

PUBLIC LAW BOARD 6390

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY

and

NMB Case No. 18
Yardmen (Various)
Air-tests on ETDs

THE UNITED TRANSPORTATION UNION

STATEMENT THE ISSUE: Are Claimant Yardmen entitled to any additional compensation other than ETD pay, for conducting two-way ETD tests on road trains at locations where carmen are on duty? If so, what is the proper pay?

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on November 10, 2001 at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

The Parties present an issue of contract interpretation as to whether yardmen required to perform two-way End-of-Train Device (ETD) air tests on road trains where Carmen are on duty are entitled to other than standard ETD pay. The controlling December, 1994 Memorandum of Agreement states in pertinent part:

Notwithstanding the provisions of Article IV, Section 5, of the October 31, 1985 National Agreement with the United Transportation Union (UTU), when a yardman with a ground service seniority date prior to January 1, 1995, is a member of a ground service yard crew that handles one or more ETDs/ETMs during a tour of duty, that employee will be paid one hour at the appropriate rate of pay. (Emphasis added)

The record establishes that the two-way air test at issue takes a matter of minutes, and is performed in the following manner: A groundman (yardman) positioned at the rear of the train presses a button on the ETD in order to initiate radio contact with a corresponding head-end device on the locomotive. Once contact is established, the groundman (yardman) closes the angle cock on the

rear car and then waits for the engineer to operate a switch in the locomotive initiating emergency application of the air brakes from the rear of the train. A successful test results in the release of brake pipe air pressure between the ETD and the closed angle cock, and verifies that the device is working properly. The groundman (yardman) completes the process by then re-opening the angle cock and establishing a continuous train line before the train departs. According to facts not in dispute, this air test does not require that the ETD be removed from the train or tested at an outlying point.

The Organization contended that ETD air-testing is not yard work covered by the cited Agreement, and asserted that yardmen providing that service at locations where carmen are on duty are entitled to additional compensation. The Carrier argued that air-testing ETDs falls within the scope of "handling" ETDs, and yardmen required to do so *whether or not* carmen are on duty, are only entitled to the standard one-hour ETD arbitrary. As resolution of the matter could not be reached on the property, it was submitted to the Board for disposition.

POSITIONS OF THE PARTIES: The Organization asserts that performing ETD air tests on departing road trains is not "handling" ETDs within the intent and meaning of the controlling 1994 Memorandum of Agreement, and argues that yardmen required to do so are entitled to penalty compensation of a basic day for performing road conductor's work. The Organization points out that prior to the 1985 UTU National Agreement, initial terminal air tests were historically performed by carmen at locations where they were employed. The Organization notes, however, that subsequent to the National Agreement, the Carrier was afforded the right to require road crews to perform this "incidental" work in connection with their own assignments. The Organization reasons, then, that at locations where carmen are on duty, ETD air-tests should always be performed by carmen or road trainmen, and never by yardmen.

The Organization also argues that when yard crews are required to perform ETD air-tests on road assignments, it is necessary from an operating standpoint for them to "attach themselves" to, or in effect become a part of, that road crew for the duration of the test. The Organization argues that this practice constitutes "comingling" of road and yard crews in violation of Articles I and II of the schedule Agreement, and urges the Board to sustain the instant claim.

The Carrier argues that performing initial terminal ETD air-tests can properly be classified as "handling ETDs", which is permissible under the 1994 Memorandum Agreement. The Carrier

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rejects the Organization's position that the term "handling" is ambiguous and was intended to cover only the placing and removing of ETDs. The Carrier points out that the "placing and removing" language with respect to ETDs in prior agreements was subsequently changed to "handling" in the controlling 1994 Agreement, and argues that this deliberate alteration signaled a clear understanding that train crews, including yard crews, would henceforward be required to perform a variety of duties relating to ETDs over above simply placing or removing them. In support, the Carrier cites Awards 7, 8, and 9 of PLB 6031 on the property (Coast Lines, 2001), wherein Referee Zusman considered similar questions under another Agreement of identical construction. Referee Zusman concluded in pertinent part as follows:

PLB 6031, Award 7

We have fully studied the associated Agreements on the Eastern and Western Divisions. We have reviewed the numerous Awards cited by both parties hereto. What we find is that the Claimant is a Yardman and under the Agreements, handling an ETD is covered. There is no evidence in this record persuasive enough to suggest that on the Coast Lines the Claimant's actions went beyond the Agreement. The battery exchange; recharge; or certification filled out; near or away from the end of the train was not demonstrated with history or evidence to violate the Agreement. There is no evidence of record to show that "handling constitutes maintenance or inspection beyond the language agreed to or encompassed by "handling". Accordingly, the claim is denied.

