

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 24205  
Docket No. 43817  
93-1-91-1-S-6558

Form 1

The First Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union  
(Soo Line Railroad Company (former  
(Milwaukee Road)

STATEMENT OF CLAIM:

"Does trains exceeding 6,780 feet in length operating on the Soo Line Railroad with a reduced crew of one (1) conductor and one (1) brakeman, violate the train length provisions of the March 17, 1978 Crew Consist Agreement?

If trains operating in violation of train length provisions of March 17, 1978 Crew Consist Agreement, are excessive train lengths penalty claims valid?"

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

The March 17, 1978 Crew Consist Agreement and Implementing Agreement between the Milwaukee Road and UTU read in parts pertinent to this dispute as follows:

"17) Effective April 1, 1978, the following car limits and train length limitations shall be made effective over the entire Chicago, Milwaukee, St. Paul and Pacific Railroad Company System in road freight train service:

- (a) Trains of 1 to 70 cars, but not to exceed 3955 feet in length, exclusive of operating caboose(s), may be operated with a reduced crew of one (1) conductor and one (1) brakeman, subject to the other provisions of this agreement.
  - (b) Trains of 71 to 120 cars, but not to exceed 6780 feet in length, exclusive of operating caboose(s), may be operated with a reduced crew of one (1) conductor and one (1) brakeman by agreement between the appropriate UTU Local Chairmen and Carrier Officer having jurisdiction of the territory over which the train is to operate, consistent with proper consideration of terrain and other conditions affecting train operations in that territory.
  - (c) Trains consisting of more than 120 cars or exceeding 6780 feet in length, exclusive of operating caboose(s), may be operated only with a crew consist of one (1) conductor and two (2) brakemen.
19. The parties hereto recognize the complexities involved in this crew consist issue and agreements involved, and agree that disputes will be handled in conference to endeavor to arrive at agreed-upon interpretations, arrangements to be made for periodic conferences to accomplish same, in keeping with the intent and purpose of these agreements and the rights of the parties thereunder.
20. This agreement will become effective April 1, 1978, and will continue in effect until revised or amended by agreement of the parties, or in accordance with the Railway Labor Act, as amended, and will supersede all other agreements, rules and understandings which are in conflict herewith.

Signed at Chicago this 17th day of March,  
1978."

A few months after the April 1, 1978 effective date of the above Agreement, former Milwaukee Road AVP/GM Plattenberger and former UTU General Chairman McGuire reached a meeting of the minds regarding application of the above-quoted train length provisions.

That understanding was memorialized in the July 7, 1978 letter from Plattenberger to McGuire:

"You will recall our meeting in DesMoines with the General Chairmen in the territory Savanna-Council Bluffs and Savanna-Kansas City, concerning the new Crew Consist Agreement, at which time it was agreed that the Carrier would restrict all trains to not more than 120 cars; and the Organization would, in turn, permit the Carrier to operate crews with one Conductor and one Brakeman, under the terms of the Crew Consist Agreement, and that any reference to the footage would be eliminated.

As I recall it, this was agreed to on a 90-day trial basis, which is up August 1, 1978. I do have some feedback to the extent that the men feel the Carrier was too long in getting radios into the area, and that certain wayfreights should actually be operated with a Conductor and two Brakemen.

We certainly do not want to lose the momentum that has been achieved up to this point in taking advantage of the Crew Consist Agreement, and am wondering what kind of feedback you have from your Local Chairmen regarding their interest in extending the Agreement for an indefinite period of time.

I might add that we now have sufficient portable radios to cover the situation on the entire ILL/IOWA Division, and that I have today approved an AFE to install MILW crystals in the MP-15 locomotives which are stationed at Kansas City. It is unfortunate that we did not have sufficient portable radios to cover all situations immediately, but we did ship as many radios as we possibly could into the ILL/IOWA-Kansas City area until the new requisition was received.

If there are some other areas that need further discussion, or the men feel that further negotiations are necessary, I would hope they would be in contact with Mr. G. A. Jonasson and his staff so that such problems, if they exist, can be ironed out before the August 1st date.

I would be glad to hear from you on this subject."

The record shows no specific response from UTU to the above letter, but it is not disputed that the understanding set forth therein was placed into practice on the Milwaukee Line from 1978 until the acquisition of the "Milwaukee Division" by the Soo Line. Record evidence of this practice includes the following correspondence over the signature of Milwaukee Road A.V.P. and G.M. Plattenberger:

"Chicago - December 5, 1978

File 020.3 - 381

Messrs. N. H. McKegney  
B. J. McCanna

Reference our meeting with Mr. T. J. McGuire and other representatives of the UTU in Minneapolis on December 1, 1978 to discuss application of the crew consist agreement between LaCrosse and Montevideo.

