

BEFORE
PUBLIC LAW BOARD NO. 7986
CASE NO. 1

SMART TRANSPORTATION DIVISION

V.

THE BNSF RAILWAY COMPANY

BEFORE PUBLIC LAW BOARD 7986

Neutral Board Member: Joshua M. Javits
Organization Board Member: Larry Miller
Carrier Board Member: Salvatore Macedonio

Date of PLB Hearing: December 14, 2021

Date of Award: April 14, 2022

ISSUES:

The Carrier proposes the issues for consideration as follows:

- 1) Is the Carrier's notice proper, per Section 1 Article IX of the October 31, 1985, National Agreement, to establish an intradivisional multidirectional freight service pool to provide service between Superior, WI and Dilworth, MN/Northtown, MN and Cass Lake, MN, in addition to protecting all taconite service on the Hib Tac, Casco and Lakes Subdivisions?
- 2) If the answer to Question 1 is yes, are the terms reasonable, per Section 2 Article IX of the October 31, 1985, UTU National Agreement?

The Organization believes that the issues before the Board are:

- 1) Are the Carrier's Notice and proposal dated September 5, 2017, imposed into a service on October 17, 2017, to establish Multi-Directional Intradivisional Pool Service headquartered at Superior, WI, proper and consistent within the provisions of Article IX of the October 31, 1985, UTU National Agreement, with the only customer being the Carrier, BNSF Railway?
- 2) Does the Carrier have the right under Article IX of the October 31, 1985, UTU National Agreement to unilaterally circumvent, change or modify the existing rules within the Great Northern Schedule for Conductors (1944) and Great Northern Schedule of Trainmen (1952), and all mutually agreed upon Collective Bargaining Agreements in effect on September 5, 2017, with the only customer being the Carrier, BNSF Railway?

STATEMENT OF FACTS:

The underlying dispute in this case centers on the Carrier's decision on September 5, 2017, to propose a multi-directional intradivisional service at Superior, WI, under Article IX of the 1985 UTU National Agreement.

Article IX of the 1985 UTU National Agreement provides as follows:

Article IX – Interdivisional Service

NOTE: As used in this Agreement, the term interdivisional service includes interdivisional, interseniority district, intradivisional and/or intraseniority district service.

An individual carrier may establish interdivisional service, in freight or passenger service, subject to the following procedure.

Section 1- Notice

An individual carrier seeking to establish interdivisional service shall give at least twenty days' written notice to the organization of its desire to establish service, specify the service it proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service.

Section 2 - Conditions

Reasonable and practical conditions shall govern the establishment of the runs described, including but not limited to the following:

- (a) Runs shall be adequate for efficient operation and reasonable in regard to the miles run, hours on duty, and in regard to other conditions of work.

(b) All miles run in excess of the miles encompassed in the basic day shall be paid for at a rate calculated by dividing the basic daily rate of pay in effect on October 31, 1985, by the number of miles encompassed in the basic day as of that date. Car scale and weight-on-drivers additives will apply to mileage rates calculated in accordance with this provision.

(c) When a crew is required to report for duty or is relieved from duty at a point other than the on and off duty points fixed for the service established hereunder, the carrier shall authorize and provide suitable transportation for the crew.

Note: Suitable transportation includes carrier owned or provided passenger carrying motor vehicles or taxi, but excludes other forms of public transportation.

(d) On runs established hereunder crews will be allowed a \$4.15 meal allowance after 4 hours at the away from home terminal; and another \$4.15 allowance after being held for an additional 8 hours.

(e) In order to expedite the movement of interdivisional runs, crews on runs of miles equal to or less than the number encompassed in the basic day will not stop to eat except in cases of emergency or unusual delays. For crew on longer runs, the carrier shall determine the conditions under which such crews may stop to eat. When crews on such runs are not permitted to stop to eat, crew members shall be paid an allowance of \$1.50 for the trip.

