NATIONAL MEDIATION BOARD, ADMINISTRATOR
SPECIAL BOARD OF ADJUSTMENT NO. 1087

In the Matter of the Arbitration

-between-

Brotherhood of Maintenance of Way Employes

-and-

National Carriers' Conference Committee

OPINION AND AWARD
Case No. 5

In accordance with the October 25, 1996 Agreement in effect between the above-named parties, the Undersigned was designated as the Chairman and Neutral Member of the referenced Board to hear and decide a dispute concerning these parties.

A hearing was held at the offices of the Organization in Washington, District of Columbia on February 28, 2001 at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to offer evidence and argument and to examine and cross-examine witnesses consistent with the Agreement that created the Board. The Arbitrator's Oath was waived.

THE QUESTION AT ISSUE

The parties failed to stipulate an issue to be resolved by the Board. The parties authorized the Board to formulate an appropriate issue. The Organization proposed the following issue:

> Does a furloughed employee, otherwise retained in service subject to compensation pursuant to Article I, Section 1 of the

Mediation Agreement dated February 7, 1965, as amended by Article XII of the Mediation Agreement of September 26, 1996, ("Feb 7th Agreement) remain subject to coverage under the Railroad Employees National Dental Plan, the Vision Care Plan and the Railroad Employees National Health and Welfare Plan as though he/she were in active service?

The Carriers proposed the following issue:

Does Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended by Article XII of the Mediation Agreement of September 26, 1996, require a carrier to furnish continued coverage under the collectively bargained National Health and Welfare, Dental, and Vision Care Plans to an employee covered by that provision who is furloughed, or is continued coverage under those Plans determined solely by whether such employee meets the coverage requirements specifically set forth in those Plans?

On the basis of the arguments of the parties and a careful review of the entire record, the Board deems a fair statement of the issue to be:

Does Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended by Article XII of the Mediation Agreement of September 26, 1996, require a carrier to continue coverage under the collectively bargained National Health and Welfare, Dental, and Vision Care Plans for a furloughed employee, who is otherwise retained in service subject to compensation?

PERTINENT PROVISIONS

MEDIATION AGREEMENT
FEBRUARY 7, 1965

All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and had fifteen or more days of compensated service during 1964, will be retained in service subject to compensation as hereinafter provided unless or until

retired, discharged for cause, or otherwise removed by natural attrition. Any such employees who are on furloughs of the date of this Agreement will be returned to active service before March 1, 1965, in accordance with the normal procedures provided for in existing agreements, and will thereafter be retained in compensated service as set out above, provided that no back pay will be due to such employees by reason of this Agreement. For the purpose of this Agreement, the term "active service" is defined to include all employees working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not October 1, 1964 was a work day), all extra employees on extra lists pursuant to agreements or practice who are working or are available for calls for service and are expected to respond when called, and where extra boards are not maintained, furloughed employees who respond to extra work when called, and have averaged at least 7 days work for each month furloughed during the year 1964.

MEDIATION AGREEMENT
SEPTEMBER 26, 1996

ARTICLE XII - WORKFORCE STABILIZATION

Part A

Section 1 - The February 7, 1965 Agreement

Entitlement to certain elements of job security, currently available under the February 7, 1965 Agreement (Agreement), shall be upgraded, so that employees who have at least ten continuous years of service will be entitled to the protection.

Section 2

(a) Article I, Section 1 of the Agreement shall be amended to read as follows:

Section 1 - All employees, other than seasonal employees, who are in active service and who have or attain ten (10) or more years' of employment relationship will be retained in service subject to compensation as herein provided unless or until retired, discharged for cause, or otherwise removed by natural attrition. For the purpose of this Agreement, the term "active service" is defined to include all employees working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not the date on which such ten or more years of employment relationship is acquired was a work day). An employee who is not regularly assigned on the date the employee is otherwise eligible to achieve protected status under this Section will be deemed to be protected on the first day assigned to a regular position in accordance with existing rules of the BMWE Agreement.

