

General switching is usually construed to mean the handling of cars not in connection with an employee's own assignment or train. PLB 5725, Award 1 examined this question in connection with the crew consist agreement in force on the former SSW Railroad; that agreement provides that general switching cannot be performed by conductor-only crews. The Award defined general switching as work "not associated with their own trains within initial or final terminals." However, the Award was silent regarding remedies, such as refusal, in the event general switching is required of a crew.

The UPED Crew Consist Agreement contains a prohibition regarding general switching, stating, "*These provisions are not intended to supplant yard engines, locals, zone locals or work trains, nor is it intended that conductor-only assignments will do general switching.*"

General switching is not further defined in our agreement, but the generally accepted definition in the industry agrees with that set forth in PLB 5725 (quoted above).

However, it must be remembered that the 1985 and 1991 UTU National Agreements do permit certain work in terminals by road crews, including picking up, setting out, transferring, spotting and pulling cars at industries, interchanging with foreign railroads, and leaving a train on more than one track. In addition, Article VIII, Section 1(d) of the 1985 Agreement provides for "*switching within switching limits at times no yard crew is on duty.*"

Section 1(d) goes on to provide that such switching will be governed by switching rules on properties with switching agreements. On the UPED, Rule 32 applies to switching by road crews whether or not yard crews are on duty. Generally, these rules are not applicable until the completion of the three moves permitted under the UTU National Agreements. Additionally, the arbitrary payment in connection with this switching is not applicable to employees who entered service subsequent to October 31, 1985.

In PLB 5912, Award 167 on this property, a conductor refused to perform switching in a terminal on a train other than the one he was called for, and was discharged for insubordination. The Organization was successful in getting him returned to service after a year, but without pay. In similar cases, we may or may not prevail.

PLB 6531, Award 4 did extend protection for refusing to perform service. This UPED case involved refusal to pick up cars enroute that were not first-out as required by the Crew Consist Agreement. The Neutral ruled that since this was not a permitted move under Crew Consist, the right of refusal was attached. Employees should not attempt to extend this logic to other questionable moves unless they are willing to be a test case.

The only absolute right of refusal of instructions issued by Carrier officers is for the fourth work event enroute, picking up not first out, and any patently unsafe instruction. It is important to remember that these refusals, excepting an unsafe order, must be in connection with work enroute. The option of refusal does not apply to moves within terminal limits.

PUBLIC LAW BOARD NO. 5725

Parties ST. LOUIS SOUTHWESTERN RAILWAY
to the and
Dispute UNITED TRANSPORTATION UNION

Public Law Board Members

R.E. Dennis - Chairman and Neutral Member
S.L. Doolittle - Carrier Member
W.E. Hollis - Employee Member

BACKGROUND OF THE CASE

This case raises a question concerning the amount of switching work that Conductor-only crews can perform in terminals where yard crews are on duty. In the past several years, the parties have attempted to define the relationship between yard/road rules and crew consist rules, specifically rules governing the use of Conductor-only crews. For the most part, these attempts at resolution have been unsuccessful at the bargaining table and the issue in one form or another has been submitted to arbitration.

The parties to this dispute have been involved in two recent arbitration proceedings that addressed the issue, but did not resolve it to the satisfaction of both parties. The decisions of those prior Boards will be referred to here as the Witt Crew Consist Award and the Zumas Award. These Awards resulted from arbitration panels chaired by Arbitrator Helen Witt and Arbitrator Nicholas Zumas.

ISSUE PLACED BEFORE THE ARBITRATION PANEL

The parties were unable to agree on a single question to place before this Board, so each presented its own. While their issues may be worded differently, the dispute essentially centers on the question of how much switching can be required for Conductor-only crews in terminals where yard crews are assigned.

ORGANIZATION'S QUESTION

Is the Carrier violating the Witt Crew Consist Award and other applicable agreements by requiring un-supplemented Conductor-only crews to perform general yard switching?

CARRIER'S QUESTION

Does the Witt Award affect the work which may be performed by unsupplemented Conductor-only, through freight crews at their initial/final terminal?

FINDING

As noted, it is this Board's responsibility to determine how much switching can be assigned to Conductor-only through freight crews, Specifically, can Carrier assign general yard switching to these crews? Based on firsthand knowledge of the intent of the Arbitration Board involved in Arbitration Case No. 509, as well as our analysis of the applicable language of the Witt Award and the Zumas interpretation of that Award, this Board is compelled to adopt the position put forth by the Union in the instant dispute.

We can find no indication in any of the documents relied on by Carrier to support the notion that Conductor-only through freight crews can be used to perform general switching not associated with their own trains within initial or final terminals, Nor do we find any basis in these Awards for authorizing carrier to call a Conductor-only through freight crew and use that crew to perform general switching for an eight-hour shift without ever leaving the terminal with a train.

