SPECIAL BOARD OF ADJUSTMENT

ESTABLISHED PURSUANT TO RULE 34, ARTICLE VII OF

THE NORFOLK SOUTHERN/TRANSPORTATION COMMUNICATION UNION

SCHEDULE AGREEMENT, JUNE 1, 1982

NORFOLK SOUTHERN CORPORATION

-and-

TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION

Board Members:

Richard Mittenthal
Neutral Member

Louis F. Miller, Jr.
Carrier Member

Carl H. Brockett
TCU Member

BACKGROUND

This dispute concerns protected clerical employees who, following their furlough, claim they are entitled to the continuation of their health and welfare benefits under Rules 34 and 41 of the parties' June 1, 1982 Schedule Agreement (CBA). The Organization (TCU) insists the claim has merit. The Carrier (NSC) believes that these furloughed employees have a limited right to health and welfare benefits under Rule 41 but no right whatever under Rule 34.

NSC, a holding company, received approval from the Interstate Commerce Commission in March 1982 to take control of two separate railroad systems, namely, Norfolk & Western Railway (NW) and Southern Railway (SR). As a result of this takeover, NSC and TCU signed a CBA effective June 1, 1982, to govern the rules and working conditions of NSC clerical employees.

Rule 34 of this CBA dealt with Job Stabilization, hereafter referred to as the parties' Job Stabilization Agreement (JSA). Article I, for the most part, describes how employees achieve "protected" status; Article II relates to the "use and assignment" of protected employees and the loss of "protected" status; Article III concerns "Implementing Agreements". And Article IV sets forth the "compensation due protected employees". The provision in question, Article IV, Section 1, reads in part:

> ...protected employees entitled to preservation of employment who held regularly assigned positions on...[the date they became eligible for protection] shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position on...[the date they first became eligible for this protection] provided, however, that in addition thereto such compensation shall be adjusted to include subsequent general wage adjustments. (Emphasis added)

Rule 41 covers health and welfare benefits (HWB) including such matters as life insurance, major medical expenses, and dental expenses. It provides in part:

> Health and welfare benefits...for employees subject to this [A]greement shall be provided for by the corporation [NSC] as set forth in Railroad Employees' National Health and Welfare Plan [Plan] Group Policy Contract GP-12000...at no cost to the employees. (Emphasis added)

Three clerical employees were furloughed in 2001 - J. E. Marshall on March 1, J. B. Keller on April 3, and D. M. Baker on April 6. They were protected employees and received the money benefit of a furlough allowance pursuant to the terms of Rule 34. They also presumably received HWB under Rule 41, that is, under the Plan, for a period of four months after their last qualifying month. Then, after these four months, NSC stopped paying them HWB. That action prompted the employee claim now before the Board.

A hearing was held at NSC's offices in Norfolk, Virginia on August 29, 2002. Post-hearing argument and clarifications to supplement the detailed pre-hearing submissions were received on September 23 and 30, 2002. Further arguments regarding the Neutral member's draft opinion were received in mid-November, 2002. The NSC was represented by A. L. Austin, Labor Relations Officer, and H. R. Mobley, Assistant Vice President. TCU was represented by Darwin B. Kubasiewicz, Associate Director, Industry Relations, and David L. Steele, General Chairman, System Board No. 9. The Special Board of Adjustment consisted of L. F. Miller, Jr., Carrier member, C. H. Brockett, TCU member, and Richard Mittenthal, Neutral member.

DISCUSSION AND FINDINGS

I - Rule 34, June 1982 CBA

The initial question before the Board is the nature of NSC's obligation with respect to "compensation" for protected employees who are placed on furlough. Rule 34 (Article IV, Section 1) says such employees "shall not be placed in a worse position with respect to compensation than the normal rate of compensation..." for their regularly assigned position as of a particular date. NSC insists these words encompass only a rate of pay; TCU insists they also encompass HWB.

True, many workers in many industries think of their "compensation" broadly to include both hourly pay and HWB, that is, a variety of fringe benefits covering health care and pensions. But the customary meaning of a "...rate of compensation" for a given "position" is simply an hourly (or salary) dollar figure for the performance of one's work. Nothing in the negotiating history or in NSC's past practice suggests that the parties intended these words to have a larger reach so that they would embrace HWB as well. Had that been the parties' intention, they surely would have said so.