POSITION OF THE ORGANIZATION

The Organization asserts that the Carriers must provide health and welfare insurance coverage to furloughed employees who remain subject to compensation. The Organization maintains that the Carriers actually acknowledged that such an obligation had existed when the Carriers appeared before Presidential Emergency Board No. 229. It is the position of the Organization that a representative of CSX Transportation, Inc. also acknowledged the obligations during certain testimony in federal court. The Organization relates that in the airline industry "compensation" includes more than wages. The Organization argues that certain arbitral precedent supports the existence of the obligation.

The Organization stresses that, in accordance with the procedures of the Railway Labor Act, Presidential Emergency Board No. 229 expanded the coverage of Article I, Section 1 with the understanding that employees retained in service subject to compensation would receive wage and benefit protection. The Organization comments that the Organization's Section 6 notice to Presidential Emergency Board No. 229 referred to "full compensation" for all employees. According to the Organization, the Organization informed Presidential Emergency Board No. 229 about the acceptability of updating the February 7, 1965 Agreement with the understanding that the employees would have their compensation protected. The Organization emphasizes that the Carriers opposed the extension of the February 7, 1965 Agreement because of a concern about the costs of providing full

compensation and benefits to furloughed employees for life. The Organization cites the testimony of Eugenia Langan, Esquire, on behalf of the Carriers before the Presidential Emergency Board on June 7, 1996 as an admission that the Carriers knew that compensation included wages and fringe benefits.

The Organization claims that these events constitute extrinsic evidence that establishes the intent of the Presidential Emergency Board about the consequence of extending the February 7, 1965 Agreement. The Organization recounts that such coverage includes wage and benefit protection as confirmed by the Board's summary of the Carrier's opposition to the extension of coverage due to the cost of providing full compensation of wages and benefits to covered employees.

The Organization insists that subsequent statements by certain Carrier officials after the Report of Presidential Emergency Board No. 229 underscore that eligible furloughed employees receive full pay and benefits for life. The Organization criticizes the Carriers for disavowing in the present proceeding the scope of protection that the Carriers recognized had existed in other contexts.

The Organization reiterates that compensation consists of wages and other benefits. The Organization mentions certain industry documents that define compensation to include wages and benefits. The Organization specifies that certain arbitral precedent found that compensation includes wages and benefits. The Organization clarifies that "retained in service subject to

compensation" embraces wages and benefits because the elements of compensation include health insurance, which flows from remaining "in service." The Organization rejects any suggestion that any existing precedent contradicts the conclusion that compensation includes wages and benefits.

The Organization relies on certain arbitral precedent concerning the February 7, 1965 Agreement to prove that the Carriers must pay the disputed premiums. The Organization elaborates that such precedent demonstrates that "retained in service subject to compensation" includes providing health insurance for furloughed protected employees. The Organization points out that the carriers have accepted this interpretation. (Third Division Award 20319 (1974) (Lazar, Ref.).) The Organization considers certain arbitral precedent to involve limited jurisdictional matters about a particular dispute and to reflect recognition that compensation includes wages and benefits such as health and welfare coverage. (Special Board of Adjustment No. 605, Award No. 99 (1969) (Friedman, Neutral).) The Organization distinguishes certain other arbitral precedent as merely involving issues about jurisdiction.

The Organization concludes that the Organization should prevail in the present matter. The Organization submits that the position of the Carriers should be rejected.

POSITION OF THE CARRIERS

The Carriers assert that the present dispute involves contract construction within the context of certain arbitral

precedent. The Carriers point out that the parties agreed about certain interpretations of the February 7, 1965 Job Stabilization Agreement on November 25, 1965. The Carriers note that Special Board of Adjustment No. 605 subsequently issued over 500 decisions concerning the Job Stabilization Agreement.

It is the position of the Carriers that Article I divides the protected employees into two classes. The Carriers maintain that Presidential Emergency Board No. 229 participated in resolving the last national round of collective bargaining. As a part of the resolution, the Carriers explain that the Organization sought to expand the coverage of the Job Stabilization Agreement to include employees who had entered service after 1962. The Carriers underscore that the Organization sought to expand the coverage and did not attempt to make any substantive changes to the Job Stabilization Agreement. The Carriers elaborate that the expansion in coverage occurred by including employees with at least ten continuous years of service.

