

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

In the Matter of the Arbitration

-between-

Brotherhood of Maintenance of
Way Employees

-and-

National Carriers' Conference
Committee

OPINION AND AWARD
Case No. 15

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 issues:

1. Was the Carrier permitted to reduce the "protected rates" of seasonally protected employees C. A. Moyer and R. M. Pokorney and other similarly situated employees when they voluntarily bid from higher rated to lower

rated positions?

2. Did the Carrier properly compute the seasonal guarantee for employee C. A. Moyer for the calendar year 2000?

The Carriers proposed the following issue:

Is the protected rate of a seasonal protected employee, who voluntarily bids in a job paying a rate lower than his/her protected rate, permanently reduced in Article IV, Section 3, of the Job Stabilization Agreement?

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 issues to be:

Issue 1

Did the Carrier, the Burlington Northern Santa Fe, violate 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 permanently reducing the "protected rates" of seasonally protected employees C. A. Moyer and R. M. Pokorney and other similarly situated employees, who each voluntarily bid in a position paying a rate lower than the employee's protected rate? If so, what shall be the remedy?

Issue 2

Did the Carrier, the Burlington Northern Santa Fe, properly compute the seasonal guarantee for employee C. A. Moyer for calendar year 2000? If not, what shall be the remedy?

BACKGROUND

The Organization filed a claim, dated April 25, 2001, on behalf of Claimant R. M. Pokorney (and other similarly situated employees) because the Carrier permanently had reduced the protected rate of the Claimant, a seasonal employee, after the

Carrier had awarded the Claimant a position with a rate of pay lower than the Claimant's protected rate. The Claim specified that the February 7, 1965 Agreement, as amended, omits any provision to permit the Carrier to make a downward adjustment to the protected rate of the Claimant, a seasonal employee. The Claim requested that the Carrier rescind the disputed action; restore the Claimant to the proper protected rate; and make the Claimant whole for the loss of pay for the year 2000.

(Organization Tab 2 and Carrier Exhibit E.)

The Carrier responded in a letter, dated May 25, 2001. The Carrier described the Carrier's reasons for denying the Claim:

As to R. M. Pokorney who was originally considered to be a "Seasonal" employee protected as an Assistant Foreman. Analysis of Manpower and Payroll data has revealed that on February 28, 1998, R. M. Pokorney bid from an Assistant Foreman position 37481, Aurora Mtct. Gang., to Sectionman position 37778, Grand Island. When Claimant bid from a higher rated position to this lower rated position, protection rate was changed to the rate of the lower rated position.

R. M. Pokorney is now considered to be a "Seasonal" employee protected at the Sectionman rate of pay. His portion of the claim is declined in its entirety.

.

As to you [sic] claim for similarly situated unnamed employees that portion of your claim is declined in its entirety.

(Organization Tab 2 and Carrier Exhibit E.)

In a letter dated July 5, 2001, the Organization appealed the Claim. In a letter dated September 21, 2001, the Carrier denied the appeal. (Organization Tab 2 and Carrier Exhibit E.)

The matter proceeded to Special Board of Adjustment No. 1087 for a final and binding determination.

The Organization also filed a claim, dated March 22, 2001, on behalf of Claimant C. A. Moyer for a monetary loss because the Carrier permanently had reduced the protected rate of the Claimant, a seasonal employee, after the Carrier had awarded the Claimant a position with a rate of pay lower than the Claimant's protected rate and because the Carrier failed to compensate the Claimant for the appropriate number of days. (Organization Tab 3 and Carrier Exhibit F.) The Carrier responded in a letter, dated May 21, 2001. The Carrier described the Carrier's reasons for denying the Claim:

Analysis of Manpower and Payroll data has revealed that on March 15, 1999 Claimant bid from Grinder Operator position 37292, Forest City, to Sectionman position 37342, Clean Up 1. When the Claimant bid from a higher rated position to this lower rated position, his protection rate was changed to the rate of the lower rated position he voluntarily bid in.

The Claimant is now considered to be a "Seasonal" employee, protected at the rate of Sectionman for 263 days.

(Organization Tab 3 and Carrier Exhibit F.)

In a letter dated July 13, 2001, the Organization appealed the Claim. In a letter dated September 21, 2001, the Carrier denied the appeal. (Organization Tab 3 and Carrier Exhibit F.) The matter also proceeded to Special Board of Adjustment No. 1087 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 as 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.

