Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25921
Docket No. 45844
02-1-N-2268

The First Division consisted of the regular members and in addition Referee Charles P. Fischbach when award was rendered.

PARTIES TO DISPUTE: (Keith A. Bennett, Richard E. Bell, Chris A. Bragg,
(Michael T. Church, Ronald W. David, Garth C. Esteridge
(James T. Etter, Jr., George A. Griffith, Bobby W. Gross,
(Cloyd D. Jefferies, Alvin D. Marchant, George A.
(Saunders, III, Carl E. Tabor, J. M. (Sonny) Wade and
(Thomas E. Wallace
(
(Norfolk Southern Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of members of the United Transportation Union ('Organization') employed by Norfolk Southern Railway Company ('Carrier') fifteen of whom are named above ('Claimants') seeking re-computation of the accrual amount for these employees who retain their rights to Productivity Fund 12 after an agreement made in 1995, which permitted employees participating in that fund to receive a lump sum payment in exchange for releasing their rights to future periodic payments from the remaining Productivity Fund (now changed to 'Fund 41'). Claimants named above claim that the accrual rate was improperly reduced by inclusion in the reduction computation of certain persons working outside of the fund territory on the effective date of the 1995 agreement to the past interpretation given to the 'in active service' requirement by the Carrier.

"Claimants maintain that the Carrier improperly reduced the accrual rate of Fund 41, as well as predecessor Fund 12, and that back pay be awarded to all individuals that elected to retain their rights to Fund 41 on July 10, 1995, retroactive from the date on which the Carrier first made payments and for all times hereafter."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 dispute here is rooted in the modifications to the 1984 Crew Consist Agreement the Carrier and Organization negotiated in 1991 and 1995 covering certain employees operating on the Norfolk and Western property. In retrospect, the 1984 Crew Consist Agreement provided for a crew composed of a conductor (foreman), a first brakeman (helper), and a second brakeman's position that was to be phased out through attrition. Under this Agreement, the Carrier had the right to operate with a "reduced or short crew" consisting of an engineer, conductor and one brakeman. The 1984 Agreement also established productivity funds for numerous territories, which were determined by the Organization. This type of fund provided the means by which the Carrier and the employees deemed to be protected under the Agreement could share in efficiency gains based upon the utilization of reduced crews.

The productivity funds involved in the instant complaint are Funds 11, 12 (later changed to Fund 41 for accounting purposes, but still referred to herein as Fund 12), and 13, all of which covered separate territories in the Carrier's "Pocahontas Division." Fund 11 encompassed the Bluefield Yard, while Fund 13 comprised the Williamson Yard. Fund 12 covered the road territory surrounding the Bluefield and Williamson Yards. The geographical boundaries of these funds were based on prior rights seniority of the affected employee groups. Yet all the employees covered by them had seniority rights in the territories of all three funds. As noted, employees embraced by the 1984 Crew Consist Agreement were considered "protected employees" and placed in the appropriate productivity fund group.

Each time the Carrier operated with a reduced crew over a designated territory, it made a fixed payment (called an "accrual payment") in the amount of $53.25 to the productivity fund of that territory. Tours of duty worked by protected employees on reduced crews in any of the referenced fund territories gave them credits to share in the appropriate fund. The Carrier on an annual basis disbursed the accrued payments made to these funds to the protected employees according to their trip credits and share value. Such payment was known as a "share amount."

The 1991 Agreement further reduced the crew size by permitting the attrition of the other brakeman's position, leaving under certain circumstances a crew consisting of an engineer and conductor. Moreover, the 1991 Agreement modified the productivity funds to the extent that employees were given the option to participate in or terminate the funds and accept fixed lump sum payments. In the latter respect, the Agreement provided for a lump sum payment of $20,000 in December, 1991, and another lump sum payment of $40,000 at retirement, death or resignation. Although the 1991 Agreement was subject to ratification by all the employees in Funds 11, 12 and 13 (including employees in four other productivity funds covered by this accord), the decision to buy out a specific productivity fund was determined by a separate vote of the affected employees within the particular productivity fund district. The fund buyout was offered on the basis that an entire fund was terminated, otherwise no members of the fund would be entitled to or accept a buyout. Conditions of this offer were twofold: (1) the Carrier made no more monetary accruals to the terminated fund; and (2) conductors and trainmen (foremen/yardmen) had to be "in active service" on November 1, 1991 to be eligible to receive the two lump sum payments. The "in active service" requirement was contained in Side Letter No. 2 of the 1991 Agreement.

