

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 25976  
Docket No. 45919  
04-1-02-1-M-2110

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

**PARTIES TO DISPUTE:** ( (Brotherhood of Locomotive Engineers  
(Kansas City Southern Railway Company  
( (former MidSouth Rail Corporation)

**STATEMENT OF CLAIM:**

“Claim of MidSouth Rail Engineer J. C. Baucom for payment of one basic day at freight rate under Article VIII paragraph 3 of the April 30, 2000 Agreement account he did not work on January 13, 2002 identified as Carrier File No. MO102-2984 (202-00073).”

**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.

At the time of the incident that gave rise to this claim, J. C. Baucom was marked up to work his regular Engineer's assignment (SE07) in Unassigned Pool Freight Service. He was not called for an assignment on January 13, 2002. The Claimant submitted a claim for one basic day account he did not work on that day.

The claim was denied at all levels and was progressed to the First Division of the National Railroad Adjustment Board.

The Claimant cites the following Contract language in support of his claim.

**ARTICLE VIII - UNASSIGNED POOL FREIGHT SERVICE**

“The Company may operate engineers in pool freight service subject to the following conditions:

The rate of pay will be the applicable Express Freight rate and all positions will be bulletined to operate for not less than seven (7) consecutive calendar days per week.

7. Extra engineers called in extra emergency or a make-up service will work under the same provisions as provided for regular engineers in this pool. It is understood that the calendar day provision provided for in paragraphs 3, or anywhere herein, only applies to Extra Engineers at the away-from-home terminal.”

At issue here is whether, under the terms of paragraph 3 of Article VIII and the direction of First Division Award 24855, the Carrier is required to pay a calendar day to an unassigned Pool Freight Service Engineer if he is not called for an assignment in each of seven days he is marked up. In the instant case, the Claimant was called late in the evening on January 12, 2001, out of Vicksburg, Mississippi, and finished his run in Shreveport, Louisiana, on the thirteenth at 12:00 noon. He did not get a start on January 13. Consequently, the claim was filed for a calendar day at the basic rate.

The Organization argues on its behalf that paragraph 3 of Article VIII is clear and unambiguous. It states that the Pool Freight position will be bulletined to operate for no less than seven consecutive calendar days per week. It views this language as a guarantee that Pool Engineers in good standing will be called each day to fill an assignment. If they are not, it argues, they shall be paid a calendar day for the missed assignment. It relies on First Division Award 24855, which stated:

"The assignment in dispute was bulletined as a seven (7) day assignment, '. . . bulletined and operated for not less than six (6) consecutive calendar days per week . . .', under the clear and express agreement language contained in Rule 15. While Carrier is correct in its assertion that the above rule constitutes a guarantee for the assignments created, the Rule also guarantees, in unambiguous terms, that an express freight assignment 'shall be' . . . operated for not less than six (6) consecutive calendar days per week.

Carrier concedes that because of the 'setting back' of the starting time of an assigned crew, Claimant was not called to work on July 6, 1995, at all; but rather was called to report for duty in the early morning hours of July 7. However, the clear and unambiguous language set forth in Rule 15 of the Agreement provides that engineers performing the very service which Claimant performed, will be called not less than six (6) consecutive calendar days per week. The Rule provides no exception for contingencies like Carrier pleads in this case. Based on the clear and unambiguous contract language, this claim must be sustained."

The record reveals that the Carrier applied the terms of Award 24855 in regard to the application of payment of calendar days if an Engineer did not work on any particular calendar day. The Union argued that the April 30, 2000, MCR/BLE Agreement was signed by the Carrier and the Organization. Both understood that paragraph 3 would allow a calendar day payment if an Engineer did not work on any particular calendar day.

The Carrier modified its position of paying calendar days for missed assignments and so notified the Organization that it intended to do so when it received Award 24 of Public Law Board No. 6192. In that Award, it stated:

"Under the circumstances of this case as presented and progressed, the Board is not in a position to conclude that the Claimant was detained an unreasonable length of time past midnight for his assignment. Nor does the Board find reason to hold that the language of the rule relied upon in support of the claim, Rule 15(a), was violated. Moreover, it appears to be unrefuted that the Claimant suffered no loss of a trip or compensation for the

workweek in which the two claims arose. Accordingly, the claim will be denied."