After considerable discussion Mr. McGuire agreed that trains up to 120 cars could be operated with a conductor and one brakeman throughout the entire territory under the terms of the Crew Consist Agreement.

It was agreed that Labor Relations would work with Mr. Riley of the UTU and other Division Officers to again review the method of calling of trainmen at St. Paul, handling of extra boards, etc.

I agreed that every effort would be made to supply the portable radios necessary to take advantage of this agreement and that Division Officers would check with Local Chairmen to know that the order that they have placed at the present time is sufficient to cover their needs. Mr. McGuire understands that it takes six to eight weeks from the time the order is placed until radios are received. I assured him that this office would do everything possible to get the necessary approval to purchase additional radios where needed. If there is any change in the number of radios that are needed promptly, as well as your projected needs for the remainder of 1979, you should so advise Mr. Reinhardt of Jim Schwinkendorf's office so that we can hold up our end of the agreement.

You will recall some discussion indicating that yardmasters and others are attempting to force individuals to work with a conductor and one brakeman even if radios are not available and furthermore that they are calling a conductor and one brakeman at times when they know radios are not available and should be advising the individuals at call time so that the additional brakeman can be furnished if the crew does not wish to go without the portable radios.

I feel that the meeting was a good one and everyone had an opportunity to express their concerns. While we are all still learning and somewhat feeling our way on this agreement, I am sure that the problems are not insurmountable if the Division Operating Officers will all get involved in this issue and see to it that it is applied in a proper and fair manner."

"Chicago, December 29, 1978

File: 020.3

Mr. V. W. Merritt:

Your letter of November 21, and our previous discussions, pertaining to crew consist agreement and its application on Lines West and with particular reference to the footage restrictions stipulated in the original agreement.

I do not agree that we should enter an agreement that stipulates train length. The Eastern region has agreed to eliminate train length and the Western region should do the same."

"May 13, 1982

File: 025

Mr. J. A. Mogan  
General Chairman - UTU  
9401 West Beloit Road, Suite 401  
Milwaukee, Wisconsin 53227

Dear Sir:

This has reference to your letter of April 16, 1982, file 10-B (258), regarding complaint received from your Savanna representative concerning train length footages.

I really don't understand your concerns about train lengths. I understand what the Crew Consist Agreement states, however, we have an agreement since the inception that management would not operate trains consisting of more than 120 cars in exchange for the UTU waiving the footage provision of said agreement."

In 1985, the Soo Line acquired the Milwaukee Road and entered into an Employee Protective Agreement (EPA) with UTU, dated July 1, 1985, reading in part pertinent to this case as follows:

"6.(a) Until a new unified schedule of rules is agreed to as per Section 14 hereof, in service which operates over road territory of two or more of the former employing carriers, payment for the tour of duty will be governed by rules and agreements applicable on the former employing carrier having the greater mileage represented on that run. Yard Service employees will be paid under rules and agreements applicable on the former employing carrier where the employees report for duty.

(b) The Memorandum of Agreement pertaining to the consist of crews in train and yard service, dated March 17, 1978, between the UTU and the Milwaukee Road, together with established practices, interpretations and understandings, will be applied subsequent to the effective date of this Agreement to all trains and employees on the Railroad's combined operating system, in accord with its and their terms, until changed by appropriate procedures under the Railway Labor Act."

About two weeks after the Soo Line took over under the above provisions, Soo Line VP Labor Relations C. W. Nelson issued the following memorandum to Operating Departments officers, with copies to then UTU General Chairmen Beyer and Mogan:

"July 15, 1985

TO: C.C. Leary  
W.F. Plattenberger  
B.J. Wilkes  
D.H. Nelson  
R.F. Shive

FROM: C.W. Nelson

RE: Crew Consist Agreement UTU (T&C)

Several questions have arisen regarding the application of the provisions of the consist of train crews. Among them is the question of train size.

Article II, Section 6(b) of the Soo/Milwaukee Employee Protective Agreement states in part 'The Memorandum of Agreement pertaining to the consist of crews in train and yard service, dated March 17, 1978, between the UTU and the Milwaukee Road, together with established practices, interpretations and understandings, will be applied subsequent to the effective date of this Agreement to all trains and employees on the Railroad's combined operating system,....'

The established practice and understanding on the Milwaukee Road relating to train size is that as long as the Carrier operates all trains with 120 cars or less, all trains are subject to be operated with one conductor and one brakeman with the second brakeman's position blankable. If the Carrier does not continue train size at 120 cars or less, the provisions of section 17 of the crew consist agreement establishing footage limitations and requiring UTU consent for operating trains with 70 to 120 cars with a reduced crew will be applicable.

