Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference - International Brotherhood of Teamsters

GENERAL COMMITTEE OF ADJUSTMENT • Norfolk Southern Railway Systems Lines (former Southern)

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January 25, 2019

****PLEASE POST ON BULLETIN BOARDS****

BLET GCA NS Southern Lines
ATTN: ALL MEMBERS

Re: Vacation Claims

Dear Brother and Sisters,

Below is the process for filing claims against Norfolk Southern for violation of the 1949 and 1996 National Vacation Agreement. This is the first step in the process for the Organization to move toward arbitration.

If you are on Knoxville seniority roster and were assigned a 2019 vacation, please submit a claim for having vacations forced assigned using the following language:

> **Claim for one (1) day at the applicable rate of pay for the Carrier's violation of Section 6 of the April 29, 1949 National Vacation Agreement, as amended in 1996. Section 6 was violated in two respects. First by the Carrier improperly excluding Local Chairman [Local Chairman's Name] from the process and instead force assigning Claimant's vacation on 12/31/18. Second, Carrier failed to comply with Agreement language which requires that: "Due regard, consistent with requirements of the service, shall be given to the preference of the employee in his seniority order in the class of service in which engaged when granting vacations."**

All NS Southern Lines GCA locations that had vacations allocations reduced and flat lined throughout the year should use the following language when filing a claim:

> **Claim for one (1) day at the applicable rate of pay for the Carrier's violation of Section 6 of the April 29, 1949 National Vacation agreement, as amended in 1996. When the Carrier unilaterally flat-lined vacations at [Location] without the concurrence of Local Chairman [Name] and instead, improperly assigning Claimant's vacation on 12/31/18, the Carrier ignored the Section 6 requirement stating that "Representatives of the carriers and of the**

> **employees will cooperate in arranging vacation periods and administering vacations and releasing employees when requirements of the service permit."**

All NS Southern Lines GCA members should file a claim for a day's pay if they have submitted a vacation change request, single day request, or personal leave day request and it was denied without "the needs of the service" being reviewed, should use the following language in their claim:

> **Claim for one (1) day at the applicable rate of pay for the Carrier's violation of Section 6 of the April 29, 1949 National vacation agreement amended with the 1996 National Vacation Agreement when I requested [Vacation Change, Single Day, or Personal Leave] on [Date] and was declined [Date] without following the 1949 and 1996 agreements in meeting the needs of the service and the practice that has been in place for twenty years, or knowing the availability of manpower on the [Date] requested.**

These claims need to be processed as Penalty Claims and if they are declined, please forward them to your Local Chairman in a timely manner. In a similar case the arbitrator made a negative comment that not all affected turned in claims.

I will keep you informed in this process in this direct violation of the Agreement.

Fraternally,

Jerry G. Sturdivant
General Chairman

JGS/ps

Enc.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

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VIA ELECTRONIC AND FIRST-CLASS MAIL

January 24, 2019

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Mr. D. L. Dehart
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Mr. J. G. Sturdivant
Chairman, NS–S GCA, BLET
11971 Staffordsburg Rd.
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Re: Carrier Violations of the April 29, 1949 National Vacation Agreement

Dear Sirs and Brothers:

This responds to your joint January 4, 2019 letter pertaining to the above-referenced subject. You advise that — in preparing this year's vacation schedules for locomotive engineers — the Carrier reduced vacation allocations at every location, flat-lined allocations at many locations, and then forced assigned locomotive engineer vacations in certain locations without the involvement of the local chairmen. Your letter forwarded copies of letters each of you wrote to the Carrier detailing the violations under your respective jurisdiction. You also forwarded: (1) an internal Carrier email providing what the Carrier terms "guidelines" regarding the movement or cancellation of vacation weeks, the approval process for single-day vacations, and converting a vacation week into single-day vacations; (2) a 2012 arbitration award resolving a 2011 vacation scheduling dispute between the Union Pacific Railroad and the UP Central Region GCA; and (3) Award No. 21 of Public Law Board No. 5811, resolving a vacation dispute between the former Norfolk & Western Railway and the United Transportation Union.