Several locals of the Organization were involved in the ratification process. Claimants belonged to Bluefield Local 655 ("Local 655") and Fund 12. Local 655 operated primarily within the Carrier's Pocahontas Division. While the 1991 Agreement was ratified by an at-large vote, the employees assigned to Funds 11 and 13 voted to terminate and sell their funds. The employees in Fund 12 which, as noted, included the Claimants, voted to retain their fund An examination of the record reveals that a number of employees who were members of Funds 11 and 13 were not physically working in the yard territories of those funds on the date in question to determine their "in active service" in relation to their eligibility for the two lump sum payments. Consequently, the employees who marked up for active service but worked outside the yard territory of either Fund 11 or Fund 13 did not receive the lump sum buyout unlike those who were working in the respective yard territories of these funds

on November 1, 1991. Yet the employees covered by Fund 11 and 13 who did receive a lump sum buyout continued to receive credits for Fund 12 shares when they worked a tour of duty in that fund's territory. However, if the same employees worked a tour of duty in the Funds 11 and 13 territories, there were no existing funds from which they could draw their shares because both funds had been terminated and sold. In this regard, the record does not disclose that any claim and/or grievance was progressed by an employee or Organization representative disputing the fact that members of Fund 11 and 13 were excluded from receiving lump sum payments who were not working in those fund territories in November 1, 1991.

Local 655, whose members were a party to the ratification process of Fund 12, acquiesced in permitting prior rights yardmen who had been members of either Funds 11 or 13 to draw a monetary share from Fund 12 for each trip credit accrued when having worked in the yard territories their former funds had covered. Under these circumstances, the record reveals that the members of Local 655 directed one of the two General Chairmen signatory to the 1991 Agreement not to progress a claim in this matter. Accordingly, no dispute existed between the Organization and Carrier in 1991 with respect to the construction of the term "in active service."

However, the Claimants and other members of Local 655 filed a lawsuit in the U.S. District Court challenging the manner in which the Organization conducted the voting process that resulted in the ratification of the 1991 Agreement and, in particular, the retention or termination and sale of Funds 11 and 12, as well as questioning the Organization's duty of fair representation. Bennett, et al. v. Norfolk & Western Ry Co., et al., Case No. 92-0381 (S.D. W. Va.). On March 31, 1994, the district court granted the defendants' Motion for Summary Judgment dismissing the case with prejudice. Subsequently, the United States Court of Appeals for the Fourth Circuit, on July 31, 1995, affirmed the district court's entry of summary judgment in favor of the Carrier and the Organization. This appeal largely focused on the sale of Fund 11 pursuant to Side Letter No. 2 of the 1991 Agreement. The primary issue arose from inaccurate information purportedly given to the affected employees by the Organization. However, the appellate court found no evidence of causal nexus between the alleged misinformation and the claimed injury. In short, the complainants there failed to show that given the correct interpretation of Side Letter No. 2 the productivity fund in question would have failed. Nor, the appellate court found, could they show that the Organization had breached its duty of fair representation. Unable to establish a claim against the Carrier, the appellate court determined that summary judgment against the complainants was appropriate.

The next turn of events occurred when some members of Local 655 had a renewed interest in selling their productivity shares in Fund 12 in exchange for lump sum payments. This prompted the request from Local 655 in 1994 to the General Chairmen representing, respectively, trainmen/yardmen and conductors to enter into negotiations with the Carrier, which they did. The General Chairmen and the Carrier explored alternatives to the fixed approach in the 1991 Agreement for a productivity fund buyout. In the course of negotiations, parties arrived at a proposal they believed accommodated all Fund 12 members by permitting them to individually elect whether to sell their rights to draw shares from the fund. Employees who did not want to have their interest bought out would continue to participate in the fund, subject to a formula that would permit the Carrier to reduce its contribution (i.e., accrual payments) to the fund proportionally by the percentage of eligible employees choosing to accept the lump sum buyout. This formula was spelled out in the proposed 1995 Agreement and Side Letter No. 1 thereto.

