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. 6

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 Carriers in Washington, District of Columbia on June 14, 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:

> Did the Carrier violate the terms of the Agreement dated February 7, 1965 in Mediation Case No. A-7128, as amended by Article XII of the Agreement dated September 26,1996 in Mediation Case No. A-12718 (Sub-Nos. 1-8)

("the Feb 7th Agreement") when on August 9, 2000 it rescinded letters to the claimants dated March 23, 2000 declaring them entitled to protection under Article I, Section 1 of the Feb 7th Agreement?

The Carriers proposed the following issue:

Do Messrs. B. H. Brake and J. J. McQueen meet the requirements of Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended, in order to qualify for protective benefits?

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:

Are the Claimants, B. H. Brake and J. J. McQueen, protected employees within the meaning of Article I, Section 1 of the February 7, 1965 Mediation Agreement, in Mediation Case No. A-7128, as amended by Article XII of the Agreement dated September 26, 1996 in Mediation Case No. A-12718 (Sub-Nos. 1-8)?

BACKGROUND

Claimant Brake began his employment on January 14, 1980 as a Track Laborer in the Track Department and transferred to the Bridge and Building Department on January 7, 1991 with a seniority date of January 7, 1991. Claimant McQueen began his employment on August 10, 1981 as a Track Laborer in the Track Department and transferred to the Bridge and Building Department on April 12, 1991 with a seniority date of April 12, 1991. A furlough occurred in February 2000 that resulted in the furloughs of Claimant Brake on February 4, 2000 and of Claimant McQueen on February 7, 2000. The Claimants sought protective benefits. The Carrier, Norfolk Southern Railroad Company, paid protective

benefits to the Claimants until on or about August 9, 2000 when it concluded that the Claimants lacked the required ten-year employment relationship to qualify for protective benefits pursuant to Article I, Section 1 of the Agreement.

The Organization challenged the decision of the Carrier. The parties failed to resolve the matter during the preliminary steps of the grievance procedure. The dispute proceeded to arbitration for a final and binding determination.

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 term "employment relationship" in Article I, Section 1 means the length of service an employee has with a carrier subject to the contents of the applicable collective bargaining agreement. The Organization maintains that an employee's seniority lacks relevance to the determination of the existence of an employment relationship. It is the position of the Organization that the Claimants have more than ten years of an employment relationship with the Carrier and that the Claimants therefore are protected employees within the meaning of Article I, Section 1.

The Organization rejects the argument of the Carrier that

bidding seniority and an employment relationship are identical. The Organization therefore disagrees with the Carrier that the Claimants did not obtain protected status because they had less than ten years of bidding seniority even though the Claimants had worked for the Carrier for over 20 years. The Organization recognizes that the bidding seniority of the Claimants for their time worked in the Track Department became extinguished when the Claimants transferred to the Bridge and Building Department.

The Organization reasons that the February 7, 1965 Agreement stabilized jobs and compensated protected employees who had two or more years of an employment relationship with a carrier as of October 1, 1964. The Organization comments that the parties agreed to distinguished the term "employment relationship" from seniority in an interpretation to Article I, Section 1. The Organization highlights that Article I, Section 1 in the February 7, 1965 Agreement generated various arbitration decisions. The Organization discerns that Special Board of Adjustment No. 605 recognized the distinction between the employment relationship concept and seniority in Award No. 34 and in Award No. 161.

The Organization distinguishes the definition of "active service" in Article I, Section 1 of the February 7, 1965 Agreement from the definition of "active service" in Article I, Section 1 of the September 26, 1996 Agreement. The Organization points out that the clause "active service" in the original provision caused certain disputes that initially led the parties to confirm their understandings in a series of mutually adopted

questions and answers that included the method of making certain calculations to determine active service. The Organization faults the Carrier in the present case for relying on Questions and Answers Nos. 9 and 10 to Article I, Section 1 because they address what employment counts to determine active service. The Organization adds that Question and Answer No. 5 and Special Board of Adjustment No. 605, Award No. 34 establish that the employment relationship depends on the length of employment of an employee with a carrier in a position covered by the scope provision of a collective bargaining agreement and not on the seniority rights of an employee.

The Organization stresses that the provisions of Article I, Section 1 of the September 26, 1996 Agreement simplified the requirements to establish the employment relationship. The Organization specifies that protected status became tied to the requirement of ten years of an employment relationship rather than the earlier requirement that linked active service plus two or more years of an employment relationship. The Organization considers Questions and Answers Nos. 9 and 10 to be irrelevant to the amended Section 1. The Organization emphasizes that Question and Answer No. 5 and Special Board of Adjustment No. 605, Award Nos. 34 and 161 continue to apply to the determination.