Your letter observes that — to your knowledge — application of the National Vacation Agreement ("NVA") to locomotive engineers generally has been unremarkable since it was executed in 1949. You suspect that the changes in application that have been unilaterally imposed by the

Carrier are intended to impede or prevent the use of single-day vacations as a means of maintaining eligibility for the quarterly attendance bonuses created pursuant to the 2015 On-Property Agreement, and you request my advice regarding potential means to force Carrier compliance with the NVA.

According to your respective letters to the Carrier, the following vacation disputes exist:

- NS–E GCA — Carrier officials failed to justify the unprecedented flat-lining of vacation schedules across the GCA's territory and refused to cooperate with the local chairmen having jurisdiction at Bluefield, Weller and Shenandoah, and the Carrier unilaterally assigned all vacations at those locations, including refusing to assign one of the first twelve choices submitted by six (6) locomotive engineers;

- NS–N GCA — Carrier officials failed to justify the unprecedented flat-lining of vacation schedules across the GCA's territory and refused to cooperate with the local chairman having jurisdiction at Mingo, and the Carrier unilaterally assigned all vacations at that location; and

- NS–S GCA — Carrier officials failed to justify the unprecedented flat-lining of vacation schedules across the GCA's territory and refused to cooperate with the local chairman having jurisdiction on the Knoxville District, and the Carrier unilaterally assigned all vacations at locations on the District.

As you know, Brothers, the case law delineating "major" from "minor" disputes under the Railway Labor Act, as amended ("RLA"), imposes an extraordinarily high burden on a party attempting to prove the existence of a "major" dispute. The fact of the matter is that for many years the courts have virtually never found this burden to have been met. In the event this dispute resulted in litigation, the Carrier undoubtedly would argue this is a minor dispute subject to mandatory arbitration under Section 3 of the RLA.

The federal courts have consistently held that where one party's position turns on provisions in a collective bargaining agreement or on past practices, all the proponent of a "minor" dispute finding has to show is that its position is supported by an arguable contractual justification. The opposing party, on the other hand, must demonstrate that the contractual argument is "frivolous" or "wholly insubstantial" — a much higher burden — in order to prevail. The fact of the matter is that there have been many hundreds, if not more than a thousand, arbitration cases involving the NVA over its nearly 70-year history, and your ongoing disputes with the Carrier will not be seen any differently.

Indeed, the Arbitration Award involving the UP–Central Region GCA enclosed with your letter, which involved disputes similar to yours, indicates that litigation in that matter did not result in a judicial finding that the carrier's conduct in that dispute triggered a "major" dispute. You also

may recall a dispute that arose over fifteen (15) years ago, when the four largest Class I carriers — including your Carrier — implemented Family and Medical Leave Act ("FMLA") policies that required employees to exhaust all earned-but-not-taken vacation and personal leave days when taking FMLA leave before they could begin unpaid leave. Although the Seventh Circuit Court of Appeals rejected the carriers' legal argument that FMLA preempted the NVA and contractual personal leave day provisions, the question of whether the carriers' policies violated those agreements (and, if so, what the remedy would be for violations) was decided in multi-carrier, multi-union arbitration.

Accordingly, this matter is governed by Section 36(a) – General Committee Rules ("GCR") of the BLET Bylaws, which states as follows:

> The right to make and interpret contracts, rules, rates of pay and working conditions for operating crafts shall be vested in the regularly constituted GCA of the BLET. When an interpretation involves a provision originating in a National Agreement, the GCA must apply in writing to the National President for his interpretation of the provision, and must be governed by said interpretation in its dealings with the carrier regarding that provision.

Related to the above is GCR Section 11(e), which provides that the GCA's authority is vested in the general chairman between sessions. Therefore, my interpretation of the NVA is provided below. However, any commentary made regarding the provisions of your respective Collective Bargaining Agreements ("CBAs") do not constitute an interpretation thereof, as only you are empowered to make such interpretations.

