SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to Dispute:	)	
	)	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	Case No. 30 Award No. 30
	)	**OPINION AND AWARD**
Organization,	)	
	)	
and	)	
	)	
UNION PACIFIC RAILROAD, COMPANY	)	
	)	
Carrier,	)	
	)	

Hearing Date: September 8, 2006
Hearing Location: Sacramento, CA
Date of Award: March 30, 2007

MEMBERS OF THE BOARD

Organization Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

ORGANIZATION'S QUESTIONS AT ISSUE

1. Did the Carrier improperly pay D. Coronado (Claimant) compensation benefits under the Agreement dated February 7, 1965, as amended September 26, 1996 (Feb 7th Agreement) for the period in December 2000 that it did not retain him in service?

2. If the answer to 1 above is YES", shall the Carrier be required to issue Claimant Feb 7th Agreement compensation benefits equal to his normal protected rate of compensation for the time the Carrier did not retain him in service in December 2000, i.e., pay him his $15.95 per hour protected rate for each hour it did not retain him in service?

3. Did the Carrier improperly pay Claimant compensation benefits under the Agreement dated February 7, 1965 as amended September 26, 1996 (Feb 7th Agreement) or he period in January 2001 that it did not retain him in service?

4. If the answer to 3 above is "YES", shall the Carrier be required to issue Claimant Feb 7th. Agreement compensation benefits equal to his normal protected rate of compensation for the time the Carrier did not retain him in service in January 2001, i.e., pay him his $16.07 per hour protected rate for each hour it did not retain him in service?

CARRIER'S QUESTION AT ISSUE

1. Did the Carrier correctly calculate the protective benefits due to D. Coronado for December 2000 and January 2001, pursuant to Article IV, Section 1 of the February 7, 1965 Mediation Agreement as amended by the September 26, 1996 Agreement?

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in the National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

Claimant is a protected employee pursuant to the February 7, 1965 Job Stabilization Agreement, as amended and updated by the September 26, 1996 National Mediation Agreement. Claimant initiated claims charging that the Carrier did not pay him the proper amount of protective pay for December 2000 and January 2001.

The Organization and the Carrier concur that Claimant's hourly protected rates were $15.95 for December 2000 and $16.07 for January 2001. The parties also concur that Claimant received compensation for performing active service and/or vacation benefits during these two months. More specifically, Claimant received eight hours of pay for time worked as well as forty hours of vacation pay during December 2000. During January 2001, the Carrier paid Claimant straight time wages for sixty-four hours of service. For the remainder of both months, Claimant was relegated to furloughed status.

The compensation which Claimant received for performing active service or vacation time was at hourly pay rates higher than his hourly protective pay rates. This dispute centers on how Claimant should be compensated under the February 7, 1965 Job Stabilization Agreement, as amended, for the time during December 2000 and January 2001 that he was not retained in service.

The issue is illustrated by examining Claimant's status and pay during December 2000. December contained twenty-three work days. If the Carrier had retained Claimant in service he would have received straight time pay (and/or vacation pay) for one hundred eighty-four hours. For the eight hours that Claimant actually worked, his straight time hourly pay was approximately two dollars greater than his protected rate of pay. Similarly, for the forty hours that Claimant received vacation pay, the amount of the vacation pay, on a per hour basis, was approximately two dollars above his protected pay rate.

The Carrier determined the amount of protective benefits that it paid Claimant by first multiplying the number of available hours (one hundred eighty-four) by Claimant's hourly protected rate ($15.95). The Carrier then deducted the eight hours of straight time pay for time worked and the forty hours of vacation pay. The Organization contends that the proper calculation is to first subtract the number of hours Claimant worked or for which he received vacation pay from the number of available hours in the month and then multiply the remaining hours (one hundred thirty six) by Claimant's protected rate.

Both parties submit that Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended by the 1996 National Mediation Agreement, supports its formula for calculating Claimant's protective pay. Article IV, Section 1 provides:

> "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 come protected; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent wage increases."

