PUBLIC LAW BOARD NO. 3972

AWARD NO. 4
CASE NO. 3a and 3b

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

3a. Claim of Fireman G. H. Miller for difference in earnings between yard job and fireman's turn when held off freight turn on December 6 and 8, 1981, La Grande to Nampa and return.

3b. Claims of Engineers G. H. Miller - July 7 and C. E. Anderson - August 9, 1982, for additional difference in earnings for held-away-from-home-terminal time when held from their assignments in pool and used as hostler or engineer at Hinkle.

OPINION OF BOARD:

These claims arose when promoted Firemen Miller and Anderson were used off their respective interdivisional freight pool turns, between La Grande and Nampa, Idaho, and used as Yard Engineers or Hostlers at Hinkle, Oregon on December 6-8, 1981, July 7, and August 9, 1982. Those assignments were made pursuant to the terms of the UP-UTU-E Memorandum of Agreement of October 14, 1975 and Article III, Sections 1(a) and (b) of the UP-UTU-E Rules Modification Re-Manning Agreement of August 28, 1972, reading, respectively, as follows:

MEMORANDUM AGREEMENT

ODF-1342

Article 39, Section 12 of the BLF&E (UTU-E) Agreement effective July 1, 1946 presently reads as follows --

> "Sec. 12. Use of Demoted Engineers, Emergency: When necessary in cases of emergency to use demoted engineers as engineers, the senior demoted engineer available at the home terminal for extra men will be used, except that when call is made to fill a vacancy as engineer at an outside point, at which point there is a senior demoted engineer, such senior demoted engineer at the outside point, if available, will be used to fill vacancy as engineer."

IT IS AGREED that the above-quoted provision is superseded and henceforth the following shall govern --

> When necessary in cases of emergency to use a promoted fireman as engineer in road or yard service, the first-out qualified promoted fireman (engineer not working as such) at the point where the vacancy exists, working in road service shall be used.
>
> In the event the first-out qualified promoted fireman is not available, any qualified promoted fireman may be used to fill the vacancy as engineer.
>
> An assigned fireman withheld from his regular assignment to work as engineer under this agreement will be allowed for such service not less than he would have received had he remained on his regular assignment calculated from the time compensation begins to accrue in such other service and ending when his regular assignment ties up at its home terminal. Earnings from all sources will be included in the computation of the guarantee.

This understanding shall be effective November 1, 1975 and shall continue in effect until terminated by fifteen (15) days written notice by any party to the agreement to so terminate, in which event, the provisions of Section 12 of Article 39 shall be restored.

Dated at Portland, Oregon this 14th day of October, 1975.

ARTICLE III - USED OFF REGULAR ASSIGNMENT

Section 1:-- Article 28 of the Schedule Agreement of July 1, 1946, is amended to the extent that the following shall be included as a provision of the effective Schedule Agreement:--

> "(a) A fireman taken from his regular assignment and used in other service will receive for such service not less than he would have earned had he remained on his regular assignment calculated from time compensation begins to accrue in such other service and ending when he resumes service on his regular assignment.
>
> "(b) Subsection (a) of Section 1 of this Article III shall not apply to a regularly assigned fireman or an extra fireman used for emergency service as an engineer."
>
> Note 1: A regularly assigned fireman taken from his regular assignment and used in other service pursuant to Section 1(a) of Article III of this Agreement must keep himself available for such other service from time called and used in other service until his is again restored to his regular assignment and should a fireman refuse or miss a call for such other service, the earnings of the service missed or for which call is refused shall be taken into account for determining compensation and payments due, if any, under Section 1(a) of Article III of this Agreement.
>
> Note 2: In calculating allowances under Section 1(a) of this Article III payments from all sources while being used in other service shall be taken into account for the purpose of calculating difference in earnings, if any.

As it happened, on each of the claim dates the La Grande-Nampa Turn laid over at Nampa long enough to earn held-away-from- home-terminal pay.

Carrier reimbursed Claimants for each of claim dates in an amount equal to the difference between their earnings as stepped-up Engineers at Hinkle and the earnings of their regular pool turns on those days, but not counting in the latter amount the held-away-from-home-terminal pay. The BLE filed these claims seeking additional compensation for Claimants equal to the held-away-from-home-terminal pay received by the incumbents of their pool

turns, citing settlements of allegedly similar claims in 1951 and 1978. Carrier declined the claims, citing Award No. 17 of PLB 2313 (H. Weston, 1981), involving the BLE and the Delaware & Hudson Railroad, as follows:

FINDINGS: Claimant was required by Carrier to appear as a witness at a court hearing in connection with a grade crossing accident. As a result, he was unable to cover his pool assignment.

Engineer Hollock covered claimant's runs. He was paid for that service 236 straight time miles, 92 overtime miles, 19 constructive miles, $11 meal allowances and 2' 15" held away from home terminal time.

Under Article 17A, claimant was allowed all the straight time miles, overtime and constructive miles earned by Mr. Hollock. The issue is whether he is also entitled to the meal and held away from home terminal payments.

In our judgment, that question must be resolved in the negative. Both of the items in question were paid because of inconvenience and expenses Engineer Hollock actually incurred. Claimant has been compensated for all the mileage and overtime involved in Mr. Hollock's runs. There is no basis in the Agreement or in any practice called to our attention for allowing compensation for meals he did not have to take or lay over time inconvenience that he did not suffer.

