

PUBLIC LAW BOARD NO. 6190

Award No. 4

Case No. 4

Carrier File No. 6299-0005

Organization File No. GO 40-393-5

Parties to Dispute:

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(**UNITED TRANSPORTATION UNION**
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(**BURLINGTON NORTHERN SANTA FE RAILWAY**
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(**-and-**
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(**BROTHERHOOD OF LOCOMOTIVE ENGINEERS**
(**(Third Party Intervenor)**

QUESTIONS AT ISSUE:

1. Were D. A. Cunningham and R. J. Kruciak improperly placed into engineer service ahead of senior train service employees who stood for this service under Article XIII of the October 31, 1985 National Agreement?
2. If the Question is answered in the affirmative, then would proper restitution be to place adversely affected senior train service employees on the engineer's roster on the basis of their relative seniority standing in train service, and give them an engineer's seniority date that reflects the seniority date of April 19, 1997?

INTRODUCTION

This Board is duly constituted by agreement of the parties dated November 9, 1998 as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representatives ("Organizations") within the meaning of the Act, as amended.

FINDINGS

During March 1997, the Carrier announced that a Locomotive Engineer Training Program (LETP) would commence on April 21, 1997. (Superintendent Notice No. 100). Subsequently, six train service employees successfully bid for the available openings in the LETP, and began their training at the Carrier's training center located in Lenexa, Kansas on April 21, 1997. Five of the six trainmen who entered the LETP completed the program and were promoted to engineer by the Carrier on September 20, 1997. On April 19, 1997, prior to the commencement of the aforementioned LETP, the Carrier hired two fully-promoted and qualified engineers, D. A. Cunningham and R. J. Kruciak. The Galveston engineers seniority roster reveals that the Carrier placed engineers Cunningham and Kruciak on the roster ahead of the five trainmen who successfully completed the LETP on September 20, 1997. As a result,

the United Transportation Union ("UTU") filed a claim which requested the Carrier readjust the seniority standing on the Galveston engineers seniority roster for the UTU represented employees. The Carrier denied the claim, and the parties were subsequently unable to resolve this dispute on the property. The Brotherhood of Locomotive Engineers ("BLE") intervened as an interested third party in this dispute, and the case is properly before the Board for resolution.

The UTU asserts that the trainmen who graduated from the Carrier's LETP on September 20, 1997, should be placed ahead of engineers Cunningham and Kruciak on the Galveston engineers' seniority roster. According to the UTU, the disputed issue was previously resolved in its favor by PLB 2412, Award No. 1, which decision was upheld by the United States Court of Appeals for the Seventh Circuit. Additionally, the UTU asserts that PLB 6171, Award No. 5 supports its contention that PLB 2412, Award No. 1, is the applicable decision on this property.

The UTU further contends that Article XIII, Sections 3 and 4 of the October 31, 1985 National Agreement set forth the manner by which train service employees would be utilized by the Carrier to fill engine service positions. The UTU points out that Article XIII, Section 4(4) allows the Carrier to hire engineers or other individuals from outside the ranks of its train service employees for engine service. However, the UTU argues that the situation described in Article XIII, Section 4(4) did not exist at the time the Carrier hired two previously qualified

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engineers on April 19, 1997. The UTU cites several awards, including PLB 5916, Award No. 1, in which various carriers have attempted to circumvent the trainmen seniority provisions contained in Article XIII of the 1985 National Agreement. According to the UTU, these awards establish that the UTU has the controlling interest in training, promoting and establishing seniority for engineers.

The UTU also points out that the claimants were notified of their acceptance into the LETP by the Carrier during the week of April 14, 1997. Therefore, the claimants were in the engineer training program prior to the date on which engineers Cunningham and Kruciak established their engineer seniority dates with the Carrier. As such, the UTU argues that the Carrier should have placed the claimants on the Galveston engineers' seniority roster ahead of engineers Cunningham and Kruciak in accordance with Section I (H)(3) of the UTU Training, Promotion and Seniority Agreement, dated September 8, 1994. For each of these reasons, the UTU argues that the answers to the questions at issue presented to this Board must be answered in the affirmative.

