Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference–International Brotherhood of Teamsters

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DON M. HAHS
National President

April 5, 2006

ALL GENERAL CHAIRMEN AND STATE LEGISLATIVE BOARD CHAIRMEN

Dear Sirs and Brothers:

I am attaching a copy of a letter drafted by Special Counsel Michael S. Wolly concerning eligibility issues for the Family and Medical Leave Act (FMLA). I believe that Mr. Wolly's letter will answer many of the questions that have been addressed to your respective offices. Please feel free to share Mr. Wolly's letter with your local chairmen or any other officers or members of your committees or boards.

With best wishes and kindest personal regards, I remain

Fraternally yours,

D. M. Hahs

President

Attachment

Cc: Advisory Board (w/enc.)
M.S. Wolly, Special Counsel

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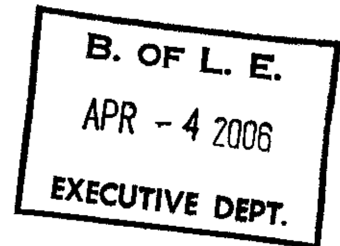
ABRAHAM L. ZWERDLING (1914-1987)



March 31, 2006

Sellar B. Nugent, Secretary-Treasurer
BLET Oregon State Legislative Board
P.O. Box 1047
Eagle Point, OR 97524

Dear Mr. Nugent:

This is to respond to your February 23, 2006 letter to BLET President Hahs, which was referred to me by Interim Coordinator for Legal Affairs Harold Ross. You ask whether Union Pacific's practice of not counting penalty time, time held away from home terminal or guarantees, all of which are paid, towards the hours an engineer must accumulate to qualify for Family and Medical Leave Act ("FMLA") leave is proper. As explained below, in some cases it is and in others it is not.

The FMLA requires that an employee work 1250 hours during the 12 months immediately preceding the start of requested leave under the statute in order to qualify for such leave. This requirement is based on time *actually worked* and, according to the Department of Labor's interpretive regulations, "is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours the employee has worked for or been in service to the employer." 29 CFR § 825.110(c). The DOL applies the same principles to FMLA eligibility as it applies in deciding wage and hour compliance issues under the Fair Labor Standards Act ("FLSA"). That means that waiting time is considered work time when an employee is on duty as is certain travel time required by the employer. Unpaid hours are not necessarily "unworked" hours for purposes of establishing FMLA eligibility. However, time spent on paid or unpaid leave, vacation days, personal leave, holidays, sick days, and union business is not considered working time.

Actual working time: For a locomotive engineer, the time spent running a locomotive, at pre-departure briefings, and waiting at the terminal for the train to be ready to depart is considered actual working time which should be counted toward the 1250 hours necessary for FMLA eligibility. So too is time spent deadheading to a duty assignment, which under the Hours of Service Act ("HSA") is time on duty. Other time under pay that is not included in the HSA maximum hours calculation should nevertheless be counted as hours worked for purposes of

FMLA. In 1996, the U.S. Supreme Court held that, for purposes of the HSA, the time spent by a train crew waiting for transportation away from the duty site to the place of final release is the same as the time spent actually deadheading from the duty place to the place of final release - "limbo time," neither time on duty nor time off duty. BLE v. ATSF, 516 U.S. 152 (1996). Because employees are paid for limbo time and it is not time they can use for personal purposes, it too should be included in the FMLA eligibility hours computation.

HAHT time: Under the Hours of Service Act " any interim period available for rest at a place that is not a designated terminal" is time on duty. 49 CFR § 228.7(a). Time spent held away from home terminal ("HAHT") could fall within this category. It would thus seem logical that time that is "on duty" for HSA purposes is actual "hours worked" for FMLA purposes. However, the DOL interpretations of the FLSA (which as noted above have been applied to the FMLA) are not necessarily consistent with that logic. Under the FLSA, "periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 CFR § 785.16(a). Whether HAHT time is "long enough to enable [an engineer] to use the time effectively for his own purposes" is likely something that has to be determined on a case-by-case basis. But, because the FLSA interpretations concern whether an employer must pay employees for that time and rail carriers already pay engineers for HAHT time, a good argument can be made that HAHT time should count toward the 1250 hour FMLA eligibility requirement.

Guaranteed Extra Boards: UP, like other carriers, pays some employees (like engineers on guaranteed extra boards) for time they wait to be called to work. Under the FLSA, on-call time is counted as work time if an employee is "engaged to wait" but not if he "waited to be engaged." The courts have applied seven criteria, none of which is itself dispositive, in deciding whether on-call time is considered working time:

1. Must the employee live on the employer's premises?
2. Are there excessive geographical restrictions placed on the employee?
3. Is the frequency of calls so great as to be unduly restrictive on the employee's use of his time?
4. Is the time within which the employee must respond unduly restrictive?
5. Can the employee easily trade on-call responsibilities (i.e., avoid responding to the call)?
6. Could using a pager or cell phone ease the restrictions?
7. Did the employee actually engage in personal activities during the on-call time?

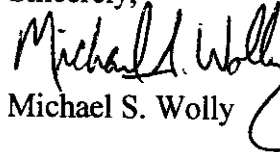
Some restrictions on an on-call employee's time are permissible without the time being considered hours worked. Otherwise, as one court put it, "all or almost all on-call time would be

working time, a proposition that the settled case law and the administrative guidelines clearly reject." Bright v. Houston N.W. Med. Ctr. Survivor, 934 F.2d 671, 677 (5th Cir. 1991 (*en banc*), *cert. denied*, 502 U.S. 1036 (1992). Overall, the test is whether the time in question is primarily for the benefit of the employer ("engaged to wait") or the employee ("waiting to be engaged"). Applying the seven factors most often relied on by the courts should enable you to determine whether the carrier's refusal to count any of the paid hours of a guaranteed extra board engineer is reasonable.

Employees in protected status: Engineers who do not hold engineer positions and who are receiving dismissal allowances by virtue of their having lost their jobs due to the merger are not working at all for the carrier. UP is not violating the FMLA by not counting their non-working hours toward FMLA eligibility. The same is true for any other engineers who are furloughed but receive full pay from TPAs based on the hours they once worked.

If you have any other questions in this regard, please let me know.

Sincerely,



Michael S. Wolly

cc: Don M. Hahs, International President
Harold Ross, Esq.