated system. TUP as a practice existed only on certain predecessor properties. By accepting Article VI, the Carrier not only gained consistency, it also gained its benefits. For instance, Article VI offered the Carrier the ability to handle a crew into and/or out of established terminals without automatic release not previously available on any former property. They can also now call a crew to deadhead in combined service from the home terminal to the away-from-home terminal and work the same crew back on a train to the home terminal on continuous time or miles. When a crew is handled accordingly, run-around and automatic release rules are inapplicable, allowing the Carrier the ability to better serve its customers by utilizing its work force to the fullest extent.

The applicability of ITD at intermediate points under Q&A No. 8 does represent a change from the practice of TUP. However, nothing in Arbitration Board 458 guarantees every change in the agreement was good for all Carriers or allowed individual Carriers to cherry pick what parts of Article VI they liked and those they didn't. The Carrier had to make a judgement whether the net effect of Article VI was in their best interest and make an election. So they did. Uniformity on a system-wide basis or on a national basis comes at some price. If the price was too high for Article VI on this Carrier, they could opt out of its applicability or negotiate local accommodations.

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AWARD

The claim is sustained.

Gil Vernon, Neutral Member

Richard K. Radek, Organization Member

Edward T. Koenig, Carrier Member

Signed this 3/4 day of July, 1998