

PUBLIC LAW BOARD NO. 6190

**Award No. 7
Case No. 7
Carrier File No. 6299-0015
Organization File No. FCT-79-331(P1)**

Parties to Dispute: (UNITED TRANSPORTATION UNION
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(BURLINGTON NORTHERN SANTA FE RAILWAY
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Statement of Claim: Claim that below named claimants on dates specified be allowed one basic day account activated an excessive amount of time prior to being called for duty.

WC Marek, Jr., ticket SR8265 dated 10-18-98, declined by T&PA 12-07-98.

RA Wade, ticket SR3777 dated 09-29-98, declined by T&PA 11-20-98.

WC Marek, Jr., ticket SR8264 dated 10-11-98, declined by T&PA 12-07-98.

RA Wade, ticket SR6739 dated 10-08-98, declined by T&PA 12-07-98.

HD Bell, ticket SR8387 dated 10-18-98, declined by T&PA 12-07-98.

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RA Wade, ticket SR3776 dated 09-28-98,
declined by T&PA 11-20-98.

DS Flippin, ticket SR3758 dated 11-08-98,
declined by T&PA 12-28-98.

RL Dowell, ticket SR3969 dated 10-10-98,
declined by T&PA 12-28-98.

WC Marek, Jr., ticket SR5424 dated 11-13-
98, declined by T&PA 12-29-98.

WC Marek, Jr., ticket SR5423 dated 11-12-
98, declined by T&PA 12-29-98.

RL Dowell, ticket SR3928 dated 09-28-98,
declined by T&PA 11-20-98.

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 representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

The claimants were assigned to interdivisional through freight service between Temple and Houston, Texas on the dates at issue. The Carrier called these particular claimants for service based upon a concept referred to as variable calling. Crews governed by the variable calling concept are either placed on the "active board" by the Carrier and subject to call, or are placed on "inactive boards" comprised of pool freight crews at the home terminal, or the away-from-home terminal crews. The crews on the inactive boards are not subject to call by the Carrier. Through the agreement establishing variable calling the parties intended to improve the quality of life for an employee in unassigned pool freight service by providing the employee with better knowledge as to when they are going to work and affording the employee the ability to maximize their time at home when off duty. (Organization Ex. 5).

Six years after implementation of the variable calling concept for crews in interdivisional service by the Memorandum of Agreement dated January 21, 1992 (1992 Agreement), the claimants filed claims requesting a basic day for each occasion when the Carrier failed to call the claimants for service during a twelve-hour period following their placement on the active board. The claims were denied by the Carrier, and subsequently appealed to the Board after the parties were unable to resolve the dispute on the property.

The following provisions of the 1992 Agreement are pertinent to this dispute:

* * *

Crews in interdivisional service will protect unassigned freight service between Temple and Houston or Galveston in either the Temple/Houston pool or the Temple/Galveston pool. When a pool freight crew arrives at the home terminal, such crew will be placed to the bottom of the home terminal board. Crews from the other home terminal arriving at the same location will be placed to the bottom of the away-from-home terminal board. These boards shall be designated as the "inactive boards."

For the benefit of pool freight crews at their home terminal, carrier will move sufficient home terminal and away-from-home terminal crews from the inactive boards to a so-called "active board", which board will govern the order in which home and away-from-home crews will be called during the next eight-hour period based on anticipated service, and such "active board" will only protect ID services. While Carrier has the right to determine the ratio for calling pool freight crews, Carrier will not exceed a ratio of 5:1, away-from-home terminal vs. home terminal or vice versa. If the Carrier determines a need to deadhead surplus away-from-home pool freight crews, such crews will not be counted in the ratio, but will be counted as turns.*

(Italics supplied; underlining in text).

* * *

The active board will be updated each four (4) hours, by deleting crews that have been called during the prior four hours, as well as adding crews to the active board. Home terminal crews (at their home terminal), when placed on the active board, will not have their order (number of times out) changed.