Specifically, the proposal provided three election choices for members of Fund 12. A lump sum payment of (1) $40,000 in November, 1995, and a final lump sum payment of $20,000 at retirement, death or resignation; (2) a lump sum payment of $30,000 in November, 1995, and the final lump sum payment of $40,000 at retirement, death or resignation; or (3) the employees could elect not to accept the lump sum payments and continue to receive trips for fund shares and receive an annual monetary distribution. This proposal had language regarding the employee's eligibility to receive the lump sum payments that was identical to the 1991 Agreement, except the "in active service" requirement date was now July 31, 1995.

The foregoing proposal was sent to the members of Local 655 who were covered by Fund 12 for ratification. Members of Local 655 did not ratify this proposal. Instead, they requested the General Chairmen of the trainmen and conductors, respectively, to reopen negotiations with the Carrier. In this instance, Local 655 sought continued full accrual payments without any reduction by the Carrier for members who chose not to sell their interest in Fund 12. General Chairman King presented this demand to the Carrier, which the latter rejected. Eventually, the parties reached an Agreement again revising the Crew Consist Agreement, to wit, establishing provisions for lump sum allocations and future accrual payments to Fund 12. Unlike the Agreement of 1991, the new provisions allowed individuals to opt out of the fund distribution and accept lump sum payments on a bifurcated basis.

fund members triggered the formula under the 1995 Agreement by which the Carrier's contribution to the fund was to be reduced based on a percentage of employees opting to accept the lump sum payments. Accordingly, the Carrier proportionally reduced its contribution by the percentage of the 196 employees who chose the buyout. Of the 196 employees, thirteen employees were marked up for active service in a territory outside of Fund 12. As members of Fund 12, the Claimants took issue with these thirteen employees being included in the formula which increased the percentage to further reduce the Carrier's accrual payments into the fund. The crux of their complaint was that the Carrier now applied the term "in active service" contrary to the interpretation placed on that language in the 1991 Agreement; i.e., the Carrier in 1991 did not allow employees working outside the territories of Fund 11 or Fund 13 to participate in the buyout of their productivity shares in the form of lump sum payments, but allowed such a buyout in 1995.

In light of this complaint, Claimant Bennett, on December 21, 1995, requested that the Organization file a grievance with respect to the Carrier's reduced contribution to Fund 12. To justify this grievance, Bennett alleged that the Carrier erroneously included more than twenty-five employees into the equation when calculating the reduction in the percentage of its accrual payments to this fund. Later on, Claimant Bennett wrote to several Organization officers, including General Chairman King, on June 6, 1996, alleging that the Carrier had reneged on its commitment to provide him with information necessary to his grievance which he wanted to progress to a Public Law Board. Here, too, he requested that a grievance be filed by the Organization to compel the Carrier to supply the requested information. Addressing similar assertions in Bennett's correspondence of May 22, 1996, the Carrier replied on June 25, 1996, stating that the matter at issue was being reviewed by counsel because it was germane to pending litigation that he and other employees had filed. In separate correspondence to the Organization the following day, the Carrier observed that it had no record of any grievance purportedly filed by Bennett, or from anyone else with respect to Fund 12.

On August 23, 1996, General Chairman King responded to Bennett's allegations opining "...that employees with seniority in the territory of Fund 12 were eligible for the productivity fund buyout even if not working in Fund 12 at the given time, so long as they were in active service and had not previously obtained a productivity fund buyout.***" Judging from this letter, King had no intention to pursue a grievance on behalf of Bennett and others contesting the manner in which Fund 12 was administered and funded by the Carrier.