(f) The foregoing provisions (a) through (e) do not preclude the parties from negotiating on other terms and conditions of work.

Section 3 - Procedure

Upon the serving of a notice under Section 1, the parties will discuss the details of the operation and working conditions of the proposed runs during a period of 20 days following the date of the notice. If they are unable to agree, at the end of the 20-day period, with respect to runs which do not operate through a home terminal or home terminals or previous existing runs which are to be extended, such run or runs will be operated on a trial basis until completion of the procedures referred to in Section 4. This trial basis operation will not be applicable to runs which operate through home terminals.

Section 4 – Arbitration

- (a) In the event the carrier and the organization cannot agree on the matter provided for in Section 1 and the other terms and conditions referred to in Section 2 above, the parties agree that such dispute shall be submitted to arbitration under the Railway Labor Act, as amended, within 30 days after arbitration is required by the carrier. The arbitration board shall be governed by the general and specific guidance set forth in Section 2 above.
- (b) The decision of the arbitration board shall be final and binding upon both parties, except that the award shall not require the carrier to establish interdivisional service in the particular territory involved in each dispute but shall be accepted by the parties as conditions which shall be met by the Carrier if and when such interdivisional service is established in that territory. Provided further, however, if carrier elects not to put the award into effect, carrier shall be deemed to have waived any right to renew the same request

for a period of one year following the date of said award, except by consent of the organization party to said arbitration.

Section 5 – Existing Interdivisional Service

Interdivisional service in effect on the date of this agreement is not affected by this Article.

A meeting between the Carrier and the Organization to discuss the matter took place on September 7, 2017, in accordance with Section 3 of Article IX. After the parties were unable to reach an agreement in discussions, the Organization notified the Carrier that it believed the Carrier's proposed changes did not fall within the remit of Article IX, Section 2(a) conditions.

On October 17, 2017, the Carrier implemented its proposal to establish a new multi-directional intradivisional pool out of Superior, WI.

The matter comes before the Board to consider whether the Carrier's imposed changes are within the terms of Article IX of the 1985 National Agreement and to determine if the changes satisfy the conditions outlined in Article IX, Section 2 of the 1985 UTU National Agreement.

POSITIONS OF THE PARTIES:

The Carrier's Position:

The Carrier argues that its September 5, 2017, Notice is proper under the requirements of Article IX of the 1985 UTU National Agreement.

The Carrier notes that Article IX of the 1985 National Agreement provides a mechanism for making changes that are reasonable and practical under the criteria established in the 1985 National Agreement.

According to the Carrier, its actions in the instant case are entirely consistent with Article IX.

The Carrier notes that, on September 5, 2017, it served timely notice under Article IX of the 1985 UTU National Agreement to establish the new multidirectional intradivisional pool out of Superior, WI, that would handle traffic between Superior and the away-from-home terminals of Dilworth, Northtown and Cass Lake. This new service allowed crews to operate through the home terminal of Superior on a continuous basis so as to facilitate a more efficient method of moving trains through the Superior complex.

The Carrier further notes that, after meeting with the Organization on September 7, 2017, the parties were unable to come to any agreement on the proposal. However, the Carrier insists that the proposal met all the criteria contained in Article IX.

According to the Carrier, the Organization failed to identify any legitimate reason as to why the notice was improper. The purpose of Article IX is to allow for more flexibility in the Carrier's operation, as Carrier management strives to achieve a more economic and efficient business. According to the Carrier, its September 5, 2017, Article IX notice is proper and well within the parameters of Article IX of the 1985 National Agreement.

The Carrier notes that the 1985 Agreement gives it the right to establish interdivisional service unless the conditions are "unreasonable or impractical." The Carrier argues that, with respect to issue two, the terms and conditions of its notice are reasonable per Article IX, Section 2 of the 1985 UTU National Agreement.

According to the Carrier, the conditions required for the establishment of interdivisional service are outlined in Section 2 of the 1985 National Agreement.