Section 6 of the NVA states as follows:

> Vacations shall be taken between January 1st and December 31st; however, it is recognized that the exigencies of the service create practical difficulties in providing vacations in all instances. Due regard, consistent with requirements of the service, shall be given to the preference of the employee in his seniority order in the class of service in which engaged when granting vacations. Representatives of the carriers and of the employees will cooperate in arranging vacation periods, administering vacations and releasing employees when requirements of the service will permit. It is understood and agreed that vacationing employees will be paid their vacation allowances by the carriers as soon as possible after the vacation period but the parties recognize that there may be some delay in such payments. It is understood that in any event such employee will be paid his vacation allowance no later than the second succeeding payroll period following the date claim for vacation allowance is filed.

Furthermore, Article V, Section 2(f) of the May 31, 1996 National (Core) Agreement ("1996 NA") states that "[a]n employee may take up to one week of his annual vacation in single day increments, provided, however, that such employee shall be automatically marked up for service

upon the expiration of any single day vacation." Related to this provision are the following Agreed-Upon Questions and Answers relevant to your disputes:

Q-5: Are current system agreements providing for more than one week of annual vacation to be taken in single day increments changed by this agreement?
A-5: No.

Q-6: What procedure should be followed when requesting a single day of vacation?
A-6: Employees should follow the established procedure for assigning vacations on the property. Where there is none, the procedures used for scheduling personal leave days should be used.[1]

Q-7: Must the Carrier allow the request made by an employee to observe a single day of vacation?
A-7: Yes, employees should follow the established procedure for assigning vacations on the property. Where there is none, the procedures used for scheduling personal leave days should be used.

* * *

Q-10: When an employee elects to observe one (1) week of vacation in single day increments as provided for in paragraph (f) does that constitute one (1) of the allowable two (2) splits in his/her annual vacation as provided for in paragraph (e)?
A-10: Yes.

* * *

Q-12: In application of paragraph (f), how many days of single day vacations may a yard service and road service employee be permitted to take: five, six or seven days?
A-12: This question should be decided on each individual property in accordance with the past practice as to what appropriately constitutes one (1) week of annual vacation.

Q-13: Can the employee elect to take vacation in periods of two (2), three (3), or four (4) days, rather than single day increments?
A-13: Yes, employees should follow the established procedure for assigning vacations on the property. Where there is none, the procedures used for scheduling personal leave days should be used.

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[1] Article VI, Section 3(a) of the 1996 NA states that personal leave days "shall be scheduled with the approval of the proper carrier officer upon forty-eight (48) hours, advance notice from the employee."

Q-16: May an employee request a single day of vacation to be taken immediately following a day where he/she was off sick or observing a personal leave day?
A-16: Yes.

As applicable to your disputes, the NVA — as amended to and including the 1996 NA — provide that:

- in the assignment of vacations, due regard must be given to the preference of the employee in seniority order, consistent with requirements of the service;

- BLET local chairmen have a contractual right to participate in arranging vacation periods, administering vacations and releasing locomotive engineers when requirements of the service will permit;

- unless your CBA provides otherwise, each locomotive engineer is entitled to take one (1) week of annual vacation in single-day increments, with the term "single-day" encompassing any vacation period less than one (1) week in duration (i.e., 2-day, 3-day and 4-day); and

- unless your CBA provides otherwise, each single-day vacation must be scheduled with the approval of the proper carrier officer upon forty-eight (48) hours advance notice.

Thus, I have identified three (3) disputes involving each of your GCAs. One concerns the Carrier's forced assignment of vacations in certain locations and its refusal to afford the local chairman having jurisdiction his or her right to participate in the assignment. The second involves the flat-lining of vacation weeks across your jurisdictions. The third involves possible future violations of the NVA flowing from unilateral changes to the process for moving or cancelling vacation weeks and the scheduling of single-day vacations.