According to the Organization, the Claimants began their employment relationship with the Carrier in 1980 and 1981 and were in active service on September 26, 1996, which constituted the effective date of the amendment to Article I, Section 1. The

Organization underscores that the Claimants therefore met the requirements for protected status. The Organization reiterates that the employment relationship involves employment in the craft under the scope of the applicable collective bargaining agreement.

The Organization insists that the Claimants worked under the scope of the same collective bargaining agreement since their original dates of employment. The Organization alleges that the Claimants transferred at the request of the Carrier from the Track Department to the Bridge and Building Department and therefore did not retain their seniority in the Track Department. The Organization concludes that the Claimants met the requirements to have protected status. The Organization observes that the transfer of the Claimants at the request of the Carrier provides another basis to warrant finding that the Claimants had achieved protected status.

The Organization concludes that the Organization should prevail in the present matter. The Organization submits that the Carrier lacked a right to rescind the original determination that the Claimants were protected employees and must compensate the Claimants for all of the benefits that the Claimants lost due to the contractual violation by the Carrier.

POSITION OF THE CARRIER

The Carrier asserts that the Claimants do not qualify for protection benefits because they do not have an employment relationship of ten years with the Carrier within the meaning and

accepted interpretation of Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended by the September 26, 1996 Agreement between the parties. The Carrier maintains that the update that occurred during the last round of collective bargaining of the protection in Article I, Section 1 added more employees to the coverage of Article I, Section 1 without changing the precedent that arose under Article I, Section 1 from 1965 to 1996. It is the position of the Carrier that arbitral precedent of Special Board of Adjustment No. 1087 confirms that the Interpretations issued on November 24, 1965 by the parties and the decisions of Special Board of Adjustment No. 605 provide continued guidance for Special Board of Adjustment No. 1087.

The Carrier points out that the Interpretations contain three questions and answers that indicate that: the term "employment relationship" is not the same as the term "seniority"; ordinarily employment in more than one craft does not count to determine protected status; and employment in more than one seniority district in the same craft on the same carrier counts to determine protected status if such movement occurred at the request of a carrier. The Carrier reasons that the 1996 update to Article I, Section 1 changed the two-year requirement based on a fixed date in the 1965 Agreement to a ten-year requirement based on a rolling period of time. The Carrier emphasizes that the Interpretations reflect that an employee who attains ten years of employment with a carrier does not always meet the employment relationship requirement of Article I,

Section 1. The Carrier elaborates that the time that an employee remains in different seniority districts or on different rosters does not always aggregate under Article I, Section 1 to satisfy the employment relationship requirement of ten years.

The Carrier stresses that the Claimants started their employment with the Carrier in the Track Sub-Department and then transferred to the Bridge and Building Sub-Department. The Carrier relates that the different sub-departments have different seniority rosters so that no aggregation of the service time in the two different areas occurs. The Carrier adds that the Claimants forfeited their original Track Sub-Department seniority when they transferred to the Bridge and Building Sub-Department. The Carrier contends that insufficient evidence exists in the record to prove that the transfers occurred at the request of the Carrier.

According to the Carrier, the Interpretations reflect the understanding between the parties that the job stabilization protection provides lifetime protection for an employee until death, resignation, or retirement unless a disqualification or a return to work occurs. The Carrier explains that the parties never agreed to permit an employee to relinquish seniority by voluntarily switching seniority districts or rosters and then to obtain protection benefits as a result of the employee's inability to continue working due to the resulting lack of seniority in the new seniority district or on a new roster. For these reasons the Carrier comments that the parties interpreted

Article I, Section 1 to preclude protection in such situations.

The Carrier reiterates that the applicable precedent from Special Board of Adjustment No. 605 supports the interpretation of Article I, Section 1 to preclude protection for employees who voluntarily transfer from a seniority district or roster and thereby fail to accumulate ten years of employment in the new seniority district or on a new roster. The Carrier insists that the decisions by the Claimants to leave the Track Sub-Department ended their eligibility for protection until they acquired ten years of employment in a new location.

The Carrier rejects the Organization's effort to expand the significance of the update of Article I, Section 1. The Carrier finds that the Organization merely had intended to upgrade Article I, Section 1 to expand the number of employees who became eligible for protection. The Carrier declares that the parties did not intend to change any other aspect of the employment relationship requirement in Article I, Section 1. The Carrier highlights that the only change to Article I, Section 1 involved the years of service that an employee must accumulate to qualify for protection.

