NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1151

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN	)
	) Case No. 1
and	)
	) Award No. 1
UNITED TRANSPORTATION UNION	)
	)
and	)
	)
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY	)

Martin H. Malin, Neutral Chairman
Francis T. Lynch, Deadlock Neutral
Richard K. Radek, BLET Member
Bruce R. Wigent, UTU Member
John F. Ingham, Carrier member

Hearing Date: July 27, 2006
Draft Award Submitted: August 14, 2006
Executive Session Held: October 24, 2006

QUESTIONS AT ISSUE:

As Framed by BLET

Has the Carrier's removal of locomotive engineers from certain assignments where locomotives are being operated by trainmen via remote control violated the provisions of Article 1 - Manning of the BLE-T/EJ&E Agreement?

As Framed by UTU

Was the Carrier proper in its assignment of trainmen (yard conductors and yard helpers) to perform remote control operations in its terminals?

As Framed by Carrier

EJ&E began implementing remote control locomotive (RCL) operations in January 2004 on specialized yard (hot metal) assignments working within US Steel's Gary Works in Gary, Indiana. EJ&E has since implemented RCL operations on certain yard assignments in Kirk Yard, also in Gary, and is preparing to implement RCL operations at its terminal in Joliet, Illinois later this year. The computerized technology involved in RCL operations eliminates any need for a locomotive engineer on remote control assignments

because the on-board computer operates the locomotive. When EJ&E implemented its first RCL operations, it assigned use of remote control technology to its yard ground service employees represented by UTU, pursuant to its collective bargaining agreement with that organization. That precipitated a dispute with BLET over whether such actions constituted a violation of Article 1 (Manning) of the collective bargaining agreement between EJ&E and BLET.

Is EJ&E correct that its actions did not violate Article 1 which states: "*All locomotives under own power and in service to be handled by engineers. . .*"?

FINDINGS:

Special Board of Adjustment No. 1151, upon the whole record and all the evidence, finds and holds that Employees and Carrier are employees and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On August 20, 2002, members of the National Carriers Conference Committee entered into an Agreement with the United Transportation Union providing for UTU-represented employees to operate remote controlled locomotive devices. A side agreement provided that Carrier, among others, could become a party to the UTU-NCCC Agreement by serving notice to that effect. Carrier served such notice on September 4, 2002.

The Brotherhood of Locomotive Engineers, now known as the Brotherhood of Locomotive Engineers and Trainmen, objected that the assignment of operation of remote controlled devices to other than engineers violated BLE Agreements. The dispute proceeded to SBA 1141, comprised of Board members appointed by BLE, UTU and the Carriers, and a neutral chair. A procedural dispute arose as to how to break a tie should one exist on SBA 1141. SBA 1141 Procedural Board, chaired by Referee Francis X. Quinn, held that a second neutral would cast the deciding vote in the event of a tie. SBA 1141 Merits Board, chaired by Referee Gil Vernon, then held that the carriers acted properly in assigning the work to UTU-represented employees.

On or about September 16, 2003, Carrier discussed with UTU its plans to implement remote control operations. On September 20, 2003, Carrier discussed these plans with BLET. BLET maintained that Carrier's plan violated Article 1 of the BLET Agreement. Article 1(a) provides:

> All locomotives under own power and in service to be handled by engineers, except on roundhouse tracks or when moving between roundhouse and machine shop at East Joliet; between roundhouse and machine shop at Kirk Yard and between terminals within a terminal.

Carrier and BLET agreed that the dispute over Article 1 should proceed before a Public Law Board or Special Board of Adjustment for resolution. UTU, supported by Carrier, sought full party status in the proceeding on the merits of the Article 1 dispute. BLET objected and the issue was brought before Public Law Board (Procedural) No. 6808 which held that the UTU would receive full party status. Thereafter, BLET, UTU and Carrier entered into the agreement which created the instant Special Board of Adjustment.

