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BEFORE PUBLIC LAW BOARD NO. 6264

BURLINGTON NORTHERN AND SANTA FE)
RAILWAY COMPANY) Chairman and Neutral Member-
) Richard R. Kasher
and) Organization Member -
) R. L. Marceau
UNITED TRANSPORTATION UNION) Carrier Member -
) John Fleps
)

ORGANIZATION'S SUBMISSION

As indicated by paragraph (F) of the September 13, 1999 Agreement between United Transportation Union ("UTU, or "organization") and the Burlington Northern and Santa Fe Railway Company ("BNSF, or "carrier") to create this Board (attached hereto as Exhibit A), it has "jurisdiction of the issue concerning the propriety of the Carrier's current 'availability policy,' issued in 1999, as separately stated by the parties in their submissions to the Board...."

UTU QUESTIONS AT ISSUE

1. Was BNSF proper in the August and September, 1999 unilateral promulgation of its "Availability Policy" covering employees represented by UTU without negotiating with UTU in light of the March 18, 1999 Work/Rest Guidelines/Principles signed by the parties as part of the work of the National Wage and Rules Panel mandated by Article XIII of the 1996 UTU National Agreement?
2. If the answer to Question 1 is in the negative, shall BNSF now be required to suspend such Availability Policy until it reaches agreement with UTU pursuant to the March 18, 1999 Work/Rest Guidelines/Principles?

HISTORY OF DISPUTE

The history of this dispute is fairly well laid out in the Declaration of UTU International President Charles L. Little (with attached numbered exhibits), which is attached hereto as Exhibit B. The short of the dispute is that BNSF committed to handle quality of life issues for employees represented by UTU in a National Wage and Rules Panel in accordance with Article XIII of the 1996 UTU National Agreement (Little Decl., Ex. 1). In furtherance of that commitment, BNSF and the other carriers represented by the National Carriers' Conference Committee ("NCCC") signed with UTU the March 18, 1999 Work/Rest Guidelines/Principles (Little Decl., Ex. 2), which required it to establish within a specified time frame programs dealing with employee fatigue issues, including "Assigned Work Days/Rest Days" and "Assigned Service" (*id.* at pp. 1, 3-6). While the Work/Rest Committee was established on BNSF as required (*id.* at 3), the UTU General Chairpersons firmly rejected the "Availability Policy" when it was presented to them.

BNSF nonetheless promulgated the "Availability Policy" in August and September, 1999 (Little Decl., Exs. 3-5), creating a firestorm of protest from the employees (see Little Decl. Exs. 6-7), and prompting a strike threat from UTU. There is little doubt the "Availability Policy" clearly implicates the Work/Rest Guidelines/Principles because at a September 10, 1999 Work/Rest meeting with the UTU General Chairpersons, a carrier expert described a computer program to compare a conventional rotating extra board and a rest-cycle board, emphasizing one of the essential criteria was "availability." (Little Decl., Ex. 8 (Declaration of Robert Kerley)).

Although irrelevant to this case, BNSF has never obtained the agreement of UTU with respect to previous "Availability Policies." (Little Decl., ¶ 14, Ex. 9-14). In fact, BNSF and the other NCCC carriers in their October 7, 1988 Section 6 Notice served on UTU proposed to "Discontinue rules and

practices that permit less than full-time availability for active service,” but as the Chairman knows from his service as a member of PEB 219, the NCCC carriers, including BNSF, did not obtain such a rule. (Little Decl., ¶ 15, Ex. 15). BNSF also put out a letter directly to its operating employees September 24, 1999 trying to justify its policy, rather than negotiate with UTU [implicating the prohibition against direct dealing under *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944)], which has had an underwhelming reception, (Little Decl., ¶ 16, Exs. 16-17). BNSF may also urge that the policy was put out at the request of UTU State Legislative Director-Nebraska Ray Lineweber, but that is just not the case. (Little Decl., ¶ 17, Ex. 18 (Declaration of Ray Lineweber)). Even if relevant, all of these matters must be measured under the stringent standard of *UTU Local 31 v. St. Paul Union Depot, infra*.

Predictably, BNSF went to court to seek a strike injunction. After a hearing held in federal court in Dallas, Texas August 30, 1999, Judge Buchmeyer issued a Preliminary Injunction Order on September 8, 1999 finding the dispute over the “Availability Policy” was a “minor dispute” under the Act and enjoining any strike, but also ordering expedited arbitration of the issues, which brings the parties to this Board. A copy of that Order is attached hereto as Exhibit C. As the Board knows, BNSF has advised it will not implement the “Availability Policy” until November 1, 1999, and, on that basis, on the joint motion of the parties, the Court entered an Order on October 6, 1999, extending the deadline for completion of the arbitration until November 1, 1999. A copy of that Order is attached hereto as Exhibit D.

POSITION OF UTU

BNSF's unilateral promulgation of its "Availability Policy" flies in the face of the collective bargaining obligations it undertook in the March 18, 1999 Work/Rest Guidelines/Principles. More fundamentally, its arrogant disregard of the obligations thereunder not only undermines the continuing work of the National Wage and Rules Panel mandated by Article XIII of the 1996 UTU National Agreement, but also jeopardizes upcoming national negotiations.

1. The Irrelevance of the "Minor Dispute" Determination

Of course, it hardly requires explanation that all BNSF had to do so succeed in Court to establish the dispute over the "Availability Policy" was a "minor dispute" was to show its position was "arguable." *Conrail v. Railway Labor Execs. Ass'n*, ___ U.S. ___, 105 L.Ed 2d 250 (1989). Such a demonstration ousts the Court of jurisdiction and places the issue in arbitration for resolution. Yet the Court recognized the volatility of the issue and the necessity for a quick resolution in order for any arbitration award to be effective demanded expedited arbitration. In arbitration, BNSF must show far more than an "arguable" position. It must preponderate in order to win. That it cannot do.

