

PUBLIC LAW BOARD NO. 5542

Case No. 1
Award No. 1

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

-and-

CONSOLIDATED RAIL CORPORATION

QUESTION AT ISSUE:

1. Whether the below stated issues are arbitrable under Letter No. 9 and Article XIV of the July 28, 1992 Agreement between Consolidated Rail Corporation and the Brotherhood of Maintenance of Way Employees (sic):

- (a) Issues relating to requirements of the Federal Highway Administration Certification of Commercial Motor Vehicle drivers.
- (b) Pay rate differentials for positions which list a CDL or FHWA certification as a requirement to hold a position as either a regular or relief driver.
- (c) If issues relating to FHWA certification and/or issues relating to pay rate differentials are subject to arbitration under Letter No. 9 and Article XIV of the July 28, 1992 Agreement, are those issues now ripe for arbitration in light of the collective bargaining history?

FINDINGS:

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Board has jurisdiction over the dispute involved herein.

In June of 1988, the Brotherhood of Maintenance of Way Employees (hereinafter referred to as the Organization or BMWE) served notices on the Consolidated Rail Corporation (hereinafter

referred to as Conrail or the Carrier) pursuant to Section 6 of the Railway Labor Act. After protracted negotiations, mediation and a Presidential Emergency Board, the Organization and the Carrier entered into a collective bargaining Agreement on July 28, 1992. Article XIV, Section 1(b), of that Agreement imposed a moratorium on both parties until November 1, 1994. Section 1(b) stated that neither party shall serve any notice or proposal for the purpose of changing the subject matter of the provisions of this Agreement prior to November 1, 1994, except proposals that may be pursued in accordance with the various Articles of the Agreement.

The parties executed sixteen (16) side letters contemporaneous with the July 28, 1992 Agreement. Side Letter No. 9 is the subject of this dispute. It provides as follows:

This confirms our discussions concerning the creation of a Select Committee to consider certain issues in dispute between the parties.

It is our mutual understanding that a Select committee, consisting of an equal number of individuals designated by the Brotherhood of Maintenance of Way Employees (sic) and by Consolidated Rail Corporation, will be created for the purpose of considering the following issues:

1. Issues relating to the governmental requirement that employees who may operate certain classes of vehicles obtain commercial drivers' licenses;
2. The forfeiture of seniority (i.e., "home district") issues;
3. The B&B seniority roster issues, and issues related to the establishment of seniority rosters for the new East/West Production Units; and
4. Issues relating to the realignment of seniority districts as listed in Appendix I attached hereto.

The Select Committee shall meet within 15 days after the effective date of this Agreement. In the event that any of the above-cited issues has not been resolved within 90 days after the first meeting of the Select Committee, either party may submit the issue to final and binding arbitration pursuant to Section 3 of the Railway Labor Act.

A Select Committee was established pursuant to Letter No. 9 and met eight (8) times subsequent to July 28, 1992. Item 2, 3 and 4 in Letter No. 9 were resolved by the parties. The Select Committee discussed Item 1 at several sessions extending over a

year but the matter could not be resolved.

On June 7, 1993, the BMWWE presented Conrail with a written proposal intended to resolve Item 1. Among other things, the Organization proposed that employees assigned to positions which require either a commercial drivers' license (CDL) or Federal Highway Administration (FHWA) certification have a rate differential added to their regular rate of pay. On June 21, 1993, the Select Committee met to discuss the Organization's June 7, 1993 proposal.

At the June 21, 1993, meeting Conrail took the position that: (1) the rate differentials proposed by the BMWWE were barred by the moratorium imposed by the July 28, 1992 Agreement; and that (2) FHWA certification was outside the jurisdiction of the Select Committee. The Organization disagreed and insisted that both the pay differential and FHWA certification were clearly within the Select Committee's jurisdiction pursuant to Letter No. 9.

The BMWWE and Conrail could not resolve their differences over Item 1 and they agreed to the bifurcated proceeding set forth in the aforementioned Question at Issue. As agreed to by the parties this Board has been given the authority to decide whether the following issues are arbitrable under Letter No. 9 and Article XIV of the July 28, 1992 Agreement:

(1) Issues relating to requirements of the Federal Highway Administration Certification of Commercial Motor Vehicle drivers.

(2) Pay rate differentials for positions which list a CDL or FHWA certification as a requirement to hold a position as either a regular or relief driver.