The Carrier notes that the first condition has a general requirement that "runs shall be adequate for efficient operations and reasonable in regard to the miles run, hours of duty and in regard to the other conditions of work." Following the Carrier's changes, the entire operation is much more flexible and efficient than the prior

configuration. There is nothing to suggest the changes are unreasonable or in any way impracticable the Carrier asserts.

The Carrier insists that all specific conditions contained in Section 2 (overmile rates, suitable terminal transportation for crews, away-from home meals, and meal allowances) have been met. As such, the Carrier insists that its proposal and imposed changes have met all of the necessary conditions of Article IX, Section 2.

The Carrier claims it has the right to establish a new multidirectional interdivisional pool out of Superior to enhance efficiency (part of which would be creating larger more flexible pools of employees in contrast to the smaller, silos of employees that existed previously).

The Carrier has, it contends, clearly established the runs are reasonable and practical by any definition and has shown that all other specific conditions contained in Section 2 (overmiles, meals and terminal transportation) have been met.

The Organization's Position:

The Organization refers the Board to preamble of Article IX of the 1985 UTU National Agreement, which outlines the parties' intent with respect to interdivisional service. It provides as follows:

Article IX – Interdivisional Service

NOTE: As used in this Agreement, the term interdivisional service includes interdivisional, interseniority district, intradivisional and/or intraseniority district service.

An individual carrier **may establish** interdivisional service, in freight or passenger service, subject to the following procedure.”

(Emphasis added).

The Organization notes that the intraseniority district service covered by the instant case was established long before the 1972 and 1985 UTU National Agreements were entered into. The runs affected by the Carriers' change in operations on October 17, 2017, were in effect long before October 17, 2017, the Organization maintains.

The Organization notes that Article IX of the 1985 UTU National Agreement provides the following:

“An individual carrier **seeking to establish interdivisional service** shall give at least twenty days' notice to the Organization of its desire to establish service and specify the **service it proposes to establish** and the conditions, if any, which it proposes shall govern the establishment of this service.”

(Emphasis added).

According to the Organization, the Carrier was not “seeking to establish interdivisional service” as required under Article IX of the 1985 UTU National Agreement, though. The service in, out and through Superior, WI, and Kelly Lake, MN, was established long before the Carrier’s proposed changes in 2017, the Organization notes. This is not a new operation that the Carrier is seeking to establish, the Organization insists. These runs were established and in service for over 40 years prior to Article IX of the 1985 UTU National Agreement and were in service after the Carrier unilaterally imposed the conditions of their Article IX Notice.

The Organization insists that Article IX was agreed to give the Carrier the right to establish Interdivisional service – not to change the rules and working conditions for those working on an established interdivisional service. If the parties had wished for the provisions of Article IX of the 1985 UTU National Agreement to apply to pre-existing intraseniority districts and interdivisional runs, they would have included specific language to that effect in their agreement, the Organization asserts. This, however, was not the intent of the parties and so this was not reflected in the express language of their Agreement.

According to the Organization, Article IX of the 1985 UTU National Agreement was never intended to apply to already established intraseniority district and interdivisional service. Since the issue in this case does not involve the establishment of a new service or new runs, Section 2 of Article IX (the section that refers to the conditions of the runs established) does not grant the Carrier authority to impose interdivisional run conditions on established interdivisional service runs.

The Organization believes Section 5 of Article IX is applicable in the instant case. This section prohibits changes in interdivisional service in effect on November 1, 1985, as here.

“Section 5 – Existing interdivisional Service

Interdivisional service in effect on the date of this Agreement is not affected by this article.”

According to the Organization, it is clear that Article IX of the 1985 UTU Agreement was never intended to apply to pre-existing intraseniority district to established interdivisional service. The Carrier did not establish a new interdivisional service in this case as it clearly continues to operate an identical interdivisional service to the one that already existed, the Organization contends.

