

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 26059

Docket No. 45935

04-1-02-1-S-6836

The First Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Locomotive Engineers  
(Kansas City Southern Railway Company (SouthRail))

**STATEMENT OF CLAIM:**

“Claim that the Carrier freeze the seniority of SouthRail Engineers L. W. Smith and S. D. Parker effective September 1, 2000 account of both Engineers refusal to comply with the terms of Article VI — Seniority Maintenance Fee.”

**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 UTU participated in this matter on behalf of its affected members, but not with full party status. The UTU's arguments have been considered.

Article III, Section 1 (Schedule of Collective Agreement) of the August 1, 2000 Agreement between the Carrier and the BLE on behalf of employees represented by the BLE of the former SouthRail Corporation provides that “[i]t is the intent of the parties to adopt the [sic] all of the provisions, including Implementing Agreements

and side letters of the March 31, 1986 MidSouth Schedule Agreement as modified April 1, 1992 and further modified April 30, 2000, unless specifically amended by this Agreement.”

Article VI of the April 30, 2000 MidSouth Schedule Agreement was not “specifically amended” by the August 1, 2000 Agreement and was therefore incorporated and continued by operation of the August 1, 2000 Agreement. That provision provides:

**ARTICLE VI - SENIORITY MAINTENANCE RULE**

**“Seniority Maintenance Fee:**

Effective the date of this agreement, engineers hired or transferring from train service or any other craft shall be subject to payment of their fair share of the expenses of negotiating and administering the collective bargaining agreement governing their rates of pay, rules and working conditions within the craft of locomotive engineers and in the protection of their continued engineers’ seniority as follows:

A. Engineers transferring to train service will have their engineers’ seniority placed in leave of absence status and will continue to accumulate such seniority. This will apply to the period of time that such employees are required to protect their train service seniority. Full dues or service fee payment to the BLE will be required while maintaining and accumulating engineers’ seniority.

B. A service fee will be required of engineers hired or transferring from train service or any other craft who do not hold membership in the BLE in order to defray the cost of negotiating and administering the collective bargaining agreement governing their rates of pay, rules and working conditions and for the maintenance and accumulation of engineers’ seniority.

C. The service fee specified in the preceding paragraphs shall be based upon the costs of negotiating and engaging in all collective

bargaining matters but in no event shall exceed the amount of full monthly dues of BLE."

By letter dated July 10, 2000, the BLE notified the engineers on SouthRail of its interpretation of Article VI to be effective August 1, 2000. In that letter, the BLE explained that it is the exclusive representative of engineers on SouthRail and negotiates the agreements for the craft and performs other representative functions and, therefore, the seniority maintenance fee is required to defray expenses for those activities for those engineers who do not pay dues to the BLE. The BLE further advised the engineers on SouthRail:

"Article VI of the SouthRail/MidSouth-BLE Schedule Agreement does not take away your rights to belong to the Organization of your choice. Engineers on the SouthRail can belong to the BLE Division 450 or to the UTU's Trainmens Local. The choice is yours. The decision a non-BLE Member Engineer must make is - if you choose not to belong to one of the BLE Divisions and the UTU is your union of choice, then along with paying your UTU Trainman dues, you will be required to pay a Seniority Maintenance Fee effective September 1, 2000. If a non-BLE Member chooses not to join Division 450 and is unwilling to pay the fee, then the non-BLE Member's Engineer Seniority will be frozen as September 1, 2000."

~~Engineers L. W. Smith and S. D. Parker are UTU members holding SouthRail engine service seniority dates prior to August 1, 2000 (April 22, 1992 and July 3, 1998, respectively) who, although given the opportunity to do so, refused to pay dues or the seniority maintenance fee to the BLE as requested in the BLE's July 10, 2001 letter. Upon learning that Smith and Parker did not opt to pay dues or the seniority maintenance fee to the BLE, by letters dated March 2, 2001, Smith and Parker were again told of the requirement and consequences of Article VI concerning payment. Smith and Parker again did not comply with the payment options set forth in Article VI.~~

On January 2 and July 17, 2002, the BLE requested that the Carrier freeze the seniority of Smith and Parker effective September 1, 2000. The Carrier refused to do so taking the position in its August 23, 2002 letter that "there is no provision contained in the Agreement that permits seniority to be frozen ... [and i]t is further the Carrier's position that this Article [VI] is not applicable to these two (2)

engineers as their seniority dates in engine service precede the effective date of the Agreement.”