At various stages during this dispute, BLET appeared to be arguing that the Award of SBA 1141 did not control the instant dispute, that the facts and Agreement language at issue in the instant dispute were materially different from the facts and Agreements before SBA 1141, that the issue presented in the instant dispute was not resolved by SBA 1141 and that the Award of SBA 1141 was so erroneous that this Board should not follow it. At the hearing, BLET clarified its position. Although BLET continues to disagree strenuously with SBA 1141's conclusion that UTU personnel when operating remote control units (RCUs) are not handling or operating the locomotive, BLET does not seek to relitigate that conclusion before this Board. BLET further clarified that it agrees that SBA 1141 did not confine its award to the nature of RCU operations but also interpreted several local agreements, some of which are indistinguishable in all material respects from Article 1. BLET agrees that, because it is impossible to distinguish the Award of SBA 1141 in any principled manner, if this Board follows SBA 1141's Award, we must answer BLET's question in the negative. However, BLET urges that SBA 1141's interpretation of the local agreements comparable to Article 1 was palpably erroneous and, accordingly, we should not follow it.

Consequently, it is necessary to examine the Award of SBA 1141 in detail. SBA 1141 adopted the analytical framework implicit in BLE's statement of the question at issue which asked whether BLE had the exclusive right to perform RCU work as a result of agreement or established practice. SBA 1141 divided its analysis into three parts: national agreements, established practice and local agreements.

SBA 1141 analyzed General Order No. 27, the 1944 and 1945 Diesel Agreements, and the 1985 Incidental Work Rule and concluded that they did not reserve RCU work exclusively to locomotive engineers. SBA 1141 then devoted the lion's share of its discussion (25 of 42 pages) to established practice. SBA 1141 observed "that there has evolved, through custom and practice, a distinct core set of exclusive duties of engineers and groundsmen (switchmen, brakemen, conductors and switch tenders) in the yard and terminal operations." SBA 1141 Award at 13-14.

SBA 1141 characterized the demarcation between engineer and groundsman duties as, "the engineer principally operates the engine and the groundsman, among others, principally controls the engine." Award at 17 (emphasis in original). The Board's ultimate conclusion was:

> As to the critical question, to wit, "Is the operation of the remote control unit (RCU) a matter of control and signaling or is it a matter of operating the engine?", the Neutral is compelled to conclude that the evidence supports the proposition that the operation of the

> RCU by UTU groundsmen does not constitute an infringement on the traditionally exclusive duties of an engineer. The critical piece of equipment is the on-board computer (CPU) and the RCU is just a control and signaling device that gives commands to the CPU in a manner consistent with the groundsman's traditional duties to control the movement of yard engines. It is the CPU that operates the engine, not the RCO [remote control operator] with the use of the RCU. Thus, the RCO is not supplanting the engineer. It is the computer.

SBA 1141 Award at 23.

SBA 1141 described the groundsman's operation of the RCU as "set it and forget it." Award at 24. SBA 1141 analogized the engineer's operation of a locomotive to a highly skilled French chef preparing a meal from scratch by adding various ingredients and cooking them in various ways, and contrasted that with the operation of an RCU which the Board analogized to placing a TV dinner in a microwave, setting the time and pushing the start button. Award at 26.

Consequently, SBA 1141 concluded that the engineer had not been replaced by the RCO. Rather, the engineer had been replaced by the on-board computer:

> The CPU, the PID controller and its programmed logic are now making all the decisions and operational adjustments for the engineer. The computer is the composite of all the engineer training and experience its designers could muster. The engineer has truly been replaced by the CPU and, as a result, the technology has dispensed with the need for an engineer. The darn computer even rings the bell.

Award at 29. The Board held, "The Carrier's agreement with the UTU to have UTU members fill RCO positions in yards and terminals and have their wages, hours and other terms and conditions governed by that agreement does not violate the BLE National Agreements because it does not involve the reassignment of duties and responsibilities that are exclusively reserved to engineers by express contract language and/or custom and practice." Award at 30-31.

As noted above, although BLET continues to take strenuous exception to SBA 1141's conclusion that the engineer has been replaced by the on-board computer and not by the RCO, it does not seek to relitigate that issue before this Board. Rather, its position in the instant case is that the replacement of the engineer by the on-board computer violates Article 1. Addressing the merits of that position brings us to the third part of SBA 1141's analysis – the local agreements.

