

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 928

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
and) Case No. 379
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)) Award No. 379

Martin H. Malin, Chairman & Neutral Member
M. B. Kenny., Employee Member
L. C. Hriczak, Carrier Member

Hearing Date: May 22, 2003

STATEMENT OF CLAIM:

Claim of Amtrak Passenger Engineer D. L. McCreary (Claimant) requesting an eight (8) hour payment for each violation date, on account being required to work his regular assignment ESKT-2 from various, unspecified turnaround points other than the Centertown, MO, location identified in Advertisement Bulletin No. 24. Claim dates are as follows: June 24, 28, 30, 1999 and July 1, 2, 5, 7, 16, 21, 23, 26, 1999.

FINDINGS:

Special Board of Adjustment No. 928, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee 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 June 9, 1999, Carrier posted Bulletin #24. Among others, the bulletin listed assignment ESKT-2, Monday through Saturday, operating trains 306 and 303 from and to Kansas City with turnaround point at Centertown. Claimant bid on and was awarded assignment ESKT-2. On the following dates, Claimant was instructed to stop at the following points:

June 24, 1999 - Moreau, sixteen miles beyond Centertown

June 28, 1999 - Jefferson City, fifteen miles beyond Centertown

June 30, 1999 - Smithtown, forty miles before Centertown

July 1, 1999 - Dow, twenty five miles before Centertown

July 2, 1999 - River Junction, twelve miles beyond Centertown

July 5, 1999 - Moreau

July 7, 1999 - Gasconade, fifty-five miles beyond Centertown

July 16, 1999 - River Junction

July 21, 1999 - Jefferson City

July 23, 1999 - Moreau

July 26, 1999 - Dow

The Organization contends that Carrier violated Rule 6(c), which provides in relevant part:

For regular assigned service, the advertisement bulletin will show the crew base; reporting and relieving point; turnaround or layover point; days on which the assignment is scheduled to work; assigned reporting time; and train or crew numbers.

The Organization contends that the instant claim is controlled by the decision of PLB No. 6312, Case No. 43, Award No. 43, which sustained a claim of a Passenger Conductor on trains 306 and 303 for the dates of June 28 and 30, and July 1, 2, and 5, 1999, under identical language of the UTU Agreement.

Carrier responds that Rule 6 is a bulletin and assignment rule and not an operational rule. Carrier maintains that the Agreement does not restrict it from modifying assignments as needed; the only restriction is a requirement that it readvertise permanent changes which are defined in an agreed-on question and answer concerning Rule 6 as changes designed to last at least thirty days. Carrier argues that PLB No. 6312, Award No. 43 is not controlling. Carrier urges that PLB 6312 had only a period of eight days before it, during which trains 306 and 303 failed to meet at Centertown on five of those days. The instant claim, Carrier observes, covers thirty-three days and cites only eleven of those days that the trains failed to meet at Centertown.

Carrier further contends that the claim is not properly before the Board. Carrier observes that Claimant submitted service time tickets for the dates on which he claimed a penalty day's pay but Rule 20(a) required him to submit service claim tickets, signed as received by a Carrier official. Furthermore, Carrier urges, the Organization failed to appeal Carrier's denial of the claims within sixty days as required by Rule 20(c).

The Organization responds that Carrier failed to raise these objections until the Director-Labor Relations's denial of the Organization's appeal. In the Organization's view, Carrier's

failure to raise the procedural objections at the outset waived them. The Organization cites Third Division Awards Nos. 32401 and 32461 in support of its position. Furthermore, the Organization contends that Carrier waived these procedural objections when it agreed to make the instant case a pilot case for several other pending claims raising the same issues.

We address Carrier's procedural objections first. The record reflects that Claimant submitted time service tickets instead of claim time slips as required by Rule 20(a). Furthermore, neither Claimant nor the Organization obtained acknowledgment of receipt of the service tickets from the Carrier officer designated to receive same. Moreover, the Local Chairman appealed the claims by letter dated October 1, 1999, mailed on October 7, 1999, and received by Carrier on October 14, 1999. However, when the claim was conferenced and denied orally on February 22, 2000, and the oral denial was confirmed in writing by the Manager Labor Relations-Intercity, no mention was made of procedural objections. When the Local Chairman and the Manager Labor Relations-Intercity prepared a joint submission, the Carrier's statement of position did not mention the procedural defects.