2. The Irrelevance of Other Agreements and Practices.

UTU relies upon the March 18, 1999 Work/Rest Guidelines/Principles before this Board, as it did in Court. The chaff thrown up by BNSF in Court about other agreements it has with UTU and practices it claims have developed may have been sufficient to create a "minor dispute" before the Court, but they have nothing to do with the work of this Board. All such agreements and alleged practices occurred well prior to the Work/Rest Guidelines/Principles. Moreover, the carrier's compliance or not with such agreements will await individual arbitrations if the carrier violates them, and its claimed practices or implied agreements awaits individual arbitrations where it must establish

the existence of same in order to rely upon them. *See UTU Local 31 v. St. Paul Union Depot*, 434 F.2d 220, 222-23 (8th Cir. 1970) (“[p]rior behavior by itself, although similar to the acts in dispute, falls short of an ‘established practice.’ Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute.”). This Board must determine if BNSF’s unilateral promulgation of its “Availability Policy” is consistent with the commitments it made on March 18, 1999 in the Work/Rest Guidelines/Principles.

3. The Relevance of Negotiators’ Testimony

It has been firmly established that “precontract negotiations frequently provide a valuable aid in the interpretation of ambiguous provisions.” Elkouri & Elkouri, How Arbitration Works (5th edition 1998) at 357. Moreover, it is equally true that “[e]ven where no stenographic record is kept and no notes are taken, the history of negotiations may be relied upon if the arbitrator is satisfied as to the accuracy of the oral testimony of persons who attended the negotiations.” *Id.* at 358 and n. 96 (citing awards). *See also Sidney Wanzer & Sons, Inc.*, 46 LA 426, 429 (Dolnick 1966) (copy attached as Exhibit E).

Here, BNSF attempts to create ambiguity in the meaning of the Work/Rest Guidelines/Principles by attempting to divorce availability of employees to perform work from fatigue-related issues. Not only does common sense dictate otherwise, but also the BNSF’s own expert noted that employee availability is key to establishing rest-cycle extra boards. (Little Decl.,

Ex. 8 (Declaration of Robert Kerley)). Additionally, the draconian effects of as little as two days off per month stated in the policy (*id.*, Exhibit 3), subjecting medical leave to the policy (*id.*, Exhibit 5), and the practical effects all this has on fatigue (*id.*, Exhibit 6) belie BNSF's ludicrous assertion.

Moreover, the testimony of UTU International President Charles L. Little, who attended every negotiating session, will clarify for the Board that all fatigue-related issues were intended to be covered by the March 18, 1999 Work/Rest Guidelines/Principles. His testimony will also establish that it was the carriers who insisted on insertion of the last line of the Guidelines/Principles, to wit, "The foregoing Guidelines reflect the parties' decision that the way to pursue resolution of fatigue-related problems is through good faith arms-length collective bargaining." BNSF has now chosen to deal with fatigue related problems by fiat, rather than bargaining.

BNSF knows that the issue of employee availability is related to fatigue issues because its Vice President-Labor Relations John Fleps virtually acknowledged it in discussing the Superior, Wisconsin pilot project on the BNSF that was part of the National Wage and Rule Panel on a jointly produced video. (Little Decl., ¶ 18, Ex. 19). UTU will show the video at the hearing.

Moreover, it has been held that carriers may not set unilateral standards for availability and enforce them. *UTU and Union Pacific*, Award No. 7 of Public Law Board No. 5142 (June 4, 1992) (Benn) (attached as Exhibit F). And as Chairman and Neutral Member Seidenberg observed in *TCU and Amtrak*, Award of Public Law Board No. 4762 (December 7, 1989) (attached as Exhibit G):

[I]t must be recognized by the Carrier, albeit reluctantly, that the very institution of collective bargaining itself is a restraint on the Carrier's freedom of action regardless of how sincerely and deeply the Carrier is convinced that its proposed actions are needed and warranted. The Board has to take cognizance of facts in the record which indicate that

the Carrier has made adjustments in the past in its smoking policy, and many of them at the request of and with the concurrence of the Organization. It is in light of this record that the Board has no recourse but to conclude that neither the cited Rules of Conduct or the negotiated provisions sanction or provide a valid foundation for the Carrier to make the quantum leap from regulating the locations where employees may smoke to banning totally smoking on the premises. The Board finds that such a broad exercise of authority is not encompassed within the Carrier's managerial prerogatives, but rather is a matter that has to be negotiated with the designated representatives of the affected employees because it is a term and condition of employment.

Id. at 25-26.

Where, as here, a carrier has committed to handle a term or condition of employment in collective bargaining, it cannot revert to promulgation of policy. *See BLE and SEPTA*, First Div. Award No. 24902 (June 10, 1998) (Dennis) (attached as Exhibit H).

The carrier tries to escape the impact of this precedent and the draconian nature of its promulgation by whittling down its original policy in the October 5, 1999 letter of its counsel to the Chairman to "address certain employee concerns." Therein we are told that availability for seven-day assignments will be 75 percent. The way BNSF should "address certain employee concerns" is by negotiating with UTU as it committed to do in the March 18, 1999 Work/Rest Guidelines/Principles, rather than negotiating with the Chairman in an attempt to protect its unilateral promulgation.

CONCLUSION

UTU's Question at Issue No. 1 should be answered in the negative and Question at Issue No. 2 should be answered in the affirmative. BNSF should be ordered to comply immediately with the Award of this Board that it cease and desist from implementing its 1999 "Availability Policy."

Respectfully submitted,



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