

The Rail Safety Improvement Act of 2008 and Six and Seven Day Assignments

When the Rail Safety Improvement Act (RSIA) takes effect on July 16, 2009, it will be unlawful for BNSF to manage 6- and 7-day assigned service as we currently do. The RSIA will not allow a train service employee to:

...remain or go on duty after that employee has initiated an on-duty period each day for 6 consecutive days, unless that employee has had at least 48 consecutive hours off duty at the employee's home terminal during which time the employee is unavailable for any service for any railroad carrier....

This provision supersedes and invalidates any conflicting agreement provision. It is BNSF's position that it currently has the right to assign 5 working days to 6- and 7-day assigned service. But even if Labor is correct that 6- and 7-day assignments must remain configured as they were prior to RSIA, that configuration has been preempted by Federal Law. As reasoned in Award 7 of Public Law Board 1240:

Federal Law supersedes and invalidates conflicting contract provisions agreed to by the parties under their private collective bargaining agreement. The Hours of Service Law is a Federal Statute and, when applicable, imposes an absolute limitation on the respective rights of the parties under their basic agreement.

Public Law Board 844 further supports that where there is a conflict between a collective bargaining agreement provision and Federal Law, the Federal Law preempts the labor agreement:

...Claimant as a "senior qualified foreman who is working as a helper on the same shift in the same yard" (Rule 22(a)(3)) was entitled to resume his 2:30 p.m. schedule. Under the Hours of Service Law, Carrier was forbidden under legal liability from permitting assignment to said 2:30 p.m. tour. There can be no doubt that "when there is an apparent conflict in the application of both the contract and the law, the law must prevail". (Award No. 6, Public Law Board No. 288).

Railroad assignments are designed to be filled by only one employee in the normal course of business. And with RSIA's implementation, train service employees can no longer fully fill 6- and 7- day assignments that

are assigned to work 6 or 7 days. After working 6 consecutive calendar days, the individual must have 48 hours off duty. So for 6-day assignments assigned to work six consecutive days, the employee cannot protect the first start of the next week's assignment. 7-day assignments that are assigned to work 7 consecutive days can no longer exist because RSIA will only allow a start on a 7th calendar day if that person is at the away-from-home terminal and needs to work home. An individual working a 7th consecutive start under these circumstances must then have 72 consecutive hours off duty. Clearly, employees cannot satisfy the conditions of such 6- and 7-day assignments because they can no longer legally work all of those assigned work days.

At several locations, BNSF's agreements with BLET and UTU provide for 5-day road assignments. Where such agreements are in place, BNSF has either already reduced the 6- and 7-day assignments to 5-days or is in the process of doing so.

Where existing agreement provisions do not allow for 5-day road assignments, BNSF will continue to advertise 6- and 7-day assignments pursuant to existing agreement provisions. However, the advertisement will be configured to provide the successful applicant the ability to work all of the assigned work days without violating the RSIA.

Train employees cannot protect 6-day assigned service **as currently configured** due to the inability to work 6 consecutive days with only 1 day (24 hours) of unavailability before the next on-duty time. In order to configure 6- and 7-day assigned service to comply with RSIA, BNSF shall make 1 of the assigned days (6-day assignments) or 2 of the assigned days (7-day assignments) "RSIA Unavailable Days."

For example, presume that a 6-day assignment's assigned rest day is Sunday. BNSF will re-advertise the assignment so that the incumbent will not initiate an on-duty period each day for 6 consecutive days, an occurrence that would otherwise render the individual unable to protect the assignment the following week. The optional configurations could look like:

Example 1

Monday	work
Tuesday	work
Wednesday	work
Thursday	work
Friday	work
Saturday	RSIA Unavailable Day
Sunday	rest day

Example 2

Monday	work
Tuesday	work
Wednesday	RSIA Unavailable Day
Thursday	work
Friday	work
Saturday	work
Sunday	rest day

Similarly, 7-day assignments shall have two RSIA Unavailable Days embedded in the assignment advertisement in order to comply with RSIA.

There are no provisions in the collective bargaining agreements that prevent BNSF from advertising these assignments in this manner. The assignment rules found in BNSF's agreements simply require that the advertisement identify the days of the week on which service will be performed. They do not say that the advertisement must require the assignment to actually work on 6 or 7 consecutive days. For example, the BLET advertisement rule only requires that the advertisement of the assignment show the days that the assignment is to work. It does not require that it show any minimum number of workdays during the week. BNSF is legally obligated to re-advertise these assignments so that their conditions comport with RSIA.

RSIA's conditions and requirements are incorporated into the agreements. Arbitration awards like Award 6 of Public Law Board 2531 support this principle:

The fact is that this Board is aware of a fundamental rule of contract interpretation namely, that statutes or laws are implicit in all agreements although they may not be set forth therein. Not only are they implicitly a part of the agreement but they are also paramount to anything expressed in the agreement that would be inconsistent with or contradictory to the law.