* * *

The Organization contends that the Carrier violated the 1992 Agreement by placing the claimants on the active board for an excessive period of time prior to being called for service on various dates. According to the Organization, an example of an employee properly called

to service by the Carrier under the variable calling concept is an employee who is activated at 4:00 p.m. and is called for duty off the active board by 12:00 p.m. However, the claimants were activated by the Carrier and were subsequently called for service anywhere from thirteen to twenty-four hours after their activation. The Organization further argues that the Carrier seeks to alter the intent of the 1992 Agreement, and relegate it to the status of a mere guideline. Finally, although the Organization admits that the 1992 Agreement does not provide a specific remedy for the alleged violations, it asserts that a day's pay is an appropriate penalty for the Carrier's violations of the agreement in this case.

The Carrier reasons that the payment of a penalty on account of a crew being "activated too long" is unsupported by the 1992 Agreement. The Carrier points out that the 1992 Agreement provides for activation of crews in anticipation of traffic to be operated during the following eight-hour period. However, the agreement does not require that the activated crews must be called off the active board within eight-hours following activation. Additionally, the 1992 Agreement does not set forth a penalty in the event that a trainman is not utilized during the eight-hour period following his or her placement on the active board. The Carrier further emphasizes that the 1992 Agreement only provides for penalties under circumstances other than those presented in this case. Finally, the Carrier argues that the claimants sustained no monetary damages, and the claims are excessive.

The issue presented in this case is whether the Carrier violated the 1992 Agreement when it failed to call the claimants for service during the eight-hour period following their

placement on an "active board." The Board finds that the intent of the 1992 Agreement requires the Carrier to place home terminal and away-from-home terminal crews on the active board based upon anticipated service during an eight-hour period following such placement. Therefore, the Carrier simply cannot remove train crews from the inactive board and place such crews on the active board unless it is anticipated that they will be called for service during the next eight hours.

In the case before the Board, the Organization has failed to produce sufficient, probative evidence which would indicate that the Carrier placed the claimants on the active board without regard to anticipated service for which it was intended these claimants would be called during the eight-hour period following their placement on the active board. Similarly, the Board has no evidence whether any delays in calling crews off the active board were due to factors outside the control of the Carrier, thereby causing "unanticipated" service requirements which may have resulted in the Carrier's failure to call the claimants for service within the prescribed period following their placement on the active board. As such, the Board is unable to sustain these claims based upon the facts and circumstances presented.

Based upon the record, the Board further finds that the issue presented in this case is one of first impression. Accordingly, the parties are put on notice that the following interpretation will henceforth be applicable to disputes arising under the 1992 Agreement. In the event that a crew placed on the active board by the Carrier is not called for service within the eight-hour period following the crew's activation, the Carrier will have the burden of proof

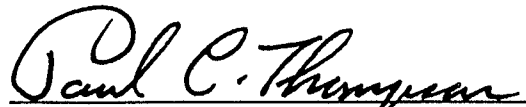
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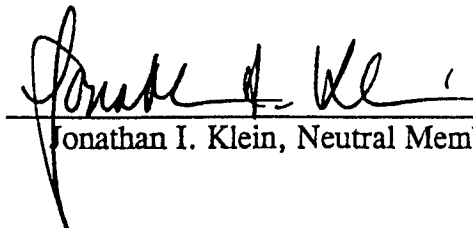
with regard to the identification of the anticipated service which was to be assigned to the activated crew. Additionally, the Carrier must produce sufficient probative evidence establishing the facts of any delays and the reasons for those delays which resulted in the crew's failure to be called for service within eight hours of placement on the active board. Delays in a crew being called for service off an active board established pursuant to the 1992 Agreement which are due to factors outside of the Carrier's control and could not have been anticipated, will not result in a violation of the 1992 Agreement.

AWARD

The claim is denied based upon the facts and circumstances presented. However, the parties are hereby notified of the analysis and burdens of proof to be utilized in the future to ensure compliance with the letter and intent of the 1992 Agreement.


Gene Shire, Carrier Member


Paul C. Thompson, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 5th day of May, 2000.