SPECIAL BOARD OF ADJUSTMENT NO. 894

AWARD NO. 1649

CONSOLIDATED RAIL CORPORATION

VS.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: System Docket Nos. CRE-8917, CRE-8919, CRE-8923 and CRE-8927 - Claim of Engineer D. D. Frew for payment of the higher rate for miles in excess of 100 while operating between West Brownsville, PA and Altoona, PA on various dates.

STATEMENT OF FACTS: During the month of June *1985*, Engineer D. D. Frew (hereinafter *claimant*) was assigned in the *West Brownsville-Altoona Through Freight Pool*, and was periodically called to perform service on various trains operating in excess of 100 miles on each cited date in his consolidated claim. As a result of each such assignment, claimant filed multiple requests for payment for all miles operated in excess of 100 miles to be paid at the same rate as that established by the basic rate of pay for the

first 100 miles operated, citing Article R-s-2(j)(2) of the carrier's Schedule Agreement. On *August 29, 1985*, Labor Relations Manager T. P. Murphy timely denied such claims, stating in pertinent part as follows:

* * * *

> Referring to you listing of July 29, 1985, appealing claims of Engineer D. D. Frew for a $2.00 meal allowance for various dates in June 1985 and an additional $4.36 for each date for higher rate for miles over 100.
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> STATEMENT OF FACTS:
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> Claimant covered trains from West Brownsville to Altoona on these dates. The West Brownsville-Altoona Pool does not come under Article R-s-2(j)(2) of the Schedule Agreement as they do not run through an established home or away-from-home terminal crew change point. Further this pool has been in operation since May 18, 1983 when it was reestablished after being abolished in 1955. No previous claims were submitted.
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> CARRIERS POSITION:
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> In accordance with the decision rendered by the Senior Director-Labor Relations in System Docket CRE-7928, claims will be allowed payment of $2.00 for each date, without precedent and in full and final settlement of this claim. Your appeal for $4.36 for each date for higher rate for miles over 100 is denied.

* * * *

Thereafter the dispute was appealed to carrier's highest ranked officer designated to handle such claims. Following such review, on March 13, *1986*, the Senior Labor Relations Director timely denied the claim, stating in pertinent part as follows (emphasis added):

* * * *

The following case was discussed in conference on February 5, *1986*:

System Docket CRE-8917
Regional Case No. AE-108-85
BLE File No. DE-E-274-325-85

Claims of Engineer D. D. Frew on various dates for the high rate of pay for all miles in excess of 100 traversed between Altoona, PA and West Brownsville, PA.

On the dates of claim, Claimant was assigned as an engineer in the West Brownsville-Altoona through freight pool and was called to perform service between West Brownsville and Altoona on various trains. On each date he operated in excess of 100 miles.

Claimant requests payment for all miles operated over 100 at the mileage rate established by the basic rate of pay for the first 100 miles operated, citing Article R-s-2(j)(2) of the Agreement in support of the claims.

It is our position that the compensation claimed is not warranted. Article R-s-2(j)(2) has no application here as the West-Brownsville-Altoona through freight pool was not established pursuant to Article R-s-2 of the Schedule Agreement. Absent the mandatory Agreement support, the claims must fail.

* * * *

No further action was taken to resolve these claims until the matter was submitted to this Board in *1998* for final adjudication.

FINDINGS: Under the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this Board is duly

constituted by agreement and has jurisdiction of the parties and subject matter.

PROCEDURAL ISSUE

The carrier *appears* to raise a type of threshold (*procedural*) objection to this Board considering this appeal on the merits. Such (dismissal) motion is arguably rooted in the Railway Labor Act, as amended (Section 2), which states in pertinent part that the purpose of such Act is, "*...to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions.*" Counsel ambiguously asserts that the carrier's objection is a type of "*alert*", which is designed to focus this Board's attention on the *apparent (un)importance* of this claim, (*i.e.* approximately thirteen years in processing the appeal), when compared to others which have developed in the interim and been more expeditiously processed to arbitration by the organization.