The Carrier apparently seized on this Award as justification for modifying its current posture on the application of Rule 15 in the MidSouth/BLE Collective Bargaining Agreement and, by inference, of paragraph 3 of Article VIII regarding Pool Engineers. By letter dated November 6, 2000, the Carrier made its intention in this regard known to the Organization:

"Mr. John R. Koonce  
General Chairman - BLE  
5909 Shelby Oaks Drive, Suite 139  
Memphis, TN 38134-7318

November 6, 2000

Dear Sir:

We would like to make you aware of a recent decision rendered by Referee Robert Peterson. This is Award No. 24 (copy attached) of Public Law Board No. 6192 between KCS (former MidSouth) and the UTU.

In Award No. 24, a claim was submitted by a train service employee for not being called during a 24-hour period for an express freight assignment that was bulletined to work 7 days per week. The employee involved was not called because the call time was set back. The Referee did not find this to be a violation of Rule 15(a) in the MidSouth/UTU Collective Bargaining Agreement. Rule 15 in the MidSouth/BLE Collective Bargaining Agreement is identical.

Award No. 24 has a significant impact on First Division Award No. 24855 and the method the KCS used in the past to calculate the so-called "calendar day". Beginning November 1, 2001, the KCS will be reviewing a former MidSouth train and engine service employees' workweek before "calendar days" are paid. Employees will only be guaranteed the number of starts that an assignment is bulletined each week.

If you wish to schedule a conference to discuss this matter, please contact my office to schedule a date that is mutually agreeable.

Sincerely,  
Emerson M. Bouchard, Vice President-Labor Relations"

The General Chairman, J. R. Koonce, responded to the BLE Bouchard letter on November 9, 2001. Pertinent parts are quoted below:

"... I wish to emphatically state that the BLE is taking great exception to the Carrier applying an Award to change the Engineers' Collective Bargaining Agreement that only pertains to a particular trainmen's regular assignment. NRAB First Division Award No. 24855 clearly defines BLE Rule 15 – Work Week Assignments and this Award is clear and unambiguous in its meaning. Of course, I was not a party to PLB 6192 and was not present when the UTU argued the UTU Rule 15 pertaining to trainmen, but clearly Neutral Peterson's Award speaks to the particulars of that Claimant's (E.D. Wright's) regular assignment on that particular day, where on the other hand in Award 24855 Referee Dana E. Eischen clearly spoke to and defined BLE Rule 15.

... Furthermore, it is clear through our recent negotiations on both the MidSouth and South Rail (separate entities) specifically Article VIII of the April 30, 2000 MidSouth Agreement that the Carrier is in full agreement with the interpretation that Referee Dana E. Eischen placed on Rule 15 of the BLE Collective Agreement."

The Board reviewed the record in detail. That review reveals that the parties have presented detailed Submissions in support of their respective positions. Both have presented numerous Awards supporting their position. The Board, however, will decide this case on a number of basic concepts:

(1) The Board concludes that the language of Article VIII, paragraph 3, is clear and unambiguous. It states that "all positions will be bulletined to operate for no less than seven (7) consecutive calendar days per week." The Board construes this to mean that all Engineers who hold Regular Engineer assignments in Unassigned Pool Freight Service will be called seven consecutive days.

(2) The Board adopts the long-standing principle that prior Awards not found to be palpably erroneous should be given standing. The Board can find no reason to decide contrary to First Division Award 24855 that plays a role so prominently in this case.

(3) Award 24 of Public Law Board No. 6192, while peripherally associated with the instant case, is not on point. The Board in this instance sustains the claim based on the clear language of the Agreement. The decision rendered in First Division Award 24855 is controlling. The fact that the Carrier honored that Award until it received Award 24 of Public Law Board 6192 demonstrates its acceptance of the First Division Award. The Board does not consider Award 24 to be the definitive Award in this instance.

**AWARD**

Claim sustained.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The 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 10th day of March 2004.