The Organization claims that the Carrier's sole purpose here was to change Conductor/Trainmen rules that were otherwise in effect. The Carrier unilaterally eliminated the effects of 1944 Great Northern Schedule for Conductors and the 1952 Great Northern Schedule for Trainmen that clearly defined First-In, First-Out in the Superior Terminal under the guise of inaugurating interdivisional freight service that is already in existence. To effect this change, the Carrier imposed what it claimed were new operational changes to the affected runs, the Organization contends.

According to the Organization, the Carrier's actions in this case have improperly altered the work conditions of the 1944 Great Northern Schedule for Conductors Rule 15 and the 1952 Great Northern Schedule for Trainmen Rule 72 (the assignment of employees to specific pool freight crews or turns).

The Organization insists that the collective bargaining agreements between the parties have been unilaterally modified and/or eliminated by the Carrier's imposed Article IX proposal. Unilateral changes imposed by the Carrier are nothing more than a carefully crafted plan to alter the parties' collective bargaining agreements, the Organization claims.

The Organization asserts that, with respect to the first issue, the Carrier's Notice and imposed agreement in changing the Great Northern Scope Rules, terms and conditions, fail to meet the standard of Article IX of the 1985 National Agreement since there was no change in service. These runs were established and in service for over 40 years prior to the Article IX Notice and they continue to run after the Carrier imposed the change in conditions.

The Organization believes that, with respect to the second issue in the instant case, the Carrier has failed to meet the reasonable and practical standards of Article IX of the 1985 National Agreement by imposing working conditions without the mutual agreement of the parties. For that reason, the Organization requests that the existing rules and Collective Bargaining Agreements in effect prior to the Carrier's imposed MOA should be put back into effect.

DECISION AND AWARD:

The instant case centers on the Carrier's decision to initiate a procedure which permits it – under certain circumstances – to make significant changes in operations when establishing a new interdivisional service.

In this case, the Carrier provided notice to the Organization under Article IX of the 1985 UTU National Agreement of changes in and around the Superior, WI, area. The result of these changes meant that the three (3) groups of employees who were doing conductor work in Superior, WI, would be reduced to one (1) pool of employees, so as to allow management to call up these employees when needed. According to the Carrier, this procedure was utilized so as to provide them with operational efficiencies and to ensure employee flexibility.

The parties then met to discuss the matter which took place on September 7, 2017, in accordance with Section 3 of Article IX. After the parties were unable to reach an agreement in discussions, the Organization notified the Carrier that it believed the Carrier's proposed changes did not fall within the remit of Article IX, Section 2(a) conditions. The Carrier responded on October 17, 2017, by unilaterally implementing its proposal to establish a new multi-directional intradivisional pool out of Superior, WI.

While the Organization accepts that the Carrier can use the Article IX procedure to establish a new interdivisional service, it insists that the Carrier can nonetheless not change certain rules protecting employees – especially as it

appears the Carrier is not really using the procedure for the intended purpose of establishing a new interdivisional service.

The Organization further contends that the single group of employees established by the Carrier is not "reasonable" because the Carrier is not enhancing service or runs but rather is only making the change in order to make it easier to use employees by combining seniority districts. This, the Organization says, is not a proper use of the Article IX procedure.

It should be noted that the process was initially agreed to in the 1972 National Agreement and then in the 1985 UTU National Agreement. The process allows the Carrier to establish interdivisional service so long as certain conditions are met. According to the Carrier, it "paid for" the right to establish interdivisional service by providing the Organization and its members very significant wage and benefit increases.

Article IX of the 1985 UTU National Agreement calls on the Carrier to notify the Union of the proposed changes; requires the parties to meet for negotiations within a specific time frame; and, if there is no agreement, allows the Carrier to implement its proposal unilaterally, though those proposals are subject to arbitration.