If you have any questions feel free to contact my office.

cc: J.E. Beyer  
J.A. Mogan"

The record shows no further action on this issue until May 13, 1986, when then UTU General Chairman Mogan wrote to Mr. Nelson, as follows:

"Please consider this letter formal request that the footages spelled out in Section 17 of the Memorandum Implementing the Crew Consist Agreement of April 1, 1978 be adhered to in train operation over our system. The flexibility given the Carrier on train length to prevent disputes arising over the addition of one car is being abused to the extent that an overage may occur representative of another train of 3000 feet.

Having been involved in the negotiations that produced the liberties you enjoy with the short crew provisions of Section 17, I know that 10,000 trains were not contemplated.

Your cooperation in enforcing sub section (b) of the aforementioned Section 17 is earnestly solicited.

Thank you."

Following a May 15, 1986 conference with Mogan and then UTU Vice President J.R. Maloney, Mr. Nelson responded by letter of May 27, 1986 as follows:

"This has reference to discussions held in this office May 15, 1986, and to your request for documentation that train lengths were waived under Section 9 of the March 17, 1978 Crew Consist Agreement; Section 17 of the Memorandum Implementing Crew Consist and Section 17 of the Question and Answers Implementing Crew Consist.

Attached are copies of various correspondence from our file documenting that train lengths were waived by the U.T.U. Committee in exchange for not operating trains consisting of more than 120 cars.

It should be noted that agreement to waive train lengths in exchange for not operating trains over 120 cars was never reduced to a written agreement at that time for two very important reasons:

1. We were advised by the two vice presidents involved in the negotiation of the agreement that former U.T.U. President Al Chesser was very firm with his vice presidents on the matter of footage because agreements had not as yet been made on other carriers and was adamant agreements on other carriers would contain this provision. In other words we were advised to avoid obtaining an actual written agreement eliminating train lengths for fear such agreements would get to other carriers and impede the U.T.U.'s attempt to negotiate a crew consist agreement on those other carriers.

2. The above referred to sections do not require that such agreement between the appropriate local chairman and local carrier officer be reduced to writing.



It should be noted that agreement to waive train lengths was obtained very early on following implementation of our Crew Consist Agreement on April 1, 1978, and where agreement was unable to be reached locally the matter was thereafter resolved between the General Chairman and Carrier's highest officer. By the latter part of 1978 an agreement was in place for all seniority districts.

The reason train length was waived so early on was because the parties recognized during negotiations there would be nothing but constant 'yardstick' disputes and neither party wanted train operations impaired or have the agreement falter because of such disputes especially since the issue of crew consist was so controversial.

Needless to say, the agreement to waive train lengths has been in effect going on 8 years and has since been reduced to writing. Article II, Section 6(b) of the Soo/Milwaukee Employee Protective Agreement states in pertinent part that 'The Memorandum of Agreement pertaining to the consist of crews in train and yard service dated March 17, 1978 between the U.T.U. and the Milwaukee Road together with established practices, and the Milwaukee Road together with established practices, interpretations and understandings, will be applied subsequent to the effective date of this Agreement to all trains and employees on the Railroads combined operating system,....'

The attached documents clearly show what the established practice and understanding has been on the Milwaukee Road with respect to the operation of reduced crews in relation to train size. If you have any further questions, feel free to contact my office.

Yours truly,

C. W. Nelson  
Assistant Vice President  
Labor Relations and Risk  
Management

## Attachments

cc: Mr. J. A. Mogan - Inasmuch as the above addresses the complaint outlined in your letter of May 13, 1986, File 36-LL (General), this is to advise there is no merit to that complaint and it is therefore respectfully denied."

Nothing further was heard from the UTU until November 21, 1986, when Mogan wrote Nelson as follows:

"Please consider this letter claim for 104 punitive miles for various trainmen in connection with carrier violation of train lengths specified in Article 8, Paragraph II of the agreement providing for crew consist.

Article 8 provides that no train in excess of 120 cars and 6780 feet may be operated with a reduced crew of one conductor and one trainman. It states further, that trains exceeding these lengths will required the standard crew referenced in the first paragraph of the memorandum implementing crew consist. Car count and train length are virtually the only prohibitions found in the physical make up of trains that limit the right to operate with reduced crews. Other prohibitions deal with the pure attrition of crewmen.

