

Award No. 1
Case No. 1

Public Law Board No. 3450

PARTIES
TO
DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Delaware and Hudson Railway Company

STATEMENT
OF
CLAIM:

Carrier has failed to pay in full the wage and cost of living increases prescribed by the June 17, 1982 Agreement and should be ordered to make immediate payment thereof with seven percent interest from the dates they became due.

FINDINGS:

This dispute concerns the interpretation and application of the so-called wage deferral provision of the parties' June 17, 1982 Agreement. That Agreement went into effect on January 2, 1982 and settled Section 6 Notices that had been served by each of the parties upon the other. A stated objective of the Agreement is to provide:

"for the deferral of certain wage increases, without reduction in current rates of pay as a means of enhancing the prospects of the D&H to become self-sustaining. To accomplish this objective, D&H agrees to adopt and apply the terms of the National Agreement reached between the National Carrier's Conference Committee and the Brotherhood of Maintenance of Way Employees," subject to certain limitations.

The most important of the "limitations" referred to in the language just quoted are set forth in Section A 1(a), (b) and (c) of that Agreement. These provisions read as follows:

1. (a) Increases in rates of pay, including cost of living adjustments (hereinafter collectively referred to as "rates of pay"), provided for by the National Agreement to be made effective on or before December 31, 1981, shall be made effective for the Organization on the respective dates set forth in the National Agreement to the extent the sum of such increases exceeds 10%.

(b) Increases in rates of pay provided for by the National Agreement to be made effective on or after January 1, 1982 shall be made effective for the Organization on the respective dates set forth in the National Agreement to the extent the sum of such increases, combined with the sum of the increases in rates of pay provided for by the National Agreement for 1981 and referred to in subparagraph (a), exceeds 12%.

(c) For the purposes of this Agreement, each "increase," including each cost of living adjustment, shall be computed as a percentage increase over the rate of pay existing immediately prior to the increase.

Accordingly, the parties have incorporated the terms of the National Agreement into their Agreement of June 17, 1982, but have agreed that wage increases provided in the National Agreement be deferred under Section A 1(b) until such time as they exceed twelve percent. Section A 1(a)'s provisions do not come into play in this case since wage increases were not sufficient as of December 31, 1981, to reach the prescribed ten percent level (that is not to say that the language used in Section A 1(a) may not be helpful in determining the intent of the parties).

Increases under the National Agreement are applied either to the basic rate or to the COLA. Increases to the basic rate are expressed in percentages while increases to COLA are expressed in cents.

Under the National Agreement, the following increases became effective during the period under consideration.

| <u>Effective Date</u> | <u>Amount of Increase</u> | <u>Type of Increase</u> |
|-----------------------|---------------------------|-------------------------|
| April 1, 1981 | 2% | General Wage Increase |
| July 1, 1981 | \$.32 | COLA |
| October 1, 1981 | 3% | General Wage Increase |
| January 1, 1982 | \$.35 | COLA |
| July 1, 1982 | 3% | General Wage Increase |
| July 1, 1982 | \$.22 | COLA |
| January 1, 1983 | \$.34 | COLA |
| July 1, 1983 | 3% | General Wage Increase |

At the time they entered into their Agreement of June 17, 1982, the parties were aware of all the above increases up to and including July 1, 1982; the cost of living adjustment of July 1, 1982 was based on the March 1982 Consumer Price Index.

The parties agree that the 12% figure mentioned in Section A 1(b) had been attained at some point within the January 1, 1982 cost of living adjustment. However, they are not in accord as to the method of computing the 12% total or the precise point within the 35 cent adjustment that that total was reached.

Petitioner would compute the 12% "trigger" by (1) applying the general wage increases of April 1 and October 1, 1981 to the basic rate, (2) applying the cents per hour COLA to the total

rate of pay (including basic rate and cost of living) and converting it to a percentage of that total rate and (3) adding all the percentages by the compounding method.