Before SBA 1141, BLE argued that numerous local agreements precluded the assignment of RCU operations to other than engineers on those properties. SBA 1141 listed six BNSF agreements, four CSX agreementrs, six Kansas City Southern and Norfolk Southern agreements and five Union Pacific agreements. The Board disposed of the arguments under these agreements as follows:

> In spite of the detail in the separate submissions, a close study of the extensive arguments

reveals that these agreements all fall into one or more of the following categories: (1) They extend preference to engineers for engineers as did General Order No. 27, which has already been addressed by the Neutral; (2) they are a derivative of or similar to the 1944/45 Diesel Agreements which says existing or exclusive duties of engineers cannot be assigned to others which has already been addressed by the Neutral; (3) they assume engineers work still exists and has not been eliminated and therefore beg the question; (4) they involve different technology and recognition by a particular Carrier whom agrees it merely assisted the engineer and did not replace him; (5) they involve seniority rules which distinguish a yard engineer's entitlement to yard work based on intra seniority (i.e. versus road seniority) considerations rather than inter craft jurisdiction; (6) agreements that are clearly based on timing did not and could not contemplate remote control technology; and (7) a few agreements which are too equivocal and thus do not support the BLE claims.

Award at 40-41.

The Neutral Chair of SBA 1141 issued his decision on January 10, 2003. By letter dated January 27, 2003, BLE counsel asked the Neutral Chair to clarify his award with respect to four local agreements:

- BNSF – St. Louis San Francisco Agreement, Article 2(A): "All motive power in road or yard service of this Carrier (except as otherwise provided herein) will be handled exclusively by Engineers in active service holding rights as Locomotive Engineers on the Engineers' seniority list. All locomotives going over the road under their own power will be in charge of an Engineer in active service. . . ."

- BNSF – Great Northern Ry Agreement, Rule 71: "When regular switch engines and yard crews are used, there shall be a switch engineer and fireman assigned."

- BNSF – Spokane, Portland and Seattle Agreement, Rule 42(I): "When regular switch engines and yard crews are used, there shall be a switch engineer assigned."

- BNO agreement on CSXT's Northern Lines, Rule 43: "Any locomotive operated over main tracks or principal side tracks within yards shall be operated by a locomotive engineer in that seniority district . . ."

BLE counsel argued:

The fact that technology may allow a locomotive to be operated <u>without</u> an engineer is irrelevant to these particular rules; the existence of new technology for locomotive operation does not alter the explicit requirement in these rules that locomotives be operated <u>by</u> or <u>with</u> an engineer. None of these rules falls within any of the categories that caused you to reject the other individual property rules.

Letter at 3 (emphasis in original).

The Neutral Chair responded by letter dated February 7, 2003:

> To clarify, it was the intent of the Arbitrator to express a finding that the four individual property agreements in question fall into one or more of the seven categories set forth in the award. Therefore, as stated in the award, none of these agreements act as a restraint on the Carrier's discretion in implementing remote control in terminals operations.

Article 1 is materially indistinguishable from the BNSF – St. Louis San Francisco Agreement Article 2(A). Indeed, at the hearing, BLET conceded as much. Consequently, the question before this Board is not how we would interpret Article 1 were we writing on a clean slate. Rather, the question is whether SBA 1141's interpretation of comparable agreement rules is so devoid of rationality as to be palpably erroneous. BLET bears a heavy burden to demonstrate that the SBA 1141 Award is palpably erroneous. To determine whether it met this burden, I turn to BLET's specific arguments.

BLET urges that I discount the SBA 1141 Award because the Neutral Chair did not expressly analyze the language of each specific rule presented to him. Even when asked for clarification, the Neutral Chair failed to specify into which of the seven categories the four highlighted agreement rules fell. The absence of such specific analysis, in BLET's view, reduces the level of deference to which the Award might otherwise be entitled. BLET urges that Article 1 does not fit within any of the seven categories listed in the Award of SBA 1141.

BLET argues that the language of Article 1 is clear, concise and unambiguous. The words "All locomotives under own power" are inclusive. Locomotives operated by CPUs directed by a groundsman operating an RCU are still "under own power." Consequently, under the plain language of Article 1, such locomotives are "to be handled by engineers." According to BLET, "handled" means operated. Thus, Article 1 precludes Carrier from having the CPU operate the locomotive; an engineer must operate the locomotive.