The Board notes, however, that Article IX of the 1985 UTU National Agreement is limited to the establishment of new interdivisional service. Article IX clearly and unambiguously provides that 'An individual carrier may establish interdivisional service, in freight or passenger service, subject to the following procedure.' (Emphasis added).

Moreover, Section 5 of Article IX of the 1985 National Agreement further provides that "Interdivisional service in effect on the date of this agreement is not affected by this Article." (Emphasis added).

The Board notes that the above language makes it abundantly clear that Article IX of the 1985 UTU National Agreement shall not apply to interdivisional service that was in effect at the date of the agreement. There is no question that the Carrier in the instant case did not establish a new interdivisional service, the Board notes. The Carrier has continued to operate the very same interdivisional service that had been in existence prior to the date of the Carrier's Article IX notice.

By all accounts, the service at the Superior, WI, terminal was in effect prior to the 1972 National Agreement and prior to the UTU 1985 National Agreement.

The Board can find nothing on the record to indicate that the Carrier made any change in service; the runs in question had been in effect for over forty years and these same runs continued in service after the Carrier's Article IX notice was served to the Organization.

The Organization's argument that the Carrier did not establish new interdivisional service runs, and thus could not employ the Article IX process in the 1985 UTU National Agreement, is well taken by the Board.

Given that there has been no new interdivisional service established by the Carrier, the Board finds that the Carrier has failed to meet the standards required under Article IX of the 1985 UTU National Agreement.

The Board believes that the Carrier simply decided that it would utilize the Article IX process to make efficiency changes – even though there was no new interdivisional service established. It appears that the Carrier was simply trying to get rid of the multiple pools of employees and reformulate them into a single pool so as to make the Carrier's operations more efficient.

This, however, was not the accepted rational or trigger for the parties' agreement regarding the establishment of new interdivisional services under Article IX of the 1985 Agreement. While the Board recognizes that establishing new interdivisional service may ultimately improve operational efficiency for a Carrier, it nonetheless finds that the Carrier cannot change existing interdivision services under Article IX to improve efficiency alone. The precedent submitted by the Organization – particularly the Fredenberger decision in PLB 3800, Award No. 1- supports this position. In contrast, the awards cited by the Carrier were not persuasive, as they for the most part involved cases related to the establishment of new interdivisional service.

All of the evidence presented at the hearing suggests that the Carrier was attempting to alter existing rules and agreements between the parties – including the Kelly Lake agreements – in an unjustified manner, the Board finds.

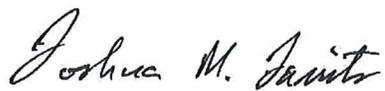
The Board believes that the Carrier made unilateral changes to the parties' Collective Bargaining Agreements so as to increase its operational "efficiency" and improperly utilized Article IX to impose these changes. It does not appear that the Carrier was establishing a new service or changing the service in a way that would justify changes affecting pools of employees.

To the contrary, it appears that the Carrier's sole aim was to change the labor pools directly by saying that it created efficiencies and was thus permitted by the Article IX process. The Board finds, however, that the Carrier has failed to meet the standards contained in Article IX of the 1985 National Agreement.

Unilateral changes to employee working conditions in the parties' Collective Bargaining Agreements were unreasonable, and were not justified under the Article IX process, the Board concludes. The Board finds that the Carrier's actions in this case have improperly altered the work conditions of the 1944 Great Northern Schedule for Conductors and the 1952 Great Northern Schedule for Trainmen (in particular the assignment of employees to specific pool freight crews or turns).

For the reasons outlined above, the Board directs the Carrier to reinstate the rules and working conditions that were in effect prior to the Carrier's imposed notice.

The Board will retain jurisdiction for purposes of the application of the remedy.



3/19/22

Joshua M. Javits
Chairman and Neutral Board Member

Date



4/14/22

Organization Board Member
Larry Miller

Date



4/18/22

Carrier Board Member
Salvatore Macedonio

Date