The first recorded protest filed by Claimant Bennett with the Carrier's Director of Labor Relations surfaced on January 17, 1997. In filing this protest, Bennett apprised the Carrier that he is taking this action himself rather than through the Organization. He requested that the Carrier provide him with all information it had utilized to calculate the last three productivity fund sheets of 1996. The Carrier's Director of Labor Relations responded on February 15, 1996, informing Bennett that his grievance was vague and overly broad, while affirming the Carrier's position that all figures stemming from productivity fund calculations were correct. Further, the Director of Labor Relations noted that the Carrier received no grievance from Bennett's duly authorized Organization representative, but advised that if he had specific questions, they would be given consideration. Bennett responded to the Carrier's request on March 7, 1997, posing questions regarding the calculation of reductions in productivity fund distributions and the July 10, 1995 modifications to Fund 12. The Carrier replied to Bennett's inquiries on March 24, 1997, again noting their lack of specificity in addition to the fact that any grievance filed by him would be considered time barred. According to the Carrier, the 1984 Crew Consist Agreement made it a requirement that any dispute regarding the disbursement of productivity fund payments be filed within forty-five days from the end of the payroll period, which did not occur in this instance. Besides, the Carrier asserted no grievance regarding this matter was filed in accordance with the time limits set forth in the parties' Schedule Agreement.

Because of Bennett's continuing dissatisfaction with the Carrier and the Organization over the 1995 Agreement, he had Local 655 file an internal appeal on his behalf with the Organization's Board of Appeals. Bennett challenged the percentage reduction utilized by the Carrier to reduce the accrued amounts it contributed to Fund 12. The Board of Appeals found the percentage formula reduction applied by the Carrier to be consistent with the terms of the 1995 Agreement and denied Bennett's internal appeal on August 8, 1997.

As Secretary/Treasurer of Local 655, Bennett next filed a grievance on October 27, 1997 with the Carrier's Superintendent of the Pocahontas Division on behalf of twenty-eight participants of Fund 12. Bennett sent a copy of the grievance to General Chairman King. In essence, the complaint here was similar to the one Bennett previously filed since it continued to dispute the calculation based upon employees' accepting buyout packages who allegedly were not working on the property at the time the 1995 Agreement was consummated. King responded on November 3, 1997,

informing Bennett that his grievance was improperly filed because it appeared he was questioning the total number of trips credited to Fund 12. According to King, this type of complaint should have been directed to the Carrier's Payroll Department as required by the 1984 Crew Consist Agreement.

To protect his right to pursue this complaint, King filed a grievance on Bennett's behalf with the Auditor of Payroll. Nevertheless, Bennett's original grievance was declined by the Carrier's Division Superintendent as being vague and ambiguous. Despite this declination, King met with the Carrier's Payroll Department to discuss the total credits for Fund 12. During that meeting, it was discovered that one employee's seniority date precluded him from participating in the fund. Since he had been incorrectly credited with trips for fund shares, the Payroll Department removed this employee's credits and adjusted the fund's share value to reflect the correction. Although two other employees' fund shares had been questioned, the Payroll Department determined that they were properly being allowed trip credits. Other than the one adjustment, the total credits for Fund 12 were considered accurate. King notified Bennett on December 1, 1997 that he found no other errors in the processing of the fund to justify his grievance. Besides, King responded to Bennett's letter of November 29, 1997, regarding the latter's clarification of his original October 31, 1997 grievance, reiterating that the Carrier's Payroll Department and not the Division Superintendent was the proper office to file any questions or grievances regarding this productivity fund. In this context, King recommended that Bennett request the assistance of the General Chairman for the trainmen and yardmen to handle his grievance if Bennett had any disagreement with him.

Notwithstanding King's advice, Bennett resubmitted a clarified version of his October 31, 1997 grievance to the Division Superintendent who denied the grievance on December 1, 1997. The denial was largely based on procedural and substantive grounds. Specifically, the Division Superintendent again informed Bennett that his grievance was vague. He further advised that only the General Chairmen representing the conductors or trainmen and yardmen, and not Bennett, were the authorized representatives to handle complaints pertaining to Fund 12. The Division Superintendent's action was not appealed to the next level of the contractual dispute resolution process.

