P.L.B. No. 6312
Case No. 226
Award No. 226

PUBLIC LAW BOARD
NO. 6312

Parties to Dispute:

UNITED TRANSPORTATION UNION AS THE REPRESENTATIVE OF VARIOUS CLAIMANTS

VS.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)
SYSTEM DOCKET NEC-UTU-SD-473

Statement of Claim:

Various Philadelphia based extra Board Conductors and Assistant Conductors claiming one (1) day's pay for each date the Carrier operated the Brandt Power Unit, beginning on August 1, 2003, through October 4, 2003, at their Downingtown Pa, Yard/MW Base, and on the Harrisburg Main Line, absent a Conductor and an Assistant Conductor in violation of Rules 1 and 11 of the parties' Agreement.

BACKGROUND FACTS

As set forth in the statement of claim, Claimants are various Conductors and Assistant Conductors on the Philadelphia based Extra Board of the Carrier. The claims herein seek one day's pay based on the contention of the Claimants and the Organization (UTU) that, on various dates between August 1, 2003 and October 4, 2003, the Carrier utilized a Brandt Power Unit and three gondola cars on "out of service" tracks 1 and 4 between Paoli Interlocking at mile post 20 and Downs Interlocking at mile post 32 on the Carrier's Philadelphia to Harrisburg line. The

Brandt Power Unit, the record shows, tied up at Chester Valley and Frazer yards and on a pocket track at Paoli, Pennsylvania during the period in question. The Brandt Unit was operated by Maintenance of Way employees consisting of a Foreman-Pilot and an Engineer Work Equipment. According to the Claimants, the Carrier was required, pursuant to rules 1 and 11 of the UTU Agreement with the Carrier, to utilize a Conductor and an Assistant Conductor in conjunction with the operation of the Brandt Power Unit.

The claims were denied initially on the Property and the UTU appealed to the Division Manager-Labor Relations in 45 letters that were dated between October 1 and 25, 2003, from the UTU Local Chairman. The Division Manager-Labor Relations denied the appeals in a November 25, 2003 letter. Subsequently, the UTU General Chairperson appealed the denial of the appeals to the Director-Labor Relations of the Carrier in a March 16, 2004 letter. The Parties conferenced on May 26, 2004, and by letter dated August 18, 2004, the appeals were denied by the Director-Labor Relations. The matter now stands before this Board for adjudication.

At the hearing on February 11, 2005, the neutral member of this Board ruled that the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters (BMW) had a possible interest in the dispute, and due notice and an opportunity to be heard were provided to BMW. BMW has appeared and submitted its position to the record of this proceeding.

The UTU contends that the Brandt Power Unit performs the same functions as a

traditional locomotive, as can be seen in the manufacturer's specifications. Moreover, the conclusion that the Brandt Power Unit is a "locomotive" the UTU asserts, can be seen in the dictionary definition of locomotive. Further, the NORAC Operating Rules, the UTU puts forth, contains a definition of "engine," which would support the conclusion that the Brandt Power Unit is a locomotive. In addition, the UTU contends that, on the dates in question, the Brandt Power Unit was engaged in work train service. It is clear, the UTU argues, that work train service has always accrued to train service employees.

According to the UTU, Rule 38 'of its Agreement with the Carrier does not apply to the Brandt Power Unit, since it can not be concluded that the Parties have agreed that the Brandt Power Unit qualifies as a "self-propelled machine" within the meaning of Rule 38. Even if the Board were to consider that Rule 38 was applicable, the UTU maintains, it is evident that the Form D involved must be considered a "train order." The UTU discounts any reliance on Award No. 30 of Public Law Board No. 35 16 because, unlike the instant factual pattern, the facts in that case did not establish the existence of an operation of equipment under "train orders." Further, the UTU claims that no weight should be given to the Award issued by Arbitrator Twomey in the "Brandt truck arbitration" between the UTU and the Board of East Coast Railway. The UTU maintains that the bargaining history between the Carrier and the UTU concerning the Scope Rule and the Consist Rule is not at all like the bargaining history between the Board of East Coast Railway and the UTU. The UTU insists, given the non-applicability of Rule 38, that Rule

11 (b) applies, and therefore, for the dates in question, a minimum crew of a Passenger Conductor and an Assistant Passenger Conductor was required in conjunction with the operation of the Brandt Power Unit. Finally, the UTU maintains that the appropriate remedy requires a day's pay for the agreement violations shown in the record.

The BMW claims that the operation of the Brandt Unit is Maintenance of Way work that is reserved to Maintenance of Way employees under the scope of its Agreement with the Carrier. According to the BMW, before the Carrier began to utilize the Brandt Power Unit, Maintenance of Way employees engaged in the operation of various machines that had the abilities to handle flat cars, gondolas, rail cars, or tie cars, all of which were used in either the distribution of Maintenance of Way materials or related Maintenance of Way work. When the Carrier began to use the Brandt Truck, according to the BMW, the Truck was designated as a self-propelled machine, with a drawbar at each end, that had the capability of handling rail cars incidental to the performance of work by Maintenance of Way employees.

In the estimation of the BMW, Rule 38 of the UTU agreement with the Carrier does not require that the work at issue be performed by UTU employees because the Brandt Power Unit was not operating under train orders. Further, the BMW maintains that the operation of the Brandt Power Unit in connection of Maintenance of Way work is covered by the Maintenance of Way Agreement. The work involved in the instant dispute, according to the BMW, consisted of the Brandt Power Unit being coupled to distribute cross ties from gondola cars on Track 1 and

4 between Paoli Interlocking and Downs Interlocking on various dates in August and September of 2003. The operation of the Truck was under a Form D that was issued by the dispatcher, the BMW observes, and the Form D was not a "tram order" within the meaning of Rule 38 of the UTU Agreement. Instead, the BMW argues, the Form D was a track permit assigned to the Maintenance of Way employees to authorize them to perform the track work assignments.

