Case No. 1
Award No. 4

PUBLIC BOARD NO. 5464

PARTIES Brotherhood of Locomotive Engineers

TO and

DISPUTE: Burlington Northern Railroad Company

STATEMENT OF CLAIM: Claim on behalf of Engineers B. A. DeWitt, R. E. Greene, G. L. Larsen, R. D. Leyde, E. G. Mathews (Mathena) and K. W. Tiffany, for a basic day at the applicable rate for each day in October 1991, account seniority restricted per TS #1 dated November 1, 1991.

STATEMENT OF FACTS: The basic facts are not disputed. Certain rules provide for regulating the size of relevant freight pools based on average mileage for the period in question. The rules dictated that the engineer's quota be increased at Spokane by six engineers. The request of the local Chairman to increase the size of the pool was discussed at the local level. Local Management informed him that because of manpower shortages in the Trainmen ranks, they could not accommodate the request. The Claimants were working as engineers on yard jobs or on the yard/road extra board. Presumably, if they had been added to the pool, the Carrier would have utilized demoted engineers working as Trainmen.

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.

DECISION: There can be no serious dispute that there was a violation of the agreement. The Carrier argues that they should be excused from this because of a dramatic and unexpected manpower shortage. The shortage was caused by a sudden increase in grain shipments (1,000 carloads per month) to Russia inspired by a credit extension by the U.S. to the Russian government.

In this case it might have been impractical and inconvenient to have complied with the agreement, but it wasn't truly impossible. Simply failure to comply with the agreement should have been a last resort for the Carrier. We are not convinced it was.

The remaining question is one of remedy. The claim requests a day's pay in addition to actual earnings. This is not supported by the agreement or the circumstances. While incorrect in its actions, the Carrier was not acting in bad faith. Nor are we convinced on the basis of this record that the Carrier made a calculated decision to violate the agreement based on an economic analysis that non-compliance was cheaper than compliance. They were faced with an acute temporary situation and made a good faith effort to balance all the competing considerations. In such circumstances, a penalty is not appropriate.

As a result, the remedy should be limited to the actual damages which would consist of the denied earnings opportunities which accrued as a result of the improper restriction on the Claimant's seniority. The Claimants are entitled to be compensated for the period in question as if they had operated in the pool. The Parties shall make a joint check of the records and make reasonable calculations as to the extent of the difference in earnings. The Board will retain jurisdiction in the event they are unable to arrive at a precise amount, if any, for each Claimant.

AWARD

The Claim is sustained to the extent indicated in the Opinion.

Gil Vernon, Chairman and
Neutral Member

R. E. Dean
Ron Dean DISSENT IN PART
Union Member

Gene L. Shire
Carrier Member

Dated: April _____, 1995.

ORGANIZATIONS DISSENT TO AWARD NO. 4, CASE NO. 1

PUBLIC LAW BOARD NO. 5464 (VERNON)

In the above captioned Award it is noted in the Decision:

> *"There can be no serious dispute that there was a violation of the agreement.... In this case it might have been impratical and inconvenient to have complied with the agreement, but it wasn't truly impossible."*

However, despite the arguments presented which clearly illustrated the violation--arguments which were obviously understood by a seasoned arbitrator-- he failed completely to enforce the agreement.

As predicted, due to the failure to enforce the agreement with the wholly justifiable penalty of a basic day payment for each such violation, the Carrier continues to violate the agreement provisions. In at least three (3) separate instances in the short time frame since issuance of the Award, the Carrier has hid behind this very Award like a shield, firmly entrenched in its position that if there is no lost earnings it has the now confirmed right to disregard the seniority provisions and mileage regulation provisions of the agreement. In essence, if no monetary harm, then no monetary foul, and no penalty for a known, planned, and *calculated decision* to violate the agreement and restrict an engineers seniority.

With decisions such as Award No. 4 where the Organization clearly made its case, where the arbitrator sustained the Organization's position yet failed to enforce the agreement, the Organization and claimants win, yet achieved nothing. It is like the zoo keeper who pulls the boy from the mouth of the lion and places him in the cage of the bear for safekeeping while he scolds the lion. Arbitration awards should resolve issues, not perpetuate them.

As a result, the Organization is left with the obvious necessity of, *again,* placing the question before a tribunal to ensure enforcement of the agreement. Therefore, in view of the incomplete decision rendered here, I emphatically dissent.

R.E. Dean

R.E. Dean
Organization Member