When the June 1982 CBA was written, the parties did consider HWB. They expressly covered this subject in Rule 41, stating that HWB "for employees subject to this [A]greement shall be provided...as set forth in..." the Plan. All employees, whether or not on "protected" status, are covered. The Plan describes in detail what benefits are available and how employees become eligible or lose eligibility. TCU would have the Board believe that the parties intended Rule 34's reference to "compensation" to encompass the very HWB matters dealt with in Rule 41. But the parties' treatment of these subjects as separate and distinct strongly suggests that they never meant Rule 34 to extend to HWB.

Nor is there any evidence of past practice to support TCU's claim. No doubt protected employees have been placed on furlough between June 1982 and early 2001 just before this dispute arose. But they must have been called back to work before their HWB rights had been discontinued. For TCU was unable to show any instance during this period where protected employees, subject to the kind of extended furlough involved in this case, nevertheless received HWB. Such a practice may well exist at some other carrier(s) for other craft employees. However, nowhere in the record before this Board does it appear that such a practice existed at NSC (or NW or SR) for its clerical employees.

* * *

Our ruling is consistent with several earlier arbitration awards. Although those awards concerned parties other than NSC and TCU, they involved JSA "compensation" language almost identical to Rule 34. That language

appeared initially in the February 7, 1965 National JSA. However the NW-TCU and SR-TCU parties chose not to be bound by the terms of this National JSA and adopted instead their own JSAs in April 1965. And it is the language of those latter JSAs which subsequently appears as Rule 34 in the relevant June 1982 CBA between NSC and TCU.

The following awards largely concern protected employees on furlough who either were not recalled when they should have been or were paid less than their protected base rate while on furlough. The employees claimed "compensation", including HWB, for the violation of the JSA. Neutral Chairman Friedman in Award 99, Special Board of Adjustment (SBA) 605, held that they were entitled to the "compensation" they had been improperly denied but that their claim for HWB payments "d[id] not fall within the jurisdiction of this Committee". Similarly, Friedman in Award 342, SBA 605, held that employees were entitled to the "compensation" they had been improperly denied but that "this Committee has no jurisdiction over other [HWB] claims cited..." And later Neutral Chairman Zumas in Award 354, SBA 605, ruled the same way and cited the Friedman awards as precedent.

These awards plainly stand for the proposition that the Rule 34 language regarding "compensation" does not encompass HWB and that one must look elsewhere in the June 1982 CBA to determine a furloughed protected employee's rights to HWB.

* * *

TCU relies heavily upon Neutral Chairman Douglas' ruling in Award 5, SBA 1087. That was a dispute between BMWE and the National Carriers' Conference committee (NCCC). It involved the "compensation" language in the February 7, 1965 National JSA as amended on September 26, 1996. Douglas held that "compensation" for furloughed protected employees encompassed not just a rate of pay but also HWB. His interpretation rested on the following three pieces of evidence.

First, he noted that the NCCC written submission to Presidential Emergency Board (PEB) No. 229 in 1996 stated:

Extending the February 7, 1965 [A]greement

> would require the carriers to pay all present and future [BMWE] employees full compensation and benefits for life if they are furloughed or displaced to lower-paying positions... (Emphasis added by present Board)

Second, he noted that during the course of that PEB hearing, one of the carrier lawyers testified that once an employee gains "protected" status,

> ...his railroad will have to go on paying him 100 percent of his compensation, that's wages and fringe benefits...for the rest of his working life... (Emphasis added by present Board)[1]

Third, he noted the testimony at the PEB hearing of a General Chairman of BMWE at Union Pacific. The General Chairman had asserted, without challenge from the carriers, that Union Pacific "routinely has paid the health insurance premium for furloughed employees protected under...the Feb. 7th Agreement".