AWARD: Claim denied.

While the present cases were pending appeal to this Board, six (6) identical claims involving the BLE and Carrier under identical language were heard and decided by PLB 3726 in Award No. 2 (J. Seidenberg, 1985). In a typically thorough decision, Dr. Seidenberg on behalf of PLB 3726 analyzed the countervailing arguments of the Parties and the numerous awards cited by each before concluding as follows:

> The Board solicited and received the comments of the UTU-(E) General Chairman as to the merits or lack thereof of the instant claims.
>
> The Board finds that the purport and intent, if not the actual language, of Rule 79(a) and Memorandum of Agreement EO-2720, support the Carrier's and not the Claimant's position. The thrust of these contractual provisions is that the regularly assigned fireman who has to work off his assignment, shall not be disadvantaged with regard to the earnings he would have made on his regular assignment vis a vis the earnings he made on the other service. In this industry there is a clearly articulated distinction, recognized by all, between basic earnings and arbitrary payments. An employee receives his basic compensation each time he performs his regular duties based on the prescribed wage rates. He may or may not receive an arbitrary payment, depending on whether he actually performed the specialized type of service calling for the payments of the arbitrary. Consequently arbitraries are a discrete form of compensation, independent of the compensation received for the usual or regular service of the trip.

The Board finds that Rule 79(a) was intended to ensure that a fireman involuntarily removed from his assignment will not lose any of the earnings that inhere to the actual work performed on the assignment, but it does not encompass payments which do not reflect actual service, but rather are payments for conditions of work. In the instant case the meal allowances for missed meals or for compensated meals at the far terminal were not experienced by the Claimants, and there is no valid reason why they should be compensated for meals which they did not either miss or purchase. They are not, therefore, entitled to be compensated, under these circumstances, for a meal allowance. Secondly, by a parity of reasoning, since the Claimants did not spend a contractually excessive period of time at the away-from-home terminal, they are not contractually entitled to be compensated for the non-existent inconvenience of remaining away more than the prescribed non-compensated period of time at the far terminal. The arbitraries here in question do not pertain to work or services performed on the trip, and consequently do not constitute lost "earnings" the absence of which, the Claimants are contractually entitled to receive under Rule 79.

The Board finds the awards and the settlements cited by the Organization to be inapposite and therefore they do not support the claims.

Award: Claims denied.

Thereafter, PLB 3634 in Award No. 8 (G. Magnum, 1986) again decided an identical dispute under the UP-UTU-E Agreement and likewise decided the issue in favor of Carrier as follows:

> The difference between pay for work performed and compensation for inconvenience and expense is persuasive to this Board. The additional minimum day's pay prescribed by Rule 127 (b) compensates for any inconvenience involved in the disrupted schedule. The employees are not entitled to pay for inconvenience not experienced or expenses not incurred. No evidence was provided to the Board that pay for such had been the past practice. However, logic and the support of other prior tribunals destroy any argument for such payment.

The common law judicial doctrines of stare decisis and res judicata do not strictly apply in labor-management arbitration. Thus, at least technically, a subsequent arbitrator is free to disregard antecedent awards involving the same Parties, issues and contract language and dispense his own personalized interpretation of language already litigated and decided. Most journeyman arbitrators recognize, however, that in the absence of compelling reasons such contrariness is merely ego indulgence at the expense of the parties. Such unpredictability of results merely encourages another round of forum shopping by the losing party. The result is constant instability in labor-management relations which renders contract administration nearly impossible. Not only are the legitimate interests of the private parties thus thwarted by the refusal or failure of arbitrators to treat prior decisions involving identity of issue, parties and language as authoritative; but the interests of the taxpaying public which underwrites arbitration in the railroad industry also is ill

served by constant relitigation of supposedly settled issues. Unless the prior decision involving identical parties, issues and contract language is "clearly erroneous, fraudulent or based upon an inadequate record, therefore, most professional arbitrators would and should consider it authortitative.

The identical issue under identical contract language decided in PLB 3726-2 (Seidenberg) and PLB 3634-8 (Magnum) was brought yet again to PLB 3599 and decided in Award No. 14 (R. Ables, 1986). Inexplicably, the majority opinion in that decision summarily dismissed the antecedent awards and sustained the claims. In effecting this abrupt about-face, PLB 3599-2 made no finding that the antecedent decisions were clearly erroneous or based upon incomplete records . Indeed, the only rationale offered by the author of PLB 3599-8 for cavalierly rejecting the earlier decisions was the cryptic and rather astonishing conclusion that the Seidenberg decision in PLB 3726-2 was "highly suspect". This Board certainly does not share that idiosyncratic and unsupportable view.

We conclude that the identical issues involving identical parties and contract language have already been authoritatively decided in Award PLB 3726-2 (Seidenberg). See also PLB 3634-8 (Magnum). Nothing in this record or in those decisions persuades us to reject them as either clearly erroneous, fraudulent or based upon inadequate records. Accordingly, we consider them to be authoritative and ample support for denying the present claims.

AWARD

Claims denied.

Dana E. Eischen, Chairman

Employe Member

Carrier Member

Date: August 29, 1987