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. 14

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 in Miami, Florida on February 4, 2002 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:

> Was the rate increase applicable to the classification of Foreman made pursuant to the new CSXT System Agreement (Attachment A of the Strongsville Agreement, dated May 23,

1999), a subsequent wage increase applicable to claimant M. J. Cronin's "protected rate" under Article IV, Section 1 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996 ("the JSA").

The Carriers proposed the following issue:

Is Claimant M. J. Cronin's, ID 518869, February 7, 1965 Job Stabilization protective rate of $17.82 per hour (rate as of December 1, 2000) the correct protective rate of pay?

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:

Did the Carrier, CSX Transportation, Inc., violate Article IV, Section 1 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996 by calculating Claimant M. J. Cronin's February 7, 1965 Job Stabilization protective rate to be $17.82 per hour (as of December 1, 2000) based on the Carrier's decision not to treat the rate increase applicable to the classification of Foreman made pursuant to the new CSXT System Agreement (Attachment A of the Strongsville Agreement, dated May 23, 1999), as a subsequent wage increase under Article IV, Section 1 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996 ("the JSA")?

BACKGROUND

The Claimant filed claims for benefits pursuant to the February 7, 1965 agreement for the months of November 2000, December 2000, January 2001, and February 2001. In a letter

dated February 12, 2001, the Carrier explained the Carrier's decision to deny the claim for the month of December 2000:

> Records reflect that your earnings were equal to and/or exceed your Feb 7 guarantee for the month of December 2000. Therefore, you are not entitled to a guarantee payment for December 2000.
>
> As information, your Feb 7 guarantee is $17.81 [sic] per hour.

(Organization Exhibit 3 and Carrier Exhibit C.)

In a letter dated April 5, 2001, the Organization clarified the pending claims on behalf of the Claimant:

> Claimant Cronin submitted Feb 7 claims beginning January, 2001 for the Month of December, 2000 and each month thereafter through February 2001. February 15, 2001 Claimant Cronin received a letter from J. D. Brinkworth, dated February 12, 2001. This letter informed Claimant Cronin that he did not qualify in the month of December for Feb. 7 benefits and Mr. Brinkworth further advised that Claimant Cronin's guarantee rate was $17.81 [sic] per hour, not the Foreman rate of $18.63 as claimed by Claimant Cronin.
>
> September 26, 1996 Claimant Cronin was working a Yard Foreman position at State Street Yard, Indianapolis, IN and his guarantee rate should reflect the current Basic Foreman Rate, currently $18.75 and July 1, 2000 $18.63.
>
> The February 7, 1965 Agreement clearly requires that Section 1 employees not be put in a worse position with respect to compensation and benefits. Had Claimant not been furloughed, he would have worked December 1, 2000 and would have been paid $18.63 for no less than 8 hours straight time.
>
> As a result of this Agreement violation please advise when Claimant Cronin will be paid 8 hours straight time at $18.63 for December 1, 2000 plus the current Foreman

> rate ($18.75) for the months of January and February, 2001. This claim is made continuous until such time as Claimant Cronin's guarantee rate is adjusted to reflect the current Basic Foreman Rate of pay.

(Organization Exhibit 3 and Carrier Exhibit G.)

In a letter dated June 27, 2001, the Carrier declined the claim for the following reasons:

> You are taking exception to the Feb 7th protected rate of Mr. Cronin, contending that his protected rate should be $18.63 (for the month of December 2000), based upon his holding a yard foreman position at State Street Yard, Indianapolis, IN, on September 26, 1996. The Carrier's records reflect that claimant held Position 5KA1-639, Foreman, with a rate of $15.07 per hour on September 26, 1996. With the subsequent general wage increases and cost-of-living adjustments, his protected rate for the month of December 2001, is $17.82, and $17.94 beginning in January 2001.
>
> In view of the above, Mr. Cronin's Feb 7th protection claim for the month of December 2000, was properly calculated and claimant was not entitled to a guarantee payment this month. His claims for January and February 2001, were properly calculated at the appropriate rates referenced above, and he was paid guarantee in the amounts of $3,048.10 and $896.50, respectively.

(Organization Exhibit 3 and Carrier Exhibit J.)

The parties failed to resolve the matter during the grievance procedure. The dispute proceeded to arbitration for a final and binding determination.