The Carrier contends that the current ranking of the Galveston engineers seniority roster is correct. The Carrier argues that the following principles support its position regarding the matter before the Board. First, trainmen do not establish seniority as firemen until they are under the jurisdiction of the 1994 UTU Training, Promotion & Seniority Agreement. Second, all engineers with a post-1985 seniority date have ground service seniority. Third, not all post-1985 ground service employees have engine service seniority.

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There is no BLE agreement or any suggestion in a UTU agreement that would allow trainmen to be automatically placed on any engine service seniority roster. Fourth, the training agreement for promotion to engineer is under the jurisdiction of the UTU. Finally, the engine service seniority roster is under the jurisdiction of the BLE.

The Carrier specifically points out that Section I (H)(3) of the 1994 UTU Training, Promotion and Seniority Agreement does not support the UTU's position because the claimants were not in training at the time engineers Cunningham and Kruciak were hired. Thus, Article I of the BLE Agreement applies to the facts presented in this case. The Carrier further argues that PLB 5916, Award Nos. 1 and 2, cited by the UTU in support of its position, are clearly erroneous and have no precedential value on this property. The Carrier relies upon numerous awards in support of its position that engineers Cunningham and Kruciak were properly placed on the Galveston engineers' seniority roster. In sum, the Carrier contends that it has pointed to clear, specific and unambiguous language which defines the proper handling of situations where an engineer is hired on a seniority district where there are "engineers-in-training." For each of these reasons, the Carrier requests that the questions at issue be answered in the negative.

The BLE concurs with the Carrier's position, and contends that there are additional reasons which support its position that engineers Cunningham and Kruciak were properly placed on the engineers' seniority roster by the Carrier. The BLE points out that Cunningham and Kruciak were fully-qualified and promoted engineers at the time they were hired by the

Carrier on April 19, 1997, and the BLE is the authorized representative of the engineer class. According to the BLE, Article I of the BLE Agreement establishes the seniority date for engineers, and the seniority dates for the claimants and engineers Cunningham and Kruciak were properly established in accordance with Article I. The BLE argues that the UTU agreements cannot be utilized to determine a question of engineer seniority.

The BLE further argues that the UTU agreements, in the event that they are deemed applicable in this case, do not support the UTU's position. The BLE asserts that Article XIII of the 1985 UTU National Agreement does not establish that ground service employees are to be the exclusive source for engineers. Furthermore, the BLE points out that Section I (H)(3) of the 1994 UTU Training, Promotion and Seniority Agreement provides that engineer trainees would rank ahead of hired engineers regarding seniority only if such trainees are in training at the time the engineers are hired by the Carrier. In the case at issue, the claimants did not begin their engineer training until two days after the Carrier hired engineers Cunningham and Kruciak. Finally, the BLE argues that PLB 5916, Award No. 1 is palpably erroneous. For each of these reasons, the BLE requests that the question at issue be answered in the negative.

The principal issue to be resolved by this Board, as agreed to by the parties, is as follows: "Were D. A. Cunningham and R. J. Kruciak improperly placed into engineer service ahead of senior train service employees who stood for this service under Article XIII of the October 31, 1985 National Agreement?" Based upon the following analysis, the Board finds

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that engineers Cunningham and Kruciak were properly placed on the Galveston engineers' seniority roster by the Carrier.

The following provisions are applicable to the Board's decision in this case. Article I of the BLE Agreement provides, in pertinent part, as follows:

- (a) Engineers entering the service of the Company for the first time shall be employed by the Mechanical Superintendent or by his authority. Engineers' seniority will start with date of promotion or employment, as the case may be.

* * *

Article XIII of the October 31, 1985 UTU National Agreement provides, in relevant part, as follows:

The craft or class of firemen (helpers) shall be eliminated through attrition except to the extent necessary to provide the source of supply for engineers and for designated passenger firemen, hostler and hostler helper positions. Trainmen shall become the source of supply for these positions as hereinafter provided.