The Carrier submitted documentation demonstrating that, during the past twenty years, its computer programs calculated protective pay for protected employees of several crafts (including Maintenance of Way Employees) according to the monthly formula that it applied to Claimant herein. The Carrier specified that when protected employees are loaded into the program, protective benefits were routinely computed just as the Carrier calculated Claimant's protective payments. The Carrier also asserted that one of its predecessor railroads, the Missouri Pacific Railroad, had an automated program which used the same formula to calculate February 7, 1965 Job Stabilization Agreement protective allowances. The Carrier submitted a report from April, 1985 showing a protected employee who worked on jobs paying the employee at rates both higher and lower than his protective pay. This employee received a protective allowance according to the same calculation that the Carrier used to determine Claimant's protective payments for December 2000 and January 2001. Finally, the Carrier declared that prior to this dispute, the Organization never filed a claim challenging the Carrier's methodology of computing protective allowances.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Claimant was protected with an hourly rate of pay. This hourly protected rate was Claimant's "normal rate of compensation" as specified in Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended. Therefore, Claimant was entitled to receive his rate of protection for each available work hour that the Carrier did not retain Claimant in service. The Carrier unilaterally and improperly transformed Claimant from an hourly rate protected employee into a monthly rate protected employee.

Article IV, Section 1 refers to the "normal rate of compensation" on a "regularly assigned" position which clearly connotes an hourly calculation. Article IV, Section 1 does not refer to or mention any monthly guarantee.

Under the Carrier's formula, Claimant incurs a loss as opposed to winning a windfall. If, during December 2000, Claimant had continued to work at a job rated exactly the same as his protected rate of pay for the remaining one hundred thirty-six hours, he would have earned aggregate compensation for the month greater than his actual earnings plus the amount that the Carrier ultimately paid him. Thus, he suffered a loss of pay because he did not receive his "normal rate of compensation".

When Claimant held a position having a higher rate of pay than his protected rate of pay, he earned compensation set by the applicable schedule agreement. Nothing in the February 7, 1965 Job Stabilization Agreement permits the Carrier to offset the amount that Claimant earned for service performed (or for vacation pay) from his protective guarantee. *Special Board of Adjustment No. 6105, Award No. 234 (Friedman).*

Finally, the Carrier's position herein is inconsistent with the position which the Carrier took any other cases where it contended that the Job Stabilization Agreement does not allow an upward adjustment in protected rates aside from subsequent general wages increases. The Carrier cannot have it both ways. If the protected rate is not adjusted upward, then the Carrier cannot utilize the greater amount of earnings accruing to Claimant as an offset against his protected rate which is equivalent to a downward adjustment.

Article IV, Section 1 clearly and unambiguously provides that Claimant is entitled to his normal rate of compensation which is his hourly protected rate for each hour that

he is not retained in service. Any past practice cannot vary or alter the clear language in Article IV, Section 1, of the February 7, 1965 Job Stabilization Agreement, as amended.

B. The Carrier's Position

Article IV, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, clearly defines protective benefits in terms of compensation rather than a rate of pay. For the month of December 2000, Claimant's normal rate of compensation was his protected rate multiplied by the number of available work hours. The product of that equation is the protective guarantee he would have received if he did not work (or receive vacation pay) for any hours during December 2000. The Carrier properly deducted the compensation he received for vacation and performing service from his normal rate of compensation to determine the net amount of protective pay due to Claimant.

Under the Organization's formula, Claimant would receive a windfall. The Organization improvidently seeks a calculation on an hourly basis so that for each hour that Claimant received no pay or a pay rate lower than his protected rate, Claimant would be allowed the difference in pay for each hour. There is not any language in Article IV, Section 1 suggesting that protective pay must be calculated on an hour by hour basis or even on a day by day basis. In essence, the Organization's position would increase the level of compensation for Claimant in excess of his protected rate as opposed to insulating him from a lack of (or a decrease in) earnings which is the objective of the Job Stabilization Agreement.