PERTINENT PROVISIONS

MEDIATION AGREEMENT
FEBRUARY 7, 1965

ARTICLE I - PROTECTED EMPLOYEES

Section 1 -

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.

. . . .

ARTICLE IV - COMPENSATION DUE PROTECTED EMPLOYEES

Section 1 -

Subject to the provisions of Section 3 of this Article IV, protected employees entitled to preservation of employment who hold regularly assigned positions on October 1, 1964, shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position on October 1, 1964; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent general wage increases.

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.

. . . .

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

> "Section 1 - Subject to the provisions of Section 3 of this Article IV, protected employees who hold regularly assigned positions shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position as of the date they become protected; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent wage increases."

Agreement
Between
CSX Transportation, Inc.
And
Its Maintenance of Way Employees
Represented by the
Brotherhood of Maintenance
of Way Employes
Effective June 1, 1999

RULE 28 - RATES OF PAY

Rates of pay in Appendix "P" shall be considered negotiated rates.

APPENDIX "P"

CSX Transportation, Inc.
(except former Clinchfield Railroad)
Rate Schedule
Effective June 1, 1999

Rates per hour	Positions
$17.69	Production Foreman
	Scale Inspector
	Welding Foreman
$17.42	Welder - Track and Structural
$17.37	Foreman-Bridge and Facilities
$17.11	Plumber
	Basic Track Foreman
$17.09	Machine Operator "A"
$17.01	Bridge Inspector
	Track Inspector
$16.83	Assistant Production Foreman
$16.65	Assistant Bridge & Facilities Foreman
$16.60	Machine Operator "B"
$16.30	Assistant Track Foreman
$16.18	Assistant Track Inspector
$16.01	Bridge Operator/Tender
	Welder Helper
$15.56	Lubricator/"Blue Hat"
$15.27	Production Trackman
$14.89	Basic Trackman
$14.66	Crossing Watchman

POSITION OF THE ORGANIZATION

In the context of Article IV, Section 1, the Organization asserts that the CSXT System Agreement contained a subsequent wage increase for the basic Track-Foreman pursuant to Rule 28 and

Appendix P of the Agreement. The Organization maintains that the disputed amount should be included in the Claimant's protected rate. The Organization reasons that the Claimant obtained protection on September 26, 1996 as a Yard Foreman and established a protective rate. It is the position of the Organization that the CSXT System Agreement eliminated the Yard Foreman position and replaced the Yard Foreman position with the Track Foreman position.

The Organization insists that the elimination and replacement of the positions caused a wage increase of $.78 per hour to occur. As a subsequent wage increase occurred within the meaning of Article IV, Section 1, the Organization specifies that the Claimant's protected rate should have included the $.78 per hour. The Organization emphasizes that the rate for the Basic Track Foreman became the new rate for such positions because of the elimination of the position of Yard Foreman. As a result, the Organization stresses that the Basic Track Foreman rate became the Claimant's protected rate.

The Organization notes that a failure to include the disputed amount creates inequities by causing former Conrail employees, who became employees of the Carrier on June 1, 1999, to have higher protected rates than the Claimant, who had obtained protected status with the Carrier on September 26, 1996, and by possibly enabling some CSX Foremen, whose prior agreements paid more than the Claimant's Agreement, to have higher protective rates than the Claimant. The Organization contends

that such an absurd result, which enables employees who were not subject to the Job Stabilization Agreement while working for the acquired carrier to have higher protected rates than the Claimant, lacks validity under a proper interpretation of the Job Stabilization Agreement.

The Organization points out that the 1999 Systemwide re-structuring agreement, which dovetailed the foreman classifications to establish a rate of pay for Basic Track Foremen, generated a "subsequent wage increase" for the Claimant within the meaning of Article IV, Section 1. The Organization argues that the Claimant's protected rate should reflect the disputed increase.

The Organization highlights that the Carrier's position relies on a misreading of Article IV, Section 1 by using the 1965 "subsequent general wage increase" standard rather than the any "subsequent wage increase" standard contained in the 1996 amendment to Article IV, Section 1. As the disputed amount meets the requirements of Article IV, Section 1, as amended, the Organization declares that the Carrier's effort to prove that the disputed amount was not a "general" wage increase lacks persuasiveness.