* * *

Section 3- Retention of Seniority

(1) Subject to the carrier's legal obligations, when selecting new applicants for engine service, opportunity shall first be given to employees in train and yard service on the basis of their relative seniority standing, fitness and other qualifications being equal. Transfer of engineers from one seniority district to another on the same railroad system will not be violative of this provision.

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Section 4- Promotion

The following principles will govern in the selection and promotion to engine service and conductor/foreman:

* * *

- (3) Trainmen who establish seniority on or after November 1, 1985 will be selected for engine service in accordance with Section 3 of this Article XIII. However, if a sufficient number of trainmen (including those promoted to conductor) do not make application for engine service to meet the carrier's needs, such needs will be met by requiring trainmen (including promoted conductors) who establish seniority on or after November 1, 1985 to take engine service assignments or forfeit seniority in train service.
- (4) If the carrier's needs for engine service employees are not met during a period when there are not sufficient trainmen (including promoted conductors) in service with a seniority date on or after November 1, 1985 who must accept promotion to engine service or forfeit seniority in train service, the carrier may hire qualified engineers or train others for engine service.

* * *

The UTU Training, Promotion and Seniority Agreement, dated September 8, 1994, provides, in relevant part, as follows:

I. Training and Promotion

The purpose of this Agreement is to modify and amend the formal program for the training and qualifying of locomotive engineers, which is in effect between the Carrier and the UTU(E) and to meet the immediate and continuing needs of the Carrier. The United Transportation Union (Engineer's Committee) will cooperate in this program.

- A. A fireman ("engineer service trainee") shall be any person selected by the Carrier for the purpose of training to be a qualified locomotive engineer under existing collective bargaining agreements. Any employee who has entered or enters the engine service training program after October 31, 1985 will establish a fireman seniority date, strictly for purposes of an orderly transition to the craft of locomotive engineer. The use of this seniority date is strictly limited by and subject to the conditions set forth in Article XIII of the October 31, 1985 UTU National Agreement. Thus employees who entered or enter engine service after October 31, 1985, shall have no right to work as fireman or hold firemen's positions.

* * *

H. Establishment of Seniority

1. An engine service trainee who successfully passes both final examinations on the first attempt will be assigned a graduation date by the Training Center. This date will be the Saturday following the week in which the exams are passed. Provided that the employee successfully completes district territory qualification, this will be the employee's locomotive engineer seniority date.

* * *

3. Employees who are certified locomotive engineers at the time they are employed and are subsequently promoted ahead of engine service trainee(s) their senior, will be considered to have established seniority dates as engineers below all senior engine service trainees who are in training at the time and subsequently pass promotion on the first or second attempt.

* * *

The record reveals that both Cunningham and Kruciak were fully-promoted and qualified engineers at the time they were hired by the Carrier on April 19, 1997. Article I of

the BLE Agreement provides, in part, as follows: "Engineers entering the service of the Company for the first time shall be employed by the Mechanical Superintendent or by his authority. Engineers' seniority will start with date of promotion or employment, as the case may be." As noted by Neutral Seidenberg, "The Board finds that once an employee reaches the threshold of the craft, and wishes to pass over into the craft of engineer, it is then the BLE Agreement that determines how this employee will be ranked as an engineer." PLB 3950, Award No. 1, at 36 (1986). The Board concludes that engineers Cunningham and Kruciak properly received engineers' seniority dates of April 19, 1997, which was their date of hire by the Carrier. Additionally, the Board finds that the claimants properly received engineers' seniority dates of September 20, 1997, the date upon which the claimants graduated from the LETP and were promoted to engineers. However, our inquiry does not end with this determination.

The Board recognizes that several UTU agreements must also be considered in order to properly resolve this dispute. The Board finds that trainmen are subject to UTU agreements *prior* to reaching the "threshold of the engineer craft." The Board further finds that in the case of trainmen the "threshold of the engineer craft" is the date upon which a trainman graduates from the LETP and is qualified for promotion to engineer.