In short, Engineers Smith and Parker are UTU members holding seniority in engine service; as a result of the August 1, 2000 Agreement, Smith and Parker came to be represented under the Agreement between the Carrier and the BLE; although requested to do so by the BLE and advised of the consequences of failure to do so, Smith and Parker refused to pay dues or the seniority maintenance fee to the BLE called for in Article VI of the August 1, 2000 Agreement; and the Carrier declined to freeze their seniority as a result of their failure to pay.

The relevant provision in this dispute is Article VI(B) which covers “... engineers hired or transferring from train service or any other craft who do not hold membership in the BLE ...” The BLE argues that the Carrier violated Article VI when it did not freeze the seniority of Smith and Parker as requested by the BLE. We agree.

“The initial question in any contract interpretation dispute is whether clear contract language exists to resolve the matter.” Third Division Award 34207. The first question, then, is whether clear contract language supports the BLE’s position that in order for Smith and Parker to accumulate engineers’ seniority, they were obligated to pay dues to the BLE or, in the alternative, pay the seniority maintenance fee to the BLE in order to defray the BLE’s costs of negotiating and administering the Agreement on their behalf. That is exactly what Article VI clearly requires. Article VI(B) provides that “[a] service fee will be required of engineers hired or transferring from train service or any other craft who do not hold membership in the BLE ... for the maintenance and accumulation of engineers’ seniority” [emphasis added]. There is little left to the imagination by the phrase “service fee will be required”. Clearly, Smith and Parker can maintain their UTU membership and not pay dues to the BLE. However, if Smith and Parker choose that route, under Article VI(B) they “... will be required ...” to pay the seniority maintenance fee to the BLE “... in order to defray the cost of [the BLE’s] negotiating and administering ...” the Agreement on their behalf.

But the Carrier and the UTU argue that the obligation to pay the seniority maintenance fee specified in Article VI does not apply to Smith and Parker because Article VI is “[e]ffective the date of this agreement” (i.e., the August 1, 2000 effective date of the Agreement between the Carrier and the BLE on behalf of employees represented by the BLE of the former SouthRail Corporation); the payment

obligation applies to "... engineers hired or transferring from train service or any other craft" after that August 1, 2000 date; and, because Smith and Parker established engine service seniority long prior to that date, they are not required to pay the seniority maintenance fee. In effect, the Carrier and the UTU argue that Smith and Parker were "grandfathered" out of the seniority maintenance fee obligation by the operation of the language in the August 1, 2000 Agreement. We disagree.

First, in order to give the Carrier and the UTU (and therefore Smith and Parker) the benefit of the doubt, we will assume for the sake of discussion that the phrase "[e]ffective the date of this agreement" in the opening paragraph of Article VI makes the obligation to pay the seniority maintenance fee ambiguous with respect to Smith and Parker. Does "[e]ffective the date of this agreement" have the grandfathering effect to exclude Smith and Parker from the payment obligation (as urged by the Carrier and the UTU) or does it just define when the obligation to pay begins (as urged by the BLE)? Both interpretations are plausible. Because both interpretations are plausible, the language can be considered ambiguous. The tools of contract construction can then be used to resolve the ambiguity. Third Division Award 35457 ("... when language is not clear, the tools of contract construction can be used.").

Second, "[o]ne of the rules of contract construction is to interpret language to avoid illogical results." Third Division Award 35934. This rule of construction does not favor the position urged by the Carrier and the UTU.

Why would the BLE agree to language that, in effect, draws a red circle around all affected engineers holding engine service seniority prior to August 1, 2000 who were UTU members and grandfather them out of the seniority maintenance fee requirement and, on the other hand, then agree to negotiate and represent them and incur the costs of such activities? Simply put, that result does not make sense and is illogical. However, that is the result urged by the Carrier and the UTU.

Third, again considering the rule of construction for avoidance of illogical results, when we consider the court litigation that has occurred over these types of fees, the result sought by the Carrier and the UTU is even more illogical.

