SPECIAL BOARD OF ADJUSTMENT NO. 955

AWARD NO. 457

CSX TRANSPORTATION INC.

VS.

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim of Louisville Terminal Trainmen Ken Neeley for $43,000 lump sum payment and $57,500 separation allowance under CSXT Labor Agreement 4-86-92.

BACKGROUND: On July 31, 1992, CSX Transportation Inc. (hereinafter carrier) and the United Transportation Union (hereinafter organization) entered into a memorandum of agreement (CSXT Labor Agreement 4-86-92) which represented the "third generation" of Crew Consist Agreements. We would note parenthetically that the first such "Crew Consist" agreement was executed February 9, 1986, and avowedly extended certain protections to all those employees who have instituted essentially identical claims to those raised in this ("pilot") dispute. Such (third) agreement,

metaphorically entitled the "Conductor-Only Agreement", prescribed an implementation date of August 10, 1992, and provided, inter alia, lump sum payments for eligible protected "**active service**" trainmen as follows:

1. Article IX -	Lump sum payment of $5,000 dollars...to each employee defined as being in **active train service** on the date agreement is signed.
2. Side Letter A	1. Productivity Fund Buyout Option - Conductors/ Foreman and Trainmen/Switchmen in **active train service** on the date agreement is signed shall receive a $20,00 lump sum (buyout payment). 2. $35,000 at retirement death, dismissed or resignation for **active (train) service** employees on date agreement is signed.
3. Side Letter B	1. Article VI D Buyout of Special Crew Allowance Option -- $18,000 payment for **active (train) service** employees on date agreement is signed. 2. $22,500 payment upon retirement death, dismissed or resignation.

Eligible yardmasters and carrier officials, who were former train service employees, were provided a special window-of-time within which they could elect to return to train service and thereby qualify for the above listed benefits, or waive all such rights. Certain other eligible employees, who were not in active (train) service on the eligibility date, were conditionally

entitled to such benefits, "...upon return to service from illness, injury, furlough (voluntary or involuntary), suspension, dismissal or full-time organizational service." We would note parenthetically that an unspecified number of employees who were, and avowedly remain, full time employees of the organization have already received the above specified payments without actually returning to active train service. The expressed rationale for such payments is that the organization and the carrier have historically considered such (full time) union representatives as "actively working in the craft" during the entire term of their approved leaves of absence.

EVIDENCE: On July 1, 1992, Louisville Trainman Ken Neeley (hereinafter claimant) exercised his option under an October 31, 1985, Mediation Agreement (Case A-11471) to accept promotion to the craft of engineer (BLE Agreement). Such election did not sever claimant's (UTU) trainman seniority, however, once he assumed such (engineer) position he was contractually barred from returning to trainman service as long as he was needed to protect an engineer position (seniority). We would note parenthetically that there is no contractual definition of "needed"; ergo, the

carrier arguably had the unilateral right to make such operational determination.

Following claimant's voluntary ascension to the engineer craft his relevant work history was essentially as follows:

7/1/92	Engine Service
1/13/93	Involuntarily removed from engine service
1/17/93	Exercised his trainman seniority to hold a train service position
1/31/93	Recalled to engine service
2/2/93	Exercised engine service seniority

Since February 2, 1993, claimant has been required (operational need) to remain in engine service at all times relevant to this dispute.

On March 25, 1993, the organization instituted an action on behalf of Trainman Neeley and all other employees similarly situated, alleging that all such claimants had been wrongfully barred from accessing such bonuses through a combination of carrier requirements (operational need) and the restrictions included in an agreement with a third party (BLE) organization. In practical effect, counsel for the organization argues that such need is contrived to block claimant's otherwise rightful access to these earned bonuses.

The carrier denied such claim, explaining in pertinent part as follows:

* * * *

"Please refer to your letter dated March 25, 1993, file 376-Y0529, concerning claim filed in behalf of Louisville Ken Neeley (194292) for $43,000 lump sum payment and $57,500 separation allowance under CSXT Agreement 4-86-92.

Your letter does not state any reason why Mr. Neeley would be entitled to the lump sum payment or the separation allowance under CSXT Labor Agreement 4-86-92. It is very difficult to research a claim when no information is given as to why the claim was filed and may be valid under agreements.

* * * *

As shown by our records, on July 31, 1992, Mr. Neeley was regular assigned as engineer at Louisville, Ky. Mr. Neeley was in engineer service from July 1, 1992, through present date, except for a 2 week period in January 1993, which he worked - as a switchman.

Mr. Neeley was in engineer service on July 31, 1992, and even though he returned to train service for a very brief period, he did not meet the definition of an 'active service' employee as defined by CSXT Labor Agreement 4-86-(g)-92 which states:

> 'It was agreed in the application of these agreements an active service employee is defined as follows:
>
> "Active service" includes those employees who return to service as trainmen or conductors from illness, injury, furlough (voluntary or involuntary), suspension, dismissal, or full-time Organization service. The amounts they receive will be equal to the amounts they would have received on the date of the Agreement.'