With RSIA incorporated into the agreements, and recognizing that there is nothing in any agreement obligating BNSF to actually work any assignment 6 or 7 consecutive days, the re-advertisement and reconfiguration of these assignments is squarely within the conditions of the collective bargaining agreements.

BNSF rejects the notion that employees will be able to protect 6- and 7-day assignments as they are currently configured by simply self-regulating. That notion flies in the face of several principles attendant to assigned service and fundamental logic.

Under BNSF's agreements, assigned service simply describes how an individual will perform service and the conditions of that service. Stated another way, the assignment bulletin outlines the job requirements. However, RSIA Sec 108 (1)(a) specifically states that "... a railroad carrier and its officers and agents may not require or allow a train employee to ... (4) remain or go on duty after that employee has initiated an on-duty period each day for – (A) 6 consecutive days..." Therefore, we are

prohibited from bulletining an assignment that conflicts with RSIA. Unlike unassigned service, assigned service has an assigned on-duty time, an assigned rest day(s), and a general description of the service to be performed. Furthermore, assigned service usually performs “nuts and bolts” railroad work. Stated another way, it is usually an assignment that actually services BNSF customers by delivering, spotting and picking-up equipment at our customer’s facilities. This can often be complicated work requiring planning based upon experience not only with the railroad, but with how our customer’s facilities are configured. Having employees assigned to these jobs places forces in motion that allow the same individuals to perform this work for our customers on a regular basis. The employees are (or at least over time become) familiar with our customers, their needs and the physical plant. Clearly, assigned service is where the “rubber meets the road” in railroad operations, and is certainly the safest and most efficient way to conduct business. That, in significant part, is the reason for assigned service and the reason that assigned service is part of the collective bargaining agreements. Allowing employees in assigned service to self-regulate obliterates the intent of assigned service and is certainly not supported by any agreement.

Assignments belong to employees and the assigned employee must be able to legally satisfy the conditions of that assignment without resorting to lay-offs, vacation, or personal leave days on an assigned work day. Such an approach would create unpredictability and unnecessary additional expense for BNSF.

Assignments are designed to be filled by a single employee. For example, the former NP conductors’ agreement makes the point that each assignment is designated to be filled by just one employee in the clearest possible way:

Assigned conductors not used in **their regular assignment**, but used for other service, will be paid not less than **their regular assignment**. (emphasis added)

The former CB&Q conductors’ agreement also supports the principle that an assignment belongs to one specific employee:

A conductor **assigned to other than his regular duties** will be paid the established rate for the service performed, but in no case shall the conductor so assigned be paid less than he would have earned on **his regular assignment**. (emphasis added)

Still another example comes from Rule 120 of the former NP engineers' schedule, which addresses assigning engineers to bulletined assignments:

When a run becomes vacant or a new run is put on, it shall be bulletined at once for a period of seven days. **The senior man making application in writing shall be assigned thereto.** (emphasis added)

There are other examples contained within the language of the several former railroad labor agreements on BNSF. In each case, an assignment describes the working conditions that a single employee can expect. There are absolutely no agreement provisions allowing employees to share an assignment, an inescapable result of self-regulation under RSIA. Self-regulation under RSIA means that when the owner of the assignment must be or chooses to be unavailable under RSIA, BNSF will be required to fill that position with an extra employee. Such built-in unavailability and inability to work an assigned work day is certainly not within the scope or intent of the assigned service agreement provisions.

Allowing employees to self-regulate in order to comply with RSIA requirements simply does not make sense. Nor is it consistent with BNSF's unbroken practice of setting employee schedules in assigned service. The Union's position is apparently that the Federal law voids BNSF's right to benefit from predictable assignments and instead obligates the railroad to bear the burden and expense of unpredictable "assigned" schedules. BNSF should not be saddled with the additional expense and unpredictability created by the Union's illogical interpretation of RSIA. Nor should BNSF have to "guess" when an individual holding an assignment may elect to become unavailable under RSIA. BNSF should not be obligated to deadhead extra employees to and from assignments as the incumbents decide to self-regulate.

BNSF has the right under the agreements to have predictability. That is a core tenet of assigned service. BNSF has the contractual right to configure assignments in order to assure that predictability by configuring them in a manner that allows regularly assigned employees to satisfy all of the requirements of the assigned service. Moreover, BNSF has the right and obligation to comply with Federal Law and at the same time have workforce predictability. Stated in its simplest terms, BNSF has the managerial right to determine when an employee in assigned service is scheduled to work and when he is not (whether because of RSIA or a different reason). That is not the employee's choice. As reasoned in Award 6 of Public Law Board 2531:

...the Board is in agreement with the findings of many prior Awards that hold to the effect that the Carrier has the right to manage and operate the railroad in a [sic] efficient and economical manner to the extent that such operation is not limited by any agreement or rule between the parties. With regard to this, it has been stated in prior Awards that the Carrier is not obligated to hold a train until the assigned crew would be rested or in compliance with the Hours of Service Law.