The Carriers stress that the Job Stabilization Agreement provided in Article IV, Section 1 that protected employees would not be "placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position [held] on October 1, 1964 . . . ." The Carriers emphasize that the Job Stabilization Agreement omits any reference to the National Health and Welfare Plan or the benefit plans. The Carriers indicate that Special Board of Adjustment

No. 1087 has limited jurisdiction pursuant to the February 7, 1965 Agreement and that the Organization must prove the claim derives from the February 7, 1965 Agreement. The Carriers elaborate that the Job Stabilization Agreement omits anything about health and welfare benefits. The Carriers interpret such silence as precluding the Organization from prevailing in the present proceeding because no intent ever existed to provide health and welfare benefits to protected employees who become furloughed. The Carriers oppose interpreting the term "compensation" to extend to health and welfare benefits and contend that extensive relevant precedent supports such a conclusion.

The Carriers observe that the National Health and Welfare Plan, as amended, provided a method for covering furloughed employees. The Carriers recount that furloughed employees received coverage for four months and could purchase longer coverage by paying monthly premiums. The Carriers comment that the national dental plan in the January 29, 1975 National Agreement and the vision care plan in the September 26, 1996 BMWE National Agreement contained eligibility requirements that thereby reflect a difference between compensated service and qualifications for benefits other than vacation pay. The Carriers reason that such treatment of compensation and the single exception of vacation pay preclude protected furloughed employees from having a right to receive health and welfare benefits solely as a part of compensation. The Carriers continue

that the decision by the parties to condition receipt of health and welfare benefits on the rendering of compensated service or the receipt of vacation pay under an amendment to the relevant insurance policy on February 1, 1965 signifies that the parties to the Job Stabilization Agreement on February 6, 1965 did not intend for protected furloughed employees to receive health and welfare benefits on a separate basis under the Job Stabilization Agreement.

The Carriers discount any significance to the actions of individual carriers that may have modified the Job Stabilization Agreement by continuing benefit plan coverage for protected furloughed employees in a different manner than the Job Stabilization Agreement requires. The Carriers view the clear and unambiguous treatment of health and welfare benefits under the Job Stabilization Agreement as eliminating the relevance of any arguable past practice. The Carriers highlight that the parties could have set forth a provision to provide for the coverage sought by the Organization if the parties had intended to do so. The Carriers argue that any precedent from tribunals other than Special Board of Adjustment No. 605 and the present Board lack relevance to the present dispute because these Boards have sole and exclusive jurisdiction over the February 7, 1965 Job Stabilization Agreement.

For these reasons the Carriers request that the position of the Carriers should be sustained.

OPINION

I. Introduction

This case involves language interpretation. The parties stipulated that the Organization--as the moving party--has the burden to prove its case by a fair preponderance of the credible evidence.

In analyzing the record, the Special Board of Adjustment underscores that Section II(A) of the October 25, 1996 agreement between the parties that led to the creation of this Special Board of Adjustment indicates that:

> The Board shall not have the authority to add contractual terms or to change existing agreements governing rates of pay, rules and working conditions.

The following analysis reflects these limitations on the authority of the Board.

II. The Meaning of the Relevant Documents

In the context of a dispute between the parties concerning travel allowances, the Arbitrator aptly observed:

> The individuals who are involved in the negotiation of railroad national agreements are among the most sophisticated collective bargaining negotiators in our nation. They know how to be specific when specificity is required. Had the Carriers at any time during the course of the negotiations sought to distinguish travel allowance benefits applicable to members of regional and system-wide production gangs from benefits which might be applicable to other traveling employees, they had more than sufficient opportunity to make their desires known to the BMWE and/or to PEB 229. As noted above, there is insufficient probative evidence to establish that any such distinction was sought or articulated.

(System Board of Adjustment 1114 at 25-26 (June 20, 1999) (Kasher, Arb.).)

A careful review of the record indicates that Presidential Emergency Board No. 229 described the contentions of the Carriers about the extension of the February 7, 1965 Job Stabilization Agreement as follows:

> The Carriers propose no change to the February 7, 1965 Job Stabilization agreement. The Carriers note that the agreement covers only 2.3 percent of the present workforce and revival of that agreement would require the Carriers to pay maintenance of way employees full compensation -- wages and benefits, adjusted for all future increases -- until they reach retirement age, if they are furloughed or displaced to lower paying jobs for any reason, apart from narrowly defined declines in business.