BLET observes that the title of Article 1 is "Manning," and quotes *Webster's II New College Dictionary* (1995) as defining "manning" as "to supply with men; to station members of a ship's crew at . . .; to serve in the force or complement of (workers who man the production lines)." It quotes the same source as defining "all," as "The total entity or extent of. The whole number, amount or quantity of. The utmost possible of. Every." BLET quotes the same dictionary defining "handle," as "To touch, lift or hold with the hands. To operate with the hands; manipulate. To deal with or have responsibility for."

BLET characterizes Article 1 as a work preservation rule, combining a crew consist rule with a scope rule. In BLET's view, Article 1 precludes Carrier from replacing the engineer with anyone else or anything else, including a computer. BLET contends that because Carrier has removed engineers from the locomotives, engineers are neither manning nor handling them, something BLET characterizes as "as clear-cut and astounding a violation of Agreement

language as one might ever see." BLET Submission at 4.

BLET analogizes the instant situation to the elimination of the work of locomotive firemen. A 1943 National Agreement provided, "A fireman, or a helper taken from the seniority ranks of the firemen, shall be employed on all locomotives ; . . ." BLET observes that when technology eliminated the work performed by locomotive firemen, carriers could not eliminate firemen from their trains in light of the explicit manning agreement. Consequently, the carriers and the Brotherhood of Locomotive Firemen and Enginemen through the RLA Section 6 negotiation process achieved a series of agreements that ultimately eliminated the fireman position. BLET urges that Article 1 requires Carrier to follow the same process if it wishes to eliminate engineer's duties in remote controlled locomotives.

UTU and Carrier advocate the same position and advance similar arguments. Therefore, I shall group their arguments together. UTU and Carrier urge the Board to follow the Award of SBA 1141. Much of their arguments focus on the contention that the instant dispute is indistinguishable from the dispute before SBA 1141, a proposition with which BLET now agrees.

UTU and Carrier defend the decision of SBA 1141. They argue that the decision is supported by an earlier decision in Canadian Railway Office of Arbitration Case No. 2191 (Picher 1993) which reached a similar result in Canada.

UTU and Carrier argue that with the introduction of RCUs, no one is handling the locomotive. They maintain that the on-board computer eliminates the need to handle the locomotive. In their view, Article 1 applies only when there is a need to handle a locomotive. Because the technology eliminates the need to handle the locomotive, there is no violation of Article 1.

UTU and Carrier maintain that the bulk of the Award of SBA 1141 focused on what it means to handle a locomotive. In their view, SBA 1141 did not have to go into great detail concerning the local agreements because its conclusions flowed from its prior analysis. They urge that Article 1 falls within categories 3 (it assumes engineer's work still exists and has not been eliminated) and 6 (agreements that are clearly based on timing did not and could not contemplate remote control technology) of the categories enumerated by SBA 1141.

UTU and Carrier contrast Article 1 to the rule governing firemen cited by BLET. They observe that the firemen rule expressly required that a fireman "be employed on all locomotives." Article 1, they contend, merely provides that when locomotives are handled, they must be handled by engineers. They also contrast Article 1 with the UTU consist rule, Article 6(a) of the Schedule of Rules and Rates of Pay Applicable to YARDMEN, which provides, "Except as otherwise provided in Supplement No. 14 - Crew Consist, each engine used in general yard service will have a crew to consist of not less than a foreman and one helper. . . . " They observe that Article 1 lacks specific language requiring Carrier to employ an engineer on the locomotive regardless of whether the engineer's work has been eliminated. UTU and Carrier further observe

that in November 2000, BLE served a Section 6 Notice on Carrier seeking, among other things, to amend Article 1. In their view the Section 6 Notice represented BLE's recognition that Article 1 did not preclude the elimination of engineer's work and replacement by a computer.