Carrier raised the alleged procedural defects for the first time in the Director of Labor Relations's denial of the Organization's third step appeal on June 6, 2002. The Organization contends that by waiting so long to raise the objections, Carrier waived them. The authority that the Organization cites, however, does not support its position. Third Division Awards Nos. 32410 and 32461 stand for the well established proposition that a Board may not consider objections that were never raised during handling on the property. Although the procedural objections were raised quite late in the handling on the property, they were raised on the property. If the claims were procedurally defective and the procedural defects were raised on the property, even though raised for the first time on appeal, the claims would be defective unless there was an affirmative waiver of the procedural defects prior to the time that Carrier raised the issue. In the instant case, we find that there was such an affirmative waiver.

The record reflects that the instant claim was one of several raising the same issues. Four additional claims were discussed in conference between the Local Chairman and Labor Relations Officer on July 21, 2000. On July 25, 2000, almost two years before the Director - Labor Relations raised the procedural objections, the Manager Labor Relations wrote to the Local Chairman confirming the parties' agreement to hold those four claims in abeyance pending resolution of the instant case which the parties regarded as the pilot case. In so doing, the parties indicated their intent that the instant claim be resolved on its merits. We hold that the combination of Carrier's failure to raise the procedural objections prior to the Director - Labor Relations's denial coupled with the parties' agreement to designate the instant case as the pilot case for several additional claims that were pending waived the procedural objections. In so holding, we note that this case serves as the pilot case with respect to the merits of the disputes and indicate no opinion as to whether the claims that were held in abeyance were procedurally proper or defective.

Accordingly, we turn to the merits of the instant dispute. We do not write on a clean slate. In PLB No. 6312, Award No. 43, the Board recognized Carrier's right to make temporary

changes in bulletined assignments, but also held that UTU Rule 8, in language identical to that contained in BLE Rule 6, requires Carrier to advertise an established turnaround point. Consequently, the Board reasoned, Carrier would violate the Rule if it established assignments without specific turnaround points, such as assignments to swap trains en route. The Board stated:

Looking at the record before it, the Board finds that Carrier did more than make a temporary change of assignment, as, for example, would have been the case if on the dates in question, the turnaround point of the assignment was at one point other than the advertised place of assignment in Centertown. The record, instead, shows that for the five dates in question, the Carrier used a different turnaround point on each date. This observation causes the Board to believe that, circumstantially, the Organization has shown that the Carrier sought to have the assignment essentially be one with no real turnaround point but an assignment that would see trains being swapped enroute between St. Louis and Kansas City.

PLB No. 6312 had before it five dates that are identical to five of the dates encompassed by the claim before us, on the identical trains, and governed by language of the UTU Agreement that is identical to the relevant language of the BLE Agreement. It would be highly anomalous for us to reach a different conclusion concerning Claimant from PLB No. 6312's conclusion involving the Conductor, a member of the same crew. We should do so only if PLB No. 6312's conclusion was palpably wrong or if evidence in the record presented to us that was not presented to PLB No. 6312 clearly undermines the conclusion that PLB No.6312 reached.

Had PLB No. 6312 reasoned that Carrier was obligated by the bulletin to guarantee the same assignment every day, its conclusion would have been palpably wrong. PLB No. 6312 reached no such conclusion. It recognized that Carrier has the right to make temporary changes to assignments. However, based on the apparent randomness of the actual turnaround point, PLB No. 6312 concluded that when Carrier advertised an assignment with a turnaround point that in reality did not have one, i.e. an assignment that in reality called for swapping trains en route between Kansas City and St. Louis. We cannot say that PLB No. 6312's conclusion was palpably wrong.

Nevertheless, Carrier urges that PLB No. 6312 considered only five dates within an eight-day period, whereas the record before us covers a thirty-three-day period. In that thirty three-day period, Carrier argues, the turnaround point is not nearly as random. Claimant failed to turn at Centertown on eleven days, leaving twenty-two days on which he did. The question, as explained above, is whether this additional evidence, which presumably was not before PLB No. 6312, clearly undermines that Board's conclusion.

