NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Form 1

Award No. 24287
Docket No. 43932
94-1-93-1-C-4602

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(
(CSX Transportation, Inc. (former Seaboard
(Coast Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of Engineer G. P. Mangum for Code 15 switching allowances for time switching at Goldsboro Yard during the first twelve hour period of the (discontinued) last yard engine while regularly assigned to train no. F-722 on claim dates."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The claim in this docket is representative of 549 identical claims that are being held in abeyance by agreement of the parties. The dispute over this claim concerns only one narrow issue:

"Does Article VIII of the May 19, 1986, Award of Arbitration Board No. 458 supersede Article V, Section 7, of the June 25, 1964 BLE National Agreement?"

Article V, Section 7, of the June 25, 1964 BLE National Agreement is incorporated into the BLE-SCL Consolidated Rules Agreement as Article 15(g), Section 7. Article V, Section 7 (Article 15(g), Section 7), provided for the payment of switching allowances to road service Engineers when switching was performed at locations

> whose seniority in engine or train service precedes the date of this Agreement and such allowances are not subject to general or other wage increases."

For the first 30 months following the release of the Award of Arbitration Board No. 458, Carrier continued to provide switching allowance payments under Article V, Section 7, of the June 25, 1964 Agreement to Engineers with seniority dates predating the Award, who performed switching at Goldsboro, including switching in connection with their own trains. Thereafter, Carrier ceased making such payments, and when this claim was appealed, contended that:

> "Article 15 of the BLE Schedule Agreement is not applicable. Article VIII, Section 1 of the May 19, 1986 BLE Award of Arb. Board 458 permits switching in connection with your train such as in the instant claim, without additional compensation to the crew."

This Board cannot agree with Carrier's conclusion. The language of Article VIII, Section 1 (d), of the Award of Arbitration Board 458, is straight forward, clear and unambiguous. Read in an uncomplicated fashion, the final sentence of Article VIII, Section 1 (d), without question, continues in place the payment of switching allowances, applicable under Article V, Section 7, of the June 25, 1964 National BLE Agreement (or under Article 15(g), Section 7, of the Consolidated Rules Agreement, effective September 1, 1975), for those employees whose seniority in engine service preceded the date of the Award. And that is the way the parties to the Award applied the Award and Agreement for 30 months following its release.

In arriving at this conclusion the Board has considered carefully Carrier's citation of Award 91, PLB 4269, wherein a different result was reached in a case involving Trainmen working under the October 31, 1985 UTU National Agreement. (The pertinent provisions of the October 31, 1985 UTU National Agreement and the BLE May 19, 1986 Award of Arbitration Board 458 are nearly identical.) PLB 4269 determined that "latent ambiguity" was present in the contract provision it was reviewing, and proceeded to resolve this ambiguity on the basis of limited parol evidence in the exclusive form of recollections of two individuals, present at the negotiations, made in statements prepared sometime after the date of the Agreement - one in 1987 and the other in 1988. This Board is unable, however, to embrace Award 91, PLB 4269 as authoritative in the claims being reviewed here, because, inter alia, we are unable to conclude that the contract language we are

reviewing is, in any respect, ambiguous. And, further, even if it were appropriate to now have this clear and concise language adjudged to be latently ambiguous, on the basis of recollections of two individuals that participated in the negotiations of the UTU Agreement, problems abound with respect to the evidentiary weight to be afforded these statements, and whether or not they may be applied as parol evidence as to the meaning of a provision of a BLE Arbitration Award, which was released almost a year after the UTU negotiations concluded. An Award, incidentally, that the parties themselves, in practice, found to be without ambiguity in the application of Article VIII, Section 1, during its first thirty months of application.

Additionally, it must be noted that Award 91, PLB 4269, in principle, is at odds with the holding in First Division Award 24080, as well as Award 30 of PLB 4990. Award 30, involved the UTU and BN, and considered arguments similar to those involved in Award 91, PLB 4269, with respect to the affect the 1985 UTU Agreement had on switching allowances provided by Article V, Section 7 of the 1964 Agreement. Award 30 stated:

> "This Board must interpret the Agreement language as written. The third sentence of Article VIII, Section 1(d) states in part that '[s]witching allowances, where applicable...or under individual agreements, payable to road crews, shall continue with respect to employees whose seniority date in a craft covered by this Agreement precedes the date of this Agreement... . A 'switching allowance' is an allowance or pay for performance of switching service. Article 7, Section 4 of the Schedule Agreement requires pay for switching at initial terminal. This language of Article 7, Section 4 is clearly a switching allowance under an individual railroad agreement within the plain meaning of the language of the parties as set forth in Article VIII, Section 1(d).
>
> The Carrier's assertion that the agreement language 'or under individual railroad agreements' found in paragraph (d) has reference to those railroads that do not have the June 25, 1964 Agreement, in its pure form as originally written, in effect on their properties, but have made individual agreements that, while incorporating most or all of the 1964 Agreement, expand upon or modify that document to

> fit the circumstances of the individual railroads, must be rejected as lacking supporting contractual wording for such a position. If the negotiators of the 1985 UTU Agreement had intended that the 'switching allowances under individual railroad agreements' referred only to expanded or modified agreements on the subject made pursuant to the 1964 Agreement it would have been a simple matter for the negotiators to insert appropriate language in paragraph (d) to accomplish this intent. The negotiators did not write in such a limitation and this Board has no authority to do so now under the guise of contract interpretation. Since the third sentence of Section 1(d) requires that switching allowances under individual railroad agreements shall continue as limited therein, we are compelled to sustain these claims."