In the Award of Arbitration Board No. 509, the issue of what work Conductor-only crews could perform in initial and final terminals was considered. As Chairman of that Board, I can state that the issue of general switching by Conductor-only road crews was not discussed, It was the intent of the 509 Board to grant the Carrier's request for Conductor-only crews, but not to negate the effect of obtaining the reduced crew size by restricting what work could be done by the crew in readying and yarding its train. To that end, the 509 Board concluded that the reduced crew could be expected to perform the normal switching required to ready and yard its train. It made no sense to the Board to establish a Conductor-only crew and then not allow that crew to perform its normal switching duties at terminals, The issue of how much general switching could be done by the crew if that work was not associated with the crew's train never arose. Utilization of Conductor-only through freight crews as yard switching crews was not contemplated, The issue of what switching could be done by Conductor-only through freight crews was always considered in relation to the crew's train, not to readying or yarding other trains or general yard switching.

This Board cannot read the Witt or the Zumas Award to go beyond the intent of the 509 Board. In fact, Arbitrator Zumas invoked the wording of the Award in that instance to support his interpretation of the Witt Award on the subject, The pertinent wording of the 509 Award on the issue is as follows:

The work that C&NW may require of a road freight crew at its initial and final terminals is governed by applicable provisions of the UTU National Agreements, Those provisions allow the Carrier to require such a crew to engage in limited work with respect to readying its train for departure from the initial terminal. This

involves, for example, doubling its train and yarding the train at the final terminal, as well as performing a specific number of pick ups and set outs at such terminals. Thus, we believe that the UTU National Agreements establish the industry practice with respect to the question of what work a road freight ground crew may be required to perform at its initial and final terminals.

The Board in this instance is impressed with the fact that none of the arbitration Awards cited in the record before us specifically addresses the issue of requiring Conductor-only crews to perform general switching within a terminal or, for that matter, any switching not associated with their own trains. It is this Board's conclusion that no arbitration Board preceding this one contemplated that switching unassociated with preparing or yarding the crew's train would be a part of the crew's duties. Consequently, it is this Board's decision to adopt the Union's position in this case. The Board concludes that the proposed Findings presented by the Union in its submission can be modified slightly and presented as the Findings of this Board.

AWARD

Through freight Conductor-only crews may only engage in switching work incidental to yarding their trains at the final terminal and switching work incidental to preparing their train for departure at the initial terminal. Through freight conductor-only crews may not engage in general switching or general yard switching.

Neither the Witt Award or the Zumas interpretation of that Award authorized general yard switching by Conductor-only yard crews,

R.E. Dennis, Neutral Member
D.L. Hollis, Employe Member
S.L. Doolittle, Carrier Member

PUBLIC LAW BOARD NO. 5912

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION)

VS

UNION PACIFIC RAILROAD CO.)

) NMB CASE NO. 167

) AWARD NO. 167

STATEMENT OF CLAIM:

Claim of Conductor P. D. Edwards for reinstatement to service with all rights unimpaired and removal of UPGRADE Level 5 from his personal record with pay for all time lost, including time spent attending the investigation, and payment for all wage equivalents to which entitled, with all insurance benefits and any monetary loss for such coverage while improperly disciplined.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

The parties to this dispute were duly notified of hearing thereon.

Claimant involved in this dispute was summoned for formal investigation on a charge that he allegedly refused to follow instructions given him by MTO D. M. Smith on December 14, 1998. Following the investigation Carrier found claimant guilty of violation of Rule 1.6.3 (insubordination) and assessed Level 5 discipline (dismissal from service) under the UPGRADE Discipline Policy.

The Board would here note that at the time of this incident claimant had been in service for approximately 35 years.

The record before this Board is clear that claimant had been called to work at 1:00 AM for an assignment of the CTLEY-04. At approximately 5:00 AM claimant was instructed to dogcatch the CEYPA-04 on which the crew's time was expiring under the Hours of Service Law. Claimant did so and, after such train was in the terminal, claimant was then instructed to continue switching the CTLEY-04 in preparation for its departure--specifically he was instructed to pick up seven cars from Track 5 so as to fill the train to 107 cars.

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The record is also clear that claimant refused to make this switching movement, stating he did not have to do so under the "switching agreement" allegedly in effect. Even after he was cautioned that his refusal to make the pickup of the seven cars was insubordination, claimant still refused to do so.