Nearly ten months elapsed before W. R. Eubanks, General Chairman for the trainmen and yardmen, wrote to the Carrier's Director of Labor Relations on September 3, 1998, advising that he would be handling Bennett's grievance. Without

conceding whether Bennett's grievance was valid, the Director of Labor Relations, on September 14, agreed to meet with Eubanks. An audit of Fund 12 for the 1998 fund year was conducted as a result of their meeting. Inaccuracies were discovered and corrected. By letter dated January 21, 1999, the Director of Labor Relations informed Eubanks that ineligible employees had been credited in Fund 12 for the fiscal fund year in October, 1998 and that the noted inaccuracy had been corrected. General Chairman Eubanks signed this letter on February 4, 1999, acknowledging the discrepancy and verifying it had been corrected.

Despite this audit of Fund 12 and the corrections that were made, Bennett continued to pursue his grievance. Eventually, the Organization assigned Vice President P. L. Patsouras to this matter. On July 13, 2000, Patsouras wrote to Eubanks regarding the issue Bennett and other employees had over the administration of Fund 12. Patsouras reported that the Carrier allowed employees who were not working in Fund 12 territory to receive lump sum payments and included them in the percentage ratio to reduce the Carrier's fund contribution. Insofar as Patsouras was concerned, there was no dispute between the Carrier and the Organization with respect to the definition of an eligible employee who could participate in the lump sum payments and the calculation used to determine the Carrier's contribution. Vice President Patsouras observed that had there been any disagreement between the parties over the proper application of the 1995 Agreement provisions in question, the Organization would have contested the procedures used by the Carrier. Concluding, Patsouras advised Eubanks that "we cannot proceed to arbitrate a 'dispute' between the Organization and Carrier at a time when a 'dispute' never existed between the parties regarding the subject in the past. For the Organization to raise a dispute at this time because of the personal views of some members would never succeed."

Dissatisfied with Patsouras' contention, Bennett asked him to state the Organization's position regarding the administration of Fund 12. In responding to this request, Patsouras reminded Bennett that he had inquired of him when they initially discussed this matter whether it was a case of first impression or one that had already been addressed. Having received Bennett's assurance that the dispute over Fund 12 had not been dealt with on an earlier occasion, Patsouras further investigated this matter and discovered that he had been misled because the Organization's Board of Appeals had previously considered Bennett's complaint after he submitted it for review and denied his appeal. Accordingly, Patsouras suggested to Bennett that if he was displeased with the handling of his dispute and wanted to pursue it elsewhere, he should submit the matter to the First Division of the National Railroad Adjustment Board. Yet

Patsouras cautioned him that "timeliness may be an issue since the complained event occurred in 1995."

Disregarding Vice President Patsouras' advice, Bennett and a number of employees filed a third lawsuit on July 1, 2001 against the Organization and the Carrier relative to Fund 12, which is presently pending. Bennett, et al. v. UTU, et al., Case No. 01-0432 (S. D. W. Va.) However, a year later, on January 28, 2002, the attorney of record in this lawsuit, acting on behalf of Bennett and the other named Claimants, submitted the instant claim directly to the Carrier's Director of Labor Relations. Claimants' attorney asserted that the dispute subject to this claim concerns the Carrier's share amount or contribution for Fund 12 which allegedly had been erroneously calculated since October, 1995 because the Carrier included in the percentage formula to reduce the share amount employees receiving lump sum payments who worked outside the geographical territory of Fund 12. The attorney for the Claimants opined that these employees should have been excluded from the percentage formula utilized to determine the Carrier's contribution; i.e., the inclusion of these employees in the computation improperly diluted the Carrier's monetary accrual contribution to Fund 12 to the financial detriment of the Claimants and other employees remaining in this fund.