This Board reaches the same result here. The language of Article VIII, Section 1(d), of the Award of Arbitration Board 458 requires that switching allowances applicable under Article V, Section 7, of the June 25, 1964 National BLE Agreement, or under individual railroad agreements, shall continue (as limited therein) to Engineers with seniority predating the date of the Award. Accordingly, the claim will be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 7th day of February 1994.

CARRIER MEMBERS' DISSENT
TO
AWARD NO. 24287, DOCKET NO. 43932
(Referee John C. Fletcher)

In issuing Award 24287, the Majority of the Board completely disregarded any arguments in support of the Carrier's position, and, in addition, disregarded Awards of Public Law Boards on this same CSX Transportation property (the former SCL) that have dealt with this same issue.

This dispute, which was brought to the Board by the Organization, should have resulted in a denial Award settling the issue once and for all on this property. Instead, we are now burdened with an Award that would require two different methods of handling payment for the same crew, should this Award have any precedential value. The United Transportation Union took this same issue to Public Law Boards on three occasions and the Carrier's position was upheld in each instance. Now, by virtue of this Award, the engine service member of a train crew would be paid switching time for switching in connection with his own train, while the train crew would not by virtue of previous Public Law Board Awards that the Majority here chose to ignore.

The Majority failed to recognize the issue from the outset. In Award 24287, it is stated that this dispute concerns only one narrow issue:

> "Does Article VIII of the May 19, 1986, Award of Arbitration Board No. 458 supersede Article V, Section 7, of the June 25, 1964 BLE National Agreement?"

The claims in this dispute concern the above statement, but further it should have stated - "when switching is performed in connection with claimant's own train." That was a critical piece of the issue that we do not believe the Majority ever realized was before the Board. It was never disputed that switching not it connection with a crew's own train when performed during the first twelve (12) hour period of the last yard assignment that had been

discontinued was compensable under the provisions of Section 7 of the June 25, 1964, UTU and BLE National Agreements. Such switching allowance is routinely paid for service when rendered. The Carrier did not seek to supersede this Agreement provision, but merely to take advantage of the economy achieved by the negotiators of Article VIII of the Award of Arbitration Board No. 458. The effect of Award 24287 is to give to the Organization on the former SCL property a pay provision it lost through the negotiation process in 1986. This is a gross violation of the provisions of the Railway Labor Act, and exceeds the authority of the Board. A rule was not interpreted, but a provision, previously eliminated, was rewritten through the arbitration process.

The Majority in this case gave great weight to the fact that claims for switching were "routinely allowed" to engineers for switching at this location. It is implied that this created a past practice. It has been well established, however, through past Awards of numerous Public Law Boards and Awards of this Board that a past practice must be one of systemwide application. In this case, it was pointed out that there was a pocket of locations, three that the Carrier became aware of, where these payments were being made. Such payments were made at the same time the Carrier was declining similar claims at other locations and arbitrating the same issue with the United Transportation Union, resulting in Award 91 of Public Law Board No. 4269, which denied the claims. When it was discovered that these switching payments were being made at Goldsboro, North Carolina, the origin of the instant case at bar, these payments were discontinued, which gave rise to this particular dispute. To indicate that payment of these switching allowances at this one location, or the total of three that the Carrier became aware of in this general vicinity, could establish a systemwide practice is unbelievable. Payroll discrepancies and misunderstandings of agreement application by line officers who are

responsible for policing these arbitrary payments are not unusual occurrences in the rail industry; but to allow such errors to rise to the level of establishing a practice on the entire former SCL Railroad property is unprecedented.

The Majority in this case opted to reject the findings of Referee Don B. Hays in Award 91 of Public Law Board No. 4269 wherein claims of the same nature were denied trainmen working under the October 31, 1985 UTU National Agreement. This Agreement contains an Article VIII that the Majority states is "nearly identical" to Article VIII of the Award of Arbitration Board No. 458. The only difference that can be gleaned from the UTU and the BLE Article VIII provisions is the description of the employees governed by the individual work rules in these documents. Article VIII in each Agreement reads identically. They must then mean the same thing. Award 91 of Public Law Board No. 4269 found that there was latent ambiguity in the contract provision. This was later confirmed in Awards 100 and 101 of Public Law Board No. 5180, with Chairman and Neutral Member David P. Twomey. Awards 100 and 101 of Public Law Board No. 5180 recognized Award 91 of Public Law Board No. 4269 as being precedential on this property. These Awards were completely disregarded in the Majority's decision. Instead of following the Awards already in existence on this property, the Majority chose to follow the reasoning of Award 30 of Public Law Board No. 4990, where the Neutral Member stated that - "Since the third sentence of Section 1 (d) required that switching allowances under individual railroad agreements shall continue as limited therein, we are compelled to sustain the claim." The Neutral Member was David P. Twomey, who in Awards 100 and 101 of Public Law Board No. 5180 ruled on the former SCL property that Award 91 of Public Law Board No. 4269 was precedential on this property. This must surely indicate material differences in the disputes on Public Law Board No. 4990 and

