

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6041**

John C. Fletcher, Chairman and Neutral Member
Jason Ringstad, Carrier Member
John C. Mullen, Employee Member

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BNSF, SANTA FE GENERAL COMMITTEE**

and

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

Award No. 56
Case No. 56
Engineer R. J. Wallace

Date of Hearing - July 29, 2002
Date of Award - September 30, 2002

Statement of the Issue

The Chairman and Neutral Member, after review of the entire record, has determined that the issue before this Board is:

Is Claimant Engineer Wallace entitled to the guarantee compensation claimed in connection with Carrier's alleged refusal to allow him to exercise his train service seniority while his Engineer Certification was suspended?

FINDINGS:

Public Law Board No. 6041, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein.

Background:

Claimant was employed by the former Atchison, Topeka and Santa Fe Railway Company as a trainman in June, 1970. The record establishes that he was subsequently promoted into engine service in accordance with all applicable schedule rules.

On August 15, 1998, Claimant was called as engineer for Train S-FRSCHI113-13A, and while so assigned, failed to observe a red signal at Winslow, Arizona. Claimant was removed from service, and the record establishes that he subsequently waived formal investigation in exchange for a Level S 30 days' disciplinary suspension. The record further shows that Claimant's engineer certificate was revoked for a period of six months.

Claimant was reinstated to service on September 14, 1998 after serving his 30-day suspension. On September 15, 1998, Claimant attempted to exercise his prior train service seniority (because his engineer certificate remained suspended), and was barred from doing so by Carrier on the basis that Rule 19 of the BLE Agreement allegedly precluded him from working in a demoted status (under any circumstances) while junior engineers were still assigned as engineers. Rule 19 states:

Eligibility for Service as Engineer

(g) Firemen having successfully passed qualifying examinations shall be eligible as engineers. Promotion and the establishment of a date of seniority as engineer, as provided herein, shall date from the first service as engineer, when called for such service, provided there are no demoted engineers back firing. No demoted engineer will be permitted to hold a run as fireman on any seniority district while a junior engineer is working on the engineers' extra list or holding a regular assignment as engineer on such seniority district, except as provided in paragraph (j), Rule 20.

On September 21, 1998, Local Chairman P. T. Lynch wrote to Carrier's Superintendent of Operations G. J. Konechy, objecting to Carrier's refusal to allow Claimant to exercise his ground service seniority pending restoration of his engineer's license. His letter stated in pertinent part:

As per the attached waiver, Belen west Engineer R. J. (Bob) Wallace has agreed to a thirty day suspension ending on September 14, 1998. We had discussed the possibility of Bob marking up to the ground at the end of his suspension. However this possibility has been precluded by Labor Relations and Crew Management as per the attached copies of E Mail. I wanted to provide you with notice that the Brotherhood of Locomotive Engineers disagrees with Labor Relations on this matter. The Organization's contention is based on the attached Public Law Board No. 5683 Case No 38 Award No. 24 UTU file No. c-1984 Carrier file No. ctg 93-08-31d. This case should establish that in Bob's case he is

unable to hold an Engineer's assignment and should be permitted to exercise his ground seniority as per the Section 3(3) of the 1985 UTU National Agreement.

By letter dated October 12, 1998, BLE Chairman John Mullen petitioned Carrier's Vice President of Labor Relations regarding Claimant's return to service as a trainman, also on the basis of Award 24 of PLB 5683 (BNSF v. UTU; Cluster, 1997). As noted by Mullen, Award 24, in sustaining a claim, stated in pertinent part:

In the Board's view, the governing rule is not Engineer's Rule 27 (A), but XIII, Section 3(3) of the 1985 [UTU] National Agreement. As to that rule, Carrier argues that Claimant was not "unable" to hold an engineer's assignment; rather he was able to hold such an assignment, but was unable to work only due to certificate revocation ...

The Organization contends that Claimant's situation falls within the specific language of Article XIII, 3(3). Claimant, because he had no certificate, was unable to hold an engineer's assignment; therefore, he could exercise his trainman's seniority. In effect, the FRA regulation that Claimant could not work as an engineer without a certificate, set aside Claimant's engineer seniority for the thirty-day decertification period ...

While it is true inability to hold an engineer's assignment because of suspension of the engineer's certificate required by the FRA was not a condition in existence at the time Article XIII 3(3) was negotiated, the Board is convinced that this later-developed form of inability falls within the general intent of the Article. The scheme was that trainmen who applied for and successfully attained engineer's seniority would retain their seniority and all other rights as trainmen. However, in order to assure carriers of a sufficient supply of engineers to meet their operating requirements, such former-trainman engineers would only be permitted to exercise such rights if unable to work in engine service. Thus, former trainmen could not go back and forth from engineer to trainman service to suit their own convenience, leaving Carrier high and dry without the supply of engineers they had bargained for. In this case, Claimant was unable to work as an engineer because of FRA requirements, not because of Carrier requirements or his own wishes. Under such circumstances, in our view, the language and intent of Article XIII, 3(3) permitted him to exercise his trainman seniority, and nothing in the FRA Regulations prohibited him from doing so or prohibited Carrier from permitting him to do so.