Douglas concluded from these points that there was "critical, significant, and substantial evidence" that the "compensation" language for protected employees in the February 7, 1965 JSA, as amended, did encompass HWB. He treated the NCCC statements like admissions against interest and hence interpreted the "compensation" language in a manner consistent with BMWE's claim. Because that JSA is much the same as Rule 34 in the instant NSC-TCU Agreement, the Douglas award plainly supports TCU's view of Rule 34.

We have real doubts, however, as to the soundness of the Douglas award. To begin with, it should be emphasized that PEB 229 was not asked to determine the nature of the

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[1] Douglas noted further in this connection the affidavit of a Senior Director of Labor Relations for CSX Transportation in a later litigation in U. S. District Court. This Management representative stated in the affidavit that the "compensation" for protected employees anticipated "100 percent of their wages for their working life and includes full health insurance coverage..." (Emphasis added by present Board).

JSA benefits or to interpret the meaning of the term "compensation". BMWE asked only that the class of employees entitled to "protected" status be expanded and brought up-to-date. PEB 229 recommended that BMWE's claim be adopted but went no further. The statements made by NCCC before the PEB should not be read as concessions with respect to the meaning of the term "compensation" inasmuch as that question was simply not before the PEB.

It may be, for instance, that NCCC was merely trying to persuade the PEB not to accept BMWE's claim by exaggerating the potential monetary consequences of that claim. It may be that NCCC based its statements on the experience of Union Pacific and CSX without considering the practice of other carriers or without considering the possible impact of its words on the interpretive question later put to the Douglas panel. Or it may be, as Douglas suggests, the NCCC representatives believed that the word "compensation" had a broad reach. But, no matter what was in NCCC's mind at the time, these statements cannot fairly be treated as a controlling consideration in resolving the interpretive question now before the present Board.

In any event, Douglas did not really address the language of the JSA in detail. He did not attempt to explain away the fact that the JSA nowhere mentioned HWB or the further fact that the parties had dealt with HWB separately under a National Health and Welfare Plan in August 1954. Perhaps these arguments were not raised before Douglas but they are a very real part of the present case and they suggest a finding quite different from the Douglas award.

Moreover, TCU learned of the dispute before Douglas in SBA 1087 shortly before the award was issued. It was anxious to avoid the possibility of the Douglas award being used as a precedent in the interpretation of its February 7, 1965 JSA with NCCC. Its President therefore wrote Douglas in August 2001, stating that "SBA 1087 is not the proper or established forum to adjudicate disputes over the application of TCU Feb. 7th Agreements" and requesting that "any decision...on the dispute before you be restricted to the parties [BMWE and NCCC]...before you..." And the Douglas award was indeed limited to BMWE and NCCC. Thus, TCU rejected in advance the notion that the Douglas award

would have any precedential force with respect to TCU.[2] This is still another reason for not following the Douglas award.

II - Feb. 7, 1965 National JSA

TCU also relies on this February 7, 1965 Agreement or, more specifically, on a side letter of understanding executed at the same time. That side letter dealt with the narrow question of what would happen if "officials, supervisory or fully excepted personnel exercise seniority rights in a craft or class of employees protected under...[the February 7] Agreement". It went on to say that such "officials..." would have the "same protection afforded by...[the February 7] Agreement to employees in the craft or class in which such seniority is exercised". And it then added:

> ...no employee subject to said Agreement shall be deprived of employment or adversely affected with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, by the return of the official, supervisory, or fully excepted employee to work under the schedule [A]greement. (Emphasis added)

There are several difficulties with this argument. First, the side letter concerns a very limited situation, namely, an "excepted person...", someone outside the bargaining unit, exercising his seniority to return to the unit, thus triggering the rights of an employee "adversely affected" by that return. The present case involves a furlough by several protected NSC employees. But nothing in the evidence suggests that such furloughs were prompted by the return of an "excepted" person to the bargaining unit. The side letter, in short, is not relevant to the facts of this case. Second, and equally important, the present dispute concerns Rules 34 and 41 of the June 1982 Schedule Agreement between NSC and TCU. The employee rights asserted

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[2] Had Douglas decided in NCCC's favor, surely TCU would have been correct in asserting that the award had no precedential force on the TCU-NCCC JSA.

here by TCU were not based on the February 7, 1965 JSA. The latter Agreement does not cover NSC clerks. Nor indeed does it cover clerks who work at what had been NW[3] and SR. Those employees are apparently still covered by JSAs in effect for NW-TCU and SR-TCU.