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Public Law Board No. 5180. This same Neutral Member confirmed the "latent ambiguity" found by Referee Hays. We cannot fathom the Majority using Award 30 of Public Law Board No. 4990 dealing with another carrier as the basis for sustaining the claims in the instant case. There is no rational basis for such approach when there are precedential Awards in existence on the same property as the instant case.

The Majority chose not to give any credence to the recollections of two of the negotiators of the UTU National Agreement that were cited by the Carrier in this case. The Majority stated that there were problems with giving any evidentiary weight to these statements as parol evidence as to the meaning of a provision of a BLE Arbitration Award released almost a year after the UTU negotiations were concluded. Is it possible that the Majority did not realize that the negotiators of the UTU National Agreement were the same negotiators that attempted to negotiate the BLE National Agreement which resulted in the Award of Arbitration Board No. 458 which contained the same language as the UTU Agreement? The recollections of these two negotiators were entitled to significant evidentiary weight. The meaning of the rules did not change in their application to the different operating crafts. The Organization did not refute the "recollections" of the two negotiators with any "recollections" of its own negotiators which it knew would be part of the Carrier's position inasmuch as it had been included in Award 91 of Public Law Board No. 4269.

In conclusion, not only did the Carrier provide recent Public Law Board Award support for its position in this case, they were Awards dealing with this same issue on this same former SCL railroad piece of CSX Transportation property. In disregarding these applicable precedents, and, instead, relying on older Awards on different properties, Award 24287 is in fundamental error because it is based neither on the applicable collective bargaining agreement,

nor the practice on the entire former SCL property. For these reasons, the Award has no precedential authority, and the Carrier does vigorously dissent.

M. W. Fingerhut

R. L. Hicks

RESPONSE OF THE EMPLOYEE MEMBERS

TO THE

CARRIER MEMBERS' DISSENT

TO

AWARD NO. 24287, DOCKET NO. 43932

The Carrier Members' Dissent continues the same propounding of half-truths, misrepresentation and obfuscation that was offered in its Submission and presentation to this Board in the proceeding which led to Award No. 24287. While we ordinarily do not view a written response to such lamentations as typify the Minority's Dissent as constructive, and not withstanding the fact that this Award certainly needs no "boost" from this writing inasmuch as it is perfectly clear and correct standing alone, we feel that after the Dissentors' remarks, we must set the record straight.

The Dissentors first complain the Majority "chose to ignore" previous Public Law Board Awards they thought should have brought them a different result. A reading of Award No. 24287, with its three pages of discussion of those precedents, demonstrates, beyond an atom of doubt, that they were not ignored. For good reasons, as we will briefly point out below, they were rejected.

The Dissentors relied upon Award No. 91 of Public Law Board 4269 (Don B. Hays) which found the Agreement language at issue in this case to contain "**latent ambiguity**". The Hays Board

Another myth the Dissentors create is that Public Law Board 5180 Chairman and Neutral Member David P. Twomey "confirmed", in Awards Nos. 100 and 101, the "latent ambiguity" the Hays Board had earlier found in the language at issue in this case. Chairman Twomey said nothing of the sort. He instead warned the parties "to put on their cases fully and completely when presenting them to a Board". The inference is obvious, and it is no acknowledgment of or has any connection to perceived ambiguity of the Agreement language itself. Moreover, Chairman Twomey, as we indicated in our Award No. 24287, and touched upon above, upheld the Organization's position in a similar, earlier case (Public Law Board 4990, Award No. 30). It is impossible to read Chairman Twomey's comments as confirming the Hays Board's finding of ambiguity.

This case involved what is considered both a BLE and UTU National Rule. Both versions have now been interpreted by several arbitration tribunals, and each, upon considering the merits of the positions studied by this Board in reaching Award No. 24287, with the solitary exception of the Hays Board, reached the identical conclusion, that Article VIII, Section 1 (d) of the Award of Arbitration Board No. 458 clearly and unambiguously preserved switching allowances applicable under Article V, Section 7 of the June 25, 1964 National Agreement or similar individual railroad agreements for employees with seniority predating the 458 Award, whether or not the switching was in connection with their own trains. A National Rule cannot mean one thing on all of the nation's railroads, and mean just the opposite on one, regardless of the desirability of so novel a concept by the Dissentors.