Again questioning the inconsistency in which the Carrier has interpreted and implemented the "in active service" requirement under the 1991 and 1995 Agreements for purposes of allowing certain individuals to receive lump sum payments, the Claimants, through their attorney, asserted they have been improperly obstructed by the Carrier from lawfully challenging the latter's interpretive application of this requirement as it affects the share amount for employees electing to retain their rights to receive future productivity fund payments. To remedy this situation, the Claimant seeks recomputation of the actual rate based upon a correct reduction formula, and back pay, from the time of the Carrier's reputedly wrongful interpretation on or about October 1, 1995 until the present.

On February 22, 2002, the Carrier's General Solicitor responded to the allegations by the Claimants' attorney, giving the reasons why the claim, in the manner appealed, was invalid. According to the General Solicitor, the claim was defective on both procedural and substantive grounds. The Carrier's initial procedural objection, as indicated by the General Solicitor, was that the Claimants' attorney did not handle the matter at issue pursuant to Article 18 of the 1984 Crew Consist Agreement; i.e., any dispute regarding an "erroneously calculated share amount" be appealed in writing to

the Carrier's Director, Payroll/Accounting, and following disposition of the appeal, the dispute is barred unless appealed by the Organization's General Chairman to the Carrier's highest designated officer within thirty days. Here, the General Solicitor maintained it was indisputable that this procedure was not followed, and for that reason, the claim was barred.

Alternatively, the General Solicitor stated that the April 1, 1954 Time Limit on Claims Rule in effect on the Carrier provided the avenue for an employee or the duly authorized representative to file a claim or grievance with the designated supervisory officer within sixty days from the date of the occurrence. Otherwise, the claim or grievance would be barred from further handling. As noted by the Carrier's General Solicitor, the claim presented by the Claimants' attorney was based on an alleged erroneous calculation that occurred in 1995. From the Carrier's perspective, the submission of the instant claim was clearly outside of the time limits prescribed by the Time Limit on Claims Rule. Moreover, the General Solicitor posited that this claim was not filed by the Claimants or their duly authorized representative as required under the controlling Agreement.

Next, the General Solicitor objected to the claim on the basis that it disputed the legality and propriety of the 1991 and 1995 Agreements, and their implementation, which were previously litigated to final adverse judgments against the Claimants. Accordingly, the General Solicitor concluded that the claim was also barred by "res judicata and collateral estoppel."

With respect to the merits, it was the Carrier's position, as explained by the General Solicitor, that the claim submitted by the Claimants' attorney contained vague allegations and assertions void of any Agreement support to provide for the restoration "of the accrual rate to what it should have been" and back pay for the Claimants "for all previous fund disbursements made under Fund [12] since its inception on or about October 1, 1995."

For the foregoing reasons, the Carrier declined the "appeal" of the claim. Not to be deterred by the Carrier's decision, the attorney for the Claimants progressed the claim to this Board subject to the Notice of Intent he filed on their behalf seeking adjudication.

The Board has thoroughly reviewed the factual record in this case correlatively with the respective arguments advanced by the parties. Mindful that the Organization,

of which the Claimants are members, is not a party to the instant claim, the position it hitherto has taken on the matter at issue is, nevertheless, part of the record.

While the matter before the Board is framed as one of contact interpretation, the underlying issue is the Claimants' dissatisfaction and endeavor to nullify the last in a series of crew consist agreements governing the operation of productivity funds on the Carrier's property. The Claimants collaterally attack and attempt to arbitrate the merits of the 1995 Agreement between the Carrier and the Organization. Simply stated, the Claimants refuse to accept the application of the 1995 Agreement which allowed certain previously excluded employees (who were members of the Organization) to participate in lump sum buyouts from the productivity fund the Claimants are in, viz., Fund 12.

As recounted herein, the Carrier and the Organization entered into crew consist agreements in 1991 and 1995 which provided opportunities for Organization-represented trainmen and conductors to obtain a bifurcated lump sum payment from the Carrier in lieu of periodic payments from a productivity fund into which the latter contributed each time an employee worked on a train with a reduced crew. After the 1991 Agreement was adopted, the Carrier denied the lump sum buyout to a group of employees participating in Fund 11, taking the unchallenged position that the employees in question were not "in active service" on November 1, 1991, because they were not actually "marked up" for work in the geographical territory of the fund which was sold. Nevertheless, those employees were subsequently allowed to continue to earn trip credits in Fund 12. Claimants, who participated in Fund 12, were patently aware that former Fund 11 participants were also participating in their fund.