During the course of the investigation, and as argued by the Organization before this Board, it was made clear that the agreement relied upon by claimant was the Crew Consist Agreement which reads in part as follows:

"ARTICLE I - BASIC CREW CONSIST

"3. The Carrier will be permitted to operate conductor only assignments in through pool freight service when such service operates under the following conditions:

"(a) There shall be no train length or car count restrictions on such service.

"(b) Trains shall be restricted to no more than three work events enroute.

(i) A work event is considered to be a straight pick-up or set-out.

(ii) Picking up, setting out, or exchanging one or more locomotives and setting out a bad order car shall not be considered an event.

(iii) Work performed in the initial and/or final terminals will be governed by applicable rules.

"NOTE 3: These provisions are not intended to supplant yard engines, locals, zone locals or work trains, nor is it intended that conductor-only assignments will do general switching. ***

"4. Employees will not be required to perform any service with less than the required train crew consist specified in this Agreement nor will they be censured or disciplined in any manner or be required to lose time for refusal to do so.

Q-1: Do the provisions of this Section apply to pick-ups and/or set-outs made enroute which would result in exceeding the agreed-to work event limitations?

A-1: Yes."

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In its argument before this Board the Organization has contended that claimant here was complying with the agreement provisions when he refused to perform the "general switching" as set forth in NOTE 3 above quoted, therefore, his right of refusal, which the Organization contends is covered by Section 4 above, carries with it the understanding he would not be censured or disciplined for such refusal

It is Carrier's position before this Board that the right of refusal applies only to pick-ups and/or set-outs made enroute, and that such right of refusal was never intended to apply to a situation such as that here involved.

The question before this Board is not one involving proper interpretation or application of the basic Crew-Consist Agreement, instead it is a question of whether or not claimant was properly disciplined for his refusal to obey the instructions of a Carrier officer.

The record before us is absolutely clear that claimant was instructed to pick-up the seven cars and that he refused to do so. Absent a clear and concise interpretation that the switching of these seven cars could be considered contrary to the agreement provisions, this Board is unable to rule in claimant's favor in this dispute. We do note, however, that claimant has a long career with the industry and we do not believe his career should end over an alleged interpretation or misinterpretation of an agreement provisions. The parties would do well to submit the question of proper interpretation of the involved provisions of the Crew Consist Agreement to an arbitration panel and thereby avoid instances such as this in the future.

Based upon the often used concept that discipline is intended to be educational rather than punitive, it is the judgment of this Board that dismissal of claimant was too harsh given the circumstances here involved, and it is our finding that claimant be returned to active service with full seniority and all other rights unimpaired. Inasmuch as claimant did refuse a direct order from his supervising officer, the Board is not inclined to issue an order compensating him for time out of service. Insubordination is a serious issue and, in this instance, claimant would have been well advised to obey the instructions and then handle the issue as a grievance in accordance with accepted procedure.

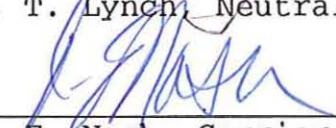
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AWARD


Claimant was returned to service with all rights unimpaired as a result of the bench decision rendered by the Board at the hearing on December 9, 1999. The decision here covers that portion of his claim for time lost and as noted in the above findings, the Board is not allowing pay for time lost.



F. T. Lynch, Neutral Chairman



J. E. Nash, Carrier Member



A. Martin, Employee Member

Award date 4-18-2000

PUBLIC LAW BOARD NO. 6531

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION
(EASTERN DISTRICT)

Case No. 4
Award No. 4

VS

UNION PACIFIC RAILROAD CO.

STATEMENT OF CLAIM: Claim of North Platte Conductor J.W. Barraclough for an additional basic day account picking up a car behind other cars at intermediate point while working as conductor-only crew on April 17, 1993.

FINDINGS: This Board, upon the whole record and all of the evidence, finds that the Employees and Carrier involved in this dispute are respectively Employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

OPINION OF THE BOARD: The basic facts are not in dispute. Claimant was called to operate a conductor- only assignment Grain NPSLCX-17 from North Platte to Marysville, Kansas. During the course of his trip he was instructed by the dispatcher to pick up car UP509357, which was located behind four cars at Odesa, MP 198. The engine was to remove the five cars and reset the first four cars to another track at Odessa. When the Claimant was instructed to make this move he informed the Train Dispatcher he did not have to pick up the car, claiming it was a violation of his crew consist agreement. The Train Dispatcher then contacted Claimant's supervisor, Manager Train Operations L.W. Handlin, who then had to drive to Odessa to meet with Claimant. After approximately 2 hours and 40 minutes of delay time, Claimant finally made the pick up of the one (1) car and re-set the four (4) cars back to track number 703 (ADM).