The Organization observes that the disputed amount would constitute a general wage increase even under the 1965 version of Article IV, Section 1. The Organization cites certain precedent from Special Board of Adjustment No. 605 to support this analysis. The Organization comments that Special Board of

Adjustment No. 605 found that "a general wage increase need not be uniform to be 'general'." (Award No. 147 (1969) (Friedman, Neutral) (Organization Exhibit 6).) The Organization explains that all of the positions in the foreman classification received increases as a result of the re-structuring and the System Agreement. The Organization elaborates that the lack of uniformity does not mean that the increases did not constitute general wage increases. The Organization acknowledges that Special Board of Adjustment No. 605 did not find payments to selected positions to eliminate inequities to be the equivalent of a general wage increase under Article IV, Section 1. (Award No. 163 (1969) (Rohman, Neutral); Award No. 196 (1970) (Rohman, Neutral); Award No. 361 (1973) (Rohman, Neutral); and Award No. 371 (1973) (Rohman, Neutral) (Organization Exhibits 8 and 9.) The Organization reiterates that the entire group of foremen received various increases to obtain the new rate of Basic Track Foremen and therefore the disputed amount constitutes a general wage increase.

The Organization summarizes that Article IV, Section 1 provides that all subsequent wage increases become part of an employee's protected rate. The Organization underscores that the CSXT System Agreement increased the wage rate for the position that afforded the Claimant protected status. The Organization urges that the Claim be sustained.

POSITION OF THE CARRIER

The Carrier asserts that the Claimant had a protected rate

of $17.82 per hour, rather than $18.63 per hour, as of December 1, 2000 because the Claimant became protected on September 26, 1996. The Carrier emphasizes that the current rate of a Basic Track Foreman does not constitute the Claimant's protected rate. Instead, the Carrier explains that the Claimant's protected rate evolved from the Claimant's protected rate as of September 26, 1996 and subsequent general wage increases.

The Carrier clarifies that the Organization mistakenly included the rate rationalization amount for the foreman position in the June 1, 1999 System Agreement pursuant to Rule 28. The Carrier views the negotiated rates to be voluntary adjustments that constituted a rate rationalization rather than a general wage increase. The Carrier describes that some rates of pay increased, some rates of pay remained unchanged, and a few rates of pay decreased. The Carrier stresses that the significant structural changes consolidated approximately 400 rates of pay into 16 rates of pay. The Carrier rejects the treatment of the rate rationalization adjustment as a subsequent wage increase to calculate the Claimant's protected rate. The Carrier indicates that a general wage increase occurs when all employees receive a cost of living adjustment or an increase in salary. The Carrier recounts that the development of a uniform rate and classification system lacks the status of a general wage increase as contemplated by the parties or as provided by the Job Stabilization Agreement.

The Carrier pinpoints that the employees did not receive an

equal increase or a percentage increase. The Carrier argues that the inclusion of the term "negotiated rates" in Rule 28 of the Agreement and the absence of the term "general wage increase" in the rate rationalization provision reflects that the skilled negotiators did not intend to treat the rate rationalization amounts as a general wage increase. The Carrier refers to certain arbitral precedent from Special Board of Adjustment No. 605 (Award No. 163 (1969) (Rohman, Neutral); Award No. 196 (1970) (Rohman, Neutral); Award No. 361 (1973) (Rohman, Neutral); and Award No. 371 (1973) (Rohman, Neutral)) to highlight the requirements for finding that a general wage increase exists.

The Carrier verifies that the Claimant received the proper protected rate that included actual subsequent general wage increases and cost of living adjustments. The Carrier reiterates that the rate rationalization did not constitute a general wage increase. The Carrier requests that the Claimant's rate of $17.82 per hour be upheld. The Carrier therefore urges that the claim 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 Nature of the Dispute

Article IV, Section 1 of the February 7, 1965 Agreement, as amended, provides certain safeguards to adjust the rate of compensation for protected employees. As a threshold matter, the parties disagree about the proper interpretation and application of the September 16, 1996 amendment to Article IV, Section 1 of the February 7, 1965 Agreement. Specifically, the 1996 amendment contains the phrase "subsequent wage increases" instead of "subsequent general wage increases," the formulation set forth in the original version of that provision.