BLET responds that the Section 6 notice sought only generally to amend Article 1 and that it cannot be read as indicating BLE's understanding that Article 1 was not a work preservation rule. BLET further responds that Article 1 cannot fall within categories 3 or 6 in the Award of SBA 1141. BLET contends that Article 1 cannot fall within category 3 because Article 1 expressly preserves the work, i.e., Article 1 precludes Carrier from eliminating the work. With respect to category 6, BLET argues that a crew consist agreement cannot anticipate all potential future events. In BLET's view, crew consist agreements, such as Article 1, are negotiated to protect employees against unanticipated future events. Technological change cannot nullify a crew consist agreement; that may only occur through negotiations.

As noted above, the issue posed to this Board is not how to interpret Article 1 in the first instance but rather whether the interpretation of comparable provisions of local agreements before SBA 1141 was so lacking in rationality as to be rejected as palpably erroneous. I have carefully considered all arguments presented by the parties at the hearing and in their submissions as well as the voluminous exhibits attached to those submissions. I am unable to say that the Award of SBA 1141 should be rejected as palpably erroneous.

BLET urges that I discount the precedential value of the Award of SBA 1141 because the Board did not analyze each local agreement in detail. Certainly, an individual analysis of each local agreement at issue would have been helpful to this Board and others who may face similar disputes on other properties that were not before SBA 1141, but such detail was not necessary. Before SBA 1141, BLE argued that the RCO was handling the locomotive by operating the RCU. After an extensive analysis of the traditional dividing lines between engineer and groundsman duties and of the remote control operations, the Neutral Chair of SBA 1141 concluded that operation of the RCU was not the handling of a locomotive; rather, he found, the work of handling the locomotive had been eliminated, replaced by the on-board computer. It followed that the operation of the RCU was not work reserved exclusively to engineers. The Neutral Chair of SBA 1141 then considered whether specific local agreements changed this result. He concluded that they did not and explained that conclusion by categorizing the local agreements. It was not necessary for him to be more specific than that.

As noted above, the local agreement that clearly is materially indistinguishable from Article 1 was the BNSF – St. Louis San Francisco Agreement, Article 2(A). Although SBA 1141 did not expressly state that this agreement fell within category 3, the parties to the instant dispute appear to recognize that SBA 1141 implicitly placed this agreement in category 3. Category 3 encompassed agreements that assumed that engineers' work still existed and had not been eliminated. BLET argues that Article 1, and presumably the BNSF – St. Louis San Francisco Agreement, could not have fallen into this category because they preserve the work that this category finds was eliminated. That characterization frames the crux of the dispute – whether SBA 1141's conclusion that these agreements do not preserve work but operate on the

assumption that engineers' work still exists is palpably erroneous.

BLET's strongest argument focuses on the language of Article 1(a) that provides, "All locomotives under own power and in service to be handled by engineers . . ." BLET urges that SBA 1141's interpretation cannot stand up against the plain meaning of these words. BLET maintains that remote control operated engines remain locomotives under their own power and remain locomotives in service and therefore must be handled by engineers, not computers. BLET's argument has considerable force, particularly if one looks only at the quoted words. However, it is also a reasonable method of contract interpretation to interpret words in the context of the entire provision in which they appear. *See Elkouri & Elkouri, How Arbitration Works* 436-39 (6th ed. Alan Miles Ruben ed. 2003).

The context in which the critical language of Article 1 appears supports SBA 1141's interpretation. Article 1 provides:

(a) All locomotives under own power and in service to be handled by engineers, except on roundhouse tracks or when moving between roundhouse and machine shop at East Joliet; between roundhouse and machine shop at Kirk Yard and between terminals within a terminal.

Exception: Hostlers at East Joliet may move locomotives between roundhouse and points within yard; hostlers at Kirk Yard may move locomotives between roundhouse and points within yard, and between roundhouse at Kirk Yard and points within Gary Mill. (Revised May 19, 1993).

(b) All locomotives to be broken in by engineers.

(c) Engineers in yard service may perform hostling work without additional payment or penalty (revised May 19, 1993).