On November 30, 1998, Claimant submitted two penalty time claims which are now before this Board, alleging that Carrier improperly withheld him from service after September 14, 1998. The first claim petitioned Conductor's Extra Board guarantee for the month of October, 1999, and the second claimed identical compensation for the month of November, 1999. Carrier denied both claims on the basis that Claimant "could have held as an engineer and was suspended as such." As resolution of the matter could not be reached on the property, it was submitted to the Board for disposition.

Position of the Organization

The Organization argues that Claimant should have been permitted to exercise his train service seniority under both applicable BLE and UTU Agreements. In particular, the Organization relies upon Award 24 of PLB 5683, adopting the Organization's conclusion in that case that Claimant's engineer seniority was, in effect, non-existent ("set aside") as a result of the revocation of his engineer certificate. Consequently, every engineer in Claimant's seniority district so assigned, was "senior" to Claimant by virtue of that revocation, and he should therefore have been permitted to work in a demoted status under applicable BLE Schedule Rules.

The Organization also accuses Carrier of applying its fundamental argument in this case disparately. The Organization cites one specific instance on this same property, when a dismissed engineer was reinstated by Carrier, and in fact permitted to exercise train service seniority pending restoration of his suspended engineer certificate.¹ The Organization argues that Claimant should also have been permitted to do so, and urges the Board to sustain the instant claims.

Position of Carrier

At the outset, Carrier argues that the instant claims are not timely, as they were not presented within 60 days of September 15, 1998, the date Claimant completed his Level S suspension and first attempted to mark up in train service. Carrier argues that the claims in this case are not continuing, as a single "triggering event" occurred when Claimant attempted to exercise his ground seniority on that date, and was admittedly barred from doing so. As such, contends Carrier, they should have been presented within 60 days of September 15th in order to be considered timely.

As to merit, Carrier admits applying its logic in this case "inconsistently", given the Organization's evidence that Engineer Hardegree was permitted to exercise train service seniority under similar circumstances. Nevertheless, Carrier argues that the controlling Agreement still supports its conclusion that Claimant was in possession of valid engineer seniority *in spite of* temporary FRA revocation of his privilege to exercise it, and because the Agreement expressly

¹ See Organization Exhibit 17, service record of Engineer R. J. Hardegree.

prohibits senior engineers from working in a demoted status while junior engineers are still so assigned, he was properly prevented from exercising his train service seniority on the basis that there were engineers beneath him on the roster who were still assigned and working as engineers.

With respect the Organization's reliance upon Award 24 of PLB 5663, Carrier argues that it is "misplaced", and accordingly urges the Board to deny the claims in their entirety.

Discussion

After reviewing the record, the Board is persuaded that the instant claims are both timely and valid. As to the issue of timeliness, the Board observes that Claimant did not assert on November 30, 1998, that he was entitled to compensation *beginning* September 14, 1998. While Carrier is somewhat correct in observing that an initial dispute regarding the exercise of Claimant's ground service seniority arose on that date, the Board points out that the *effect* of that dispute was ongoing. In other words, Claimant could have attempted to exercise his ground service seniority at any point during the claim months of October and November, and apparently failed to do so on the basis of a reasonable expectation, given the record, that he would be barred from doing so. Consequently, because claims were filed in November for lost wages during the claim months October and November, they were clearly timely under Schedule Article 43, and are now appropriate for consideration on merit.

As to the merits, the Board adopts Referee Cluster's conclusion that the spirit and intent of seniority provisions cited by Carrier, were to protect Carrier from engineer shortages resulting from individual elective demotion. The reality here, as Referee Cluster similarly observed in Award 24, is that the mandatory revocation of Claimant's engineer certification effectively rendered his engineer seniority *void*, if only temporarily. Therefore, because by previous agreement Claimant had been permitted to retain his train service seniority in order to protect his employment in the event he could no longer work as an engineer (and that is precisely what happened here), he should have been permitted to exercise it upon his return from disciplinary suspension. The Board is fully persuaded that its conclusion is a sound one in light of cited arbitral precedent, and Carrier's own acknowledgment relative to the Organization's evidence on Engineer Hardegree, that its application of cited agreement provisions has been "mixed".²

The Board is convinced by the evidence that Claimant should have been permitted to access and exercise his train service seniority (after serving his disciplinary suspension) until such time as his engineer certificate was reinstated. Therefore, the instant claims must be, and are, sustained.

The following Award so reflects.

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Award No. 56
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AWARD

The issue before this Board:

Is Claimant Engineer Wallace entitled to the guarantee compensation claimed in connection with Carrier's alleged refusal to allow him to exercise his train service seniority while his Engineer Certification was suspended?

is answered in the affirmative, "Yes". The claims are sustained as set forth in the findings.

ORDER

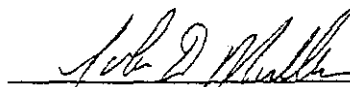
Carrier is directed to comply with this Award within thirty (30) days of the date indicated below, and make any payments that may be due Claimant within that time period.



John C. Fletcher, Chairman and Neutral Member



Jason Ringstad, Carrier Member



John C. Mullen, Employee Member

Dated at Mount Prospect, Illinois, September 30, 2002