The Carrier contends that a clerical error occurred when Presidential Emergency Board No. 229 inadvertently failed to include the word "general" in the recommended amendment to Article IV, Section 1 of the February 7, 1965 Agreement and that the parties fully intended that this Article should continue to be interpreted and applied in the manner as it has since its inception. The Organization's presentation to PEB 229 clearly sought no change to the language "subsequent general wage increases" nor, in addressing the Organization's presentation, did the members of PEB 229 indicate that they considered this

phrase to be a matter of dispute before them. In fact, the testimony, both written and oral, leads to the opposite conclusion.

The Board further notes that the phrase "subsequent general wage increases" is not unique to the February 7, 1965 Agreement, but in fact appears in numerous protective agreements and in protective conditions imposed by the ICC/STB, including the Amtrak C-1 Conditions, New York Dock, Oregon Short Line, N&W, Burlington, and Mendocino Coast Protective Conditions. The phrase also continues to appear in the February 7, 1965 Agreement as it applies to the other labor organizations who are signatory to the agreement, including the Brotherhood of Railroad Signalmen, who, like the BMWE, has similarly updated the February 7, 1965 Agreement in recent national agreements. The Board finds that the phrase "subject to subsequent general wage increases" is a term of art to labor relations practitioners in the railroad industry and embodies the standard industry approach to adjustment of protective rates. Thus, it is reasonable to assume that PEB 229 would have specifically addressed such a significant departure from established precedent if it had truly intended to recommend such a significant change to that standard. The utter silence of the record before us strongly supports the inference that it had no such intention. Therefore, it is impossible for this Board to conclude that PEB 229 purposely recommended a material alteration to the manner in which protected rates of pay were to be subsequently adjusted, or that the parties knowingly

agreed to such a change when the PEB's recommended language amending the February 7, 1965 Agreement was incorporated in toto in the 1996 national agreement. As indicated previously, this Board is not empowered by the parties to add contractual terms or to change existing agreements; its authority being limited to interpreting and applying the February 7, 1965 Agreement, as amended. It is therefore the conclusion of this Board that the phrase "subsequent wage increases" should be interpreted and applied as having the same meaning as the phrase "subsequent general wage increases" based upon the absence of any evidence to demonstrate that the parties knowingly agreed to eliminate the word "general" and thereby materially alter the manner in which protected rates of pay would be adjusted.

Having so concluded, the Board must now determine whether the wage adjustment emanating from the May 23, 1999 Strongsville Agreement, which resulted in Claimant M. J. Cronin's hourly rate being changed from the hourly rate of compensation of Yard Foreman (old rate) to the hourly rate of compensation for the position of Track Foreman (new rate), resulted in an increase to Claimant Cronin's protected rate of compensation pursuant to the provisions of Article IV, Section 1, of the February 7, 1965 Agreement.

The adjustment to Claimant Cronin's rate of pay resulted from a unique rate rationalization agreement which consolidated approximately 400 rates of pay into 16 rates of pay. The only question before the Board is whether the adjustment to Claimant

Cronin's rate of pay was a subsequent general wage increase for purposes of Article IV, Section 1. The Board concludes, based on the relevant facts and circumstances, that it was. Accordingly, Mr. Cronin's protected rate of compensation under the provisions of Article IV, Section 1, should be that of Track Foreman (new rate), subject to subsequent general wage increases. This Board expresses no views on the appropriate disposition of claims which may be filed or which may have been timely and properly filed by other individuals, concerning wage adjustments, related to the Strongsville Agreement.

III. Conclusion

Under the special circumstances here involved, the Award shall indicate that the Claim is sustained and Claimant Cronin shall be made whole in all respects consistent with this determination by recognizing that his protected rate of pay under Article IV, Section 1, of the February 7, 1965, Agreement should be considered the rate of pay of the position of Track Foreman.

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 Carrier, CSX Transportation, Inc., did violate Article IV, Section 1 of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718, dated September 26, 1996 by calculating Claimant M. J. Cronin's February 7, 1965 Job Stabilization protective rate to be $17.82 per hour (as of December 1, 2000) instead of $18.63 per hour. The Claimant shall be made whole in accordance with the

accompanying Opinion.

Robert L. Douglas
Chairman and Neutral Member

Donald F. Griffin
Union Member
Concurring/Dissenting

A. K. Gradia
Carrier Member
Concurring/Dissenting

R. B. Wehrli
Union Member
Concurring/Dissenting

John F. Hennecke
Carrier Member
Concurring/Dissenting

DATED: January 29, 2004
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.