It is Carrier's view that the contracting parties never intended that the compounding method be used and that Petitioner's computing formula is not supported by evidence. Moreover, Carrier contends, that the proper way to compute the 12% figure is to determine the general wage increases percentages to be added by applying those increases to the rate of pay that includes COLA; by so doing, the April 1, 1981 increase would be added as 1.87% and not 2% in computing the 12% figure, while the October 1, 1981 increase of 3% would be added as 2.8625%. Carrier urges that Petitioner's method fails to comply with Section A 1(c) and that it cannot validly compute wage increase percentages on the basic rate while determining COLA percentages on the rate that includes both COLA and the wage increase.

It is undisputed that both general wage increases and cost of living adjustments are to be counted in computing the 12% wage deferral. Neither the record nor any applicable agreement or practice to which we have been referred provides any basis for counting the April 1, 1981, and October 1, 1981, general wage increases as less than, respectively, 2% and 3%, in computing that 12% figure. The fact that the COLA percentage is determined in a different fashion does not call for a contrary result; COLA and general wage increases are not treated alike in the National Agreement. No valid ground is perceived for concluding that it was the parties' intent to count the general wage in-

crease percentages as anything less than the percentages provided for in the National Agreement. We find no merit in Carrier's argument to the contrary.

As to whether the 12% is to be calculated by the simple addition of the percentages, as is urged by Carrier, or by compounding them, the Agreement is silent. We are not at liberty to consider evidence submitted by Carrier after the hearings were concluded. Nor, as Carrier maintains, are Petitioner's bare assumptions and contentions that compounding is the proper method entitled to weight. Petitioner's case must be supported by competent evidence and more argument and assumption, no matter how strongly made, are not the equivalent of proof.

It nevertheless is our conclusion, after analyzing the record in its entirety, that the proper way of calculating the 12% figure is by using the compounding method in adding the increase percentages. This conclusion is realistically inescapable since the wage rates of employees would have been compounded by each new increase, but for the deferral. As Section A 1(c) provides, each increase "shall be computed as a percentage increase over the rate of pay existing immediately prior to the increase." Only through the compounding method, can the loss to the employee and thus his wage deferral, be appreciated and calculated.

Accordingly, it is this Board's conclusion that Petitioner's method of computing the 12% figure mentioned in Section A 1(b) is correct and that Carrier should pay all wage increases and cost of living adjustments after that 12% level is attained. The 12% figure is readily ascertainable by the addition, on a

compounding basis, of the April 1 and October 1 general wage increase in 1981 and the COLAs of July 1, 1981 and January 1, 1982.

Once the 12% "trigger" point was reached, the employees were entitled to the full increases in the amounts and on the dates prescribed by the National Agreement. There is no sound basis for reducing those increases to any extent. Neither expressly nor by fair implication does the Agreement require that a 12% wage differential exist throughout its duration between Carrier's rates and those that would have been in effect had there been no wage differential. The wage increases, including COLAs, were merely deferred until the 12% level was attained.

Petitioner also maintains that Carrier failed to pay the July 1, 1982 increases until August 1, 1982. At the hearing, it appeared that the increases were in fact due, but had not been paid until August 1, 1982, due to financial problems. This Board lacks authority to delay or modify wage payments because of financial or equitable considerations. Increases must be paid on their effective dates.

Petitioner's request for seven percent interest will be denied. The Agreement does not provide for such interest and the record does not establish that the issues in this case were not raised in good faith and in an effort to explore and interpret the Agreement. This conclusion does not prejudice Petitioner's right to seek interest at the prevailing rate if this Award is not complied with in a timely manner.

AWARD:

1. In determining the 12% threshold mentioned

in Section A 1(b) of the June 17, 1982 Agreement, (a) all pay increase percentages, including cost of living adjustments, shall be added by compounding and (b) the general wage increase figures shall be the identical percentage figures mentioned in the National Agreement.


2. A 12% wage differential between Carrier's wage rates and those that would have been received but for the deferral is not frozen and in force throughout the life of the June 17, 1982 Agreement. Once the 12% level is attained, the employees in question are entitled to all subsequent increases in full and no later than the effective date of such increases.

3. The claim for 7% interest is denied.

To be effective within 30 days.

Adopted at Albany, New York on January

1984.



Harold M. Weston, Chairman

Carrier Member



Employee Member