PLB 6031, Award 8

The question at bar is whether "handling" encompasses the replacing of the ETD's battery. The Organization's position is that it refers to the ETD, not the battery in that removing and replacing ETD is handling, but the charging of a battery to assure the ETD is functioning is not covered by the Agreement. The Board finds that the Agreement requiring the "handling of one or more" ETDs is directly on point and without the necessary ambiguity to find a violation of the Agreements. In short, there is no proof in this record to support a conclusion that handling refers only to the physical movement of ETDs and that changing a battery directly associated with the ETD is beyond the language envisioned by the negotiators. The claim must be denied.

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PLB 6031, Award 9

The instant case involves an Engine Foreman and Helper required to remove a battery from an ETD, place it on a charger, replace it with a charged battery and pre-test the ETD with an air compressor. As indicated in Award Nos. 7 and 8, we do not find sufficient evidence of record that "handling" limits yard and roadmen on the Coast Lines to only placing or removing ETDs. There is no record of proof to support that conclusion.

In our consideration of these instant circumstances we have carefully reviewed all Agreements, including the 1994 Agreement and it has no provision in the language suggesting that "handling" be so construed. Nor is there persuasive evidence that this work is neither yard work, nor within the scope of the Claimant's duties.

The Carrier asks the Board to similarly support its position that performing ETD air-tests is "handling", and can therefore be performed by yard crews without penalty under the 1994 Memorandum of Agreement. It urges that the claim be denied.

DISCUSSION AND ANALYSIS: Based on carefully review of the record, the Board is convinced by the Carrier's argument. Obviously a change in the application of ETD-related provisions was intended when new and less restrictive language was adopted in the subsequent and controlling 1994 Agreement. As to the instant facts, then, the Organization was obligated to show that the parties intended to exclude ETD air-tests from the generic principle of "handling", or demonstrate to the satisfaction of the Board that requiring yard crews to perform them violated other schedule rules. The Board concluded that the Organization failed to meet its burden to so demonstrate.

On the first point, the Board finds no evidence that performing this simple test constitutes work outside the scope of "handling" within the intent and meaning of the 1994 Memorandum Agreement. It is logical that if Yardmen are permitted to place the device on the train, insuring that it is operating properly is only another part of that duty. Moreover, according to the cited *Zusman* awards, yard crews may even be required to perform minor maintenance (change ETD batteries) and then field-test ETDs without violating the Agreement. The instant facts, in the opinion of the Board, do not even extend the term "handling" that far.

As to the second point, the Organization did not demonstrate that requiring yard crews to air-test ETDs is a violation of other

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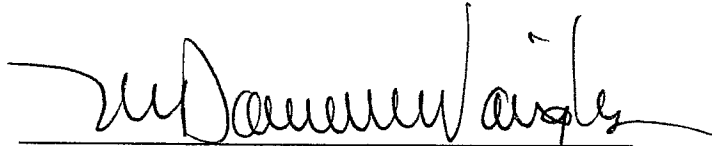
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schedule rules. The Board does not find that enlisting the aide of the road engineer for the ETD air-test constitutes the "co-mingling" of a road and yard crew (or road and yard work) in any material way. Moreover, if the Board were to accept the Organization's contention that yard crews are in fact "attached to" road crews from an operating standpoint while ETD air-tests are being conducted, Article VIII, Section 3(7) (Incidental Work) then controls, and it specifically provides that yard crews may be required to perform walking and rear-end air tests in connection with their own assignments.

Consequently, the Board is convinced that air-testing ETDs falls within the scope of "handling" under the 1994 Memorandum Agreement, and yardmen with seniority dates prior to January 1, 1995 who are required to do so are only entitled to the one-hour ETD arbitrary provided therein. The Board confirms the Carrier's position that the Agreement was not violated, and the claim must be, and is, denied.

AWARD: The Organization's claim is denied.

Dated this 7th day of January, 2002.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


Rick Marceau, Employee Member