U.T.U. President Chesser in 1977 and 1978 insisted that length and car count be determinants in train make up to allow for operation with reduced crews. President Chesser stated that multiples of 50 foot cars on which the 6780 foot was loosely predicated, would have no validity as cars of 60 feet and more would produce the excesses giving rise to the claims listed herein.

Some have suggested that the 6780 foot figure might be reached with 12 or 16 articulated cars with single markings and numbers.

Your rationale for operation of trains exceeding prescriptions based on a waiver is inaccurate because the waiver you allude to involved a single River Division conductor who expressed intent to tape measure trains based on desire to slow operations.

Both Mr. Plattenberger and Mr. McGuire were dedicated to reason and had no truck with either tape measure or two mile trains now in operation.

Our secondary motivation in seeking compliance, is the current breakdown in train operation. Train failure on the Kansas City line is attributable, in most cases, to limitations in passing options imposed by excessive train length.

To enable prompt payment of claims or final and binding arbitration that will lead to payment, we will list names, dates, trains and other relevant data on attachments to this letter.

Thank you."

Attachment A to the letter of November 21, 1986, submitted claims for 104 miles because of carrier violation of train length provisions of the Crew Consist Agreement of April 1, 1978, on behalf of the following employees:

<u>Conductor</u>	<u>Brakeman</u>	<u>Date</u>	<u>Train</u>
R.J. Artman	P. O. Mills	10/2,3,5/86	225,227,228
B.J. Vass	D. L. Kelly	10/4,12,14/86	229,251
R.J. Artman	P. O. Miller H. L. Riffe, Jr.	10/10,10,15/86	225,226,227
J.L. Frederick	M. Destefano	10/8,10/86	224
V.H. Folkers	R. D. Miller	9/20,20,20,20, 22,22,25/86	228,223
R.A. Hutton	R. A. Cloudeman	10/1/86	225
E.F. VonEssen	J. T. Boulds	10/8/86	229
A.R. Wagner	R. D. Larsen	10,3,3/86	224
R.F. Yuva	R. E. Walston	9/21/86	229
A.R. Wagner	L. V. Campbell	10,8,11,13/86"	

The record does not contain a written denial of the claims filed by Mogan on November 21, 1986; but neither does it show any further appeals by the UTU. The same observation holds true for a series of additional identical claims filed sporadically by Mogan during 1987, 1988 and 1989, all of which were denied in writing by Carrier. So far as the record before this Board shows, UTU did not even attempt to appeal any of those denied claims to arbitration until the July 30, 1991, Notice of Intent letter to the Board by

current UTU General Chairman E. F. Von Essen, reading as follows:

"Ms. Nancy J. Dever  
Executive Secretary  
National Railroad Adjustment Board  
First Division  
175 W. Jackson Boulevard - Suite A-931  
Chicago, Illinois 60604

Dear Ms. Dever:

This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of our intention to file an Ex Parte Submission within thirty (30) days covering an unadjusted dispute between United Transportation Union (UTU) and the Soo Line Railroad Company, involving the questions:

Does trains exceeding 6,780 feet in length operating on the Soo Line Railroad with a reduced crew, one (1) conductor and one (1) brakeman, violate the train length provisions of the March 17, 1978 Crew Consist Agreement?

If trains operating in violation of train length provisions of March 17, 1978 Crew Consist Agreement are excessive train lengths penalty claims valid?

Very truly yours,

E. F. Von Essen  
General Chairman

cc: Mr. N. R. Foot - Vice President-Operations  
Soo Line Railroad  
Ms. C. S. Frankenberg - Vice President Labor Relations  
Soo Line Railroad  
Mr. F. A. Hardin - President UTU  
Mr. G. T. DuBose - Assistant President UTU  
Mr. L. W. Swert - Vice President UTU"

In handling before this Board, Soo Line raised a threshold procedural/jurisdictional objection that the Board lacks jurisdiction on grounds that the July 30, 1991 Notice of Intent was untimely under Article 35 (f) of the Collective Bargaining Agreement. UTU responded that the Parties had entered into a Letter Agreement of November 27, 1990 (extended by Letter of April

1991), as follows:

"Under the circumstances, it is understood and agreed that the parties will not apply the provisions of Article 35 (d) and (e) to any claims and disputes prior to July 1, 1991 that have not already been raised between the parties.

It is further understood and agreed that Article 35 - Time Limit on Claims - will be fully applicable to claims and disputes subsequent to July 1, 1991."

The cited provisions of Article 35 - Time Limit on Claims, read as follows:

"Section (d) Any claim disallowed by the Superintendent that is to be appealed must be appealed in writing by the UTU General Chairman to the Vice President-Labor Relations within one hundred and eighty (180) days from the date of Superintendent's decision; otherwise the claim will be barred, but this shall not be considered as a precedent or waiver of the contentions of the United Transportation Union as to other similar claims.