I am enclosing herewith the complete Award from the FMLA arbitration case, which consists of: the 43-page Opinion and Award, dated December 2, 2008, which determined that the carriers FMLA policies violated the NVA; a 2-page Interpretation, dated January 5, 2009; and the 58-page Opinion and Award on Remedy, dated June 1, 2009. Taken together, the Award provides a comprehensive history and interpretation regarding NVA provisions applicable to your disputes, and details the rationale supporting the payment of a claim for a day's pay penalty for each day the NVA is violated. This Award — along with the pair you included with your letter — provides a solid foundation for progressing claims consistent with this interpretation.

I believe that the Carrier's forced assignment of vacations in certain locations and its refusal to afford the local chairman having jurisdiction his or her right to participate in the assignment are the most obvious and egregious violations of the NVA. In my view, the exclusion of the local chairmen from the process, *per se*, means that every day of vacation force assigned by the Carri-

er at the terminals or districts specified in your letter constitutes a NVA violation that should be remedied by payment of a day's pay penalty for each day of vacation that the carrier improperly force assigned. The claim should be phrased as follows:

> Claim by or on behalf of [ENGINEER'S NAME] for one (1) day at the applicable rate of pay for the Carrier's violation of Section 6 of the April 29, 1949 National Vacation Agreement, as amended, on [FORCE ASSIGNED VACATION DATE]. Section 6 was violated in two respects, each of which independently warrants payment of the penalty. First, by improperly excluding Local Chairman [NAME] from the process and, instead, force assigning Claimant's vacation on [FORCE ASSIGNED VACATION DATE], the Carrier ignored the Section 6 requirement stating that "Representatives of the carriers and of the employees will cooperate in arranging vacation periods, administering vacations and releasing employees when requirements of the service will permit." Second, in force assigning Claimant's vacation on [FORCE ASSIGNED VACATION DATE], the Carrier ignored the Section 6 requirement stating that "Due regard, consistent with requirements of the service, shall be given to the preference of the employee in his seniority order in the class of service in which engaged when granting vacations."

Moreover, and as applicable, the claim should further specify (1) that the date for which the claim is being submitted was not a date listed on the engineer's vacation bid, or (2) the date for which the claim is being submitted was so far down the list of preferences that it would not have been force assigned had the Carrier complied with the NVA. Additionally, to the extent that you have jurisdiction over locations where the demonstrable past practice of assigning locomotive engineer vacations included the process outlined in Award No. 21 of Public Law Board No. 5811, violation of that practice also should be cited where applicable.

In order to maximize the impact of your response to this first dispute — and if permissible under your CBA — I would urge that you strongly consider having either the GCA or the Local Chairman having jurisdiction file the claims on behalf of each locomotive engineer. Our satisfaction with the FMLA arbitration victory was made bittersweet when we discovered that at least 75% of the BLET members who had a claim either failed to file it in the first instance, or failed to refer it to the Local Chairman for further handling upon denial. BLET-filed claims will create some extra work for the representatives in the initial stages (although the above claim language could be adjusted to accommodate multiple dates), but such a process will streamline later handling and maximize the Carrier's potential economic liability.

Regarding the dispute over the flat-lining of vacation weeks across your jurisdictions, I am enclosing Award No. 15331 issued by the Third Division of the National Railroad Adjustment Board, which I believe can be applied to the issue. This claim involved a gang of signalmen whose seniority-based vacation bids were ignored when the involved carrier unilaterally decided to place the gang on vacation at the same time, which was an option available under that craft's vacation agreement. In his sustaining award, relying on the historic Interpretations by Referee

Morse,[2] Referee House held that the carrier's failure to obtain the organization's consent prior to deciding to group the vacations violated the agreement and "was not soundly based." He further found that the organization's refusal to acquiesce, after the fact, to the carrier's unilateral actions was not a violation of the agreement. While flat-lining would appear to be the opposite of the grouping that Referee House found to be improper, the agreement interpretation and analysis are identical.