Read as a whole, Article 1 addresses the division of the work of handling locomotives between engineers and others. It reserves that work to engineers except "on roundhouse tracks or when moving between roundhouse and machine shop at East Joliet; between roundhouse and machine shop at Kirk Yard and between terminals within a terminal," where the work may be performed by others. It further provides that hostlers may handle locomotives to move them "between roundhouse and points within yard" at East Joliet and Kirk Yard and "between Kirk Yard and points within Gary Mill." It also authorizes engineers in yard service to perform hostling work without additional payment and reserves to engineers the work of braking in locomotives. The context of Article 1 read as a whole reflects a work allocation provision rather than a work preservation provision. It supports SBA 1141's categorization of the rule as one that presumes that the work exists and has not been eliminated.

When the language on which BLET relies is read in context, the very dictionary definitions on which BLET relies can reasonably be read as supporting SBA 1141's interpretation. BLET quotes *Webster's II New College Dictionary* (1995) definition of "handle," "To touch, lift or hold with the hands. To operate with the hands; manipulate. To deal with or have responsibility for." In other words, *Webster's II New College Dictionary* defines handling as the action of a human being.[1] Although this could be read to support BLET's interpretation that Rule 1 mandates that a human being (specifically an engineer) operate the locomotive, it may also rationally be read to support SBA 1141's interpretation that the rule applies only when there is work for a human being to do and does not apply where the human being, i.e. the engineer, has been replaced by a computer. The definition certainly supports SBA 1141's conclusion that the work of handling the locomotive has been eliminated because a computer is incapable of handling anything.

Additionally, the language of Article 1 stands in marked contrast to other language designed to preserve work. The fireman's agreement to which BLET analogizes Article I provided, "A fireman, or a helper taken from the seniority ranks of the firemen, shall be employed on all locomotives ; . . ." That language is far more specific than Article 1 in making clear that a fireman was required regardless of the circumstances. Similarly, Article 6(a) of the Schedule of Rules and Rates of Pay Applicable to YARDMEN provides, "Except as otherwise provided in Supplement No. 14 - Crew Consist, each engine used in general yard service will have a crew to consist of not less than a foreman and one helper. . . . " Supplement No. 14, Crew Consist Agreement, provides, "The consist of all yard and transfer crews, except as otherwise provided in this agreement, will be not less than a foreman and one helper. . . ." This language also is much more specific in preserving work for its craft, rather than allocating work among crafts.

This is not to say that BLET's interpretation of Article 1 is irrational. On the contrary, BLET has put forth several reasonable arguments in support of its interpretation that Article 1 precludes Carrier from eliminating engineers' work. However, as I have stated several times previously, the issue as posed to this Board is not which rational interpretation the Board would select were it deciding the issue on a clean slate. Rather, the question is whether SBA 1141's interpretation is palpably erroneous. SBA 1141 interpreted the relevant agreement language in a rational, reasonable manner. Its interpretation was not palpably erroneous. Therefore, this Board should defer to it.

VOTE

For the reasons set forth above, the Neutral Chairman votes as follows:

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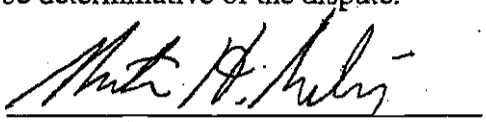
[1]The definition could also encompass the action of an animal (e.g. "The monkey is handling the banana.") but that aspect of the definition is irrelevant to the instant dispute.

The question at issue as framed by BLET is answered in the negative.

The question as issue as framed by UTU is answered in the affirmative.

The question at issue as framed by Carrier is answered in the affirmative.

In accordance with the arrangements agreed to at the hearing and at the Executive Session, the partisan members of the Board shall promptly serve their votes on all members of the Board. In the event a majority exists, the majority vote of the Board shall be adopted as the Award of this Board pursuant to paragraph 9 of the Agreement creating this Board. Pursuant to paragraph 15 of the Agreement, the Award will become effective 30 calendar days after it is rendered and it will be final and binding on the parties with respect to the matters covered, subject to the provisions of the Railway Labor Act. If a majority does not exist, the Board will notify the Director of Arbitration of the National Mediation Board to unseal the vote of the Deadlock Neutral which will be determinative of the dispute.