Furthermore, it should be emphasized that the side letter in question mentions "compensation" and "fringe benefits" as separate and distinct matters. Yet, when the instant parties negotiated the June 1982 Schedule Agreement and described the kind of "protection" many employees would enjoy, they spoke only of "compensation" in Rule 34. They made no mention of "fringe benefits", or HWB, in Rule 34. They dealt with that subject elsewhere in Rule 41.

III - Rule 41, June 1982 CBA

Rule 41 is entitled "Health and Welfare Benefits" and includes such matters as "life insurance, early retirement, major medical expense benefits, dental benefits, and off-track vehicle accident benefits". It states that such HWB is "for employees subject to this [June 1982 A]greement" and "shall be provided for by the [Carrier] as set forth in Railroad Employees' National Health and Welfare Plan Group Policy Contract...as amended, and Aetna Group Policy Contract..., as amended, at no cost to the employees". To determine what HWB have been "provided" by NSC, one must look to the "Plan" and "Group Policy Contracts" which have been expressly incorporated in Rule 41. Because the HWB rights of furloughed employees, whether in "protected" status or not, are explained in detail in the Plan as amended, the answer to this dispute must be found in Rule 41.

Limitations on the HWB rights of furloughed have been in place for years. The original August 1954 Plan has been amended numerous times by NSC and TCU. That history plainly reveals what the parties had in mind with respect to the eligibility requirements for furloughed employees.

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[3] There is one minor exception. Twelve clerks, originally employed by Illinois Terminal Railroad which was later acquired by NW, are evidently still covered by the February 7, 1965 Agreement.

In August 1960, the parties agreed[4] that an employee whose right to HWB would lapse under then-existing agreements because of -

> ...[his] being furloughed and not having rendered compensated service in a month or months shall have [his] rights to such benefits extended for any period, not exceeding three consecutive months, during which such rights would not exist under present agreements...

In November 1964, the parties agreed that "vacation pay" would be regarded as "compensated service" in determining a furloughed employee's eligibility. In December 1981, the parties agreed that "vacation pay" would no longer qualify a furloughed employee for HWB. Then, in April 1986, the parties changed their position and agreed to allow "vacation pay" to be treated as "compensated service" at least until January 1988.

Finally, in September 1996, the parties agreed that in order to continue eligibility for HWB in any given month, an employee must have "rendered compensated service on, or received vacation pay for, an aggregate of at least seven (7) calendar days" in the preceding month. However, this formula in no way diminished the established eligibility rule which allowed continued HWB coverage for a furloughed employee until the end of the fourth month following the month in which the employee last rendered "compensated service".[5]

What this history demonstrates is that a furloughed employee loses his eligibility for HWB after a period of months when he can no longer show the necessary "compensated service" or "vacation pay". These are the only grounds the parties provided for continuing a furloughed employee's eligibility. Nowhere in any of these agreements did the

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[4] This agreement applied to hospital, surgical and medical benefits and to group life insurance.

[5] Other agreements establishing a dental care plan and a vision plan appear to have embraced these same eligibility requirements.

parties say, or even suggest, that a furloughed employee on "protected" status will continue to receive HWB by reason of the protective payments he receives pursuant to Rule 34. Such protective payments clearly do not represent "compensated service". That principle was established years ago and has been recently affirmed in rulings by Referee Marx, Award 29659 (Third Division, June 1993) and by Referee Benn, Award 4902 (Fourth Division, October 1993).

For these reasons, assuming that the claimants did not meet the "compensated service" or "vacation pay" test, we find that Rule 41 does not support TCU's case.

IV - Side Letter No. 4, Sept. 1996 Agreement

The parties' September 1996 Agreement included Side Letter No. 4 which explained how "the seven calendar day per month eligibility requirement for benefit [HWB] coverage..." for furloughed employees should be applied. Items 1 and 7 of that Side Letter have been cited by the parties:

> 1. Nothing contained in this letter shall in any way add to, diminish or alter existing rights and/or obligations of both carriers and employees with regard to eligibility requirements for benefit coverage for employees going on furlough, furloughed or returning from furlough.
>
> 7. An employee subject to call under applicable call rules for which there are sanctions for not responding will be credited with one calendar day for each day such employee is available for service but is not called.