The Carrier questions the Organization's attempt to separate the employment relationship concept from the seniority concept. The Carrier recognizes that the employment relationship concept differs from the seniority concept. The Carrier, however, underscores that the parties did not change the definition of the term "employment relationship" in the 1996 amendments. The

Carrier relies on Interpretation No. 10, which recognizes that employment in more than one seniority district in the same craft on the same carrier only counts toward determining protected status if the transfer occurred at the request of the management for temporary service. The Carrier notes that the Claimants did not transfer at the request of the Employer for temporary service.

For these reasons the Carrier requests that the position of the Carrier should be sustained. The Carrier urges that the claims should be denied.

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 Article I, Section 1

A careful review of the record indicates that Article I,

Section 1 is ambiguous. Article I, Section 1 contains the term "employment relationship" without specifying whether the employment relationship pertains to the employment relationship with the Carrier as a whole or with the Carrier in a particular craft, seniority district, or on a particular roster. The failure of the parties to have included additional language in Article I, Section 1 to clarify this potential confusion constitutes the underlying cause for the present dispute.

Either interpretation of Article I, Section 1 is equally justifiable, logical, and plausible. The parties could have agreed to provide protection for employees so long as the Carrier had employed them for at least ten years or so long as the employees had remained in the same seniority district or on the same roster for at least ten years. Such a substantive decision is exactly the type of decision that parties routinely make during the collective bargaining process.

Each interpretation has a different potential impact. Measuring the employment relationship based on the combined time that an employee works in any capacity within the bargaining unit with the Carrier would expand the number of employees subject to protection by making irrelevant certain movement of employees from one seniority district or roster to another seniority district or roster. In contrast, limiting the calculation of the employment relationship solely to the period of time an employee remains in a particular seniority district or on a particular roster would reduce the number of employees subject to protection

because certain movement of employees from one seniority district or roster to another seniority district roster would exclude such employees from protection until they had remained in such a seniority district or on such a roster for ten years.

As a result of the ambiguity of Article I, Section 1, further analysis of the history of the administration of Article I, Section 1 is appropriate and necessary. The parties have referred to certain Interpretations that the parties reached about the proper meaning and proper application of the February 7, 1965 Agreement. The introduction or preamble of the Interpretations sets forth the critical significance of the Interpretations:

> THE FOLLOWING INTERPRETATIONS OF THE PROVISIONS OF THE MEDIATION AGREEMENT DATED FEBRUARY 7, 1965 (STABILIZATION OF EMPLOYMENT AGREEMENT) HAVE BEEN AGREED UPON BY THE PARTIES TO SAID AGREEMENT AND WILL HAVE THE SAME FORCE AND EFFECT AS THE PROVISIONS OF THE AGREEMENT THAT HAVE BEEN THUS INTERPRETED.

The Interpretations therefore operate as if the parties had included them in the actual Agreement.

The record contains references to several interpretations:

> Question No. 5: Is the term "employment relationship" synonymous with "seniority"?
>
> Answer to Question No. 5: The term "employment relationship" used in this Section should not be confused with the term "seniority", since it was used in the agreement to provide protection to employes who had at least a 2-year employment relationship with a carrier on October 1, 1964, but who may not have had at least 2 years' seniority.

With respect to Interpretation No. 5, the language in the answer distinguishes the "employment relationship" concept from the "seniority" concept. By doing so, the parties recognized that the length of time of the employment relationship of an employee could exceed the seniority of an employee.

Interpretation No. 9 arguably relates to the dispute:

> Question No. 9: Can employment in more than one craft be counted in determining protected status?
>
> Answer to Question No. 9: Ordinarily no; however, in cases such as promotion of a telegrapher to train dispatcher, promotion of a clerk to yardmaster, etc., where the seniority in the craft from which promoted is retained, employment in the higher classification will be counted.

Interpretation No. 9 reveals a principle that generally precludes an employee from combining employment in different crafts to achieve protected status. This rule implicitly recognizes that the movement of an employee from one craft to another craft may cause the employee to forfeit certain accumulated time from employment in a former craft to determine whether the employee possesses protected status.

Interpretation No. 10 also may relate to the present dispute:

> Question No. 10: Can employment in more than one seniority district in the same craft on the same carrier be counted in determining protected status?
>
> Answer to Question No. 10: Yes, provided the employe acquired and retained seniority on each seniority district or roster or was transferred to another seniority district or roster at the request

of management for temporary service. Otherwise, no.