If the language in Article IV, Section 1 is unclear, the past practice on this property supports the application of the Carrier's formula. Without any challenge from the Organization, the Carrier has used the same computer program for twenty years to

determine the protective pay due to protected employees in several crafts. More particularly, the Carrier has consistently applied the monthly formula to Maintenance of Way employees. Since the February 7, 1965 Job Stabilization Agreement has been in effect for more than forty years, it is inconceivable that this Organization never brought a claim if the Carrier's application violated the Job Stabilization Agreement. The absence of claims conclusively demonstrates that the Carrier's formula is the proper interpretation of the "normal rate of compensation" phrase set forth in Article IV, Section 1.

III. DISCUSSION

If Claimant had not performed any active service and had not received vacation pay during December 2000, the parties agree that Claimant would have been entitled to receive a protective payment calculated by multiplying one hundred eighty-four (available work hours) by his protected rate of pay ($15.95 per hour). The disagreement arises because Claimant earned wages and received vacation pay at hourly rates greater than his protected pay rate covering forty-eight hours during December 2000. The Organization submits that those earnings must be disregarded so that Claimant's protective pay is predicated solely on the number of remaining available work hours. Contrarily, the Carrier submits that Claimant's protective guarantee must be calculated on a monthly basis by deducting the earnings he received from the aggregate protective pay he would have received if he had neither worked nor received vacation pay during December 2000.

Article IV, Section 1 provides that Claimant "... shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position ..." based on the position that Claimant held when he became

a protected employee. The adjective "normal" before the noun "rate" refers to the pay rate attached to the position which, in this case, is an hourly rate of $15.95. This placement of words might imply that the protective pay calculation is predicated on an hourly basis.[1] However, Article IV, Section 1 is vague because it also provides that the employee shall not be placed in a worse position with respect to the normal rate of compensation which implies that the protected employee should not be placed in a better or more lucrative position than the employee's normal rate of pay. Applying the formula advanced by the Organization could result in Claimant receiving far greater compensation than he would receive if he had been furloughed the entire month of December.

Prior awards interpreting the February 7, 1965 Job Stabilization Agreement are not helpful in reconciling the contradiction between not placing Claimant in a worse position vis-à-vis protecting him at the normal rate. In *Special Board of Adjustment 605, Award No. 397 (Rohman),* the Board ruled that the Carrier may compute protective guarantees on a monthly basis but the decision addressed a daily rated position and focused on daily overtime pay as opposed to straight time pay. In *Special Board of Adjustment No. 605, Award 450 (LaRocco),* the Board addressed an unusual situation where language that was changed for the sole purpose of conforming to the Railroad Unemployment Act could be misconstrued resulting in an unintended windfall for protected employees. *Award No. 450* did not definitively define "normal rate of compensation" within the context of the facts presented in this case. Similarly, in *Special Board of Adjustment No. 605, Award No. 234 (Friedman),* the Board held that the Carrier

[1] **This implication would be problematic if the rate attached to the position on the day the employee becomes protected is a rate other than an hourly rate.**

could not offset regular earnings from protective pay but the earnings in question were from sources distinct from the usual hourly wages for performing straight time service. In sum, these decisions do not provide any guidance for resolving this dispute.

Since the language in Article IV, Section 1 is vague and susceptible to more than one reasonable interpretation, this Board may properly resort to extrinsic evidence, including evidence of a past practice, to construe the vague provision. The record contains substantial evidence of an open, notorious, continuous, and uninterrupted past course of applying Article IV, Section 1 to protected employees. For the last twenty years (or longer), the Carrier, and at least one of its processor railroads, has utilized a computer program that calculated protective pay according to the formula that the Carrier applied to Claimant herein. During these twenty years, the Organization did not grieve the Carrier's application. In addition, the Organization did not present any evidence either refuting the past practice or demonstrating that the Organization lacked actual or constructive knowledge about how the Carrier routinely applied Article IV, Section 1 to protected employees. Therefore, the past practice is controlling.