TCU contends that the claimants, protected furloughed employees, are covered by Item 7 above. It alleges that they "may be used...for...other temporary assignments..." (JSA, Article II, Section 3), that they were accordingly "subject to call...for service" and were indeed "available for service" (Item 7), that their failure to respond to such a "call...for service" would have led to "sanctions", namely, suspension of their "protected" status (JSA, Article II, Sections 1 and 2), that they hence must be "credited with one calendar day for each day...[they were] available...but...not called" (Item 7), and that they

therefore qualify for HWB under the Plan language, seven calendar days of "compensated service" in a month. It insists that, given this coverage under Item 7, the NSC view that the claimants have not met the Plan's eligibility conditions makes no sense.

This argument, although not without a certain surface appeal, is not convincing. Acceptance of TCU's position would allow every protected employee on furlough to receive a "calendar day" of "compensated service" for every day they were available to respond to a call for their services. This would mean that protected employees would qualify for HWB under the Plan regardless of how long they were on furlough. Item 7 would thus have effectively repealed most of the Plan's eligibility requirements for furloughed employees. This could not possibly have been what the parties intended. They had made large efforts over the years to establish a Plan and to refine it time and again through several amendments. Item 7 represents just one of many different items in Side Letter No. 4 to help guide those who administer the "calendar day" eligibility requirement. It is difficult to believe the parties meant Item 7 to have the extraordinary broad reach urged by TCU. "The tail does not wag the dog".

Indeed, Item 1 states in effect that nothing in Side Letter No. 4, including Item 7, "shall in any way...diminish or alter existing rights and/or obligations...with regard to [HWB] eligibility requirements..." for furloughed employees. TCU's reading of Item 7 would dramatically "diminish" and "alter" the Plan's eligibility requirements. Such a result is expressly forbidden by Item 1.

Furthermore, a close reading of Side Letter No. 4 is revealing. Item 9 continues "current practices" with respect to whether vacations, holidays, personal leave, etc. are to be treated as days of "compensated service". Item 10 guarantees an employee called up for "military duty" in response to an "emergency" four months of HWB eligibility even though the call-up resulted in his failure to meet the seven-calendar day requirement in the month in which he was summoned. Item 12 concerns a "lapse in benefits" due to the eligibility changes in the September 1996 Agreement (i.e., Rule 34 and Side Letter No. 4) and how that "lapse" is later remedied.

More to the point, however, Items 2 through 6 and Items 8 and 11 all deal with active employees, not those on furlough. It would appear that Item 7 likewise was meant to deal with active employees, not those on furlough. Item 7 covers employees "subject to call under applicable call rules..." Nothing in the record suggests that there are "call rules" applicable to furloughed employees. Such "call rules" apparently relate to those on stand-by status. But nothing in Item 7 or in Rule 34, Article II, Section 3 ("...a protected employee...may be used...for any other temporary assignments...") suggests that furloughed employees are required to stand-by for such assignments.

For these reasons, Side Letter No. 4 did not provide claimants the kind of continuing "compensated service" credit which TCU requests. It follows that NSC's action in stopping HWB for claimants after they had been on furlough for four months was not a violation of the relevant Agreements.

AWARD

The claims are denied.

Richard Mittenthal
Neutral Member

Louis F. Miller, Jr.
Carrier Member
Concurring

Carl H. Brockett
TCU Member
Dissent ATTACHED

Date of Award: ~~December~~ January 8, ~~2002~~ 2003

LABOR MEMBER'S DISSENT TO
THE AWARD OF SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED PURSUANT TO RULE 34, ARTICLE VII OF THE
NORFOLK SOUTHERN/TRANSPORTATION COMMUNICATIONS UNION
SCHEDULE AGREEMENT, JUNE 1, 1982
(REFEREE RICHARD MITTENTHAL)

With the rendering of the Neutral Member's decision in the case at bar a dissenting opinion is required. This dissent is necessary because the arbitrator's decision ignored and/or totally disregarded factual considerations material to the dispute.