Section 2 -

Seasonal employees, who had compensated service during each of the years 1962, 1963 and 1964, will be offered employment in future years at least equivalent to what they performed in 1964, unless or until retired, discharged for cause, or otherwise removed by natural attrition.

ARTICLE II - USE AND ASSIGNMENT OF EMPLOYEES AND LOSS OF PROTECTION

Section 1 -

An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work

when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement.

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.

Section 2 -

Subject to the provisions of Section 3 of this Article IV, all other employees entitled to preservation of employment shall not be placed in a worse position with respect to compensation than that earned during a base period comprised of the last twelve months in which they performed compensated service immediately preceding the date of this Agreement. For purposes of determining whether, or to what extent, such an employee has been placed in a worse position with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve. If his compensation in his current employment is less in any month (commencing with the first month following the date of this agreement) than his average base period compensation (adjusted to include subsequent general wage increases), he shall be paid the difference less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average time paid for during the base period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the time paid for during the base period; provided, however, that in determining compensation in his current employment the employee shall be treated as occupying the position producing the highest rate of pay and compensation to which his seniority entitles him under the working agreement and which does not require a change in residence.

Section 3 -

Any protected employee who in the normal exercise of his seniority bids in a job or is bumped as a result of such an employee exercising his seniority in the normal way by reason of a voluntary action, will not be entitled to have his compensation preserved as provided in Section 1 and 2 hereof, but will be compensated at the rate of pay and conditions of the job he bids in; provided, however, if he is required to make a move or bid in

a position under the terms of an implementing agreement made pursuant to Article III hereof, he will continue to be paid in accordance with Section 1 and 2 of this Article IV.

**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 BMW Agreement.

(b) Article I, Section 2, of the February 7, 1965 Agreement shall be amended to read as follows:

Section 2 - Seasonal employees, who had compensated service during each of the years 1995, 1996, and 1997 who otherwise meet the definition of "protected" employees under Section 1, will be offered employment in future years at least equivalent to what they performed in 1997 unless or until retired, discharged for cause, or otherwise removed by natural attrition.

(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.

INTERPRETATIONS

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

. . . .

ARTICLE IV - COMPENSATION DUE PROTECTED EMPLOYEES

Section 3 -

Question No. 1: If a "protected employee" for one reason or another considers another job more desirable than the one he is holding, and therefore bids in that job even though it may carry a lower rate of pay than the job he is holding, what is the rate of his guaranteed compensation thereafter?

Answer to Question No. 1: The rate of the job he voluntarily bids in.

AGREEMENT

October 25, 1996

III. Arbitration Procedures

B. 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.

POSITION OF THE ORGANIZATION

The Organization asserts that Article IV, Section 3 does not apply to a seasonal employee's protected rate. The Organization explains that the present dispute constitutes an outgrowth of the decision of Special Board of Adjustment 1087 in Award No. 1,

Question No. 2. As a result, it is the position of the Organization that Article IV does not apply to a seasonal protected employee who voluntarily exercises seniority from a higher-rated position to a lower-rated position. The Organization reasons that Article IV, Section 3 lacks any effect on the protected rate for a seasonal protected employee's make whole remedy at the end of a year. The Organization considers the arguments before Special Board of Adjustment 1087 in Award No. 1 and the decision by Special Board of Adjustment 1087 to support the Organization's analysis.

The Organization recounts that the computation and the administration of the seasonal guarantee arises under Article I, Section 2. The Organization refers to Article I, Section 2, which identifies 1997 as the benchmark year to determine the employment that the Carrier must offer seasonal employees in subsequent years. The Organization pinpoints that the Job Stabilization Agreement lacked clarity about the computation and the administration of the seasonal guarantee. The Organization describes that the parties presented different arguments to Special Board of Adjustment 1087.

The Organization stresses that Special Board of Adjustment 1087 adopted the Carrier's argument that computation of the protected rate for a seasonal employee does not involve Article IV, Section 1 or Article IV, Section 2. The Organization contends that the reference by Special Board of Adjustment 1087 to Article IV, Section 3 lacks significance because Article IV,

Section 3 only applies to compensation that arises from Article IV, Section 1 and Article IV, Section 2. The Organization specifies that Article IV, Section 3 perforce cannot apply to a seasonal employee's protected rate. The Organization emphasizes that the Carrier lacked authority to reduce the protected rate of seasonal protected employees such as the Claimants.