In summary, the Carrier properly paid Claimant's protective guarantee under the February 7, 1965 Job Stabilization Agreement, as amended, for both December 2000 and January 2001.

AWARD AND ORDER

1. The Answer to the Organization's first question at issue is No.
2. The Organization's second question at issue is Moot.
3. The Answer to the Organization's third question at issue is No.
4. The Organization's fourth question at issue is Moot.

5. The Answer to the Carrier's question at issue is Yes.

DATED: March 30, 2007

R. B. Wehrli
Organization Member

Kenneth Gradia
Carrier Member

Dissenting

Donald F. Griffin
Organization Member

John Hennecke
Carrier Member

John B. LaRocco
Neutral Member

DISSENTING OPINION OF EMPLOYE MEMBERS TO AWARD NO. 30 OF SPECIAL BOARD OF ADJUSTMENT NO. 1087

The following represents a dissent of the Employe Members in connection with the decision determined by the majority of SBA 1087 regarding Case No. 30.

From the very beginning, the Employe Members warned this Board to not confuse the payment schedule with the "*normal rate of compensation.*" Yet, it is apparent that is exactly what has happened.

On page 5 of its submission the Carrier indicated:

> "*The Carrier multiplied the number of hours available by the respective protective rate for each month. This resulted in $2,934.80 for December; $2956.88 for January. For each respective month, the* ***figure*** *represents the '****normal rate of compensation*** *for said regularly assigned position as of the date' the Claimant became protected, adjusted for wage increases.*"
>
> (Emphasis added)

Immediately this Board should have recognized that the Carrier's calculation process creates at least four (4) different "*normal* ***rates*** *of compensation*" in a calendar year, when the Feb 7th Agreement provides for only one "normal **rate** of compensation. Please see the following which illustrates this point.

Year 2000	**Year 2001**
184 hr mos. = $2,934.80 (Mar, May, Aug)	184 hr mos. = $2,956.88 (Jan, May, Aug, Oct)
176 hr mos. = $2,807.20 (June, Oct, Nov)	176 hr mos. = $2,828.32 (Mar, July, Nov)
168 hr mos. = $2,679.60 (Jan, Feb, July, Sept, Dec)	168 hr mos. = $2,699.76 (Apr, June, Dec)
160 hr mos. = $2,552.00 (Apr)	160 hr mos. = $2,571.20 (Feb, Sept)

Simply stated, the Carrier's calculation process which, in reality, is based on a payment schedule, can not be correct because it provides four (4) different normal **rates** of compensation when the Feb 7th Agreement clearly provides for only one "normal **rate** of compensation." Stated differently, how could there be four (4) different "***figures***" representing one "normal ***rate*** of compensation?"

On page 6 of the award, it indicates:

> ***"Article IV, Section 1 provides that Claimant '...shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position...' based on the position that Claimant held when he became a protected employee. The adjective 'normal' before the noun 'rate' refers to the pay rate attached to the position which, in this case, is an hourly rate of $15.95. This placement of words might imply that the protective pay calculation is predicated on an hourly basis."***

A footnote is provided, which further analyzes this statement indicating,

> ***"This implication would be problematic if the rate attached to the position on the day the employee becomes protected is a rate other than an hourly rate."***

Contrary to what the award says, the language does not *"imply that the protective pay is predicated on an hourly basis."* In this case, it declares it conclusively. Stated differently, how could anyone conclude in this case that this language implies that the protective pay calculation is predicated on a monthly basis? Further, it is not problematic if the rate attached to the position was not hourly, i.e., it was daily, weekly or monthly. For example, if the employee was filling a position that had a normal rate of compensation that was a daily rate, the determination of benefit entitlements would simply be a comparison between the daily rate of compensation he receives (or not) each available day of earning opportunity and the daily protected rate he is guaranteed to receive each day. Contrary to the award's implication otherwise, correctly categorizing the Claimant as an "*hourly protected employee*" and computing his benefit entitlement on that basis as the Organization asserts, does not, in any way, cause a problem in connection with computing benefit entitlements for a protected employee whose normal rate of compensation is a daily, weekly or monthly rate.