The record reflects that the percentage of times that the train turned at Centertown will vary depending on the time frame at which one looks. During the period covered by the instant claim, the train had at least seven different turnaround points, including Centertown, spread

across 95 miles (from Smithtown to Gasconade). The key determinant of where the train turned around was where train 306 coming from Kansas City met train 303 coming from St. Louis. We note further that prior to Bulletin 24, these assignments were straightaway service from Kansas City to St. Louis with a layover in St. Louis and a return with straightaway service from St. Louis to Kansas City the following day. When Carrier notified the Organization of its intent to change to the assignments contained in Bulletin 24, the Organization promptly protested that it believed that Carrier intended "to establish a 'run until you meet' scenario."

In light of the above, we cannot say that the evidence before us that was apparently not before PLB No. 6312 so substantially undermined its conclusion as to deny it the deference to which it would otherwise be entitled. Accordingly, we will defer to the result reached by PLB No. 6312 and sustain the instant claim.

Finally, Carrier argues that the remedy requested is excessive. PLB No. 6312 rejected the identical argument and we defer to its conclusion as to remedy as well.

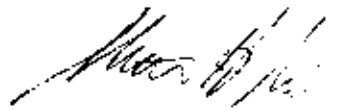
We imply no view as to how we would have resolved this case had it been presented de novo, i.e. if we had a clean slate to write on. We hold only that under the facts and circumstance presented, the appropriate course of action is to defer to the result reached by PLB No. 6312.

AWARD

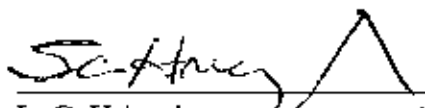
Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

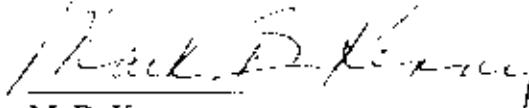


Martin H. Malin, Chairman



L. C. Hriczak,
Carrier Member

3-26-04



M. B. Kenny,
Employee Member

(CORRECTION! DISSENT AFFIXED)

Dated at Chicago, Illinois, March 11, 2004.

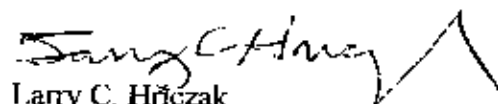
CARRIER MEMBER DISSENT
Special Board of Adjustment No. 928, Award No. 379

The Carrier Dissents to Award No. 379, Special Board of Adjustment No. 928 as rendered by the Majority. At page 3 of this Award, the Board recognizes that this claim was not initiated in accordance with Rule 20(a) and that the Carrier took exception to such fatal procedural error while the case was being handled on the property. Rule 20(a) is specific and self executing, it states in clear and unambiguous language that "*If not presented in the manner outlined in this paragraph, a claim will not be entertained or allowed, but the improper handling of one (1) claim will not invalidate other claims of like or similar nature.*" (Emphasis supplied) The Majority had no right to ignore that clear and unambiguous language of Rule 20 and find that the Carrier had somehow waived the application of that language. **The language is mandatory.**

Further, without prejudice to and specifically preserving the fact that the Board should never have reached the alleged merit of the claim, when it considered the alleged merit, the Board was bound to recognize the significant factual differences between the facts before it and those before the Board in the case resulting in Award No. 43, Public Law Board No. 6312. However, confronted with those clear factual differences, the Board instead minimized them. The merit question before this Board should have been whether or not Centertown was a *bona fide* advertised turn-around point based upon the case record before it. It is little consolation when the Board states, "We imply no view as to how we would have resolved this case had it been presented de novo, i.e. if we had a clean slate to write on". The Organization will surely attempt to use this award as precedent in the future.

The facts before this Board established that the train had turned at Centertown for a solid week (page 5) and eleven (11) out of thirty-three (33) days (67%) in total. The finding that Claimant did not work the train on five (5) of the days in the record does not alter the fact that this daily train turned at Centertown on those five (5) days. The Majority's conclusion that the different evidence before it was not so substantial as to undermine the conclusion reached in Award No. 43, Public Law Board No. 6312 constitutes blind deference to an award which considered only an eight (8) day period on which that claimant turned at other than Centertown on five days (63%) of the time. Indeed, the facts concerning the amount of time the crew turned at Centertown in the case before this Board, 67%, was higher than the reverse amount in Award 34, Public Law Board No. 6312, where the crew missed the turn 63% of the time. An award based on cleverly crafted facts which distorts the true performance of the train in turning its crew at the bulletined turnaround point should not have constituted precedent to be deferred to in the case before this Board.

I Dissent.


Larry C. Hriczak
Carrier Member

March 26, 2004