The last sentence of Interpretation No. 10 contains the general rule that employment in more than one seniority district in the same craft on the same carrier does not count to determine protected status. This rule also implicitly recognizes that the movement of an employee from one seniority district to another seniority district within the same craft may cause the employee to forfeit certain accumulated time to determine whether the employee possesses protected status.

The record also contains references to certain arbitral authority from 1969 to 1976 from Special Board of Adjustment 605. The Organization relies on Award No. 34 (March 7, 1969) (Rohman, Neutral); Award No. 77 (May 26, 1969) (Zumas, Neutral); Award No. 161 (November 17, 1969) (Rohman, Neutral); and Award No. 236 (January 19, 1971) (Friedman, Neutral). The Carrier cites Award No. 75 (May 26, 1969) (Zumas, Neutral); Award No. 168 (December 8, 1969) (Friedman, Neutral); Award No. 236 (January 19, 1971) (Friedman, Neutral); Award No. 345 (April 1973) (Rohman, Neutral); Award No. 381 (July 26, 1974) (Rohman, Neutral); and Award No. 403 (October 21, 1976) (Lieberman, Neutral). A meticulous review of these prior decisions reflects that conflicting arbitral authority arguably exists regarding the proper interpretation of the term "employment relationship" in Article I, Section 1 in the context of the precise facts of the present dispute.

Under these circumstances the meaning of Article I, Section

1 cannot be determined solely on the basis of the arbitral precedent contained in the record. Instead, a careful analysis of the Interpretations provides the appropriate basis to discern the meaning of Article I, Section 1. In this regard Interpretation No. 5 suggests that the employment relationship in Article I, Section 1 could exceed the seniority of an employee in certain situations. At the same time, however, Interpretation No. 9 and Interpretation No. 10 generally preclude an employee from combining employment in different crafts or in more than one seniority district in the same craft on the same carrier to achieve protected status. Interpretation No. 9 and Interpretation No. 10 contain more detailed information than Interpretation No. 5 in the context of the present dispute. As a result, Interpretation No. 9 and Interpretation No. 10 provide the critical and determinative information to resolve the ambiguity of the term "employment relationship" as set forth in Article I, Section 1. In the absence of any other more definitive evidence and in the context of the present dispute, the term "employment relationship" in Article I, Section 1 therefore generally depends on the time an employee has remained in a particular seniority district or on a particular roster.

III. The Application of Article I, Section 1

The record indicates that Claimant Brake began his employment on January 14, 1980 as a Track Laborer in the Track Department and transferred to the Bridge and Building Department on January 7, 1991 with a seniority date of January 7, 1991. The

record also indicates that Claimant McQueen began his employment on August 10, 1981 as a Track Laborer in the Track Department and transferred to the Bridge and Building Department on April 12, 1991 with a seniority date of April 12, 1991. The record omits sufficient evidence to prove that the Carrier had requested that either Claimant transfer out of the Track Department into the Bridge and Building Department on a temporary basis. Instead, the record supports the finding that the Claimants voluntarily transferred to the Bridge and Building Department on a permanent basis. As a result, no basis exists in the record to overcome the unavoidable conclusion that the Claimants had forfeited their Track Department seniority and also had forfeited their eligibility for protection benefits under the "employment relationship" requirement of Article I, Section 1 that derived from their employment in the Track Department. Any change to this arrangement is a matter for collective bargaining, not arbitration.

IV. Conclusion

Under these special circumstances and based on a thorough analysis of the entire record, the Organization failed to prove by a fair preponderance of the credible evidence that the Claimants, B. H. Brake and J. J. McQueen, are protected employees within the meaning of Article I, Section 1 of the February 7, 1965 Mediation Agreement, in Mediation Case No. A-7128, as amended by Article XII of the Agreement dated September 26, 1996 in Mediation Case No. A-12718 (Sub-Nos. 1-8). The Award shall

indicate that the Claim is denied.

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:

> The Claimants, B. H. Brake and J. J. McQueen, are not protected employees within the meaning of Article I, Section 1 of the February 7, 1965 Mediation Agreement, in Mediation Case No. A-7128, as amended by Article XII of the Agreement dated September 26, 1996 in Mediation Case No. A-12718 (Sub-Nos. 1-8) ("the Feb 7th Agreement"). The Claim is denied.

Robert L. Douglas
Chairman and Neutral Member

Donald F. Griffin
~~Union Member~~
Concurring/Dissenting

A. K. Gradia
Carrier Member
Concurring/Dissenting

Ernest L. Torske
Union Member
Concurring/Dissenting

John F. Hennecke
Carrier Member
Concurring/Dissenting

DATED: January 17, 2002
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.