The 1995 Agreement was negotiated to modify the terms of the 1991 Agreement which only offered the lump sum payment if the so-called "sale" of that fund was approved by a majority vote of its participants. It provided for the "partial sale" of the funds by allowing employees individually to elect to receive a lump sum buyout regardless of the other members' preferences. To address the situation where employees had been denied a lump sum from Fund 11, the 1995 Agreement also changed the Carrier's application of the "in active service" requirement by giving those employees the option to take a lump sum buyout from Fund 12, in which they had continued to earn trip credits, without regard to whether they were working in that fund's geographical territory on the designated date.

To adjust to the reduced membership in funds experiencing a "partial sale", the 1995 Agreement provides for a corresponding reduction of the Carrier's contribution to a fund based on the percentage of employees leaving that fund. The formula for the reduction is stated in paragraph (B) of the 1995 Agreement, with its application set forth in Side Letter No. 1, both dated July 10, 1995. The complaint before the Board centers on the inclusion of the employees excluded from the sale of Fund 11, who opted to take a lump sum from Fund 12, in the calculation to reduce the Carrier's contribution to Fund 12. It is evident, however, that the Claimants were fully aware of this formula even before the 1995 Agreement was ratified, because based on their objections, General Chairman King proposed that the Carrier maintain its contribution at $53.25 without reduction. That proposal was rejected by the Carrier on May 24, 1995. Shortly after the 1995 Agreement went into effect upon ratification, General Chairman King clarified the application of the formula in a letter of November 20, 1995 to the Local Chairmen for conductors in Bluefield and Williamson performing the math and showing that the percentage formula did not reduce the actual amounts received by the remaining participants after the exodus of participating employees from Fund 12.

Suffice it to say that the 1995 Agreement was negotiated between the Carrier and the Organization, and applied consistently according to its terms. It was negotiated as a new agreement to modify some of the practices established by the 1991 Agreement. The 1995 Agreement was properly ratified, and survived a challenge in federal court in Bragg, et al. v. King, et al., supra, where many of the same issues were raised that are prevalent in the matter presented to the Board.

If there was any doubt as to the correct interpretative application of the 1995 Agreement, it was fully resolved with the handling of Claimant Bennett's request to the Organization on December 21, 1995 that a grievance be filed on his behalf regarding the Carrier's reduced contribution to Fund 12. Once again, the crux of Bennett's complaint was that the Carrier had erroneously included in the equation to calculate the reduction in the percentage of its accrual payments to Fund 12 a certain group of employees who received buyouts. General Chairman King considered such a grievance to be meritless, explaining to Bennett that the employees in question had seniority in Fund 12 territory and were eligible for productivity fund buyouts whether or not they were working in geographical territory of the fund at the given time so long as those employees were in active service. Since the Organization's interpretation with respect to the term "in active service" did not differ from that of the Carrier's, King saw no compelling reason to pursue Bennett's purported grievance. It is a well-established labor relations principle that a union is under no obligation to bring a grievance on

which it has little or no chance of success. Under these circumstances, King did not act inappropriately.

Not content with this interpretation, Bennett appealed King's decision to the Organization's Board of Appeals. Here, too, Bennett complained about employees working outside of Fund 12 territory who were included in the total percentage used by the Carrier to reduce the per trip run contribution. The Organization's Board of Appeals upheld General Chairman King's position that the 1995 Agreement had not been violated and that the formula applied by the Carrier calculating annual productivity payments based on its contribution to the productivity fund was correct. Significantly, the Board of Appeals found no Agreement support requiring employees/participants in the productivity fund holding train service seniority to be working within the geographical territory of Fund 12 in order to qualify for a buyout. These findings are memorialized in the Board of Appeals decision of August 8, 1997, Case No. 367-File 8-8-357.

