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**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25406

Docket No. 45114

03-1-01-1-S-6814

The First Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Southeastern Pennsylvania Transportation Authority

STATEMENT OF CLAIM:

"Grievance/Claim BLE-98-031-T2 protests that carrier's unilateral change in the terms of the Collective Bargaining Agreement. Account violation of CBA, Article I, Section 101 Through Bulletin Order 3-66 which directed Locomotive Engineers to perform the work of Conductors. Further, SEPTA shall cease and desist from requiring Locomotive Engineers to perform the duties of Conductor and pay each engineer that was required to perform Conductor duties a basic day's eight (8) hours, pay."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On April 1, 1998, the Carrier published Bulletin Order No. 3-66, effective April 5, 1998. B. O. No. 3-63 revised Carrier's Passenger Operations Instruction Manual, SPO-1. Prior to B. O. No. 3-66, SPO-1, Section 9.4 provided:

"When stopped at Center City Station, Market East, Suburban Station, and 30th Street, Conductors must arrange to have all vestibule doors open on the cars in use including the door in the Engineer's Compartment."¹

B. O. No. 3-66 provided, in relevant part:

"At Market East, Suburban Station, and 30th Street Station, Conductors must have all vestibule doors on the cars in use which are on the platform side to permit safe and efficient loading and unloading of passengers. The Conductor, or other employee designated by the Conductor, must be positioned at the rear open vestibule for each station stop and remain in position at that location to assist passengers and perform other duties necessary for the safe movement of the train. If stop is made on Engineer's platform side, the Engineer must store retractable seat and must open side vestibule door to permit passenger loading and unloading."

The effect of B. O. No. 3-66 was to require Engineers, when the station platform is on the Engineer's side of the train, to break down their seats, open the doors and assist passengers to board or alight. The Organization maintains that B. O. No. 3-66 required Engineers to perform the work of another craft, Conductors, who are represented by the UTU, and seeks a basic day's pay for each Engineer who was required to perform said work. The Carrier contends that Engineers have been doing this work since the mid 1990's that it is not Conductor's work, that the work involved is de minimus and that a basic day's pay is not an appropriate remedy. The parties disagree over the effect of First Division Award 25059.

Article I, Section 101 of the controlling Agreement provides:

"(a) This agreement will apply to work or service of transporting passengers performed by employees specified herein and governs rates of pay, hours of service and working conditions of all such

¹ Carrier objects that SPO-1 was not provided during handling on the property. However, the record reveals that in the Step 2 Appeal, the Organization urged, "A comparison of the SPO-1 and the Bulletin Order in question establishes SEPTA's attempt to compel locomotive engineers to perform the work of conductors." Accordingly, we conclude that the argument based on comparing SPO-1 and B. O. No. 3-66 is properly before us.

employees engaged in the operation of engines or any other motive power used in performing the work or service provided by engineers, and other work recognized as the work of engineers performed on any track or physical property, resulting from the transfer of services from Conrail to SEPTA pursuant to the Northeast Rail Service Act of 1981.

In the event new type motive power is placed in service to replace or add to the present equipment, Engineers will be fully instructed in operation of same, as well as to operate it.

- (b) SEPTA recognizes the Brotherhood of Locomotive Engineers' General Committee of Adjustment as the designated bargaining representative of and for all engineers employed by SEPTA. The identity of said representative appears signatory hereto."

Award 25059 held that Article I, Section 101 is a scope clause and restricts the type of work that the Carrier may assign to engineers. Award 25059 further held that the Carrier violated Article I, Section 101 when it assigned engineers as "copilots," performing the duties normally performed by conductors, even though the copilots did not collect fares.

The Carrier distinguishes Award 25059, arguing that in the instant case Conductors are on duty and Engineers are not taking their place. While that is factually accurate, we do not see that as a relevant distinction. Award 25059 holds that the Carrier may not assign duties of a Conductor to an Engineer. Thus, the relevant question is whether B. O. No. 3-66 assigned Conductor responsibilities to Engineers.

The record reflects that the task of breaking down and stowing the Engineer's seat is Engineer's work. During handling on the property, the Carrier asserted that the Engineer is responsible for his seat and is trained in the proper break down and storage of the seat. This was not rebutted by the Organization. Indeed, the Organization focused not on the break down of the Engineer's seat but on the opening of the door.

Accordingly, we turn to the responsibility for opening the door and assisting passengers to board and alight. The plain import of SPO-1 is that prior to B. O. No. 3-66, responsibility for these functions rested with Conductors, not Engineers. The

Carrier asserted that Engineers began performing these tasks in the mid 1990's. However, the Carrier offered no evidence that Engineers were charged with responsibility for these tasks prior to B. O. No. 3-66. Accordingly, we conclude that the Carrier violated Article I, Section 101, by imposing on Engineers the responsibility for opening the door and assisting passengers in boarding and alighting from the train.

We are not persuaded by the Carrier's argument that these responsibilities were de minimus. Although such tasks probably do not require a considerable amount of time to perform, the Carrier has deliberately and permanently assigned Engineers the responsibility for work that is the responsibility of another craft. If this were a one time event, we might be inclined to view it as de minimus. However, we cannot view a permanent, on-going violation of the Agreement as de minimus.

Therefore, we turn to the question of remedy. The Carrier contends that the Agreement does not authorize payment of a basic day's pay. The Carrier's argument was rejected in Award 25059 and we cannot say that Award 25059 is palpably wrong. We will follow Award 25059's holding that we have authority to award a basic day's pay. However, having the authority to make such an award does not mean that the exercise of that authority is appropriate in all instances. Indeed, in Award 24903, the Board exercised its discretion not to award a basic day's pay. Read together, Awards 25059 and 24903 indicate that the appropriateness of an award of a basic day's pay must be evaluated based on all the facts and circumstances of a particular case.

In the instant case, we find that an award of a basic day's pay is not an appropriate remedy. First, we note that although prior to B. O. No. 3-66, Engineers were not responsible for opening the doors, since the mid 1990's Engineers did perform that task, albeit voluntarily, i.e., not as a required part of their jobs. This ambiguous practice suggests that the Carrier was not acting in bad faith when it issued B. O. No. 3-66. Compare Award 24903 ("The record reveals that the practice existed for five years prior to the instant grievance. . . . There does not appear to be an arbitrary disregard of contract terms in this instance.") with Award 25059 ("The Board did not expect to see identical cases [to those presented in Award 24903] before it in the future.").

Second, although the violation of the Agreement was not de minimus, the additional responsibilities imposed on the Engineers were not particularly onerous. Indeed, it appears that Engineers had been performing these job functions, at least some

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of the time, voluntarily. Furthermore, it appears that, at least initially, the Organization did not regard the requirement of opening the door to be so onerous as to justify an award of a basic day's pay. In the initial claim presented at Step 1 of the grievance procedure, the Organization sought a remedy of an hour's pay.

Considering all of the circumstances peculiar to this case, we conclude that the appropriate remedy is to order the Carrier to cease and desist requiring Engineers to open the door and assist passengers in boarding and alighting the train. We admonish the Carrier that if it persists in assigning Conductor duties to Engineers, it risks stronger remedies, including an award of a basic days pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 7th day of March 2003.