In my view, the Carrier bears the burden of proving that flat-lining vacations was necessary and proper under the NVA at each location where it departed from the historic practice. Therefore, a day of vacation assigned by the Carrier under its unilaterally imposed flat-lining schedule that deviates from how that day would have been assigned in accordance with the locomotive engineer's actual stated preference as indicated in his or her vacation bid — and consistent with his or her seniority under the historic non-flat-lined practice — constitutes a NVA violation that should be remedied by payment of a day's pay penalty for each day of vacation that the carrier so assigned. Keeping in mind that the Organization will bear the burden of proving how the vacation day "should" have been assigned, the claim should be phrased as follows:

> Claim by or on behalf of [ENGINEER'S NAME] for one (1) day at the applicable rate of pay for the Carrier's violation of Section 6 of the April 29, 1949 National Vacation Agreement, as amended, on [IMPROPERLY ASSIGNED VACATION DATE]. Section 6 was violated in two respects, each of which independently warrants payment of the penalty. First, by unilaterally flat-lining vacations at [LOCATION] without the concurrence of Local Chairman [NAME] and, instead, improperly assigning Claimant's vacation on [IMPROPERLY ASSIGNED VACATION DATE], the Carrier ignored the Section 6 requirement stating that "Representatives of the carriers and of the employees will cooperate in arranging vacation periods, administering vacations and releasing employees when requirements of the service will permit." Second, in improperly assigning Claimant's vacation on [IMPROPERLY ASSIGNED VACATION DATE] because of its improper flat-lining of the vacation schedule, the Carrier ignored the Section 6 requirement stating that "Due regard, consistent with requirements of the service, shall be given to the preference of the employee in his seniority order in the class of service in which engaged when granting vacations."

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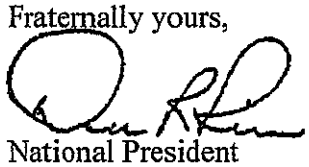
[2] Namely, that carriers cannot "disregard the desires and preferences of the employes in fixing vacation dates or could deny a vacation altogether ***just because the granting of a vacation at a particular time might increase operating costs or create problems of efficient operation*** ...." Therefore, "the desires and preferences of the employes in seniority order should [not] be ignored in fixing vacation dates ***unless the service of the Carrier would thereby be interfered with to an unreasonable degree***." For example, "the Carrier should oblige the employe in fixing vacation dates in accordance with his desires or preferences, ***unless by do doing there would result in a serious impairment in the efficiency of operations which could not be avoided by the employment of a relief worker at that particular time or by the making of some other reasonable adjustment***." *See* Third Division Award No. 15331 at 17 (all emphases added).

Moreover, and as applicable, the claim should further specify (1) that the date for which the claim is being submitted was not a date listed on the engineer's vacation bid, or (2) the date for which the claim is being submitted was so far down the list of preferences that it would not have been improperly assigned had the Carrier complied with the NVA and the past practice at that location. Once more, to the extent that you have jurisdiction over locations where the demonstrable past practice of assigning locomotive engineer vacations included the process outlined in Award No. 21 of Public Law Board No. 5811, violation of that practice also should be cited where applicable. As with the first set of claims, consideration should be given to having the GCA or the Local Chairman filing the claim in order to maximize the Carrier's potential economic liability and for claim management purposes.

Lastly, the Carrier's unilateral changes to the processes for moving or cancelling vacation weeks and the scheduling of single-day vacations could result in additional future violations of the NVA. As with the forced assignment of vacation days without the participation of the local chairman, denials of requests to move vacations or to take single-day vacations that are inconsistent with the 1996 NA — including the Agreed-Upon Questions and Answers — and/or the practice that has been used on the property over the past 20 years should trigger the filing of a claim for a day's pay penalty for each such violation. Because such violations are speculative at this point, and unpredictable, the claims should be filed by each adversely affected locomotive engineer.

I recommend that each of you provide your local chairmen with a circular letter outlining how such claims should be worded, and that they convey this information to the locomotive engineers working under their jurisdiction. Both my office and the National Division's Arbitration Department stand ready to provide any needed assistance regarding this issue — as well as the other two disputes — upon your written request of me. Trusting this provides sufficient guidance for the present, and with warmest personal regards, I remain

Fraternally yours,



National President

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