Section (e) Should any claim appealed to the Vice President-Labor Relations be disallowed by him, he must decline the claim within one hundred eighty (180) days from the date of appeal; otherwise the claim shall be paid, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims.

Section (f) Decision of the Vice President-Labor Relations shall be final and binding unless within one (1) year from the date of said officer's decision following conference, such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the claimant, or his duly authorized representative, and the Vice President-Labor Relations is so notified. The parties hereto may, be agreement in any particular case, extend the one year period referred to in this Section (f)."

Careful consideration of the countervailing arguments on the threshold issue persuades this Board that Carrier's procedural/jurisdictional objections are well placed and require dismissal of the questions at issue without comment upon their merits. In the Letter of Agreement of November 27, 1990, the Parties mutually waived timeliness objections based upon Article 35

(d)[180 days to take second step appeals]. Significantly, however, the Parties did not mention the time requirements of Article 35 (f)[1 year to "institute proceedings for final disposition," ie. arbitration under Section 3 First (i) of the Railway Labor Act]. Under the established principle of "inclusio unius est exclusio alterius," the Board must conclude that neither Party intended to waive objections based upon Article 35 (f). Further, Carrier's failure to raise the Article 35 (f) defense prior to Board handling is not a waiver for two reasons: 1) The objection is not just procedural but also jurisdictional, and thus may be raised at any time; and 2) The Article 35 (f) objection was not viable until Carrier finally and belatedly was placed upon notice by the Organization that it intended to appeal the denied claims to arbitration.

The Board does not fault the efforts of current General Chairman E. F. Von Essen, but the Notice of Intent finally filed on July 30, 1991, comes too late under Article 35 (f). Finally, the attempt to add new time claims after filing of the July 30, 1991 Notice of Intent does not cure the violation of Article 35 (f).

Based upon all of the foregoing, the issues in dispute and statements of claim presented in this case must be dismissed for lack of jurisdiction due to violation of Article 35 (f). No opinion regarding the merits or lack thereof in the underlying questions are expressed or implied by this Board.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Attest:

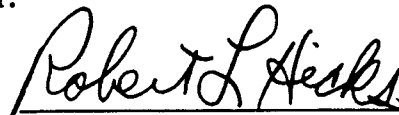
  
Nancy J. Geyer - Executive Secretary

Dated at Chicago, Illinois, this 5th day of March 1993.

CARRIER MEMBERS' RESPONSE  
TO  
LABOR MEMBERS' DISSENTING OPINION  
TO  
AWARD 24205, DOCKET 43817  
(Referee Eischen)

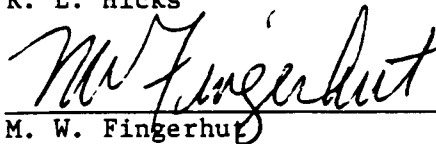
The concerns expressed by Labor in its Dissent are understandable as the dismissal of the train length dispute resolves the issue once and for all.

The Dissent argues that the Carrier should have raised the issue of the Organization's late filing of the dispute with the Board during the handling of the dispute on the property. The dissenters, however, do not explain how such a miracle could have been accomplished.



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R. L. Hicks



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M. W. Fingerhut

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

INTERPRETATION

Award No. 24205  
Docket No. 43817

PARTIES TO DISPUTE: (United Transportation Union  
(  
(Soo Line Railroad Company (former Milwaukee  
( Road)

On March 5, 1993, the Board issued First Division Award 24205 dismissing the claims in Docket No. 43817 on timeliness grounds, while expressly disavowing the expression of any opinion on the underlying merits of those claims. Commencing March 12, 1993, the UTU General Chairman began requesting claims conferences on the property of another series of train length claims, invoking Section 2, Sixth of the RLA. By letter of March 30, 1993, Carrier took the position that the "fresh claims" were barred by Award 24205. By letter of same date, Carrier applied for an "Interpretation" of that Award by the Board supportive of Carrier's position.

We have carefully reviewed the decision in Award 24205 in light of Carrier's request for an "Interpretation." In our considered judgement, the Award is clear on its face. We find nothing pointing to any ambiguity which requires us to interpret or clarify that Award. Accordingly, this Board must dismiss the request for "Interpretation" and we must decline to express or imply any opinion regarding either the arbitrability or the merits of claims which are still in handling on the property.

Referee Dana E. Eischen sat with the Division as a Member when Award 24205 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Dated at Chicago, Illinois, this 16th day of September 1994.