As indicated on page 9 of BMWED's submission, the Carrier was **not** obligated to make payment of protective benefits in line with any specified schedule. In choosing a payment schedule, all the Carrier was required to do was "...*keep reasonably current in maintaining the protected rate of compensation of a protected employee*," as determined by SBA 605 Awards 268 and 269. The Carrier apparently chose, and the Organization accepted without protest, a *monthly* schedule for making payments to entitled Article I, Section 1 protected employees, which was in line with those awards.

As previously indicated, choosing and implementing one payment schedule over another does not allow the Carrier to treat the Claimant as if he was a monthly rated employee or unilaterally change his hourly protected rate of compensation to a monthly protected rate of compensation.

Further, choosing one payment schedule over another should not change the amount of his benefit entitlement. However, this is exactly what occurs with the Carrier's calculation process of deducting the earnings he received from the aggregate protective pay he would have received during a particular period had he been furloughed the entire time. In fact, the Employes provided clear and undeniable evidence how the Carrier's calculation process produced a different benefit payment for the Claimant's same 136 hours of furlough when a monthly, bi-monthly or quarterly payment schedule was used.

The question is, if the Claimant is to "...*not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position...*" and there can be only one "*normal rate of compensation*," how could there be three (3) different payments for the same 136 hours Claimant was furloughed? Surely, the writers of the Feb 7th agreement did not contemplate there would be different payments for the same time of furlough simply because the Carrier chose one payment schedule over

another. Instead, the writers of the Feb 7th Agreement obviously contemplated payments to be uniform for the periods of furlough regardless of the payment schedule the Carrier employed and the universal language they created in Article IV, Section 1 appropriately captures that which they contemplated. Obviously, the Carrier's payment methodology, which provides a host of different payments for the same period of furlough, makes no sense whatsoever and is in direct conflict with the intended payment concepts contemplated by the writers of the Feb 7th Agreement.

On the other hand, the Employes clearly demonstrated and provided mathematical evidence verifying that in the application of the Article IV, Section 1 language in line with the obvious intent thereof and as contended to be correct by the Employes, the amount of payment for the same period of furlough did not change in any way regardless of the payment schedule utilized, i.e., the outcome is consistent and/or the same.

The Employe Members claimed that the Carrier's calculation methodology differs dramatically from the industry-wide practice. Specifically, the Employes contended that the process used by the BNSF, CSXT, NS and the CN coincides with the process that the Organization has argued to be correct in this case. The Board concluded that since the Employes did not raise such an issue on the property, the Board would not consider it in this case. It is felt this Board could have, and should have considered this information even though it was not part of the handling of the dispute on the property. Such handling would be in line with the agreed-to-procedures of October 25, 1996, specifically, Article III, paragraph B, which states:

> "*The Board, upon its own motion, may accept and consider evidence relevant to the dispute not part of the handling of the dispute on the Carrier's property.*"

Nonetheless, the inescapable conclusion is that the Carrier's calculation process cannot be correct since there is no basis for having four (4) different figures in a year representing the Claimant's "normal rate of compensation," and there is no basis for having different benefit amounts for the same period of furlough when using different payment schedules.

This Award indicates that since the language in Article IV, Section 1 is vague and susceptible to more than one reasonable interpretation, this Board may properly resort to extrinsic evidence, including evidence of a past practice, to construe the vague provision. First, BMWED does not agree that the language in Article IV, Section 1 is vague and susceptible to more than one reasonable interpretation. We have explained why the Carrier's interpretation is anything but reasonable by pointing out there is no basis for having four (4) different figures in a year representing the Claimant's *"normal rate of compensation,"* and there is no basis for having different benefit amounts for the same period of furlough when using different payment schedules.

Secondly, the Employes provided awards of SBA 605, which ordered benefit payments to be made as the Organization argues is correct in this case. If there truly was a lack of clarity in the Article IV, Section 1 language as this award indicates, the awards cited by the Employes gave this Board guidance on how to interpret the language. There is no basis for this Board to ignore these past decisions and, then, say since the language is vague and there are no awards to give us guidance, we must rely on past practice.