The Organization's treatment of Claimant Bennett's earlier attempt to grieve on the same subject now before this Board is indisputable evidence that the Organization and the Carrier did not differ in their interpretive application of the meaning of an "in active service" employee, or the manner in which the percentage formula to determine the Carrier's contribution to Fund 12 would be calculated in relation to the productivity payments to participating employees. As the highest designated Organization representative under the Railway Labor Act, General Chairman King had the authority to make and then interpret the Agreements at issue in this dispute. Such statutory authority does not extend to the Claimants' attorney or the Claimants themselves. Furthermore, King and General Chairman Eubanks conducted independent audits of Fund 12, found some inaccuracies, had them corrected, and so notified Bennett that these discrepancies had been rectified. The record also indicates that another Organization representative, Vice President Patsouras, conveyed to Bennett that no dispute existed between the parties to the 1995 Agreement. Under these circumstances, all three of the Organization's representatives acted responsibly. Accordingly, the Board finds that the Claimants' productivity fund payments are deemed correct and consistent with the terms of the 1995 Agreement and the intent and understanding of the parties to that Agreement.

In light of the foregoing findings, there is no need for the Board to determine whether the instant claim is barred by res judicata preclusion or collateral estoppel. Yet the Board has not overlooked the indelible fact that essential elements of this

dispute have surfaced in previous complaints pursued by Claimant Bennett and many of the other Claimants who are similarly situated participants in Fund 12. There must be an end at some point to the same dispute, like the one here; otherwise nothing is resolved resulting in endless controversy.

Even if the claim had merit, it would be denied because of procedural irregularities violative of the Railway Labor Act and the applicable time limits prescribed in the controlling labor agreements. Specifically, the claim was submitted to the Board after the Claimants' attorney filed a Notice of Intent on their behalf seeking adjudication. Absent statutory and contractual support, the attorney for the Claimants had no legal authorization to file a Notice of Intent at their request. On this point, Section 3, First (i) of the Railway Labor Act states that "... disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board ...." Simply put, counsel for an aggrieved employee(s) does not have standing under this statutory requirement to file such a petition to any of the divisions of the National Railroad Adjustment Board. Progression to this Board is restricted to the employee, carrier or duly authorized representative, viz., the labor organization. To maintain that the Claimants' attorney in this instance was the "duly authorized representative" because he attempted to handle their claim on the property is not persuasive and a construction of language that would contravene the intent of the Railway Labor Act. Precisely on point are First Division Awards 24100 and 24138. This statutory departure constitutes a fatal procedural flaw nullifying the claim.

Notwithstanding the statutory procedural requirement, other egregious procedural mistakes were committed by the Claimants. Since the Claimants' complaint disputed the share amount and accrual rate calculated by the Carrier for Fund 12, it was incumbent upon them to appeal a dispute of this nature in writing to the Carrier's Director, Payroll Accounting within forty-five days from the end of the payroll period in question. This procedural requirement is contained in Article 18, Section D(2) of the 1984 Crew Consist Agreement which remained in effect under the modifying Agreements of 1991 and 1995. Pursuant to the applicable time limitation, an unfavorable disposition of the claim by the Director, Payroll Accounting must be appealed by the Organization's General Chairman to the Carrier's highest designated officer within thirty days. Neither requirement was followed by the Claimants in the usual and customary manner. Arguably, if the appeal process set forth in the Crew Consist Agreement did not strictly control, the Claimants were then required to utilize the Time Limit on Claims Rule under the Schedule Agreement by filing their claim with the Carrier's designated supervisory officer within sixty days of the date of the

occurrence. The record clearly shows they failed to adhere to this contractually mandated requirement. Here, too, the Claimants' alleged complaint was not handled in the usual and customary manner required of this Rule and was similarly time barred.

Given the foregoing reasons, the claim on behalf of the Claimants not only lacked a substantive basis but was also procedurally defective on statutory and contractual grounds.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 29th day of October 2003.