(Report to the President by Emergency Board No. 229 at 12 (1996).

In formulating this summary, the record indicates that Presidential Emergency Board No. 229 received critical, significant, and substantial evidence from representatives of the Carriers that supports the position advanced by the Organization in the present dispute. For example, a written submission on behalf of the Carriers argued:

> Extending the February 7, 1965 agreement would require the carriers to pay all present and future MW employees full compensation and benefits <u>for life</u> if they are furloughed or displaced to lower-paying positions for virtually any reason . . . .

(Brief for Carriers at 2, May 1996.)

The testimony of Eugenia Langan, Esquire, from the law firm that represented the Carriers before Presidential Emergency Board

No. 229 conceded that:

> For any employee who was on the payroll in 1994 and for anyone else who has come on since or who comes on in the future who has two years of seniority, once they get two years of seniority, his railroad will have to go on paying him 100 percent of his compensation, that's wages and fringe benefits, adjusted for all subsequent wage increases and benefits increases, for the rest of his working life . . . .

(Presidential Emergency Board Number 229, Record at 1307 (June 7, 1996).)

A sworn affidavit of James B. Allred, Senior Director--Labor Relations--Special Projects, for CSX Transportation, Inc., in connection with certain subsequent litigation before a United States District Court, recognized that:

> The February 7, 1965 national agreement . . . provides protections for employees who have been furloughed. That protection is 100 percent of their wages for their working life and includes full health insurance coverage. The February 7 agreement provides such protections for employees with ten (10) or more years of service.

(Affidavit in Civil Action No. 3:00-cv-264-J-21B (M.D. Fla 2000).) Furthermore, the unrefuted evidence in the record from a General Chairman of the Union Pacific System Division of the Organization reflects that the Union Pacific "routinely has paid the health insurance premiums for furloughed employees protected under Article I, Section 1 of the Feb 7th Agreement." (Declaration of David D. Tanner at 2 (February 14, 2001).)

The combination of this information provides credible and persuasive evidence to support the claim of the Organization.

The record contains certain arbitral precedent that arguably supports the position of the Carriers in the present proceeding. If the record only contained such precedent, the position of the Carriers would be more credible. Such precedent, however, fails to supersede, refute, or discredit the statements by Presidential Emergency Board No. 229, the representatives of the Carriers before Emergency Board No. 229, the statement of a credible Carrier representative, and the practice that exists on certain properties.

The presentation by the Carriers to Presidential Emergency Board No. 229 undoubtedly sought to persuade the Board to reject the Organization's effort to extend the coverage of the Job Stabilization Act. The Carriers assumed the risk that the Board would grant the Organization's request after hearing the argument developed by the parties. As a consequence, the Carriers lack the right at this time to disavow, renounce, and repudiate in the present proceeding the identical interpretation that the Carriers knowingly and voluntarily advanced before Presidential Emergency Board No. 229. Any change to this straightforward interpretation of the relevant provisions therefore is a matter for collective bargaining, rather than for arbitration.

III. Conclusion

Under these special circumstances and after a thorough analysis of the entire record, the Organization proved by a fair preponderance of the evidence that Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended by Article XII

of the Mediation Agreement of September 26, 1996, does require a carrier to continue coverage under the collectively bargained National Health and Welfare, Dental, and Vision Care Plans for a furloughed employee, who is otherwise retained in service subject to compensation. The Award shall so specify.

Accordingly, the Undersigned, duly designated as the referenced Board and having heard the proofs and allegations of the above-named parties, make the following AWARD:

> Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended by Article XII of the Mediation Agreement of September 26, 1996, does require a carrier to continue coverage under the collectively bargained National Health and Welfare, Dental, and Vision Care Plans for a furloughed employee, who is otherwise retained in service subject to compensation.

Robert L. Douglas
Chairman and Neutral Member

Donald F. Griffin
Union Member
Concurring/Dissenting

A. K. Gradia
Carrier Member
Concurring/Dissenting

E. L. Torske/DFG
Ernest L. Torske
Union Member
Concurring/Dissenting

John F. Hennecke
Carrier Member
Concurring/Dissenting

Written Dissent to follow.