The Organization elaborates that the Claimants tried to comply with their obligations pursuant to the seasonal guarantee by filling positions through the exercise of their seniority rights. The Organization criticizes the Carrier for trying to use the actions of the Claimants to reduce the amount of the make whole remedy that applies when the Carrier fails to offer employees their guaranteed work opportunities. The Organization requests that the Carrier restore the protected rates of the Claimants and other similarly situated seasonal protected employees and pay Claimant Moyer a monetary remedy at the Group 4 Machine Operator rate.

The Organization adds that Special Board of Adjustment 1087 should direct the parties to conduct a joint check of Claimant Moyer's payroll records for calendar year 2000 to determine the computation of the seasonal guarantee. The Organization relates that such a joint review, which the Carrier refused to conduct on the property, will reveal the number of days of work that the Carrier had offered to Claimant Moyer. The Organization highlights certain dates that the Carrier improperly computed. The Organization declares that Special Board of Adjustment 1087

has the authority to order such a joint check pursuant to Article III, Section B and should retain jurisdiction in the event the parties fail to resolve the matter.

POSITION OF THE CARRIER

The Carrier maintains that the rate of pay for the regularly assigned job on the day an employee became a seasonal protected employee constitutes the protected rate for the seasonal protected employee. The Carrier views Article IV, Section 3 as authorizing the Carrier to reduce the protected rate of a seasonal protected employee who bids into a lower-rated position than the seasonal protected employee's higher original protected rate.

According to the Carrier, the Organization must prove that Article IV, Section 3 does not apply to a seasonal protected employee to avoid the reduction of such a seasonal protected employee's protected rate. The Carrier confirms that seasonal protected employees are protected employees pursuant to the Agreement as supported by Article I, Section 1 and Article I, Section 2; the application of the Agreement treats seasonal protected employees as protected employees as supported by Article II, Section 1 and by Special Board of Adjustment 605 in Award 278; and the Questions and Answers signed by the parties to interpret the February 7, 1965 Agreement reflect that Article IV, Section 3 applies to a seasonal protected employee, who voluntarily bids into a position that has a lower rate of pay to calculate the employee's guaranteed compensation.

The Carrier discerns that the Claimants voluntary bid into lower-rated jobs and thereby permanently reduced their protected rates of pay. The Carrier underscores that Article IV, Section 3 constitutes the key provision to resolve the dispute. The Carrier urges that the Claims 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

A careful review of the record indicates that the Claimants, who are protected pursuant to Article I, Section 2 as seasonal employees, voluntarily bid for positions that paid a lower rate of compensation than the protected rates of compensation for the Claimants. The Claimants obtained the positions.

Article I, Section 2, as amended in the September 26, 1996

Agreement, established 1997 as the benchmark year for determining a carrier's obligation to offer employment to protected employees in future years. Special Board of Adjustment No. 1087 (Hockenberry, Arb.) rendered an Award, dated September 28, 1998, that addressed certain aspects of the treatment of seasonal protected employees by carriers. (Organization Tab 1 and Carrier Exhibit B.) The Special Board of Adjustment commented about the applicability of Article IV to seasonal protected employees:

The decisions of SBA 605 [the predecessor of Special Board of Adjustment No. 1087] . . . debate the terms 'compensation' and 'normal rate of compensation' found in Sections 1 and 2 of Article IV, but it does not appear that such an analysis under Article IV applies to seasonal employees pursuant to Article I, Section 2. In the Questions and Answers for Article IV, Section 6, specifically Question and Answer No. 2, there is a clear distinction between employee's compensation guaranteed under Article IV, Sections 1 or 2, and information required "with respect to seasonal employees covered by Section 2 of Article I".

(Organization Tab 1 at 15 and Carrier Exhibit B at 15.)

This analysis is consistent with a thorough examination of Article IV. Article IV, Section 1, as amended, refers to "regularly assigned positions" and Article IV, Section 2 refers to certain calculations that presuppose an employee had performed compensated service throughout a twelve-month period. Article IV, Section 2 explicitly links the language in Article IV, Section 2 to Article IV, Section 3. Furthermore, Article IV, Section 3 specifically ties Section 3 to Section 1 and to Section 2 of Article IV. As a consequence, a fair reading of the entire

context of Article IV reveals that Article IV lacks applicability to seasonal employees. This conclusion is consistent with the position advanced by the Carriers to Special Board of Adjustment No. 1087 concerning the treatment of seasonal protected employees by carriers. In particular, the Carriers argued that:

Article IV, Section 1 sets forth the method of establishing protective benefits for non-seasonal employees who held regularly assigned positions of October 1, 1964. . . .