In *Corzine, et al. v. Brotherhood of Locomotive Engineers and Illinois Central Railroad Company*, 147 F.3d 651 (7th Cir. 1998), the BLE and the Illinois

Central negotiated a provision which, like here, required payment of a fee by UTU members to the BLE capped at the dues the BLE charged its members which fee was "... intended to compensate the union [the BLE] for the costs incurred by it in performing its duty of fair representation toward the UTU engineers." 147 F.3d at 652. The suit (in which the UTU was a party plaintiff along with two UTU members) alleged that the fee requirement violated the BLE's duty of fair representation under the Railway Labor Act. Failure to pay the fee, like here, did not cause the UTU member loss of employment, but the result of non-payment was "... that his seniority as an engineer will be frozen as of the date of the refusal, enabling other UTU engineers, those who do pay the service fee, as well as the BLE's members, to pass him on the seniority ladder and thus reduce his job security as an engineer." Id.

The court in Corzine found no breach of the duty of fair representation and upheld the imposition of the fee. The court noted that in prior litigation the BLE unsuccessfully argued that the UTU acted improperly by requiring that any engineer who wanted to retain seniority in the train service had to pay full union dues to the UTU even if the engineer had joined the BLE, noting that "[n]ow the shoe is on the other foot." 147 F.3d at 653-654. The court further observed (147 F.3d at 654-655 [emphasis in original]):

"... It is difficult to understand why, if the BLE has a statutory duty, as it does, to represent them, it cannot charge them for the actual costs of that representation. In the earlier litigation, the UTU engineers were being required to pay full union dues to protect a purely contingent right of seniority in the train service, and the courts said that was okay; here these engineers are being required to pay merely a service fee for the seniority and other benefits that the engineers' union has negotiated for them in their current employment. ...

The real injustice here is not the BLE's insistence on a service fee, but the UTU's insistence on charging full union dues (or the full agency fee) to engineers for whom it appears to be doing very little; mainly, just maintaining their seniority against the day when they are laid off as engineers, a day that may never come for most of them. ... It is apparent, however, that the bulk of the expense entailed in the representation of the UTU engineers is borne by the

BLE, yet the latter seeks only a service fee which cannot exceed its regular dues, whereas the UTU is charging the full union dues or agency fee to its engineer members. By getting seniority in two crafts as well as the full panoply of representative services, the UTU engineers are getting greater union benefits than BLE engineers, so it is not, unreasonable that they should pay more. What would be unreasonable, and fortunately is not required by the statute, is that they should have to pay everything to the UTU and nothing to the BLE, even though they are getting greater benefits from the latter than from the former and the latter is incurring greater costs than the former."

With that kind of decision from the Seventh Circuit in 1998 upholding the seniority maintenance fee on the Illinois Central, it is even more illogical that in the August 1, 2000 Agreement (which became effective after the decision in that case) that the BLE would agree that it would perform its representative functions for UTU members at no cost and would only seek to apply a seniority maintenance fee to UTU members transferring to engine service after that date. Given the decision in Corzine, the argument by the Carrier and the UTU that the BLE agreed to grandfather out the UTU members in engine service prior to August 1, 2000 makes all the less sense.

Fourth, as a result of Corzine, the BLE (as does the UTU) has the right under the Railway Labor Act to impose such fees as it did through negotiations with the Carrier. Stripped to its essence, the Carrier and the UTU are really arguing that the BLE waived the right to collect the seniority maintenance fee from those UTU members in engine service prior to August 1, 2000. Typically, waivers must be clear and unmistakable. See *Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. 693, 708 (1983) ("Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."). We have given the Carrier and the UTU the benefit of the doubt and considered the language ambiguous. Through the use of the rules of contract construction, we have then resolved the ambiguity against the position of the Carrier and the UTU. But as far as the waiver of the ability collect the seniority maintenance fee is concerned, language which is at best ambiguous does not amount to a clear and unmistakable waiver.

In sum, we find that under Article VI(B), the requirement to pay the seniority maintenance fee to the BLE in order for those employees to have an "... accumulation of seniority" falls upon all engineers under the Agreement who elect to remain members of the UTU irrespective of the date they entered engine service. The Carrier therefore violated Article VI when it allowed the seniority of Smith and Parker to continue to accumulate after they refused to pay the seniority maintenance fee to the BLE.

We now turn to the remedy.

This Board has broad authority with respect to fashioning remedies. "The function of a remedy for a demonstrated contract violation is to restore the status quo ...." Third Division Award 34026.

In July, 2000 and March, 2001, the BLE gave Smith and Parker fair and repeated warning of the obligation to pay and the consequences of not paying the seniority maintenance fee. Yet, Smith and Parker ignored those notices and the Carrier similarly refused — in violation of Article VI — to freeze their seniority as requested by the BLE. In the restoration of the status quo, it is within this Board's discretion to now require that the seniority of Smith and Parker be frozen as of September 1, 2000 as demanded by the BLE — the date specified in the BLE's letter to them dated July 10, 2000 — a date we find to be reasonable for the implementation of the requirements of Article VI as a result of the August 1, 2000 Agreement.