The UTU Training, Promotion and Seniority Agreement, dated September 8, 1994, provides, in part, as follows:

(H)(3) Employees who are certified engineers at the time they are employed and are subsequently promoted ahead of engine

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service trainee(s) their senior, will be considered to have established seniority dates as engineers below all senior engine service trainees who are **in training at the time** and subsequently pass promotion on the first or second attempt.

(emphasis added).

The Board finds that the following award referenced by the UTU demonstrates the intended application of the language contained in Section I (H)(3) of the 1994 UTU Training, Promotion and Seniority Agreement. In PLB 6171, Award No. 5, which issued on this same property on October 25, 1999, Neutral Fletcher was faced with an issue similar to the one presented to this Board. Writing for the board, Fletcher noted, as follows:

Furthermore, the record dictates that this Board make a determination that Carrier properly placed Engineer Wagner in relative order below those employees who were **actively training** for engine service at the time of his move to the Old Arizona District. Those trainees, by virtue of their previously existing seniority on the District as ground service employees (as opposed to Wagner's "new hire" status on the District as a result of his resignation from the Los Angeles District) were clearly senior, and placed ahead of Wagner on the roster in compliance with the requirements of Section I H(3), cited above. (Underlining and bold supplied).

PLB 6171, Award No. 5, at 7-8 (1999).

The record established that the claimants began their LETP training on April 21, 1997. The Board finds that an employee is not "actively training" for engine service until such date as the training program actually commences, which in this case was April 21, 1997. Mere acceptance into the LETP is *not* the equivalent of an engine service trainee, "in training."

Engineers Cunningham and Kruciak were hired by the Carrier on April 19, 1997, two days prior to the date on which the claimants began active training for the positions of engineer. Therefore, the Carrier's placement of engineers Cunningham and Kruciak ahead of the claimants on the Galveston engineers' seniority roster was in full compliance with Section I (H)(3) of the 1994 UTU Training, Promotion and Seniority Agreement.

Article XIII, Section 4 of the October 31, 1985 UTU National Agreement sets forth language regarding the source of supply for engineers. The Board notes that the evidentiary record concerning the source of supply for engineers at Galveston is significantly underdeveloped. Suffice it to say that in its written rebuttal to the Carrier's and BLE's submissions, the UTU argues that the "sufficient trainmen" with a seniority date on or after November 1, 1985 who could have been forced to take promotion to locomotive engineer were the claimants - the very employees given an opportunity for engine service two days after engineers Cunningham and Kruciak were hired. Equally scant record evidence exists concerning the critical need for qualified engineers, the forces generating the so-called "crisis" as alleged by the Carrier and the status of the Carrier's locomotive engineer training program leading up to the hiring of outside engineers in this case. The apparent reason this record is so woefully underdeveloped on the exigency of the Carrier's hiring need and the sufficiency of the available trainmen is that the scope of the issue before this Board is determined to be a narrow question of timing - the date of Carrier's employment of certified locomotive engineers hired from the outside versus the date the engine service trainees are to be considered in

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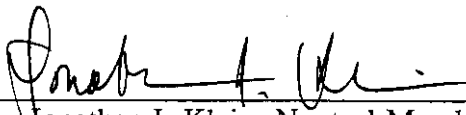
training for the purpose of establishing a seniority date in the transition to the craft of locomotive engineer. In other words, this decision is limited to an application of the Section I (H)(3) of the 1994 UTU Training, Promotion and Seniority Agreement, and in no way should be interpreted to minimize, modify or amend in any way the principles of promotion and hiring set forth in Section 4(4) of Article XIII of the 1985 UTU National Agreement with respect to hiring qualified engineers "off the street." For each of the foregoing reasons, the Board finds that engineers Cunningham and Kruciak were properly placed into engineer service ahead of senior train service employees who stood for this service under Article XIII of the October 31, 1985 National Agreement.

AWARD

Question At Issue No. 1 is answered in the negative.

Gene L. Shire, Carrier Member

Paul C. Thompson, Employee Member



Jonathan I. Klein, Neutral Member

This Award issued March 28, 2002.