The dispute before the Board presents two questions, both of which involve the interpretation and application of the December 19, 1991 Modified Crew Consist Agreement, in particular Article I, Section 3 and 4 which read as follows:

3. The carrier will be permitted to operate conductor-only assignments in through pool freight service when such service operates under the following conditions:

- (a) There shall be no train length or car count restrictions on such service.
- (b) Trains shall be restricted to no more than three work events en route.
 - (I) A work event is considered to be a straight pick-up or set-out.
 - (ii) Picking up, setting out, or exchanging one or more locomotives and setting out a bad order car shall not be considered an event.
 - (iii) Work performed in the initial and/or final terminals will be governed by applicable rules.

NOTE 1: Each type of move, pick up or set out will be considered as separate work events for the purpose of application of this Agreement. Thus a pick up and a set out at an intermediate point will count as two work events. Hanging onto cars already in the train in order to make a pick up or set out is permissible under this agreement.

Pick up or set out as referred to above means straight pick up of a car or cars coupled together and first out that go together in one place in the train; set out means straight set out of a car or cars coupled together in the train that are set out in one movement. This note applies only to Conductor/Foreman operations and does not restrict crews with brakemen/helpers.

NOTE 2: Crews transported or deadheaded from their initial terminal to a point en route to pick up a train shall not be considered as having performed a work event, if the train is received with locomotives attached and no picking up or setting out is required other than doubling the train, if the track where the train was yarded was not of sufficient length to hold the entire train, and the coupling of a train, if it had been necessary to cut road crossings.

Crews who set out a train en route and are deadheaded or transported to the final terminal shall not be considered as having performed a work event en route if the locomotives remain attached to the train and no other work is performed other than doubling the train over to another track if the track on which the train is yarded is not of sufficient length to hold the entire train and the cutting of crossings if necessary.

The intent of this language is not to expand upon the work that a crew can perform en route.

NOTE 3: These provisions are not intended to supplant yard engines, locals, zone locals or work trains, nor is it intended that conductor-only assignments will do general switching. No Carrier supervision, official (including yardmasters), or non-craft employee will be used to supplant or substitute in the exclusive work of any train or yard crew working under UTU Agreements.

4. Employees will not be required to perform any service with less than the required train crew consist specified in this Agreement nor will they be censured or disciplined in any manner or be required to lose time for refusal to do so.

Q-1: Do the provisions of this Section apply to pick-ups and/or set-outs made en route which would result in exceeding the agreed-to work event limitations?

The first question is whether the Agreement simply prohibits the move in question as the Organization contends or whether, as is the Carrier's position, the move is permitted as long as the Carrier does not exceed the "three-work event" limitation.

The Carrier is correct, to the extent a Conductor-only train is allowed to three en route work events. However, the Carrier is wrong and the Organization is right that the move in question is not a permitted work event. A "work event" under Section 3(b)(I) of the Agreement "is considered to be a straight pick-up or set-out." Note 1 to Section 3 further defines a straight pick-up/set-out as the "pick up of a car or cars coupled together and first out..." The car in question was not first out and the four cars in front of it were coupled and reset at this location. This is not a straight set-out by definition of the Agreement and accordingly, not a permissible move for a Conductor-only assignment in through pool freight service.

The Carrier did argue that the move in question should be viewed as two work events (the pick-up of the cut as one and the resetting of the cars as two) on the theory that the Carrier could have had the four cars set-out at the next station or siding (thus counting as the second work event). The problem with this is that this isn't what the Carrier asked the Claimant to do. The Carrier cannot eliminate a clear restriction in the Agreement merely because they could have accomplished the pick-up of the car in question with a completely different set or combination of moves. The fact is the Carrier re-set the other four cars to the same location. It was not a straight pick-up and the awards cited by the Carrier are not persuasive.

The second question presented by the grievance is whether under Section 4 of Article I the Grievant was permitted to refuse to accomplish the move. The Organization argues that the plain language of the Agreement gives the Claimant this right. The Carrier contends that if the move isn't a "work event" under the Agreement, Claimant can't seek the shelter carved out in the "question and answer."

The Board again disagrees with the Carrier. While they are right the Q & A doesn't apply, it ignores the broad protection in the first paragraph of Section 4. To make the move in question, a crew with more than a Conductor-only is required. Therefore, the Claimant cannot be censured or disciplined or required to lose time for refusing to make the move.

AWARD

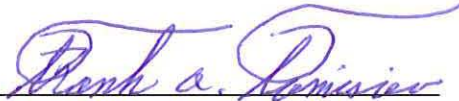
The claim is sustained.



Gil Vernon, Neutral Member



Dean Hazlett
Union Member



Frank Tamisiea
Company Member

Dated this 1st day of November, 2004.