Significant to understanding our dispute was recognition of its genesis. Pointed out repeatedly in our submission; oral arguments; post-hearing brief; and, in subsequent explanation of pertinent substantial matters of consideration was how our dispute started in the first place.

Importantly, a dispute predating the Carrier's unilateral change in how health and welfare (hereinafter HW) benefits were applied to TCU represented Feb. 7th furloughed protected employees was the impetus behind the issue placed before this arbitrator. That prior dispute, between BMWE and NS was over the continuation of HW benefits to BMWE furloughed protected employees under its newly modified Feb. 7th agreement.

Because of the BMWE dispute involving the parties' Feb. 7th Agreement the Carrier notified TCU that it would no longer provide HW coverage to our Feb. 7th furloughed protected employees. The Carrier's notification to TCU of this change in application was premised upon receiving a favorable precedential decision from the arbitrator (Douglas) in its BMWE Feb. 7th HW dispute.

However, BMWE prevailed in its Feb. 7th dispute with Arbitrator Douglas (hereinafter Douglas) holding that HW benefits were part of the protective panoply.[1] Faced with this development, the Carrier contented that such application did not cover similarly situated TCU Feb. 7th protected employees (remember such employees previously enjoyed such benefits). Arbitrator Mittenthal was then designated as the neutral member of the Special Board of Adjustment to consider our case.

It is worth noting that Douglas was faced with the question:

Does Article I, Section 1 of the February 7, 1965 Mediation Agreement, as amended by Article XII of the Mediation Agreement of

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[1]Award 5 of SBA 1087

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? (Underlining our emphasis)

This is exactly the same issue and dispute that arbitrator Mittenthal was faced with. TCU's position was that furloughed protected employees were entitled to continuation of HW benefits as long as they were retained in service and receiving compensation via the Feb. 7th Agreement (Rule 34).

But, in distinction to Douglas, arbitrator Mittenthal attacked the reasoning found in Douglas asserting that he had "real doubts" over the soundness of such decision. Mind you, both Douglas and arbitrator Mittenthal were provided with incontrovertible testimony made by the National Carriers Conference Committee (NCCC) before Presidential Emergency Board No. 229; NCCC's written submission; a sworn affidavit from a carrier officer and witness to a US District Court; and, testimony from an NCCC lawyer along with other pertinent documentation and applicable arbitral decisions.

This is what Douglas had to say about this evidence:

> 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 for life 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 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. [bold added]

After 11-days of consideration arbitrator Mittenthal found this "credible and persuasive evidence" to be "doubtful". Perhaps more onerous is that arbitrator Mittenthal when considering the evidence held that "*it may be*" that the testimony before a PEB was merely an exaggeration; or, "*it may be*" that statements regarding Feb. 7th

applications made by the NCCC before the PEB were without consideration of their impact upon other carriers (also in such handling); or, finally, *"it may be"* NCCC representatives believed the word compensation had a broad reach.[2]

No matter to arbitrator Mittenthal, he concluded such "credible and persuasive evidence" could not "fairly be treated as controlling" in the dispute before him. Truer words were never spoken, because arbitrator Mittenthal did not fairly treat any of the evidence supportive to our case.[3]

Also pointed out to arbitrator Mittenthal in our post-hearing brief was that continuation of HW benefits for protected employees was directly addressed in a side letter to the original Feb. 7th Agreement stating:

> *...no employee of said Agreement shall be deprived of employment or adversely affected with respect to compensation, rules, working conditions,* ***fringe benefits****, or rights and privileges pertaining thereto...* [bold added]

This understanding fully and completely recognized the continuation of HW benefits for protected individuals and was signed by the representatives of the Carrier's Conference Committees representing all carriers including NW and NS.[4] Nevertheless, this too was ignored by arbitrator Mittenthal and portrayed as limited in its scope. Arbitrator Mittenthal justifies this misinterpretation by the illogical assumption that while employees under the limited side letter were entitled to HW benefits, all other employees covered by the Feb. 7th Agreement were not.[5]

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[2]There is no indicatation that arbitrator Mittenthal ever considered that this compelling evidence *"may be"* simply the truth. To the contrary, the decision goes to extreme lengths to dispel direct evidence considered by PEB 229. Thereby, arbitrator Mittenthal placed himself as judge of what only PEB 229 could effectively consider in face-to-face testimony and presentation.