This principle is central to BNSF's position. Absent a limiting agreement or rule, BNSF must be able to reschedule work consistent with both the Federal law and its managerial prerogative to configure efficient and economical operations. Employee self-regulation is squarely at odds with that concept.

Moreover, the employee's right to voluntarily absent himself from work has always been tightly controlled. The Second Division of the Adjustment Board reasons in its Award 6710:

Every employee has an obligation and a duty to report on time and work his scheduled hours, unless he has good and sufficient reason to be late, to be absent, or to leave early. Those reasons must be supported by competent and acceptable evidence. No employee may report when he likes or choose when to work. No railroad can be efficiently operated for long if voluntary absences are condoned.

And Public Law Board 6345, in its Award 38, found that BNSF had the right to expect employees to report for work as scheduled:

The Carrier is entitled to have its full-time employees be available and report for work, as scheduled. When the Carrier holds a full-time position for an employee, an implicit part of the bargain is that the employee will be available on a reasonably full-time basis. The Carrier is, of course, in the business of providing reliable, scheduled service... The absences of such employees must be covered, requiring extra employees and resulting in extra costs.

Allowing employees to self-regulate under RSIA is tantamount to allowing the employee to create his or her own working conditions. In other words, the individual employee is allowed to decide, on a week-by-week or even day-by-day basis, when to work or when to be unavailable. Moreover, since assigned service has an assigned starting time on consecutive days, the ability to accumulate the starts on consecutive

days is much easier in assigned service than it would be in unassigned service, thereby granting many options to the employee regarding his or her unavailable time. BNSF must retain its managerial right to set forth when employees are expected to work and when they are allowed to be unavailable. Second Division Award 11592 succinctly states:

The Carrier is entitled to reasonable assurance that Claimant would work scheduled hours.

Second Division Award 11686 discusses the nature of the employment relationship:

The nature of the employment relationship demands that employees keep their employers apprised of their availability for work, and that employees do not seek to unilaterally determine their own schedules

Public Law Board 969, in its Award 112, held that employees are not allowed to self-regulate the conditions of their assignment. The Railroad has the right to establish the assignment and its conditions and the employee is obligated to satisfy those conditions:

It is apparent that there is no rule in the Agreement which provides for the kind of special consideration which Claimant requires. He did not comply with the requirements of the job which he chose.

Labor argues that contractually allowable time off, e.g. personal leave days, single-day vacations, "reasonable lay-off privileges, etc. can be used to break the "starts on consecutive days" cycle, thereby legitimizing the survival of 6- and 7-day assignments under RSIA. There is no merit to this contention.

This contractually allowable time is granted by BNSF and is done so consistent with the needs of BNSF's service. Arguing that an employee has a personal leave day or a single-day vacation that can be used to break the consecutive-start cycle is akin to saying that employees have the right to take this time off at any time they choose. That is not correct. Employees do not have the contractual and unilateral right to be absent. As Referee O'Brien reasoned in Award 29 of Public Law Board 5405:

If conditions do not permit an employee to lay off the Carrier has the right to refuse the lay off request.

Labor has also argued that BNSF can certainly work a 6- or 7-day assignment only 5 days, but must annul the assignment on the 6th or on the 6th and 7th day in order to comply with RSIA. The theory being that as long as BNSF pays the incumbent for the 6 or 7 days of the assignment, then the Railroad is free to work the person as few days as it wishes. That argument fails as well.

There is a long line of arbitration decisions that uphold the principle that BNSF is not obligated to pay employees for service that they could not perform due to application of the Hours of Service Law.

Award 13 of Public Law Board 2054:

The Board finds no contractual provision requiring Carrier to pay Claimant a penalty for not using him in service he is not legally qualified to perform.

In a case where two brakemen missed their assignment account not being rested because they had been used in emergency service, their claim for the mileage of their missed assignment was denied by Award 4 of Public Law Board 2091, reasoning:

There is no evidence that an extra man was available, and First Division Awards 21011, 8339 and 21089 have held that under such circumstances there is no support for the claim.

While denying a claim, the First Division found, in its Award 22627:

Claimant was not available for the service claimed because of the rule requiring that he be given eight hours' rest and the claim is denied.

The 6- and 7-day assignments as they are currently configured cannot survive in that form after the effective date of RSIA. BNSF has the right to re-advertise those assignments so that the employees may satisfy the requirements of those assignments without fear of violating Federal Law. Nothing in any agreement requires that a 6- or 7-day assignment be assigned to work all 6 or 7 days; therefore, inclusion of RSIA Unavailable Day(s) in the assignments advertisement is appropriate. Employees are not entitled to compensation contemplating the RSIA Unavailable Day because that portion of the assignment is necessary due to RSIA imposed conditions.