Martin H. Malin, Neutral Chairman

Dated at Chicago, Illinois, November 7, 2006

THE J

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

1141 Maple Road - Joliet, IL 60432-1981

J. F. INGHAM
SENIOR DIRECTOR LABOR RELATIONS
412-433-7818 815-740-6911 (fax - Joliet)

November 8, 2006

Martin H. Malin
Chairman, SBA 1151
565 West Adams Street
Chicago, IL 60661-3691

Re: SBA 1151, Case No. 1

Dear Mr. Malin:

The Carrier Member of this Board votes as follows with respect to each party's Question at Issue:

1. The BLET's question is answered in the negative.
2. The UTU's question is answered in the affirmative.
3. The Carrier's question is answered in the affirmative.

Respectfully,

John F. Ingham
Carrier Member

cc: R. K. Radek, BLET
B. R. Wigent, UTU
C. J. Miller III, UTU

PAUL C. THOMPSON
International President

RICK L. MARCEAU
Assistant President

DAN E. JOHNSON
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November 14, 2006

Martin H. Malin
Chairman, SBA 1151
565 West Adams Street
Chicago, IL 60661-3691

Re: SBA 1151, Case No.1

Dear Mr. Malin:

The UTU Member of the Board votes as follows with respect to each party's Question at Issue:

1. The BLET's question is answered in the negative.
2. The UTU's question is answered in the affirmative.
3. The Carrier's question is answered in the affirmative.

Very truly yours,

Bruce Wigent
Vice President

cc: C.J. Miller
J.F Ingham
R.K. Radek

Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference–International Brotherhood of Teamsters

NATIONAL DIVISION
1370 Ontario Street, Mezzanine • Cleveland, Ohio 44113-1702
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RICHARD K. RADEK
Vice President

November 20, 2006

Mr. Martin, H. Malin, Neutral Member
Special Board of Adjustment No. 1151
Chicago-Kent College of Law
565 West Adams St.
Chicago, IL 60661-3691

Re: BLE-T Member vote, SBA N0. 1151

Dear Mr. Malin:

Please record my votes in connection with your Award No. 1 of the captioned Board as follows:

Questions at Issue:

As framed by BLE-T .....affirmative.

As framed by UTU.....negative.

As framed by Carrier.....negative.

Additionally, should it turn out that it is not necessary to open the vote of the deadlock neutral and the Award becomes final, please attach the enclosed dissent to the Award so that it may become part of the Award's distribution.

Sincerely,

Richard K. Radek

Richard K. Radek
BLE-T Member, SBA No. 1151

Enclosure

cc: John F. Ingham, Carrier Member
Bruce R. Wigent, UTU Member
Rick E. Jackman, General Chairman, BLE-T

Dissent of the BLE-T Member to Award No. 1
Special Board of Adjustment No. 1151
Martin H. Malin, Neutral Chairman

In Award No. 1, Neutral Arbitrator Martin H. Malin has decided that the Carrier has not violated Article 1 of the BLE-T Agreement by removing locomotive engineers from assignments operated by trainmen using a remote control unit. We believe this conclusion is egregiously erroneous. For ready reference, Article 1 reads as follows:

(a) All locomotives under own power and in service to be handled by engineers, except on roundhouse tracks or when moving between roundhouse and machine shop at East Joliet; between roundhouse and machine shop at Kirk Yard and between terminals within a terminal.

Arbitrator Malin decided to endorse the elimination of locomotive engineers from their assignments principally on the basis of a prior decision by Arbitrator Gil Vernon in Special Board of Adjustment No. 1141. Vernon ruled that a computer installed in locomotives which receives radioed commands from a remote control operator eliminated locomotive engineers' work. According to Vernon, the remote control technology is a "set it and forget it" system where operating a locomotive by remote control is simply like "placing a TV dinner in a microwave, setting the time and pushing the start button." In reality, the system is nothing like this, as anyone who actually works with it knows.[1] Nevertheless, Vernon went on to say that because engineers' work did not exist, there was no need to heed clear, unambiguous manning or scope rules requiring the handling of locomotives by locomotive engineers.