However, it is further within this Board's discretion to assume that the refusal of Smith and Parker to pay the seniority maintenance fee was because of a good faith — albeit incorrect — doubt that such payment could be required under the language of the governing Agreement. We shall give Smith and Parker the benefit of the doubt that such was the case. In the exercise of our remedial discretion, as the remedy in this case, in order to accumulate further seniority, Smith and Parker shall therefore have 30 days from the date of this award to begin paying the seniority maintenance fee to the BLE.

But Smith and Parker have not paid that fee for over four years and they have obtained the benefits of the BLE's representative services. It would be manifestly unfair — particularly to those other similarly situated employees who followed the BLE's advice and paid the seniority maintenance fee — to allow Smith and Parker, in effect, a four year free ride and at the same time allow their seniority



to accumulate. Therefore, in addition to the requirement that they begin paying the seniority maintenance fee to the BLE on a prospective basis, in order to accumulate further seniority commencing 30 days from the date of this award, on a monthly basis, Smith and Parker shall begin paying the equivalent of an additional one month's seniority maintenance fee to the BLE until their respective balances due for the time they did not pay are paid up.

Smith and Parker must recognize that by not immediately freezing their seniority as of September 1, 2000 and by allowing them to repay the balances they owe, this Board has given them a break — a big one. It is also within this Board's discretion to require immediate and complete repayment by them of the amounts owed. ~~However, we have chosen not to impose that requirement and allowed~~ monthly installment repayments, which amounts to giving Smith and Parker yet even more of a break. But, because we have given Smith and Parker the benefit of the doubt along with several breaks, should Smith and Parker fail to make all the required back payments within the time frames specified, their engineers' seniority shall be adjusted and frozen as of September 1, 2000.

On the whole, this remedy will sufficiently restore the status quo which resulted from the failure of Smith and Parker to pay the seniority maintenance fee as required by the BLE and the Carrier's failure to freeze their seniority for their not having done so as required by Article VI. Upon issuance of this award, the BLE shall advise Smith and Parker of the current seniority maintenance fee which they must begin to pay; the amounts they owe; and the monthly installments which they must pay to make up for the past payments they did not make.

Inasmuch as it has been argued that this Board lacks the authority to impose a freezing of seniority, we reject that argument. Article VI(B) (which applies where employees transfer from train service) provides that the seniority maintenance fee "... will be required ... for the ... accumulation of engineers' seniority." It therefore follows that if an engineer falling under the requirements of Article VI wishes to remain a UTU member, payment of the required fee is a condition precedent for "accumulation of engineers' seniority" and the consequence for failure to make that payment is not having the "accumulation of engineers' seniority" — i.e., having seniority frozen. Thus, in Article VI, the Carrier and the BLE clearly contemplated that failure to pay the seniority maintenance fee would mean that seniority would be frozen. Any other interpretation reads the phrase "accumulation of engineers' seniority" out of the Agreement. Moreover, in *Corzine*, the Seventh Circuit

recognized that seniority can be frozen for failure to pay the required fee. 147 F.3d at 652 (the result of non-payment was "... that his seniority as an engineer will be frozen as of the date of the refusal, enabling other UTU engineers, those who do pay the service fee, as well as the BLE's members, to pass him on the seniority ladder and thus reduce his job security as an engineer."). The District Court in Corzine made the same observation. Corzine, et al. v. Brotherhood of Locomotive Engineers and Illinois Central Railroad Company, 982 F.Supp. 1288, 1293 (N.D. Ill. 1997) ("Employees who refuse to pay the fees ... will not accrue engineer seniority ..."). If the parties negotiated the language specifying the consequence of an employee's failure to pay the seniority maintenance fee and the Agreement states that consequence and the courts have found that similar language means that seniority is to be frozen for those who do not pay the seniority maintenance fee, this Board surely has the authority to require that the Carrier freeze the seniority of those employees who fail to meet their seniority maintenance fee obligations under Article VI.

This Board shall retain jurisdiction for disputes, if any, which may arise under the remedy.

### AWARD

Claim sustained in accordance with the Findings.

### ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Dated at Chicago, Illinois, this 24th day of November 2004.