(1) Issues relating to requirements of the Federal Highway Administration Certification of Commercial Motor Vehicle drivers.

It is the Organization's position that the language of Letter No. 9 is clear and unambiguous and encompasses both employees who are required to obtain commercial drivers' licenses and those who must obtain FHWA certification. Moreover, according to the Organization, the context in which Letter No. 9 was executed manifests broad jurisdiction for the Select Committee. The Organization maintains that in their deliberations, the Select Committee discussed both commercial drivers' licenses and FHWA certification.

Evidently, the BMWWE assumed that Item 1 of Letter No. 9 included both governmental requirements regarding commercial drivers' licenses and FHWA certification. However, there is no

reference in Letter No. 9 to "FHWA certification," or to any other certification requirements for employees. Rather, Item 1 clearly and explicitly provides that issues related to "commercial drivers' licenses" are to be considered by the Select Committee. The term "commercial drivers' license" is a term of art under FHWA regulations. Based on the clear and unambiguous language of Letter No. 9, this Board finds that the parties limited the jurisdiction of the Select Committee to issues related to governmental requirements that employees must obtain "commercial drivers' licenses" before they would be allowed to operate certain classes of vehicles.

Governmental requirements to obtain a CDL may be similar to governmental requirements regarding FHWA certification but there is a clear distinction between the two. For instance, a commercial driver's license is issued by the state in which a driver lives whereas Conrail is responsible for assuring that FHWA certification requirements are met by its employees who are required to be certified. Also, CDL requirements went into effect on April 1, 1992 while FHWA certification has been required since 1988. Moreover, a CDL is required for employees who drive vehicles in excess of 26,000 lbs., whereas FHWA certification is required for employees who operate vehicles exceeding 10,000 lbs.

This Board is convinced from the evidence before us that CDL and FHWA certification may be similar but they involve separate and unique governmental requirements. They are also governed by separate sets of regulations. There is nothing in Letter No. 9; the July 28, 1992 Agreement; or bargaining history that leads this Board to conclude that the parties mutually intended to include FHWA certification as an issue to be considered by the Select Committee. Accordingly, issues relating to FHWA certification of commercial motor vehicle drivers are not arbitrable under Letter No. 9.

- (2) Pay rate differentials for positions which list a CDL or FHWA certification as a requirement to hold a position as either a regular or relief driver.

Based on the language of Letter No. 9, it is clear that the Select Committee established to consider the four (4) items set forth in the side letter was given a broad charter. The Select Committee was granted jurisdiction to consider "Issues relating to the governmental requirement that employees who may operate certain classes of vehicles obtain commercial drivers' licenses." Based on this express language, the Select Committee was given the authority to consider all issues relating to governmental requirements that certain employees obtain commercial drivers' licenses, in the opinion of this Board. Letter No. 9 did not make any exceptions for wage differentials. As was the case with FHWA certification, this Board must apply the language of Letter No. 9

as it was plainly written. Letter No. 9 included all issues related to CDL governmental requirements.

Despite what BMW General Chairman Dodd may have said at the June 5, 1992 negotiating session, Letter No. 9 does not state that the Select Committee was to consider non-revenue issues only. The clear and explicit language of the side letter cannot be disregarded based on an oral statement made at a single negotiating session. In the light of the broad language in Item 1 of Letter No. 9, an exception cannot be implied to this contractual provision for pay differentials.

There was simply no exceptions set forth in Letter No. 9. The Select Committee was given jurisdiction to consider all issues, revenue as well as non-revenue, related to governmental requirements concerning commercial drivers' licenses. This broad mandate must be enforced even though it was Conrail's intent to restrict the authority of the Select Committee to non-revenue issues. Letter No. 9 was an exception to the moratorium imposed by Article XIV of the July 28, 1992 Agreement and the issue of a wage differential for those Conrail employees who are required to obtain commercial drivers' licenses is therefore arbitrable.

AWARD:

(1) Issues relating to requirements of the Federal Highway Administration Certification of Commercial Motor Vehicle drivers are not arbitrable.

(2) Pay rate differentials for positions which list a CDL certification as a requirement to hold a position as either a regular or relief driver are arbitrable.

Pay rate differentials for positions which list an FHWA certification as a requirement are not arbitrable.



Robert M. O'Brien, Neutral Member



Steven V. Powers, Organization Member



Jeffrey H. Burton, Carrier Member

NOVEMBER 30, 1994