[3]As arbitrator Mittenthal has sat on previous PEBs, one can only wonder how factual statements and considerations from any party were considered by him – does he assume them to be untruthful on their face and render a decision based upon his own standards of adequacy?

[4]As the continuation of health and welfare benefits was understood to be part of the protective cloak, Rule 34 of the CBA also recognized the continuance of HW without exception.

[5]This of course coincides with the damage he has laid upon the same Feb. 7th

In reality, the side letter was an expression of the parties' understanding that protected employees not affected by triggering events specified by our Feb. 7th Agreement but displaced by officers coming back to rank-and-file positions would not be treated differently than other protected employees when it came to HW benefits. It is that simple.

Finally, as pointed out in our submission; oral argument; and, post hearing correspondence, the 1996 National Agreement addressing HW issues had a direct impact upon this dispute. As part of the TCU Negotiating Committee and head of our Social Services Department which is charged with administering HW Plans, I was directly and personally involved in the formation of Side Letter No. 4 of our 1996 National Agreement and provided arbitrator Mittenthal with insight into such understanding.

It is the intent of Paragraph 7 of Side Letter No. 4 that an employee who cannot hold a regular position, who is required to stay in place for call, and who may receive sanctions (discipline and/or loss of protective benefits in the case of protected employees) for missing a call, will continue to receive health and welfare eligibility. And yes, HW benefits would continue indefinitely, for as long as the employee is required to stand by, subject to sanctions if he misses a call.

While this reality may be repugnant to arbitrator Mittenthal -- that furloughed employees may retain HW benefits in perpetuity -- we must refer back to the intent of Article V of the 1996 National Agreement in the first place. There is a huge difference between a UTU employee who is able to work but voluntarily makes himself absent for 28 days out of every month, or a furloughed employee who goes about his business and finds other work outside the rail industry, and a TCU employee who is involuntarily affected by a force reduction and unable to hold a regular assignment but is still required to maintain availability, literally around the clock, under penalty of sanctions.

In the case of protected employees, legions of awards have held that time spent in standby service is considered compensated service. Indeed, the parties drafted Item No. 7 because it was assumed that an employee who was required to make himself available for service was to be considered performing compensated service. Standby service is also considered compensated service under the National Vacation Agreement.

Agreement between crafts on this Carrier. Henceforth, BMWE protected employees who previously did not receive HW benefits will be enjoying them under Douglas, while TCU protected employees who previously had HW benefits are denied them under Mittenthal.

This is not a novel or new argument. An employee who subjects himself to the Carrier's bidding by being in place for calls cannot be expected to do so for free, out of the goodness of his heart, particularly where he is subject to having his protective entitlement reduced or disciplined (i.e., "sanctioned") for being out of place.

For these reasons, the parties agreed that insurance coverage for such employees would continue if they were performing standby service for seven days or more in a month, even if they are not paid for standing by. Indeed, if such employees were being compensated for standing by, there would be absolutely no need for Paragraph 7.

Disregarding such testimony and evidence, arbitrator Mittenthal (who admittedly had little experience in railroad arbitration issues) held that Side Letter No. 4 did not say what it said.[6] In doing so, arbitrator Mittenthal once again ignored the evidence submitted or *"it may be"* he just thought it was another exaggeration of reality.

These are but a few of the material errors, omissions, and refusal of arbitrator Mittenthal to accept the reality of our position in this dispute. For these and other reasons not reiterated herein, the award has no precedential value whatsoever.

Respectfully submitted,

Carl H. Brockett

Carl H. Brockett
TCU Labor Member

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[6]It was necessary to provide the arbitrator with a history of the Feb. 7th Agreement; a summary of how the NS was formed; and, explanations on various common and long-standing concepts upon which our agreements are founded.