Thirdly, and again, the prevailing practice among all the railroads other than UP is to calculate hourly rated employees' benefit payments on an hourly basis as the Organization has argued to be correct in this case.

Hence, there is no basis for this Board to rely on past practice. There were many who thought for many, many years that the world was flat. This Board suggests that because UPRR thought it was flat for many, many years, and conducted its business based on that premise, it should be allowed to continue to think of the world as flat and conduct its business based on that premise even though all others recognize the unmistakable evidence that the world is not flat. This makes absolutely no sense.

In light of the foregoing facts and circumstances, the Employes dissent.

Respectfully submitted,

R. B. Wehrli - Employe Member SBA 1087

D. F. Griffin - Employe Member SBA 1087

Dated: 5/3/07

CARRIER MEMBERS' CONCURRING OPINION AND ANSWER TO THE EMPLOYEE MEMBERS' DISSENTING OPINION TO AWARD NO. 30 OF SPECIAL BOARD OF ADJUSTMENT NO. 1087

At the outset, the Carrier Members express their concurrence with the findings set forth in Award No. 30 of Special Board of Adjustment No. 1087.

The Employee Members' Dissent to that Award, dated May 3, 2007, merely recycles arguments that were repeatedly rejected by the Board and are no more convincing now. The arguments presented in the dissent regarding the method in which the Union Pacific Railroad Company has calculated and paid protective benefits, without objection from the employees or the organization for a period of over 20 years, were presented to SBA 1087 and were rejected by the majority because they are neither convincing nor rational.

That said, the Carrier Members are more deeply troubled by the lack of candor in the assertions made at page 4 of the Employee Members' Dissent, particularly that portion which states:

> *The Employe Members claimed that the Carrier's calculation methodology differs dramatically from the industry-wide practice. Specifically, the Employes contended that the process used by the BNSF, CSXT, NS and the CN coincides with the process that the Organization has argued to be correct in this case. The Board concluded that since the Employees did not raise such an issue on the property, the Board would not consider it in this case. It is felt this Board could have, and should have considered this information even though it was not part of the handling of the dispute on the property. Such handling would be in line with the agreed-to-procedures of October 25, 1996, specifically, Article III, paragraph B, which states:*
>
> > *"The Board, upon its own motion, may accept and consider evidence relevant to the dispute not part of the handling of the dispute on the Carrier's property."*

What the Employee Members did not disclose in their dissent was the fact that, **in addition to their admission that this issue was not properly or timely raised by the employees during the handling of this dispute on the property, this issue was not raised in the Employees' Submission to SBA 1087 in Case No. 30, nor was this issue raised during the oral argument of Case 30 before SBA 1087 on September 8, 2006**. This issue had not been raised by the time a draft award was prepared and presented to the Employee and Carrier Members of SBA 1087. **This issue was raised for the very first time by the Employee Members in an e-mail sent on March 8, 2007**, in advance of an executive session scheduled for March 12, 2007. Moreover, when the issue was introduced by the Employee Members, it was raised as an assertion, without any evidence presented to support such assertion. To suggest that the Chairman or the Carrier Members in any way erred in refusing to consider the Employee's untimely and unsupported introduction of a new issue months after the case had been argued before SBA 1087 is ludicrous. For the Employee Members to suggest that they have the right to raise new issues for the first time after seeing a draft award that they do not find favorable is beyond comprehension.

The decision in Award No. 30 is correct; it is supported by the record in this dispute and its conclusions are based upon a reasoned interpretation of the language of the February 7, 1965 Agreement and a sound application of the principles of arbitration and the procedures agreed upon by the parties when they established Special Board of Adjustment No. 1087.

For those reasons, we concur with the findings set forth in Award No. 30 of SBA No. 1087.

Respectfully submitted,

A. Kenneth Gradia

John F. Hennecke

May 25, 2007