

UTU FILE NO.  
CARRIER FILE NO.

C-1984  
CTG 93-08-31D

PUBLIC LAW BOARD NO. 5663

CASE NO. 38

AWARD NO. 24

**PARTIES** BURLINGTON NORTHERN RAILROAD COMPANY

**TO** and

**DISPUTE:** UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim of Brakeman [REDACTED] Memphis Tennessee, claiming one day at local freight rate of pay each date, March 27 through April 7, 1993, "account improperly withheld from service."

FINDINGS:

Claimant had trainman (brakeman-yardman) seniority dating from either his hire as a switchman on May 15, 1981, according to Carrier, or a brakeman on May 2, 1979, according to the Organization. He established engineer seniority in March, 1989, after successfully completing the Locomotive Engineer Training Program.

On March 26, 1993, while working as engineer on a yard job in Memphis Terminal, he allegedly passed a stop signal without proper authority. Under FRA Regulations, if such conduct is established in a decertification hearing, there is a mandatory requirement of suspension of an engineer's certificate for 30 days. Without a certificate, under the FRA Regulations, an employee may not work as an engineer. Also under the Regulations, it is Carrier's responsibility to enforce the requirement, and

a formal investigation under Schedule Discipline Rules serves as an appropriate decertification hearing. Carrier lifted Claimant's certificate on March 26, and held him out of service pending hearing.

Carrier held such a hearing (investigation) on April 5, 1993. Neither party supplied the Board with any information about the investigation - charges, notices, transcript, exhibits, etc. Carrier simply states that based on the facts developed at the hearing, it notified Claimant that his engineer certificate was suspended for 30 days beginning April 8, 1993. Apparently, Carrier found no independent violation of its Operating Rules by Claimant, since it imposed no discipline upon him as a result of the investigation.

Claimant thereafter attempted to exercise his trainman seniority to displace a junior brakeman, but was not permitted to do so. On April 23, he filed claim for a day's pay each day March 27 through April 7 based on Carrier's refusal to permit him to exercise his trainman seniority on those dates. Carrier's response to the claim was: "... on March 26, 1993, you were removed from service in accordance with FRA guidelines. Inasmuch as the law required your removal from service, you may not exercise your trainman's seniority."

Both parties cite Article XIII, Section 3(3) of the UTU 1985 National Agreement; Carrier also cites Article 27, Section A(1) of the BLE Schedule.

"XIII, 3 (3): An employee who has established seniority as conductor (foreman), trainman (brakeman-yardman), hostler or hostler helper (but without seniority as a locomotive fireman) who is selected for engine service shall retain his seniority standing and all other rights in train and/or yard or hostling service. However, such employee shall be permitted to exercise such rights only in the event he or she is unable to hold any position or assignment in engine service as engineer, foreman or a designated position in passenger service, hostler or hostler helper."

"27 (A)(1): . . . No demoted Engineer will be permitted to hold a run as a Fireman on any seniority district while a junior Engineer is working on the Engineers' extra list or holding a regular assignment as Engineer on such seniority district, except where there are approved Local Agreements which permit such a practice."

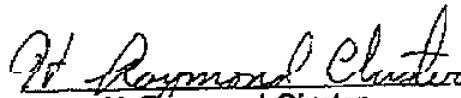
In the Board's view, the governing rule is not Engineer's Rule 27 (A), but XIII, Section 3 (3) of the 1985 National Agreement. As to that rule, Carrier argues that Claimant was not "unable" to hold an engineer's assignment; rather, he was able to hold such an assignment, but was unable to work only due to certificate revocation. The FRA requirement for engineer certification did not come into effect until after the 1985 National Agreement; therefore, Article XIII, 3 (3) was not referring to inability to hold an engineer's position due to certificate revocation.

The Organization contends that Claimant's situation falls within the specific language of Article XIII, 3 (3). Claimant, because he had no certificate, was unable to hold an engineer's assignment; therefore, he could exercise his trainman's seniority. In effect, the FRA regulation that Claimant could not work as an engineer without a certificate, set aside Claimant's engineer seniority for the thirty-day decertification period. As to Carrier's claim that because the law required his removal from service, he could not exercise his trainman seniority, the Organization points out that the FRA has dealt with this issue in Section 240.5 (e) of its Regulations. In answer to questions whether Section 240.5 (e) prevents an engineer whose certificate is suspended from exercising his or her seniority to work in some other capacity for the railroad, typically as a trainman or conductor, FRA issued a paragraph of interpretative guidance on April 9, 1993. The paragraph stated: "Paragraph (e) simply reflects FRA's intent that loss of certification is not intended to create an eligibility or entitlement to employment in other service for the railroad. It does not prevent railroads from recognizing such an eligibility or entitlement or otherwise agreeing to allow a person to provide such service."


While it is true inability to hold an engineer's assignment because of suspension of the engineer's certificate required by the FRA was not a condition in existence at the time Article XIII 3 (3) was negotiated, the Board is convinced that this later-developed form of inability falls within the general intent of the Article. The scheme was that trainmen who applied for and successfully attained engineer's seniority would retain their seniority and all other rights as trainmen. However, in order to assure carriers of a sufficient supply of engineers to meet their operating requirements, such former-trainman engineers would only be permitted to exercise such rights if unable to work in engine service. Thus, former trainmen could not go back and forth from engineer to trainman service to suit their own convenience, leaving Carrier high and dry without the supply of engineers they had bargained for. In this case, Claimant was unable to work as an engineer because of FRA requirements, not because of Carrier requirements or his own wishes. Under such circumstances, in our view, the language and intent of Article XIII, 3 (3) permitted him to exercise his trainman seniority, and nothing in the FRA Regulations prohibited him from doing so or prohibited Carrier from permitting him to do so.

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AWARD: Claim sustained.

  
H. Raymond Cluster  
Neutral Member

  
Gene L. Shiro  
Carrier Member

  
R. L. Marceau  
Organization Member

Dated: 2/4/91