DATED: September 2, 2001
STATE of New York) ss:
COUNTY of Nassau

I, Robert L. Douglas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

CARRIER MEMBERS' DISSENT - CASE NO. 5

We must respectfully dissent from the majority's Award in this case.

The Chairman cites with approval an excerpt from the Award by SBA 1114 (Kasher), a portion of which states (emphasis added):

> The individuals who are involved in the negotiation of railroad national agreements are among the most sophisticated collective bargaining negotiators in our nation. They know how to be specific when specificity is required.

Unfortunately, he has failed to heed that fundamental truth. In this Award, the Chairman purports to find a contractual commitment by the carriers to provide continued health benefits to certain protected employees in a provision, Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended ("JSA"), that is utterly silent on the subject. Indeed, a careful examination of the entire agreement reveals absolutely no credible textual support for such a construction. Moreover, the Chairman was presented with several awards by this Board's predecessor, Special Board of Adjustment No. 605, including an award involving this very Organization, in which claims for health and welfare benefits were specifically rejected because they fell outside the ambit of the parties' agreement.

Assuming arguendo that Article I, Section 1 was intended by the parties to require continuation of health benefits, one would expect that the moving party, the Organization, would have produced mounds of evidence dating back to the inception of the Agreement in 1965 demonstrating the implementation and application of that commitment. It is telling that no such evidence was advanced by the Organization.

To paraphrase Arbitrator Kasher, if the parties to the 1965 Agreement had intended to provide for continuation of health and welfare benefits to employees protected under Article I, Section 1, they knew how to say so specifically and explicitly.

The Award's interpretation of Article I, Section 1 rests principally upon certain statements growing out of the proceedings before Presidential Emergency Board No. 229 in 1996. As we explain next, the majority's analysis betrays a fundamental misunderstanding of that record.

First of all, it is important to recognize the sheer scope of the PEB 229 proceedings when attempting to analyze the Board's handling of this issue. PEB 229 held eight days of hearings, received and reviewed well over 100 exhibits, and took hundreds of pages of testimony. The Board was established on May 16, 1996 and issued a 45 page report to the President on June 23, 1996 containing its detailed recommendations on the 50-odd proposals before it.

In the case of the BMWE's proposed changes to the JSA, it is undisputed that: (i) BMWE sought, and the carriers opposed, the BMWE's proposal; (ii) the only changes sought by the BMWE were those necessary to "update" the class of covered employees beyond those protected by original agreement; (iii) PEB 229 concluded that the BMWE request was justified and recommended "updating" coverage of that Agreement; and (iv) the parties ultimately implemented the PEB recommendation in Article XII of the 1996 Mediation Agreement.

The specific issue before this Board--whether Article I, Section 1 of the JSA required continuation of health and welfare benefits for furloughed protected employees--was never presented to, much less addressed by, PEB 229. The specific issue presented to the PEB was whether to update the class of protected employees. The contours of that protection were simply not a matter pressed before the Board, and its recommendation is plainly crafted merely to extend such protection (in its original form) to additional employees. To read anything more than that into the PEB's handling of this issue requires one to ignore the realities of the PEB 229 proceedings and engage in raw conjecture and speculation.

When the statements relied upon by the Board are placed within this context, they simply do not merit the Board's characterization as "critical, significant, and substantial evidence". We think this is particularly so given the ambiguous nature of the statements themselves (the scope and nature of the "benefits" contemplated is not stated) and the complete absence of credible agreement and precedential support for the claimed interpretation.

The other "evidence" cited in the Award in support of the decision was and is readily explained by the fact that the railroads in question had decided, for policy and other reasons, to provide continuing benefit plan coverage. It is axiomatic that such a course of action cannot be deemed to change the terms of the parties' agreement.

In the end, this Award purports to discover a contractual obligation under a 1965 agreement provision based on "evidence" presented some thirty years later. We are profoundly disappointed that the Chairman has chosen to remake the parties' negotiated commitments in the guise of contract interpretation. Regardless of who is affected by a particular decision, such activism is inevitably injurious and destabilizing to settled expectations, the institutional interests of both sides, and the collective bargaining process.

A. Kenneth Gradia

John F. Hennecke