Notwithstanding such (carrier) explanation, a board's jurisdiction cannot be conferred or removed by the parties to dispute; there must be a basis for such in the applicable contract or law. Therefore, because the issue has been obliquely raised, we must necessarily consider whether the

claim is time barred by the Act, or the collective bargaining agreement *per se*. Toward that goal we would note parenthetically that, prior to the current collective bargaining agreement, there was no *specified limitation* period for processing such claims. Significantly, during such precedent negotiations, the carrier purposed a strict (12 months) limitation, which was successfully rejected by the organization. Thereafter the parties agreed to a *five year limitation on appeals*. Such a bargaining history is pivotal in determining the parties intent as reflected in both the current and prior agreements.

If there is any aspect of the interpretation and adjudication process of a labor agreement that compels *strict construction*, many courts, and the majority of arbitration awards, consistently hold that it is in those procedural portions of the grievance machinery which impose "*time limits*" [Pressman's Union v. International Paper Co., 107 LRRM 2618 (Ct. App. 3rd Cir. - 1981)]. However we recognize that other courts and arbitrators (boards) have (conversely) stressed that it is inadvisable to be overly technical in language construction, when the net effect is to preclude an employee's access to the grievance system [Forrest Industries v.

Woodworkers of America, Local No. 3-436, 381 F.2d 144 (9th Cir., 1967)]. Notwithstanding such divergent "case law", in this dispute it is significant, if not pivotal, that an explicit (claim) limitation provision was not included in the collective bargaining agreement until *after* these claims were initiated. *Ergo*, we find no procedural error or bar to our jurisdiction under the Act. Furthermore, the organization's delay in processing the claims is not deserving of an *adverse inference*.

SUBSTANTIVE ISSUE

The organization argues that these claims are payable in accordance with the *literal* language of Article R-s-2, Paragraphs (a) and (J)(2) and (3) (SBA 894, Award No. 1, Van Wart, 1979). Specifically, union counsel argues that the Pool established to operate between West Brownsville and Altoona, Pennsylvania, operates through previously established *home* and *away-from-home* terminals (*i.e.* Shire Oaks, Pitcairn and Conemaugh). *Ergo*, claimant's assignment constitutes *intraseniority district* service, *per se*, applying the *literal* provisions of Article R-s-3(a). The organization reasons that since the claimant's trains each operated through Pitcairn, a former crew change point for *many* pools, (*i.e. not including the West*

Brownsville-Altoona freight pool) the service must necessarily qualify as *R-s-2 service.*

We do not agree; as resourcefully noted by the carrier, Pitcairn is only 49 miles north of West Brownsville (*i.e.* it would be operationally improbable that the carrier would establish a terminal just 49 miles from West Brownsville as a crew change point in the disputed service). Furthermore, Pitcairn closed in 1982 and therefore does not stand as a viable crew change point for service operating between West Brownsville and Altoona during the time period applicable to this claim; the service between West Brownsville and Altoona was first established in 1955 prior to advent of the applicable (cited) contract provision. Based on our reading and understanding of the agreement and the evidence of record, in order for Pitcairn to be considered a crew change point the organization must have offered preponderant proof that such location *was a crew change point in this particular service.* The mere fact that the service in dispute is operated through "*a generic crew change point*", with no evidence that such location

was related to this service, was not sufficient evidence to qualify it as R-s-2 service, *per se*.

Based on the undisputed circumstances and preponderant proof offered in this appeal, we are persuaded that the organization's *literal* interpretation of Article R-s-2(a) is without merit. It is axiomatic that negotiators do not insert terms into an agreement which are to be *considered* and applied *out of context*, or *ignored*. Clearly Article R-s-2 must be read in its entirety. In our judgment, in order to qualify as R-s-2 service, an assignment must either operate entirely within a Conrail Seniority District and run through a *relevant* and *established* home, or away-from-home, terminal crew change point in order to be considered *intraseniority* district service; or, alternatively, operate between Conrail seniority districts, in which case such service would be defined as *interseniority* district service. In our judgment claimant was not operating in either *intra* or *interseniority* district service, as defined, and therefore cannot qualify for the payment of the (over 100) miles as requested. From the evidence this Board is

persuaded that claimant was involved in Divisional Service. *Ergo*, these claims must be denied based on the evidence of record.

AWARD: Claims denied.

DON B. HAYS, Neutral Member

S. R. FRIEDMAN, Carrier Member

E. W. RODZWICZ, Organization Member

February 19, 1999
DATE