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May 11, 2011

File: Tulsa – Ft. Scott

Mr. S.F. Green
UTU General Chairman
1603 N. Hwy CC
Nixa, MO 65714

Dear Mr. Green:

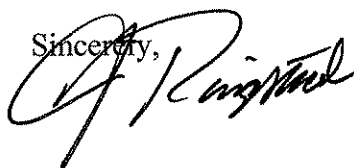
This is a follow-up to our phone conversation on Monday, May 9, 2011 where I advised that BNSF plans to implement the ID notice (dated April 5, 2011) to establish a single ended pool out of Tulsa that will protect traffic between Tulsa and Ft. Scott. BNSF plans to implement this ID agreement on Wednesday, May 18, 2011.

Additionally, in response to your April 28, 2011 letter wherein you advised of the Organization's position that Section 5 of Article IX does not support this type of ID notice, BNSF disagrees. In particular, I've attached Disputes Committee Issue #3 that specifically addressed Section 5 of Article IX. As you will see, Section 5 was meant to limit the Railroad's ability to serve an ID notice just to obtain the more attractive pay elements provided for in Article IX. Additionally, the Disputes Committee decision goes on to state that:

“The Carrier's have the right to establish extended or rearranged interdivisional service and it constitutes new service within the meaning of Article IX unless it is a substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement.”

As BNSF does not currently have a single ended pool that operates out of Tulsa to Ft. Scott, it is BNSF's position that we are establishing new service within the meaning of Article IX. Additionally, BNSF is not using Article IX to change any pay element. And, there are arbitration awards that support the use of an Article IX notice to establish a single ended pool where a double ended pool existed previously.

Lastly, I wanted to reiterate BNSF's willingness to arbitrate this issue as soon as possible. We have an arbitration hearing scheduled with Referee Peterson on June 7 & 8, 2011, and BNSF is willing to arbitrate this issue at that time.

Sincerely,


Enclosure

ISSUE NO. 3

Can established Interdivisional Service be extended or rearranged under this Article?

Pertinent Agreement Provisions

ARTICLE IX - SECTIONS 1, 3 AND 5 - INTERDIVISIONAL SERVICE

"Section 1 - Notice

"An individual carrier seeking to establish interdivisional service shall give at least twenty days' written notice to the organization of its desire to establish service, specify the service it proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service.

* * * *

"Section 3 - Procedure

"Upon the serving of a notice under Section 1, the parties will discuss the details of operation and working conditions of the proposed runs during a period of 20 days following the date of the notice. If they are unable to agree, at the end of the 20-day period, with respect to runs which do not operate through a home terminal or home terminals of previously existing runs which are to be extended, such run or runs will be operated on a trial basis until completion of the procedures referred to in Section 4. This trial basis operation will be applicable to runs which operate through home terminals.

* * * *

"Section 5 - Existing Interdivisional Service

"Interdivisional service in effect on the date of this Agreement is not affected by this Article."

Discussion

The threshold question is whether Carriers may extend or rearrange interdivisional service established prior to the effective date of Article IX of the 1986 Arbitrated National

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Agreement. It should be noted that the Article IX, Section 2 conditions attached to interdivisional service are more favorable to the Carriers than the terms and conditions in Article VIII of the May 13, 1971 National Agreement. The second but related issue is whether the conditions under which the interdivisional service was previously established are carried forward with the extended or rearranged interdivisional service made pursuant to notice under Section 1 of Article IX.

The record contains, as an example, a dispute which has arisen on the Southern Pacific Transportation Company. Although the Southern Pacific dispute is pending before Arbitration Board No. 468, the proceeding has apparently been held in abeyance until this Committee can provide the parties with some necessary guidance. Under the auspices of Article VIII of the 1971 Agreement, the Southern Pacific established interdivisional service between San Antonio and Ennis through the away from terminal Hearne on March 26, 1986. Ennis and San Antonio are home terminals. This elongated interdivisional service had been superimposed on preexisting interdivisional service between San Antonio and Flatonia and between Flatonia and Hearne. Now, under the auspices of Article IX of the 1986 Agreement, the Southern Pacific seeks to establish interdivisional service between Dallas and San Antonio and between Fort Worth and San Antonio. The Southern Pacific proposes a two pronged extension of the existing interdivisional service through home terminal Ennis.

In addition to the Southern Pacific example, the Carriers provided other instances where new interdivisional service

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overlapped or extended existing interdivisional service pursuant to the 1971 Agreement even though Article VIII, Section 4 of the 1971 National Agreement is substantively identical to Article IX, Section 5 of the 1986 Arbitrated National Agreement. The former provision did not impose a restraint on creating new interdivisional service over territory covered by an existing interdivisional agreement. See Public Law Board No. ³⁹⁶⁵~~3695~~, Award No. 1 (Seidenberg). During the recent round of national bargaining, the parties were aware of the well entrenched past practice. If they wished to deviate from the past practice, the parties would have written unequivocal language in Article IX, Section 5 to the effect that an extension or rearrangement of present interdivisional service could never be construed as new interdivisional service within the meaning of Article IX. Moreover, Article IX, Section 3 clearly evinces the parties' intent that the Carriers could legitimately extend existing interdivisional service. Section 3 refers expressly to "...previously existing runs which are to be extended..." The parties would not have set up a trial basis procedure for implementing an extended run if the Carriers, in the first instance, lacked the authority to propose an extended interdivisional service. Thus, Section 5 of Article IX does not restrict the Carriers from rearranging or extending existing interdivisional service.

The second question is what shall be the terms and conditions that apply to interdivisional service which is extended or rearranged pursuant to Article IX. The Carriers

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argue that Section 5 only applies to interdivisional service which remains absolutely intact. The Organization stresses that the conditions in the existing interdivisional service agreement must be preserved and automatically apply to the extended or rearranged service. In our view, the Carriers' construction of Article IX, Section 5 is too narrow while the Organization seeks an overly broad interpretation of Section 5.

Article IX, like its predecessor contract provision, grants a Carrier the right to serve a notice seeking to establish interdivisional service. The Carrier may subsequently establish or refrain from establishing the proposed service. An arbitrated interdivisional run agreement might apply conditions so onerous the Carrier is deterred from instituting the interdivisional service. Since the discretion is vested in the Carrier, a Carrier may not use Article IX as a pretext for taking advantage of the more favorable conditions set forth in Section 2 of Article IX. Section 5 of Article IX bars a Carrier from proposing only a minor modification in an existing interdivisional run with the motive of procuring the more favorable conditions. Thus, Section 5 preserves conditions on existing interdivisional runs or any proposed extended run that is substantially the same as the existing run where the purposeful objective of the extension is to procure the more beneficial conditions in Article IX, Section 2. In resolving the Southern Pacific dispute, Arbitration Board No. 468 should examine the surrounding circumstances and apply Article IX, Section 5 in a manner consistent with our Opinion.

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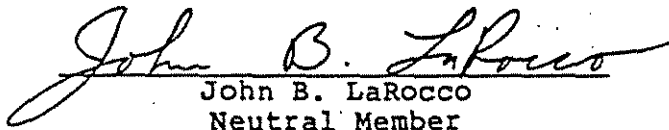
The Committee concludes that the parties must reach a balanced application of Article IX. The Carriers have the right to establish extended or rearranged interdivisional service and it constitutes new service within the meaning of Article IX unless it is a substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement.

Answer to Issue No. 3: Yes to the extent consistent with the Committee's Opinion.

DATED: March 31, 1987

Larry D. McFather
Organization's Member

Charles I. Hopkins, Jr.
Carriers' Member


John B. LaRocco
Neutral Member