The BMW claims that its position is supported by an Award of Referee Twomey in a dispute including the Brotherhood of Locomotive Engineers and CSX. According to the BMW, the Award of Referee Twomey should be considered controlling because of his conclusion that the Brandt Truck was a "self-propelling machine" that was utilized in conjunction with Maintenance of Way duties. The BMW further identities the language in the Award that cites the lack of evidence "that the Brandt Truck was a mere substitute for a locomotive."

According the Carrier, the record shows that it purchased a Brandt Power Unit in 2003 for the primary purpose of material distribution, unloading railroad ties, and dragging sections of rail along the right of way for installation by Maintenance of Way employees: The Carrier observes that the Brandt Power Unit is not capable of hauling a full rail train, a ballast train, or a work train consist. On the dates in question, the Carrier contends, the Brandt Power Unit was utilized as a self-propelled machine. According to the Carrier, the Form D involved was issued by a dispatcher as a movement permit and can not be considered a train order.

The Carrier claims that 42 claims are invalid for lack of factual support because the

Brandt Power Unit did not operate on various dates for which these claims have been filed. Additionally, the Carrier asserts that 37 claims must be considered invalid under rule 24 (d) because the Claimants involved, for various dates, were not available to perform the work they have claimed.

As to the merits, the Carrier claims that the UTU did not sustain its burden of proof in establishing any contractual violations. According to the Carrier, the Brandt Power Unit operated on an "out of service" track under a Form D and was not operating under train orders. The Carrier maintains that the UTU was required to show that the Brandt Unit operated under train orders on main line territory, and the UTU produced no proof to support any such contentions. The Carrier also contends that its position is supported by Award No. 30 of Public Law Board 43516 in which Referee Yogoda found that the UTU failed to establish that a Speno rail grinder operated on an in-service track under train orders. Further, the Carrier relies on the aforesaid award issued by Referee Twomey referenced above. In essence, according to the Carrier, no contractual violation has been established because the work was properly performed by Maintenance of Way forces.

OPINION OF THE BOARD

The Board finds the initial question before it to be whether, as the UTU argues, the Brandt Power Unit, as used by the Carrier on the dates set forth in the statement of claims, was

a locomotive instead of a self-propelled machine within the meaning of Rule 38 of the UTU Agreement with the Carrier. If the Brandt Power Unit was a locomotive, then Rule 38 would not apply and the UTU has established a contractual violation because of the Carrier's obligation to assign train men to a locomotive. If, however, the Brandt Power Unit is considered to be a self-propelled machine within the meaning of Rule 38, then the UTU cannot prevail unless it can be established that the Brandt Power Unit was "operating in main line territory" and was "operating under train orders."

In addressing this question, the Board finds direction in the decision of the Board in a dispute involving CSX and the Brotherhood of Locomotive Engineers. (September 24, 2003; Chairman and Neutral Member Twomey). In that case, the Board concluded that, as used in a non-rail mode, coupled to a flat car and air dump car containing ballast to perform Maintenance of Way work, the Brandt Unit was a "self-propelling machine" utilized "in conjunction with Maintenance of Way duties during the claim dates." The Board observed that, on the claim dates, the Unit "had the capacity to load and haul materials and equipment while on-rail, as well and loading and hauling and handling materials and equipment off-rail, over the road during this period." The Board also found that "[n]o evidence exists that the Brandt truck was a mere substitute for a locomotive during this period." This Board reaches a similar conclusion and rejects the UTU's position that the Brandt Power Unit, as utilized on the dates of claim, "was a mere substitute for a locomotive."

Thus, the question becomes whether, as a self-propelled machine, under the meaning of Rule 38, the Brandt Power Unit was "operating in main line territory . . under train orders."

In Award No. 30 of Public Law Board 3516, the Board had before it a claim that an assistant passenger conductor was improperly denied earnings because he was not called to perform service on Speno rail grinding equipment. The Board found that the equipment " was being operated in main line territory on tracks that had been previously taken out of service by Maintenance of Way employees." It further noted that the equipment "operated with authority of track car permit form M." The Board found that the equipment was not operating under "train orders" and denied the claim. In the instant case, the Form D permit, the record shows, explicitly stated that the Brandt Power Unit would be operating on "out of service" track. As in Award No. 30 of Public Law Board 3516, the Form D cannot be likened to a "train order" so as to support the conclusion that the Brandt Power Unit was operating under the auspices of Rule 38. In this regard, the Board does not accept the UTU's argument that because the NORAC Operating Rules state that a Form D controls the "movement of trains" that the use of a Form D in all instances supports the conclusion that it is a "train order." Put differently, where, as here, the Form D is utilized for Maintenance of Way work on "out of service" track, it cannot be considered a "train order" within the meaning of Rule 38.

Accordingly, the Board finds that the UTU has not sustained its burden of proof in establishing any contractual violations. Based on this conclusion, it is not necessary for the

Board to address the procedural contentions raised by the Carrier.

AWARD

For the reasons, stated the claims are denied in all respects.

DATE: 3/15/06

THOMAS N. RINALDO, ESQ., NEUTRAL MEMBER

3-21-06

LARRY C. HRICZAK
CARRIER MEMBER

dissenting

C. A. IANNONE
EMPLOYEE MEMBER