As you can see, Mr. Neeley does not meet the requirements of an 'active service' employee and the claim filed in his behalf is without merit and is declined in its entirety."

* * * *

Such claim was thereafter processed to this Board for final resolution.

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.

The parties agree that the dispute pivots on the meaning of the phrase **in active service**. The carrier argues that it means active service as a trainman/yardman. The Organization initially contends that such phrase only requires active service with the carrier in any capacity; ergo, if the affected employee holds trainmen seniority and would be working in such craft, but for the carrier's requirements, then the individual claim for all earned bonuses should be summarily granted.

In practical effect the organization's first alternative argument equates claimant's (engineer) assignment to those eligible employees on involuntary furlough. Union counsel avows that during negotiations the carrier representatives verbally agreed that those former trainmen, who were then working in engine service "...would not be moved into or kept in such

service unless needed to protect such service." Extending such verbal commitment they argue that the carrier has failed to offer credible proof of any real continuing need. As a second alternative basis for this Board to grant these claims, counsel argues that if management personnel were allowed a limited "window" to elect to return to train service then it is discrimination, per se, to deny claimant that same opportunity for recovery.

The phrase "continue in active service" is not new to railroad industry agreements, it most often appears in connection with retroactive general pay increases. Often such qualifying provision has been inserted into the retroactive provision in order to preclude payments to employees who have quit or been terminated prior to the effective date. However, the bonus payments in this dispute cannot be unconditionally compared to a general wage increase [PLB 3882, Award 155 (Cluster, 1993), First Division Award No. 24412 (Richter, 1994), PLB 5191, Award 2 (Euxer, 1993)].

Notwithstanding the organization's allegations (parole evidence) concerning the negotiators' dialogue, the "bargain and consideration" specifically reflected in the terms of these agreements appears to have been carefully designed; only certain and very specific categories of employees

were declared eligible for such bonus. Clearly claimant does not "fit" into any of these defined eligibility classes.

The present claim requests the Board to uphold petitioner's request for two lump sum payments predicated on the single fact that claimant held trainman's seniority, notwithstanding the additional fact that he was in service and working as an engineer on the dates indicated hereinabove. Because the movants (organization) bear the burden of proof, we cannot ignore the void in the record of any credible evidence that the carrier ever expressly or impliedly agreed that employees, like claimant, would be declared eligible, notwithstanding the specific limitations adopted. Counsel for the organization resourcefully argues that because claimant is obligated to protect his seniority as an engineer at the unilateral discretion of the carrier, it is patently unfair to hold that his working status on one specific eligibility date should control the validity of his otherwise valid claim for the (two) lump sum payments.

All of these arguments raised by the organization are both reasonable and resourceful, and would be given pivotal consideration if we were a board of equity, and/or we had both the parole evidence and the authority to

reform the Agreement so as to be completely fair. However, our jurisdiction is very narrow; we are limited to the "interpretation and application of the parties' Agreements" as written. Consequently our decision must be founded solely upon the proven intent of the contracting parties as manifested by the language used, utilizing the applicable and recognized rules of contract construction. To hold otherwise would expose our conclusions to being overturned by a court of competent jurisdiction. Sympathetic as we might be, we are not authorized to dispense our own brand of industrial justice (Steelworkers' trilogy and its progeny).

Such jurisdictional limitation is a sound principle of statutory and contract construction and, in this case, destroys any inference and rejects any interpretation that employees working in another craft on the designated eligibility date were intended to be considered as "active employees," merely because they had trainmen's seniority and would have opted to work in such craft if such alternative were available. If there are inequities in the system, as the Organization contends, it is a matter that only the parties may remedy by modifying the expressed eligibility requirements.

In arriving at our conclusion we are also aware that in some of the claims filed in concert with this appeal, one or more employees may have had contributions made to the Productivity Fund in their behalf, for which they might even have subsequently recovered. However, that is not one of the qualifying conditions for these lump sum distributions, and again we are not privileged to change the Agreement based upon our perception of the equities involved.

In this particular dispute the claimant did not have the opportunity to contribute to the Productivity Fund on those (12) days that he worked in train service in early 1993, inasmuch as such fund had previously been closed (bought out) concurrent with the implementation of the 1992 Conductor-Only Agreement. It was a result of that "buy out" agreement that accruals to the Productivity Fund ceased; therefore, there was no contribution made in behalf of Claimant Neeley and there was nothing for him to recover.

As regards the collateral issue of disparate treatment (full time organizational representatives receiving bonus payments), we find such persons to have been uniquely situated and the beneficiaries of a clear and

prevailing practice. Clearly such practice is a circumstance that distinguishes their (sic) threshold eligibility from this particular claimant.

AWARD: Claims denied.

DON B. HAYS, Neutral Member

R. O. KEY, Carrier Member

A. L. SMITH, Organization Member

Sept 25, 1996
DATE