For the reasons that follow, we believe that Article IV, Section 2 does not apply to "seasonal employees".

1. Article IV Applies Only to Non-Seasonal Employees.

(Organization Tab 4--Carriers' Brief at 19-21.) The official Interpretations, dated November 24, 1965, of Article IV of the February 7, 1965 Agreement lack the necessary specificity and therefore omit any persuasive evidence that Article IV applies to seasonal protected employees under the present facts and circumstances.

As a result of Article IV not applying to seasonal protected employees, the record fails to identify any provision in any agreement that authorizes a carrier to make a permanent downward modification of the protected rate of a seasonal protected employee who bids into a lower-rated position in the normal way by reason of a voluntary action. Consistent with Section II(A) of the October 25, 1996 Agreement between the parties that led to the creation of Special Board of Adjustment No. 1087, the Special Board of Adjustment lacks the authority to add contractual terms or to change existing agreements governing rates of pay, rules

and working conditions. The Special Board of Adjustment therefore lacks the authority to add a section to the Agreement, as amended, to create language similar to Article IV, Section 3 that would authorize a carrier to make the disputed downward modification of the protected rate of seasonal protected employees who voluntarily bid into lower-rated positions than the positions that the employees occupied during the benchmark year of 1997.

III. Conclusion

With respect to Issue 1, the Organization proved by a fair preponderance of the credible evidence that the Carrier violated 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 permanently reducing the "protected rates" of seasonal protected employees C. A. Moyer and R. M. Pokorney and other similarly situated employees, who each voluntarily bid in a position paying a rate lower than the employee's protected rate. As a remedy, the Carrier shall make the adjustments to the protected rates and shall make the affected employees whole. The Award shall provide that the Special Board of Adjustment shall retain jurisdiction to resolve any disputes that may arise concerning the remedy.

With respect to Issue 2, the record contains insufficient evidence at present to resolve the dispute concerning the proper computation of the precise number of days of Claimant Moyer's claim. In accordance with the authority set forth in Section

III(B) of October 25, 1996 Agreement between the parties concerning the establishment of Special Board of Adjustment 1087, the parties shall meet and confer within 45 days to conduct a joint check of the relevant records to identify the facts that the Carrier relied on to compute the seasonal guarantee for employee C. A. Moyer for calendar year 2000. The Special Board of Adjustment shall retain jurisdiction to resolve any disputes that may arise concerning this interim remedy and to resolve any dispute that still may exist after the parties conduct the joint check of the relevant records.

Any other issues not specifically addressed in the foregoing analysis are not material to the proper resolution of the disputed matters. Any change to the present arrangement is a matter for collective bargaining, not arbitration.

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:

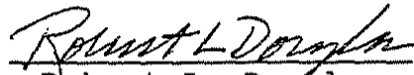
Issue 1

The Carrier, the Burlington Northern Santa Fe, did violate 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 permanently reducing the "protected rates" of seasonal protected employees C. A. Moyer and R. M. Pokorney and other similarly situated employees, who each voluntarily bid in a position paying a rate lower than the employee's protected rate. As a remedy, the Carrier shall make the adjustments to the protected rates consistent with the analysis set forth in the accompanying Opinion and shall make the affected employees whole. The Special Board of Adjustment shall retain

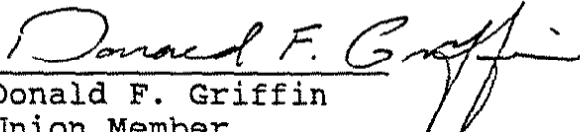
jurisdiction to resolve any disputes that may arise concerning the remedy.

Issue 2

The parties shall meet and confer within 45 days to conduct a joint check of the relevant records to identify the method that the Carrier, the Burlington Northern Santa Fe, used to compute the seasonal guarantee for employee C. A. Moyer for calendar year 2000. The Special Board of Adjustment shall retain jurisdiction to resolve any disputes that may arise concerning this interim remedy and to resolve any disputes that still may exist after the parties conduct the joint check of the relevant records.



Robert L. Douglas
Chairman and Neutral Member




Donald F. Griffin
Union Member
Concurring/Dissenting



A. K. Gradia
Carrier Member
Concurring/Dissenting

 DFG

R. B. Wehrli
Union Member
Concurring/Dissenting



John F. Hennecke
Carrier Member
Concurring/Dissenting

DATED: January 6, 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.