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[1]. The remote technology involved in this (and Vernon's) case places a device in the operator's hands that contains miniaturized controls. The operator selects which direction to go and then picks a speed, 2 mph, 4 mph, 10 mph etc., to go. The CPU (computer) on the locomotive then commands the locomotive to go that speed, like the cruise control in many automobiles. The operator must watch for signals, obstructions, misaligned switches and anything else affecting the movement. The operator must decide how much brake effort to apply and when to apply it. The CPU decides none of this by itself.

The Federal Railroad Administration requires remote control operators to be certified under the Locomotive Engineer Certification Regulations (49 CFR Part 240). If the remote control operator commits an operating violation [49 CFR § 240.117 (e)], the operator is subject to certification revocation. The computer never receives the blame because the computer is not operating the locomotive. That the operator is handling the locomotive, and not the computer, cannot seriously or truthfully be argued.

We believed Vernon was wrong that explicit agreement language requiring handling of locomotives by engineers could be vitiated because another method to operate locomotives without an engineer in the cab arguably has been devised. We initiated the dispute and arbitration of the case subject of this Dissent in an attempt to reaffirm the principles that clear and unambiguous agreement language must be strictly construed and cannot be altered or eliminated except through negotiations.

In his findings Arbitrator Malin writes:

BLET's strongest argument focuses on the language of Article 1(a) that provides, "All locomotives under own power and in service to be handled by engineers..." BLET urges that SBA 1141's interpretation cannot stand up against the plain meaning of these words. BLET maintains that remote control operated engines remain locomotives under their own power in service and therefore must be handled by locomotive engineers, not computers. BLET's argument has considerable force, particularly if one looks only at the quoted words. However, it is also a reasonable method of contract interpretation to interpret words in the context of the entire provision in which they appear. *See Elkouri & Elkouri, How Arbitration Works* 436-39 (6th ed. Alan Miles Ruben ed. 2003).

Arbitrator Malin then cites the "Exception" to Article 1(a):

> Exception: Hostlers at East Joliet may move locomotives between roundhouse and points within yard; hostlers at Kirk Yard may move locomotives between roundhouse and points within yard, and between roundhouse at Kirk Yard and points within Gary Mill. (Revised May 19, 1993).

From this Arbitrator Malin concludes that Article 1 is "a work allocation provision rather than a work preservation provision." We think this is nonsensical. The rule requires handling of locomotives by engineers, with certain enumerated exceptions, and no exception to that requirement may be inferred merely because a computer may (arguably) be capable of operating a locomotive. Stipulating the exceptions implies the exclusion of all others. See *Elkouri & Elkouri, How Arbitration Works,* 467-468 (6th Edition, Alan Miles Ruben, Ed.) "*Expressio unius est exclusio alterius.*"

The very purpose of putting an Agreement in writing is to express the promises and commitments the parties have made to one another in bargaining. Here the Carrier promised that locomotives would be handled by engineers. "Handling" as used in Article 1, is an expression of art. Handling a locomotive

means to be in control of it, to operate it. If an engineer is not assigned to a locomotive, he or she certainly cannot "handle" it. It should not have mattered one whit to Vernon or Malin whether a computer installed in a locomotive is capable of operating it. One might assume for argument's sake that the computer does, all by itself, independent of anything or anyone, perform all the functions necessary to operate the locomotive, and, thereby, the railroad can choose two methods to operate the locomotive; one by remote control (computer) and the other with a locomotive engineer. The method employed should be the one which comports with the Agreement. Anyone who is capable of reading the Rule ("All locomotives ...to be handled by engineers...") should know which method must be employed to comply with the Agreement.

An arbitrator's function in this process is to properly consider, interpret and apply provisions of a collective bargaining agreement. We think that Arbitrator Vernon, and now Arbitrator Malin in following him, are both guilty of the most fundamental errors an arbitrator can make. They looked at clear and explicit contractual language and did not give it its plain meaning. They substituted tortured rationalizations for reason, abandoning even common sense. They eliminated a provision of the parties' Agreement through the guise of interpreting it. Arbitrators, the Courts have said, are to draw the essence of their awards from the Agreements, not obliterate them. On the Elgin, Joliet & Eastern Railway, Engineers, who were contractually entitled to handle locomotives, now are not. That this has been done is so horribly wrong it simply takes one's breath away.

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